

OCTOBER 1997

COMMISSION ORDERS

10-09-97	Peabody Coal Company	KENT 97-342	Pg. 1613
10-10-97	Rock of Ages Corporation	YORK 94-76-RM	Pg. 1617
10-29-97	Kentucky Stone	KENT 97-352-M	Pg. 1621

ADMINISTRATIVE LAW JUDGE DECISIONS

10-09-97	Yukon No. 1 Mining Claim	WEST 97-85-M	Pg. 1625
10-14-97	Triton Coal Company	WEST 97-77	Pg. 1630
10-14-97	Newmont Gold Company	WEST 97-159-RM	Pg. 1640
10-15-97	Jim Walter Resources, Inc.	SE 94-244-R	Pg. 1646
10-16-97	Costain Coal Incorporated	KENT 97-90	Pg. 1653
10-16-97	Clyde Perry v. Phelps Dodge Morenci, Inc.	WEST 96-64-DM	Pg. 1664
10-20-97	Windsor Coal Company	WEVA 97-34	Pg. 1675
10-23-97	Energy Trucking, Inc.	WEST 96-184-M	Pg. 1685
10-27-97	Windsor Coal Company	WEVA 97-95	Pg. 1694
10-28-97	Newmont Gold Company	WEST 95-434-M	Pg. 1730
10-30-97	Peabody Coal Company	KENT 93-369	Pg. 1760



OCTOBER 1997

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

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 97-342.  
(Request for Relief)

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket No.  
WEVA 97-84-R. (Judge Melick, September 15, 1997)

Secretary of Labor, MSHA v. Kentucky Stone, Docket No. KENT 97-352-M.  
(Request for Relief)

There were no cases filed in which review was denied.



## COMMISSION ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

October 9, 1997

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

v.

PEABODY COAL COMPANY

:  
:  
:  
:  
:  
:  
:  
:

Docket No. KENT 97-342  
A.C. No. 15-14074-03711

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 18, 1997, the Commission received from Peabody Coal Company ("Peabody") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Peabody.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

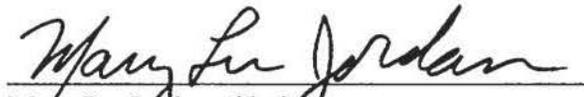
Peabody asserts that its late filing of a hearing request to contest the proposed penalty for the violation alleged in Citation No. 4067695 was due to a misunderstanding concerning the need to separately contest the proposed penalty. According to Peabody, on April 10, 1997 it timely filed a Notice of Contest with respect to the violation alleged in Citation No. 4067695. Mot. at 2; Ex. B. Peabody contends that following its receipt of the proposed penalty assessment on June 30, its counsel sent a copy of the assessment to the mine for review, in accordance with its internal

procedures, and advised the mine that a notice of contest had already been filed. Mot. at 2. Peabody's counsel, however, did not specifically advise the mine that it was necessary to separately contest the penalty proposed with respect to Citation No. 4067695. *Id.* Peabody claims that, as a result, the mine retained control of a vital internal form until August 1, when its counsel immediately completed and mailed the hearing request concerning the proposed assessment. *Id.* at 3. Peabody asserts that due to these events, its hearing request was not received by MSHA until August 5 — six days after the 30-day deadline. *Id.* Peabody asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(1) and (6).

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Peabody intended to contest Citation No. 4067695 and any related penalty and that, but for an apparent lack of coordination between its counsel and personnel at the mine, Peabody likely would have timely submitted the hearing request and contested the proposed penalty assessment for this citation. In the circumstances presented here, Peabody's late filing of a hearing request properly could be found to qualify as inadvertence or mistake within the meaning of Rule 60(b)(1). *See Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (granting operator's petition for review when operator filed notice of contest as to alleged violations, but was unaware that contest of civil penalty proposals was required).

Accordingly, in the interest of justice, we grant Peabody's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 4067695. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

Distribution

Caroline A. Henrich, Esq.  
Peabody Coal Company  
P.O. Box 1233  
Charleston, WV 25324

Douglas N. White, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Ralph York  
Associate Regional Solicitor  
Office of the Solicitor  
U.S. Department of Labor  
2002 Richard Jones Rd., Suite B-201  
Nashville, TN 37215

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 10, 1997

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

v.

ROCK OF AGES CORPORATION

:  
:  
:  
:  
:  
:  
:  
:  
:

Docket Nos. YORK 94-76-RM  
through YORK 94-83-RM

ORDER

BY THE COMMISSION:

On October 9, 1997, counsel for Rock of Ages filed a Motion to Participate in Oral Argument on behalf of David Gomo, and Motion to Accept Late Request for Participation in the above-captioned matter. Upon review of the motions, Chairman Jordan and Commissioner Marks vote to deny them. Commissioner Riley and Commissioner Verheggen would grant the motions.

To grant the relief requested requires the affirmative vote of a majority of participating Commissioners. *Jim Walter Resources, Inc.*, 17 FMSHRC 1682 (October 1995). Accordingly, because there is no majority vote on this motion, the motion is denied.

The separate views of the Commissioners follow:

Chairman Jordan and Commissioner Marks, in favor of denying the motion:

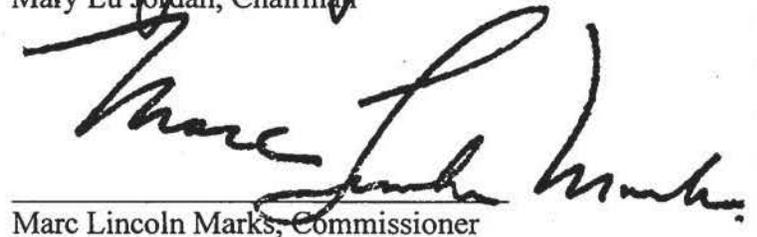
We vote to deny the Motion to Participate in Oral Argument filed by counsel for Rock of Ages on behalf of David Gomo. Our denial is based on the fact that David Gomo's prior motion for amicus curiae status indicated that it was filed on behalf of "[t]he employees of the Rock of Ages Corporation, by and through their undersigned union representative." Mot. at 1. The Commission subsequently granted amicus curiae status to "the employees of Rock of Ages, through their union representative." Order of December 29, 1995. The motion filed by counsel for Rock of Ages now makes clear that Mr. Gomo seeks to appear at oral argument "on his own behalf." Mot. at 1. Our colleagues urge us not to impose the "extraordinary reasons" for amici participation in oral argument required by Fed. R. App. P. 29. However, it is our colleagues who are prepared to take the extraordinary step of allowing an individual to appear before us who has not been granted status as a party or an amici in this matter. We note further that Mr. Gomo has never filed a brief in this case. It would be patently unfair to the other participants at the oral argument (all of whom have submitted briefs to the Commission) to permit him to offer his views when they have not had the benefit of being able to prepare a response by reviewing his brief.

Although it is true, as our colleagues remind us, that the Commission has usually granted participation to amici asking to argue before the Commission, that right generally has been granted only to organizations or unions representing the views of industry or workers. We recall no instance in recent Commission history when an individual, in no representative capacity, was permitted to share his thoughts with the Commission during oral argument. We also do not remember an instance in which an amicus was permitted to argue after failing to file a brief.

Accordingly, after careful review of this motion on its own merits, we have voted to deny it. Because we review each motion that comes before us based on the substance of its own independent arguments, we fail to understand our colleagues' position that the Commission's grant of the USWA's motion to participate in oral argument necessitates that we grant Mr. Gomo's motion.<sup>1</sup> Under that rationale, once an amicus has been permitted to argue on behalf of one party, *any* person asking to argue for the opposing side must be similarly entitled, simply in the name of equitable considerations.

True equity does not mean that the Commission must employ a "tit-for-tat" rule requiring an equal number of amici on both sides of a question. Rather, true equity means that the Commission must carefully evaluate the merits of each motion, taking into account the procedural and substantive issues raised, and any institutional concerns the motion might generate.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

---

<sup>1</sup> We are frankly puzzled by our colleagues' assertion that "the USWA has come before us after the fact to assume the 'representative' role." The Commission's previous orders permitted Mr. Gomo and the International Union to each play a distinct representative role, and to submit separate arguments on behalf of each side. The key phrase, as our colleagues recognize, is that we assumed amici would appear in a "representative role." Since Mr. Gomo has now indicated he would be appearing at argument "as an eyewitness to the events at issue," Mot. at 1, we disagree with our colleagues' claim that "it is too late in the game to withdraw our invitation."

Commissioner Verheggen and Commissioner Riley, in favor of granting the motion:

We write separately because we are deeply troubled by the Commission's denial of Mr. Gomo's motion to participate in the upcoming oral argument in this case. Until today, the Commission has routinely accommodated amici wishing to participate in oral argument. Clearly, the Commission has never relied upon Rule 29 of the Federal Rules of Appellate Procedure, which states that motions by amici "to participate in oral argument will be granted only for extraordinary reasons." Fed. R. App. P. 29. Indeed, our colleagues who now vote to deny Mr. Gomo's motion only days ago voted in favor of granting a similar motion from the amicus curiae United Steel Workers of America ("USWA"). That our colleagues now refuse to similarly accommodate Mr. Gomo strikes us as inequitable.

Mr. Gomo moved for amicus status, and his motion was granted. Although technically we did not grant amicus status to Mr. Gomo personally, that the USWA has subsequently come before us to assume the "representative" role does not alter the fact that a local worker asked for and was granted amicus status. It is too late in the game to withdraw our "invitation." To quibble with exactly who he represents, especially in light of the fact that the Secretary does not oppose Mr. Gomo's motion ("on the condition that [he] not be allowed to testify . . . and that his argument be otherwise proper in scope"),<sup>2</sup> is to exalt form over substance at the expense of equity and a balanced and open exchange of ideas.

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

---

<sup>2</sup> The Commission's Office of General Counsel has determined administratively that the USWA has no position on Mr. Gomo's motion. We also note that our colleagues are concerned that "[i]t would be patently unfair" if Mr. Gomo were allowed to present oral argument because he chose not to file a brief, and thus, the Secretary and USWA were not "able to prepare a response." But the Commission never required Mr. Gomo to file a brief. Moreover, the Commission is institutionally capable of ensuring that any presentation given by Mr. Gomo would not stray beyond the evidentiary scope of our review.

Distribution

Henry Chajet, Esq.  
Patton Boggs, LLP  
2550 M Street, N.W.  
Washington, D.C. 20037

Robin Rosenbluth, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Harry Tuggle  
United Steel Workers of America  
Health & Safety Department  
Five Gateway Center  
Pittsburgh, PA 15222

David Gomo  
c/o Rock of Ages  
P.O. Box 482  
Barre, VT 05641

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 29, 1997

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

v.

KENTUCKY STONE

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Docket No. KENT 97-352-M  
A.C. No. 15-00003-05552

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 29, 1997, the Commission received from Kentucky Stone a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Kentucky Stone.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Kentucky Stone asserts that its failure to file a hearing request to contest the proposed penalty for the violation alleged in Citation No. 04554612 was due to an internal processing error made by its accounts payable department. According to Safety Director Terry Jones, Kentucky Stone decided to contest this citation, and Jones checked the "appropriate box" on the assessment sheet and forwarded it to the accounts payable department "for our process to be completed." Letter from Safety Director Terry Jones of Sept. 25, 1997. Apparently believing

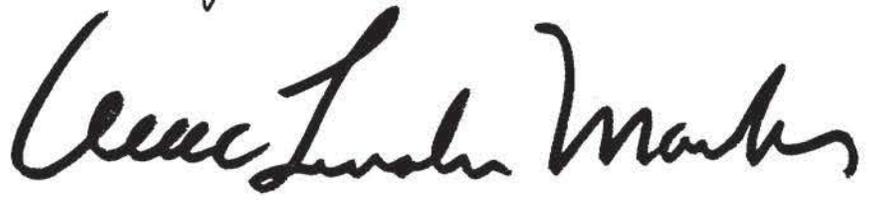
that he had taken the appropriate steps to contest the citation, Jones was surprised to receive a notice of delinquency from MSHA on September 15, 1997. *Id.* Upon Jones' investigation into the matter, he learned that the accounts payable department had failed to process the hearing request. *Id.* Jones then searched for and located the notice of contest form, which was still attached to the paperwork he had sent to the accounts payable department. *Id.* By this time, the thirty-day period for submitting a hearing request had already passed.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 16 FMSHRC 1931, 1932 (September 1994).

We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996). *See also Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (March 1997) (remanding for judge's consideration operator's request to reopen penalty assessment after Green Card was misfiled in accounts payable file); *Eastern Associated Coal Corp.*, 19 FMSHRC 494, 494-95 (March 1997) (remanding operator's request to reopen final order when substitute mailroom employee failed to refer proposed assessment to legal department); *RB Coal Co., Inc.*, 17 FMSHRC 1110, 1110-11 (July 1995) (remanding for judge's consideration operator's request to reopen penalty assessment after Green Card was misplaced among other penalty assessments that operator intended to pay).

On the basis of the present record, we are unable to evaluate the merits of Kentucky Stone's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Kentucky Stone has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

Distribution

Terry Jones, Safety Director  
Kentucky Stone  
209 Old Harrods Creek Rd.  
Louisville, KY 40223

Douglas N. White, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

**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 9 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-85-M
Petitioner	:	A.C. No. 24-02089-05501
v.	:	
	:	Yukon #1 Mine
YUKON NO. 1 MINING CLAIM,	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Glenn Davis, Owner-Operator, Yukon Mine, Moccasin, Montana;  
Mark N. Savitt, Esq., and Willa Perlmutter, Esq., Patton Boggs, L.L.P., Washington, DC, for Respondent.

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Yukon No. 1 Mining Claim (Respondent) of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to Notice the case was scheduled for hearing on August 26, 1997. At the hearing, Glenn Davis, owner-operator of Respondent, who had been representing Respondent, advised the court that he intended to have Respondent represented by Mark Savitt, Esq. A conference call was arranged between the court, counsel for Petitioner, and Mark Savitt. The latter indicated he would represent Respondent. Counsel for both parties conferred and attempted to limit the issues to be litigated. The matter was continued to allow counsel to continue to negotiate.

Counsel have stipulated the following:

1. Respondent withdraws its contest to the citations involved in this proceeding. All information contained in the citations (including any special findings and any narrative information) may be regarded as established. The only remaining issue with respect to each citation is the appropriate penalty.

a. History. Respondent has no previous MSHA inspection and violation history.

b. Size of business. The mine is a small mine. Four individuals are involved in the business. The operator has reported to MSHA that: 1. during the third quarter of 1996, two employees worked a total of 240 hours at the mine; 2. during the first quarter of 1997, no work was performed at the mine; and 3. during the second quarter of 1997, two employees worked a total of 96 hours at the mine.

c. Negligence. Each of the violations involved in this case resulted from the respondent's moderate negligence.

d. Gravity. As indicated in lines 10(a), 10(b), and 10(c) on each citation, the gravity of each violation involved in this case is as follows:

Citation 4645194: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-significant-and-substantial ("non-S&S").

Citation 4645195: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 4645196: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, the injury was not reasonably likely to result in lost workdays. The violation was non-S&S.

Citation 4645197: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900303: There was no likelihood that an injury would occur as a result of the violation. The violation was non-S&S.

Citation 7900304: There was no likelihood that an injury would occur as a result of the violation. The violation was non-S&S.

Citation 7900305: An injury was reasonably likely to occur as a result of the violation, and if an injury did occur, it is reasonably likely that the injury would be fatal. The violation was significant and substantial (“S&S”).

Citation 7900306: An injury was reasonably likely to occur as a result of the violation, and if an injury did occur, it is reasonably likely that the would result in lost workdays. The violation was S&S.

Citation 7900307: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900308: An injury was reasonably likely to occur as a result of the violation, and if an injury did occur, it is reasonably likely that the injury would be fatal. The violation was S&S.

Citation 7900309: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900310: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900311: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900312: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900313: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

Citation 7900314: An injury was reasonably likely to occur as a result of the violation, and if an injury did occur, it is reasonably likely that the injury would be fatal. The violation was S&S.

Citation 7900315: An injury was reasonably likely to occur as a result of the violation, and if an injury did occur, it is reasonably likely that the injury would be fatal. The violation was S&S.

Citation 7900317: An injury was unlikely to occur as a result of the violation. If an injury did occur as a result of the violation, it is reasonably likely that the injury would result in lost workdays. The violation was non-S&S.

2. On September 23, 1997, Respondent filed its Motion for Reduction of Proposed Assessment, attaching documentary evidence in support of the motion. The Secretary stipulates that the court may consider, to the extent it is appropriate to do so, Respondent's documentary evidence for the purpose of determining an appropriate penalty in this case. The Secretary notes that she intends to file a brief response to the motion for reduction of penalties.

Based on the parties' stipulations, I find that Respondent violated the mandatory standards cited in the citation at issue, and affirm these citations as written.

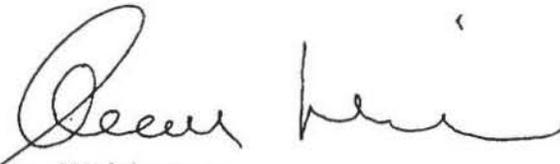
I further find, based on the parties' stipulation, that the violations cited in the following citations were of a moderate level of gravity: 4645194, 4645195, 4645196, 4645197, 7900306, 7900307, 7900309, 7900310, 7900311, 7900312, 7900313, and 7900317. I find that the violations cited in citation Nos. 7900305, 7900308, 7900314, and 7900315 were of a high level of gravity. I find that the violations cited in citations Nos. 7900303, and 7900304, were of a low level of gravity. I find, based on the parties' stipulations, that each of the violations cited resulted from Respondent's moderate negligence. I find, based on the parties' stipulations, that Respondent had no previous violation history and that the subject mine is a small mine. These factors serve to mitigate the amount of penalty to be assessed.

On September 26, 1997, Respondent filed a Motion for Reduction of Proposed Assessment. Attached to this motion are signed statements from four individuals Clare E. Knight, Glenn Davis, Jack Hughes, and Lee Bliss. Each of these statements contain the following language: "I declare under penalty of perjury that the foregoing is true and correct." The declaration indicates that the mine at issue is owned and operated by a partnership consisting of Davis, Bliss, Knight, and Hughes. The declarations indicate that the mine is not in production, and does not have any income. It is asserted that the mine has no assets aside from \$300 in a bank account, and owes approximately \$4,000. Tax returns of Bliss, Davis, Knight, and Hughes indicate minimal income. I find that the imposition of a penalty would have an adverse effect on Respondent's ability to continue in business considering all the above factors, I find that the following penalties are

appropriate for the violations cited in the following citations: 4645194 - \$40; 4645195 - \$40; 4645196 - \$40; 4645197 - \$40; 7900303 - \$20; 7900304 - \$20; 7900305 - \$88; 7900306 - \$40; 7900307 - \$40; 7900308 - \$88; 7900309 - \$40; 7900310 - \$40; 7900311 - \$40; 7900312 - \$40; 7900313 - \$40; 7900314 - \$88; 7900315 - \$88; and 7900317 - \$40.

ORDER

It is ordered that, within 30 days of this decision, Respondent shall pay a total civil penalty of \$872.



Avram Weisberger  
Administrative Law Judge

Distribution:

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

Mr. Glenn Davis, Yukon #1 Mining Claim, P.O. Box 158, Moccasin, MT 59462  
(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

October 14, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-77
Petitioner	:	A. C. No. 48-01200-03540
v	:	
	:	Buckskin Mine
TRITON COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Ned Zamarripa, Esq., Conference and Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado, for the Secretary;  
Michael O. McKown, Esq., LaTourette, Schlueter & Byrne, P.C., St. Louis, Missouri, for Respondent

Before: Judge Barbour

This civil penalty case arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Triton Coal Company (Triton or the company) for an alleged violation of 30 C.F.R. § 77.1606(c), a mandatory safety standard for surface coal mines requiring defects affecting the safety of loading and haulage equipment to be corrected before the equipment is used. The Secretary alleges the violation occurred at the company's Buckskin Mine, a surface coal mine located in Campbell County, Wyoming, and that the violation was a significant and substantial (S&S) contribution to a mine safety hazard. The Secretary proposes a penalty of \$362 for the alleged violation. Triton denies it violated the standard, and contests the Secretary's S&S allegation. The case was heard in Gillette, Wyoming.

**STIPULATIONS**

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

1. The Buckskin Mine is engaged in mining and selling coal in the United States, and its . . . operations affect interstate commerce.

2. Triton . . . is the owner and operator of the . . . [m]ine. The . . . [m]ine is subject to [the] jurisdiction of the . . . Act.

3. The . . . [j]udge has jurisdiction.

4. The . . . [c]itation was properly served by . . . [an inspector] upon an agent of . . . [Triton] on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevance of any statements asserted therein.

5. The exhibits offered by . . . [Triton] and the Secretary . . . [are] authentic, but no stipulation is made as to their relevance or [the] truth of matters asserted therein.

6. The proposed penalty will not affect . . . [Triton's] ability to continue in business.

7. [Triton] demonstrated good faith in abating the violation.

8. Triton . . . is the coal mine operator, with 34,139,068 tons [of coal produced] and 11,616,418 hours of production in 1996.

9. The certified copy of the MSHA Assessed Violation History accurately reflects the history of the mine for the two years prior to the date of the [c]itation (Tr. 9-10; Joint Exh. 1).

The parties further agreed that the company should be characterized as a large operator (Tr. 11).

### THE NATURE OF THE DISPUTE

The parties disagree whether a tire on a 190 ton haulage truck affected safety. The company's tire contractor altered the tire by cutting funnel shaped holes into it (a process known as "skiving"). The company moved the tire from the front to the rear of the truck and used the truck to haul refuse. The Secretary maintains the tire was defective, adversely affected safety, and should not have been used (Tr. 12). The company maintains the tire did not adversely affect safety and was properly used without violating section 77.1606(c) (Tr. 89-90).

### THE CITATION

<u>Citation</u>	<u>Date</u>	<u>77 C.F.R. §</u>	<u>Proposed Penalty</u>
4366121	8/8/96	1606(c)	\$362

The citation states in part:

The right rear outside tire on the 190 ton . . . dump haul truck . . . is in an unacceptable condition. The outer rubber layer (tread) of the tire is separated from the tire core around the outer circumference for a distance of about 4½ [feet]. Three holes about 4 [inches] in diameter and 3½ [inches] in depth have been cut through the tread layer to relieve pressure and prevent heat buildup. The holes leave the tire core and outer steel belts visible. The two outer protective steel belt layers are worn and frayed away in the 4½ [feet] area. One of the cords is broken in the third steel belt layer and the third layer is showing wear. The tire should have been removed from service before deteriorating to this condition (Gov. Exh. P-2).

### THE TESTIMONY

Herbert J. Skeens is the MSHA inspector who issued the citation. He has been an inspector for 4½ years. Prior to that he has had 18 years of experience in the coal mining industry, first in the eastern coal fields and later in the west (Tr. 14-15). He has operated heavy equipment associated with surface coal mining (bulldozers, backhoes, drills, etc.) including coal haulage trucks similar to the truck at issue (Tr. 15). Skeens has had some experience in the maintenance of tires, and he believes he has more knowledge of tires than the average MSHA inspector (Tr. 43). As part of his MSHA training, Skeens received instruction in tire safety in a one day course. Prior to the course he estimated he received one other day of training in tire maintenance and repair (Tr. 45).

Skeen testified that in the late 1980s, steel belted radial tires for heavy equipment came into common use (Tr. 44). In a steel belted radial tire the air is contained within the tire's casing. The casing is the foundation of the tire. Layers of steel belts cover the casing and help give the tire its strength (Tr. 57, 59-60). The tread layer is the outer surface of the tire (Tr. 57). The tread layer protects the steel belts and gives the tire traction (Tr. 61).

On the morning of August 8, 1996, Skeens went to Triton's Buckskin Mine to conduct an inspection. (Throughout the inspection Skeens was accompanied by Triton mining technician, Paul Norfolk (Tr. 18).) After inspecting the pit, high-walls, and roadways, Skeens selected three or four pieces of equipment to inspect, including the subject haulage truck (Tr. 20).

The truck was loaded to capacity hauling refuse (overburden) (Tr. 22). As Skeens and Norfolk approached the truck, Skeens requested the driver stop so he and Norfolk could look at the tires. There were two front tires and four rear tires, two rear tires on each side (Tr. 20, see also Tr. 122). As the truck came to a halt, Skeens could see part of the tread layer on the outside right rear tire “jiggle like Jell-O” (Tr. 23). This indicated to Skeens “something wasn’t right” (Tr. 83).

When Skeens inspected the tire, he found:

[T]he outer rubber-layer tread of the tire . . . [was] separated from the tire core around the outer circumference for a distance of four and a half feet . . . holes about four inches in diameter and three and a-half inches in depth . . . [were] cut through the tread layer to relieve pressure and prevent heat buildup.

The holes [left] the [tire] core and outer steel belts visible. The two outer protective steel-belt areas . . . were worn and frayed away in a four-and-a-half-foot area. One of the cords . . . [was] broken in the third steel belt layer, and the third layer . . . [was] showing wear (Tr. 20-21).<sup>1</sup>

Skeens described the holes as “skived out.”<sup>2</sup> The purpose of skiving was to relieve pressure and heat inside the tire (Tr. 47, 50). The holes allowed air that was heated and expanded when the tire rotated, to escape the tire, which, in turn, relieved heightened air pressure inside the tire (Tr. 62). Skeens did not have the capacity to measure the tire’s pressure and heat so he did not know what the air pressure was when he cited the alleged violation, nor did he know what the pressure was supposed to be, or what pressure should cause concern about the tire’s condition (Tr. 62, 69). However, after Skeens insisted the tire be taken out of service, the pit mechanic read the temperature and pressure with a gauge. The temperature inside the holes measured between 127 to 132 degrees Fahrenheit (Tr. 128-131). The pressure was 122 pounds per square inch (Tr. 130).

Skeens believed the holes should have been fill with rubber to protect the exposed steel belts (Tr. 47-48). The rubber would have “act[ed] as a guard to keep a rock from going through the . . . hole[s] and puncturing the steel belts” (Tr. 30). Also, it would have prevented debris from getting between the tread layer and the steel belts (Tr. 30, 48).

---

<sup>1</sup>/Although Skeens initially testified there were three holes in the tire and although the citation mentions three holes, he later testified there were five holes (Tr. 83). All other witnesses who referenced the number of holes, agreed there were five (Tr. 97, 126, 161-162), and I find there were five holes in the tire.

<sup>2</sup>/“Skiving” is defined as the “[r]emoval of a material in thin layers or chips with a high degree of shear or clippage, or both, of the cutting tool” (U.S. Department of the Interior *A Dictionary of Mining, Mineral, and Related Terms* (1968) at 1022).

In addition to noticing the loose tread and skived holes, Skeens saw the word "runout" painted on the sidewall of the tire. To Skeens, the word meant the company had decided "to run . . . [the tire] until it destroy[ed] itself" (Tr. 39, see also Tr. 67-68, 84).

Given the condition of the tire, Skeens feared a rock could penetrate to the tire's core and cause a blowout. Or, heat produced by the tire's operation could cause a blowout (Tr. 25). In either event, the driver could lose control of the truck, veer into the path of another vehicle, or plunge through a berm and over the edge of the roadway. Injuries resulting from the blowout could be fatal (Tr. 25-26).

The company's witnesses challenged Skeens' opinion the tire posed a hazard. After the citation was issued, Richard K. Burns, the safety coordinator, went to the mine and examined the tire (Tr. 97). He saw that some of the tread had separated from the tire's steel belt layers (Tr. 115). Also, he saw the holes (Tr. 97). When he looked into the holes, he saw "some insignificant wire breakage" (Tr. 97). He could not see the tire's casing (Tr. 100).

Burns testified that tires for 190 ton haulage trucks are "very expensive" and that skiving is a way to mitigate damage to a tire and to keep damage from worsening (Tr. 99). (The cited tire cost between \$16,500 and \$17,000 (Tr. 145-146)). Burns also explained the company used a contractor, Cobre Tire, for tire maintenance and repair. Representatives of Cobre visited the mine each week. They inspected all of the tires in use (Tr. 100). Employees of Triton also inspected the tires during each of mine's two shifts (Tr. 101-102).

Burns did not believe the company violated section 77.1606(c) because the defect in the tire "had been mitigated . . . or corrected. Not reversed, but stopped so that it did not become a defect that affected safety" (Tr. 102). Burns explained:

[I]f a tire . . . has a rock cut and is left uncorrected . . . it can build up heat and it can separate the tread from the steel. But if . . . skiving is done correctly . . . it prevents or . . . stops that heat from building up . . . . When a cut is made, the rocks get in it and the . . . dirt gets in it and it keeps making that separation larger . . . . [I]f you can skive those cuts . . . then the dirt isn't allowed to stay in there. It falls out. It also cools it so it prevents . . . [the tire] from overheating . . . and skiving mitigates that . . . or prevents that from happening. And . . . the separation is stopped at that point (Tr. 103).

Equally important to Burns was the fact the tire's casing was free from damage. He described the casing as the "load-bearing part of the tire" (Tr. 104). Since the casing was not compromised, neither was safety. Burns explained that although tire cuts can lead to the tread layer separating from the tire, if the casing is unimpaired the tire still supports the load (Tr. 112-116).

Burns believed Skeens misunderstood what was meant by "runout." As used by the company and the contractor, the word signaled a tire had been moved from the front of the equipment to the rear. He stated:

We normally put . . . new tires on the front, and then if . . . there's a cut . . . we move those front tires to the rear to be run out. And we put new ones on the front. It does not mean that we're running it until it blows . . . . It . . . means we've changed the location from the front of the truck to the back of the truck (Tr. 116).

Norfolk, who also noticed the holes, three damaged belts, and loose tread, agreed with Burns that part of the purpose of skiving is "to extend the life of the tire by preventing further tread separation from the steel cords underlying the tread" (Tr. 132). The skived holes "blow out debris that may get in between the tire tread and the . . . belt below" (*Id.*). According to Norfolk, skiving is common at the mine and in the industry (Tr. 131). Indeed, with "rocks and everything," Norfolk felt it would be "highly unusual" for a tire not to be skived (Tr. 134).

He believed the tire was safe because if one of the four rear tires failed, "the extra tire . . . [would] carry that load until you can get [the truck] safely stopped" (Tr. 136). (This is not true in the front of the truck, where there is only one tire on each side.) He also believed the tire was safe because there was no indication of heat build up or dangerously high air pressure.

Wesley, the Cobre store manager, stated that when a tire is cut the area around the cut is removed to reach the top of the steel belts. If the resulting hole is small, it is filled with rubber. If the hole is filled, the tire may continue to be used on the front of the truck (Tr. 156-157). If the cut out area is large and has not reached the casing, the hole is left unfilled. Leaving the hole unfilled allows air to ventilate and cool the tire when the truck is operating. The unfilled hole also allows dirt to fall out of the tire and prevents the tread from separating. If the tread has started to separate, skiving helps to keep the separation from growing (Tr. 147-148, 158).

Wesley went to the mine to look at the tire. He believed the holes were skived for these purposes (Tr. 161-162). He noted the tire's casing was unaffected (Tr. 153), and the tire showed no evidence of heat and air pressure buildup (Tr. 155). In Wesley's view, air pressure above 138 pounds per square inch was something about which to be concerned because it indicated heat was being generated in the tire (Tr. 146). Conversely, pressure below 138 pounds per square inch was acceptable (Tr. 147).

To Wesley the word "runout" indicated the tire should be put on "the rear and watch[ed] . . . until it becomes unsafe to run" (Tr. 151, *see* Tr. 151-152).

The company's final witness was Glen Whitear, an engineer who works for Cobre. He has spent approximately 45 years in the tire industry (Tr. 167-168). He described steel belted radial tires in detail. A single band of steel runs radially round the inner circumference of the tire

and forms the casing of the tire (Tr. 175-176). The casing is “the strength” of the tire (Tr. 176). Whitear agreed with all of the other witnesses that inside the casing is a “cushion of air” that carries the weight of the truck and its load. Steel belts over the casing protect it and “stabilize the tread so it doesn’t squirm” (Tr. 177). The tread provides traction (*Id.*). Here, where three of the steel stabilizing belts were damaged, but the casing remained in tact, Whitear believed the tire was capable of safely supporting its load (Tr. 177-178, 182-183).

Whitear agreed with the other company witnesses that “skiving” was a method of “significantly” prolonging the life of a tire while still providing safety (Tr. 179-180). Skiving is recommended by all rubber companies (Tr. 182, 186). It does not weaken the tire in any way. Rather, it stops the tire’s deterioration (Tr. 188).

If a front tire is skived and moved to the rear, continued safe operation of the truck is unaffected (Tr. 180). If one of the two front tires fails, the truck can swerve and go off the road. If one of the four rear tires fails, the other three bear the load (Tr. 187), and unlike the front tires, those on the rear do not turn from side to side (Tr. 190).

Finally, Whitear agreed with Burns and Wesley that the term “runout” means a tire “has to be removed to the rear and it remains there while it is safe” (Tr. 189).

### THE VIOLATION

Section 77.1606 is headed “*Loading and haulage equipment; inspection and maintenance.*” Section 77.1606(c) states “[e]quipment defects affecting safety shall be corrected before the equipment is used.” The standard’s requirement is clear, if loading and haulage equipment has a defect that makes the equipment unsafe, the equipment cannot be used until the defect is corrected. The standard is “simple and brief in order to be broadly adaptable to myriad circumstances” (*Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981)). Compliance is evaluated by an objective test of those actions taken by a reasonable prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the standard (*see, e.g. Austin Power, Inc.*, 9 FMSHRC 2015, 2018 (December 1987); *Alabama By-Products, Corp.*, 4 FMSHRC 2128, 2129 (December 1992)).

The evidence establishes: the haulage truck was in operation when the alleged violation was observed; the right rear outside tire on the truck had a 4½ to 5 feet area where the tread layer was loose and separated; five holes were skived in the tire; the holes exposed three of the tire’s six steel belts; the two belts closest to the tread were cut; the third exposed belt was worn and frayed; and the casing of the tire was unaffected.<sup>3</sup>

---

<sup>3</sup>/I recognize Skeens stated in the citation the core was visible (Gov. Exh. P-2). (Skeens used the terms “core” and “casing” interchangeably.) However, because the holes affected the outer three and not the inner three belts, I believe he confused the casing with the inner belts, and I credit the testimony of the company’s witnesses the casing was fully functional.

The first question is whether these conditions constituted “equipment defects?” “Defect” is defined in part as, “Wanting or absence of something necessary for completeness, perfection, or adequacy in form or function” (*Webster’s Third New International Dictionary* (1986) at 591). Clearly, the loose tread, the skived holes, and the damaged steel belts detracted from the tire’s form and diminished its completeness. In other words, they were equipment defects.

The next question is whether the defects adversely affected safety? Or, to put the question in the context of the Commission’s test, whether a reasonably prudent person familiar with the mining industry and the Buckskin Mine would have believe the tire was unsafe and have corrected the condition before using the truck? I conclude the answer is “no,” that whether the loose tread, the holes, and the damaged belts are viewed separately or in combination, the record does not support finding they made the tire unsafe.

Skeens testified the purpose of the tread layer was to give the tire traction (Tr. 57). He also testified the tread layer protected the steel belts (*Id.*). Wesley agreed with Skeens that the purpose of the tread layer was to provide traction, and he described the relationship of the tread and the belts as one in which the belts stabilized the tread (Tr. 177). This testimony bespeaks the obvious. What is not obvious is how the loose tread adversely affected safety. There is no testimony linking the partially separated tread layer to a specific hazard, and even if I assumed the loose layer caused the loss of some traction, there is no evidence that the loss of traction on one of the four rear tires posed a hazard.

One of the reasons the holes were skived in the tire, as Norfolk, Wesley, and Whitear testified, was to prevent the tread layer from separating further (Tr. 132, 145, 147-148, 158, 161, 163, 188). While I might infer from this that tread separation needed to be stopped for safety reasons, I might as easily find it needed to be stopped for fiscal reasons. (The tire cost \$16,500 to \$17,000 (Tr. 145-146).) The point is, the Secretary did not establish a nexus between a hazard and the loose tread.

The parties also agreed, as Skeens, Burns, and Wesley testified, that in addition to preventing further tread separation, the reason the holes were skived in the tire was to relieve heat and pressure build up (Tr. 47, 50, 62, 103, 147-148, 158 ). These palliative purposes enhance, rather than diminish safety, and the testimony establishes the holes were meeting these objectives.

Although Skeens did not know what the tire’s temperature and pressure were, or what the pressure was supposed to be (Tr. 62, 69), the pit mechanic measured both and Norfolk testified without dispute the pressure was acceptable and the tire showed no signs of “overheating” (Tr. 130-131). In addition, Wesley testified air pressure below 138 pounds per square inch was safe (Tr. 147). (Clearly, the 122 pounds of pressure found by the pit mechanic was well below this amount.) The Secretary did not challenge any of this testimony. I therefore conclude the Secretary failed to prove the heat, air pressure, or the holes themselves affected the safe operation of the tire.

The Secretary also failed to prove the damaged steel belts affected safety. Below the three damaged belts were three undamaged steel belts that protected the tire's casing. The company presented compelling testimony that because the casing was functional, it was safe to use the tire.

Burns explained the casing was the "load-bearing part of the tire" (Tr. 103), and as long as the casing remained in tact, safety was unaffected (Tr. 112-116). His testimony was corroborated by Wesley (Tr. 148, 153), and was further bolstered by Whitear, an engineer with nearly an half century of experience in the tire industry (Tr. 177-178 , 182-183). I recognize Skeens believed "[t]he strength of the tire had been compromised," and I do not doubt his sincerity (Tr. 64). However, the company's witnesses offered detailed accounts of the structural makeup of the tire and their testimony, based on their thorough understanding of the tire's structure and capacity, is more persuasive.

In addition, the Secretary did not overcome the company's contention that even if the tire somehow suffered a blowout, the driver would not loose control. The tire was one of four rear tires. Norfolk's testimony that in the event of a blowout, the three remaining tires were sufficient to carry the weight of the truck until it could be safety stopped was not rebutted (Tr. 136). Also, Whitear persuasively pointed out that because the tire was on the truck's rear axel, the tire could not be turned to the right or left like a front tire. Therefore, if the rear tire failed, the truck would not be pulled suddenly to one side or the other (Tr. 187, see also Tr. 190).

Finally, I conclude Skeens' citation of the company was triggered by his incomplete understanding of the purpose of skiving and tire usage at the mine. Skeens believed rubber should have been poured into the holes (Tr. 47-48). However, Norfolk and Wesley explained the holes were purposefully left unfilled so dirt and debris fell out of the holes rather than worked between the tread and belt layers, causing further tread separation and belt damage (Tr. 132, 147-148, 158). In addition, Skeens clearly misunderstood the meaning of the word "runout." He thought it meant the tire could not be repaired and the company would "run it until it destroy[ed] itself" (Tr. 39, see also Tr. 67-68, 84). He acted to prevent this from happening.

However, the testimony of Burns, Wesley, and Whitear leads to the conclusion the word was put on the tire to further safety not to detract from it. They agreed "runout" was painted on the tire to keep the tire from being mistakenly placed on the front of the truck (Tr. 116, 151-152, 189). The word alerted company employees to watch the tire to make sure it was safely used — that is, to make sure it was used as a rear tire and that it remained in safe condition (Tr. 151-152). Had Skeens understood the holes were preventing not contributing to further deterioration of the tire, and had he understood company employees were on notice not to use the tire on the front of the truck and to keep watch over its condition, I doubt he would have issued the citation.

Commission Administrative Law Judge T. Todd Hodgdon, recently vacated a citation issued under similar circumstances (although alleging a violation of a different standard) because the Secretary had not proven a violation. He found, "the company's witnesses were more knowledgeable concerning the tire in question than was the inspector, who . . . was not aware of all the facts pertaining to the tire" (*Amax Coal West, Inc.*, 19 FMSHRC 1311, 1312 (July 18, 1997)). Judge Hodgdon's observation is equally applicable here. Like Judge Hodgdon, I believe that a reasonably prudent person familiar with the Buckskin Mine and the condition of the tire would have concluded the tire was not in an unsafe condition. I find the company did not violate section 77.1606(c).

**ORDER**

Citation No. 4366121 is **VACATED** and this proceeding is **DISMISSED**.



David F. Barbour  
Administrative Law Judge

Distribution:

Ned Zamarripa, Conference and Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, P. O. Box 25367, Denver, CO 80225 (Certified Mail)

William A. Miller, Esq., Zeigler Coal Holding Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

Michael O. McKown, Esq., LaTourette, Schlueter & Byrne, P.C., 11 South Meramec, Suite 1400, St. Louis, MO 63105 (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 14 1997

NEWMONT GOLD COMPANY,  
Contestant

v.

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

: CONTEST PROCEEDINGS  
:  
: Docket No. WEST 97-159-RM  
: Order No. 7704275; 4/21/97  
:  
: Docket No. WEST 97-160-RM  
: Order No. 7704276; 4/21/97  
:  
: Docket No. WEST 97-161-RM  
: Order No. 7704277; 4/21/97  
:  
: Docket No. WEST 97-162-RM  
: Order No. 7704278; 4/21/97  
:  
: Docket No. WEST 97-163-RM  
: Order No. 7704279; 4/21/97  
:  
: Docket No. WEST 97-164-RM  
: Citation No. 7704270; 4/21/97  
:  
: Docket No. WEST 97-165-RM  
: Citation No. 7704271; 4/21/97  
:  
: Docket No. WEST 97-166-RM  
: Citation No. 7704272; 4/21/97  
:  
: Docket No. WEST 97-167-RM  
: Citation No. 7704273; 4/21/97  
:  
: Docket No. WEST 97-168-RM  
: Citation No. 7704274; 4/21/97  
:  
: Genesis Mine  
: Mine ID 26-00062

## DECISION

Appearances: David J. Farber, Esq., PATTON BOGGS L.L.P.,  
Washington, D.C.,  
for Contestant;  
James B. Crawford, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia.,  
for Respondent.

Before: Judge Cetti

These ten consolidated cases are before me on the request of Newmont Gold Company (Newmont) for a hearing under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" and Commission Rule 20, 29 C.F.R. 2700.20, to contest the validity of the five citations and the five 104(b) orders.

At the hearing, the Secretary by counsel entered into the record the order of the Secretary vacating the 104(b) orders in Docket Nos. WEST 97-159-RM through WEST 97-163-RM. (Ex. N-2) and requested an order dismissing these dockets. There being no objection, the undersigned Judge at the hearing verbally issued a bench order dismissing docket Nos. WEST 97-159-RM through WEST 97-163-RM and now by this decision confirms the bench order in writing. This leaves for resolution the issues arising out of the citations in Docket Nos. WEST 97-164-RM through WEST 97-168-RM including the validity of the citations.

## STIPULATIONS

At the hearing, the parties entered into the record the following stipulations:

1. Contestant, Newmont Gold Company, is a mine operator as defined under section 3(d) of the Mine Act and has products and mining operations and extracts products which enter and affect commerce.
2. The Administrative Law Judge has authority to hear and rule in these proceedings under section 113(d)(1) of the Federal Mine Safety and Health Act of 1977.

## STATEMENT OF THE PROCEEDINGS

On April 21, 1997, Inspector Bonifacio issued five citations to Newmont Gold Company. Each citation alleges an identical guarding violation of the moving parts of the front mounted engine of each of the five haul trucks used at the Genesis Mine. All five trucks were Dresser Haulpak 510 haul trucks. Each of the citations has an identical description of the alleged violation for all of the haul trucks. Each citation alleges violations of 30 C.F.R. § 56.14107 concerning the guarding of moving parts of the engine of each haul truck. The identical description in each citation reads as follows:

The fan blades and accessories drive pulleys and v-belts located at the front of the motor on the Dresser Haulpak 510 haultruck Co. No. HT-026 weren't guarded. The unit is operated at the pit 24 hours per day and the motor is left running during shift change, the truck operator must stand within 7 feet of the moving parts in order to check for defects to the steering, braking and suspension components during the pre-operational inspection of the unit. The truck driver could contact the moving parts and sustain a serious injury.

The citations fixed the abatement time as 8 a.m. on April 21, 1997.

It is undisputed and clear from the citations and the record that the citations were not for guards that were available from the manufacturer or for missing guards that had been previously installed by the manufacturer or others and then removed for making repairs or maintenance and not replaced. The citations were issued because Respondent did not install new additional guards which the inspector believed should be added to supplement the guards installed by the truck's manufacturer.

As a preliminary matter Newmont presented undisputed evidence that no miner had ever sustained any injury because of contact with a moving machine part of the engine of any of the haul trucks.

Newmont entered into the record undisputed measurements it took to support its contention that in any event, the exposed moving parts of the truck's engine were at least seven feet away from walking or working surfaces. MSHA on the other hand never took any measurements whatsoever and thus, MSHA did not provide any *measurements* that refute Respondent's measurements or contentions that the moving machine parts came within the express exception stated in subsection "b" of the cited safety standard. Each citation was issued for the alleged violation of 30 C.F.R. § 56.14107 which expressly provides under subsection (b):

"Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

In support of its position that the cited standard was applicable to the engines of haul trucks, counsel for the Secretary placed in evidence as Exhibit G-2 a copy of the preamble of the cited safety standard which states in part:

... larger, off-road vehicles present special hazards because of the greater accessibility to their moving machine parts. In some instances persons can walk directly under the vehicle to inspect the engine and be exposed to its moving parts. In most instances, these parts are already guarded by the manufacturer but guards are

sometimes removed during repair work and not replaced. MSHA's objective is to ensure that these guards remain in place. (Emphasis added).

In my opinion, the wording and context of the preamble shows that the promulgators of the standard intended that, except in a rare exceptional case, there would be no requirement to supplement the existing guards that the manufacturer of the truck had installed in and around the truck's engine area. The preamble clearly indicates that its primary purpose was to insure that the truck manufacturer's installed guards were reinstalled and "remain in place" after any removal for maintenance or repair of the engine.

**The Inspector Exceeded His Statutory Authority In Issuing Citations That Did Not Conform With the Statutory Requirements of Section 104(a) of the Mine Act**

The inspector did not act in conformance with the mandate of section 104(a) of the Act in issuing the citations in question. Section 104(a), in addition to requiring the citation to be in writing, mandates that the 104(a) citation "fix a reasonable time for the abatement of the violation." The time specified for abatement in the written citation was 8 a.m. on April 21, 1997, which was more than 7 hours before the written citation was issued to the operator. The citations were issued on April 21<sup>st</sup> at approximately 3:30 p.m. Thus it clearly appears that the inspector did not even attempt to comply with this mandatory requirement of fixing a reasonable time for abatement of the alleged violations and under the facts of this case, the citations should be dismissed.

Counsel for MSHA in attempting to justify its issuance of the written citations that did not conform to the statutory requirements, entered into the record evidence and arguments which on close analysis demonstrate that it was pushing for enforcement of what the inspector referred to as an "oral citation" issued a few days before the abatement time of 8 a.m. April 21, 1997. This oral citation must also fall as it clearly exceeds the statutory authority granted in section 104(a) of the Mine Act.

The evidence presented by the Secretary demonstrates that the inspector was apparently intentionally trying to enforce an oral citation. First the inspector testified that, although he never observed haul truck drivers making the required preoperational inspections of the haul trucks, he determined on the 9<sup>th</sup> of April by interview with truck drivers and the foreman and looking at the trucks, there was a violation of the cited standard in that the factory installed guards were inadequate. (Tr. 161, 737). The inspector notified this determination to the maintenance foreman Mr. Mueller. The inspector testified Mr. Mueller agreed that he would install supplementary guards as soon as possible. Mr. Mueller, on the other hand, gave credible testimony that the inspector misunderstood what he said. He only said he "could," not that he "would," add the requested supplementary guarding."

On April 14, 1997, the inspector inquired about the supplemental guarding and learned Mr. Mueller's boss, Mr. Peske, wanted to check with the truck's manufacturer about a permanent guard installation and the fact that additional guards might cause other problems.<sup>1</sup> The inspector agreed but insisted that temporary guards to be installed as soon as possible. (Tr. 169).

The inspector testified that on April 17<sup>th</sup> he went to the MSHA field office and at the request of Dennis Tobin, the MSHA supervisor, made a call to Mr. Bill Miles, an agent of Newmont. (Tr. 172). The inspector testified the MSHA supervisor, Mr. Tobin, got on the line and told Mr. Miles that, in lieu of Newmont's request for a ruling on whether they needed to install additional guarding or not, "Yes he had checked on it and that it was a violation" and added that a citation was issuing "effective then" with an abate time of 8 a.m. April 21, 1997.

On April 21 the inspector went to the mine "a little bit before 12 o'clock," talked to Mr. Mueller and handed him "draft copies" of the citations. (Ex. N-1). The "draft copies" had printed at the top and bottom in large print "DRAFT COPY ONLY - NOT FOR ISSUE." The inspector testified that Mr. Mueller and others seemed to have no knowledge of the conversation of April 17 between Mr. Tobin and Mr. Miles. On further questioning, the inspector testified that citations were issued verbally on Thursday, the 17<sup>th</sup> of April to Mr. Miles. (Tr. 177).

Again, on further direct examination, the inspector testified that on April 21, 1997, he explained to Mr. Mueller and other company officers, "that the citations had been issued the previous Thursday (April 17, 1997) per a conversation with Mr. Miles." This obviously referred to the phone conversation between Mr. Tobin and Mr. Miles. (Tr. 179).

Thus it is clear from the record that the abatement time of 8 a.m. April 21, 1997, on the written citations was no inadvertent error. It was the abatement date orally specified on Thursday, April 17, 1997, to Mr. Miles and again specified in the written citations served approximately 3:30 p.m. on April 21, 1997, seven hours after the abatement time deadline. The inspector testified that when he went to the property on April 21 just before 12 o'clock, to see what "action" had been done and testified "and if no action was done, you issue a noncompliance order" and that is exactly what the inspector did." (Tr. 181, lines 21-22). Thus it is clear from the record that both the oral and written citations are invalid for failure to conform to the statutory authority clearly set forth in section 104(a) of the Mine Act which requires that the citation be in writing and that it fix a reasonable abatement time. As stated by the Chief Law Judge Merlin in his Order of Dismissal in D.H. Blattner & Sons, Inc., 17 FMSHRC 1073, 1074 (June 1995), "An Administrative agency is a creature of Congress and cannot exceed the jurisdiction given to it by Congress." Lyung v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office

---

<sup>1</sup>At the hearing Newmont contended that the additional engine guards created a greater hazard for drivers because of fire that could result from overheating the haul truck's engine and its interference with the engine fire suppression system.

Management, 991 F.2d 1564, 1569 (Fed Cir. 1993)." *See, also, Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (September 1988). The citations are dismissed.

**ORDER**

Citation Nos. 7704270, 7704271, 7704272, 7704273 and 7704274 are vacated and Docket Nos. WEST 97-164-RM, WEST 97-165-RM, WEST 97-166-RM, WEST 97-167-RM and WEST 97-168-RM are **DISMISSED**. Order Nos. WEST 97-159-RM, WEST 97-160-RM, WEST 97-161-RM, WEST 97-162-RM and WEST 97-163-RM are **DISMISSED**, pursuant to the Secretary's order dismissing the corresponding 104(b) orders.



August F. Cetti  
Administrative Law Judge

Distribution:

Henry Chajet, Esq., David Farber, Esq., PATTON BOGGS. LLP, 2550 M Street NW,  
Washington, DC 20037 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson  
Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

/sh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**OCT 15 1997**

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. SE 94-244-R  
: Citation No. 3182848; 1/31/94  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : No. 7 Mine  
Respondent : Mine ID No. 01-01401

**DECISION ON REMAND**

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

Before: Judge Melick

This case is before me upon remand to this Commission by the United States Court of Appeals for the District of Columbia Circuit, by decision dated May 2, 1997, (Secretary of Labor v. FMSHRC, 111 F.3d 913) and upon subsequent remand to this judge by the Commission on August 11, 1997, (19 FMSHRC 1377).

The procedural and factual background of the case was set forth by the Commission in its initial decision on April 19, 1996, (18 FMSHRC 508) as follows:

On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR [Jim Walter Resources, Inc.,] for a violation of [30 C.F.R.] section 75.400 because of trash accumulations in the No. 2 entry of JWR's No. 7 Mine. Tr. 29-30; Govt. Ex. 3. See 16 FMSHRC at 1514.

On January 31, 1994, the date of the citation at issue, Meredith conducted a follow-up inspection and confirmed that JWR had abated the conditions that led to the

issuance of the January 24 citation.<sup>1</sup> Tr. 31. During the inspection, he observed in the No. 3 entry an accumulation of trash at the check curtain, which directed ventilation across the longwall face and also separated the active outby area from the inactive inby area. Tr. 16; 64. The judge found that the trash in the outby area consisted of "[a] garbage bag, one box and one rock dust bag . . . ." 16 FMSHRC at 1513. Inby the curtain, there was a larger accumulation of trash that extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools. Tr. 21-24; Gov't Ex. 2. The materials on both sides of the curtain were combustible. Tr. 24. See 16 FMSHRC at 1512.

Inspector Meredith issued a citation, which charged a violation of section 75.400, and a withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). [fn 1, supra]. The inspector designated the violation as S&S and alleged that it was due to the operator's unwarrantable failure to comply with the standard. 16 FMSHRC at 1511-13; Govt. Ex. 2.

JWR challenged the citation and, following hearing, Judge Melick affirmed the violation. [fn 1, supra]. Although he noted that the existence of accumulations inby and outby the check curtain was undisputed, the judge concluded that "the inactive inby area cited in the order was not within the 'active workings' and the accumulations located therein were therefore not in violation of the cited standard." *Id.* at 1512. He further concluded that the evidence concerning combustible material outby the line curtain was insufficient to establish that the violation was S&S. 16 FMSHRC at 1512-13. The judge also determined that the evidence was insufficient to establish that the violation was due to the operator's unwarrantable failure. *Id.* at 1513-14.

Subsequent events were reported by the Commission in its August 16, 1997, decision:

The Secretary petitioned the Commission to review the S&S and unwarrantable determinations. A divided Commission affirmed the judge's decision. 18 FMSHRC 508 (April 1996).

Subsequently, the Secretary filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On May 2, 1997, the court issued its decision, affirming in part and reversing and remanding in part the decision of the Commission. *Secretary of Labor v. FMSHRC*, 111 F.3d 913 (D.C. Cir. 1997).

---

<sup>1</sup> As a matter of clarification, the only charging document at issue in this case is the withdrawal order issued by Inspector Meredith on January 31, 1994, pursuant to Section 104(d)(2) of the Act, Order No. 3182848. That withdrawal order was subsequently modified to a citation by decision of the trial judge on August 28, 1994.

The court affirmed the Commission's determination that the section 7[5].400 violation was not S&S and rejected the Secretary's argument that, in considering whether the violation was S&S, the Commission should take account of the seriousness of the nearby non-violative accumulation. *Id.* at 917-18. Relying on the language of section 104(d)(1), the court determined that "Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards" from the S&S determination. *Id.* at 917.

However, the court determined that section 104(d)(1) was ambiguous on the question whether the non-violative accumulation could be considered for the unwarrantable determination. *Id.* at 919-20. The court noted that, when the Mine Act is ambiguous on a point in question, a court is required to apply the analysis set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and defer to a reasonable interpretation of the Secretary. 111 F.3d at 914-15, 919-20.

The court agreed with the Secretary's interpretation of Section 104(d) of the Act, which had not been advanced at the trial below, that, in determining unwarrantable failure, consideration must also be given to the surrounding non-violative conditions. The Secretary argued before the court that the existence of inby trash, although not violating any health or safety statute or regulation, demonstrates negligence rising to unwarrantability. The court accordingly remanded this case to the Commission to determine whether, "applying the Secretary's interpretation of the statute, the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." In its subsequent remand order to this judge, the Commission directed that the non-violative accumulations in the inactive area of the mine therefore be considered "in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that the violative condition has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order."

Before proceeding with an analysis of the issues on remand it should be observed that two issues in this case have now been resolved through the appellate process, i.e., that the accumulations cited in the inactive area were not violations and that the violative accumulations in the active area were not the result of "unwarrantable failure" or high negligence based upon consideration of those violative conditions alone. Accordingly, those issues are not reconsidered here.

The limited issue on remand, then, is whether or not the non-violative accumulations were the result of operator negligence (culpability) and, if so, whether that negligence was of

such an aggravated nature as to constitute more than ordinary negligence.<sup>2</sup> If such non-violative accumulations were the result of such negligence, the issue then is whether the record contains sufficient evidence of causation to support an "unwarrantable failure" finding as to the violative condition.

In general, negligence is defined as "the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence." Mod Tort Law § 3.01 (Rev. Ed). The Secretary defines negligence in Part 100 of her regulations as follows:

Negligence is committed or omitted conduct which falls below a standard of care established under the Act to protect persons against the risks of harm. The standard of care established under the Act is that the operator of a mine owes a high degree of care to the miners. A mine operator is required to be on the alert for conditions and hazards in the mine which affect the safety or health of the employees and to take the steps necessary to correct or prevent such conditions or practices. 30 C.F.R. § 100.3(d).

A finding of negligence presupposes that there was a legal duty to conform to the standard of conduct established by law. Mod Tort Law § 3.02 (Rev. Ed). In a pervasively regulated industry such as coal mining, those duties are specifically defined by statute and regulation. Indeed, the Supreme Court of the United States recognized this in Donovan v. Dewey, 452 US 594, 69 L Ed 2d 262, 101 S Ct 2534, when it stated as follows:

... the standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations. Indeed, the Act requires that the Secretary inform mine operators of all standards proposed pursuant to the Act. § 811(e). Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence. Like the gun dealer in Biswell, the operator of a mine "is not left to wonder about the purposes of the inspector or the limits of his task." 406 US, at 316, 32 L Ed 2d 87, 92 S Ct 1593. 452 US at 604.

---

<sup>2</sup> Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). As noted by the Commission in its remand order, relevant issues therefore include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

The duties of a mine operator (and, conversely, what are not duties) are even further defined when Congress, in enacting mandatory standards such as the one at issue, carefully carves out an exception and clearly distinguishes between prohibited and non-prohibited conduct. As also noted by Commissioner Riley and the court on review of this case, if the Secretary is truly concerned about hazards presented by accumulations of trash outside active workings, she has a responsibility to clearly proscribe such hazards through rulemaking. The absence of a legally defined duty in such a pervasively regulated industry may therefore appropriately be considered in determining whether negligence existed or at least in mitigation of negligence. Mod Tort Law §§ 3.33 and 3.36 (Rev. Ed).

Within this legal framework and based on the present record, it is reasonable to conclude that the operator was at least minimally negligent to have allowed the non-violative accumulations to exist. Accepting Inspector Meredith as a reasonably prudent person familiar with the mining industry and based on Meredith's undisputed testimony, it is apparent that even the non-violative accumulations in this case presented a hazard that such a person would recognize and, therefore, had some duty to promptly remove.<sup>3</sup> Based on the amount of combustible materials found in the inactive area, it may also reasonably be inferred that management knew or should have known of the existence of those materials. The non-violative accumulations extended throughout the Number 3 Entry over a distance of 250 feet and included approximately 100 to 250 empty rockdust bags that had been piled two or three feet high along the rib, five wooden pallets and a number of wooden cable spools. It may also reasonably be inferred, based on Inspector Meredith's observations of rock dusting activity on January 24, 1994, that at least some of the materials, i.e., some of the rock bags and wooden pallets, may have accumulated over as long as a week. On the other hand, even Inspector Meredith conceded that he had no idea how long some of the other materials, e.g., the wooden cable spools, had been present.

While the Secretary also notes that, only seven days earlier, another withdrawal order (Gov. Exh. 3) had been issued for accumulations in an adjacent entry, those accumulations were presumably in an active area of the mine, and were, therefore violative. The prior order would not, therefore, have provided notice in itself that the accumulations now at issue, which were in an inactive area of the mine, were unlawful or had to be promptly removed. The Secretary correctly observes, however, that there is no evidence that the operator attempted to abate or clean up the non-violative accumulations.

Under the circumstances, it is clear that JWR was not without negligence in allowing these non-violative accumulations to exist. Such negligence was, however, strongly mitigated by the factors previously discussed and clearly was not so aggravated or of such a gross nature as to constitute unwarrantable failure. As the Commission noted in Secretary v. Mettiki Coal

---

<sup>3</sup> It is noted that since this issue was first raised by the Secretary on appellate review and was not squarely presented at trial, there may be an absence of contrary evidence in the record. Because of the result in this case, however, "due process" concerns in this regard are moot.

Corporation, 13 FMSHRC 760 (May 1991), typical definitions of gross negligence include: "the intentional failure to perform a manifest duty and reckless disregard of the consequences; "an act or omission respecting a legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care;" "indifference to present legal duty and utter forgetfulness of legal obligations;" and "a heedless and palpable violation of legal duty." Citing Black's Law Dictionary (5th Ed.), 931-32 (1979). The non-violative facts of this case considered in light of the mitigating factors, previously discussed, do not meet these definitions.

In its remand order, the court also directed the Commission to address the issue of causation. In determining legal responsibility for negligence, it is indeed customary to divide the inquiry into two steps, i.e., was there negligence (culpability), and, if so, was that negligence the proximate cause of the subsequent harm (causation).<sup>4</sup> Although the Secretary was accordingly directed to specifically address the issue of "causation" in her brief on remand, she declined to do so. The Secretary's failure to have addressed this essential element may be considered an abandonment of her claim on which she has the burden of proof and a default.

However, even assuming, arguendo, that the Secretary had a theory of causation and the record evidence supported such a theory, on the facts of this case it would in any event be irrelevant. Since the level of negligence associated with the non-violative accumulations has been found on the unique facts of this case to be minimal, I conclude that such negligence would not enhance the negligence in regard to the violative accumulations sufficient to justify unwarrantable failure findings.

### ORDER

Order No. 3182848, is hereby modified to a citation under Section 104(a) of the Act.<sup>5</sup>



Gary Melick  
Administrative Law Judge

---

<sup>4</sup> Under the "substantial factor" test of causation which has been adopted by the Restatement (second) of Torts § 431, conduct is the cause of an effect if that conduct has such an effect in producing the harm "as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense." Mod Tort Law § 4.03 (Rev. Ed).

<sup>5</sup> Inasmuch as this is a Contest Proceeding, no civil penalty is assessed.

Distribution:

David M. Smith, Esq., J. Alan Truitt, Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

William Lawson, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chambers Building, Highpoint Office Center, Suite 150, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

\mca

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

**OCT 16 1997**

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. KENT 97-90
	:	A.C. No. 15-14492-03725
	:	
	:	Docket No. KENT 97-131
COSTAIN COAL INCORPORATED, Respondent	:	A.C. No. 15-14492-03726
	:	
	:	Docket No. KENT 97-132
	:	A.C. No. 15-14492-03727
	:	
	:	Baker Mine
	:	
	:	Docket No. KENT 97-160
	:	A.C. No. 15-16020-03530
	:	
	:	Smith Underground No. 1

## DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Charles E. Lowther, Esq., Mitchell, Joiner, Hardesty & Lowther, Madisonville, Kentucky for the Respondent in Docket No. KENT 97-160;  
Carl B. Boyd, Jr., Esq., Sheffer-Hoffman, Henderson, Kentucky, for the Respondent in Docket Nos. KENT 97-90, KENT 97-131 and KENT 97-132.

Before: Judge Feldman

These consolidated proceedings concern petitions for assessment of civil penalties 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). These consolidated matters were called for hearing on July 22, 1997, in Owensboro, Kentucky. At trial, the parties moved for the approval to settle Docket No. Kent 97-90 in its entirety by reducing the proposed civil penalty from \$937.00 to \$381.00 for the two citations in issue. The parties also moved for the approval of their settlement agreement with respect to a reduced civil penalty from \$957.00 to \$100.00 for two citations in Docket No. KENT 97-131; and a reduction in civil penalty from \$1,643.00 to \$1,430 for three citations in Docket No. KENT 97-132. The settlement terms were approved on the record as consistent with the statutory penalty criteria and will be summarized at the end of this decision.

## **A. Background**

There are four remaining citations to be resolved through this hearing process. Three of these citations involve excessive respirable dust concentrations in violation of section 70.100(a), 30 C.F.R. § 70.100(a), that were detected as a result of bimonthly respirable dust samples obtained from a designated occupation in several of the respondent's mechanized mining units (MMU).

The mandatory safety standard in section 70.100(a) provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . .

In order to ensure that miners are exposed to less than 2.0 milligrams per cubic meter of air (2.0 mg/m<sup>3</sup>) section 70.207(a), 30 C.F.R. § 70.207(a), provides, in pertinent part:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days. The bimonthly periods are: January 1-February 28 (29), March 1-April 30, May 1-June 30, July 1-August 31.

The designated occupation in a given mechanized unit is the work position determined to have exposure to the highest respirable dust concentration. Section 70.2(f), 30 U.S.C. § 70.2(f). The five valid samples are obtained from Mine Safety and Health Administration (MSHA) approved filter cassettes contained in an air sampling unit worn by the miner in the designated occupation. In accordance with section 70.207(a), these five cassette dust samples are sent by the operator to MSHA's laboratory where the filter is removed and weighed to determine if the average respirable dust concentration is in compliance with the 2.0 milligram standard in section 70.100(a). If violations of section 70.100 (a) are detected by the MSHA laboratory, an MSHA inspector issues a citation that establishes a deadline for abatement. The citation and abatement commonly occur without a mine facility visit or an inspection by MSHA personnel.

During the time fixed for abatement, the operator must take corrective action to lower the concentration of respirable dust to within a permissible concentration and then sample each production shift until five valid respirable dust samples are taken. 30 C.F.R. § 70.201(d).

Citation Nos. 9898430, 9898420 and 9898402, issued during the period October through December 1996, concern violative respirable dust samples, based on the average of five samples, taken from the designated occupation, *i.e.*, the continuous miner operator, in several different

mechanized mining units at the respondent's Smith and Baker mines. The citations were issued by Robert G. Smith, an MSHA District Industrial Hygienist. Each of the citations was issued after the bimonthly sample submitted by the respondent for MSHA's laboratory analysis revealed average respirable dust concentrations in excess of 2.0 mg/m<sup>3</sup> obtained from five samples. Specifically, the violative average respirable dust concentrations for Citation Nos. 9898430, 9898420 and 9898402 were 2.2, 4.4 and 3.4 mg/m<sup>3</sup>, respectively.

Consistent with MSHA's normal respirable dust monitoring procedures, Smith did not inspect the subject MMU and has no personal knowledge concerning the circumstances surrounding each violative dust sample. However, Smith concluded the respondent's degree of negligence was moderate for Citation No. 9898430 issued at the Smith Underground Mine, and high for Citation Nos. 9898420 and 9898402 issued at the Baker Mine. The high negligence was based on the Baker Mine's general history of generating large quantities of coal dust. Smith also concluded the entire MMU crew was affected (the foreman, shuttle car operators and roof bolt operators) based on the respirable dust exposure of the miner in the designated occupation (continuous miner operator).

The fact of the violations cited in these MMU citations, as well as the violations' significant and substantial (S&S) characterizations, are not in dispute. What is disputed is the number of persons affected by the violations and the degree of culpability (negligence) attributable to the respondent. Thus, in essence, the issue is the application of the penalty criteria to the respirable dust violations in issue. Consequently, each penalty criterion with respect to each MMU citation will be discussed in turn.

However, consideration of the statutory penalty criteria must be viewed in the context of the unique circumstances and issues concerning excessive respirable dust concentrations. In this regard, the Commission has concluded, "in the particular context of the control of respirable dust in coal mines some departure [from normal enforcement considerations] is justified because of fundamental differences between a typical safety hazard and the respirable dust exposure-related health hazard at issue." (*Emphasis added*). *Consolidation Coal Company*, 8 FMSHRC 890, 895 (June 1986), *aff'd sub nom. Consol. Coal v. Fed. Mine Safety & H. Rev. Com'n.*, 824 F.2d 1071 (D.C. Cir. 1987). Thus, the D.C. Circuit agreed with the Commission that, given the insidious nature of respirable dust exposure:

Congress clearly intended the full use of the panoply of the Act's enforcement mechanisms to effectuate [the goal of preventing respiratory disease], including the designation of a violation as a significant and substantial violation. 824 F.2d at 1086, *quoting* 8 FMSHRC at 897.

## **B. Civil Penalty Criteria - MMU Violations**

### **1. Previous History of Violations**

Although the Commission has stated that an operator's general history of violations is a relevant consideration in assessing a civil penalty, it is well settled that a history of similar violations serves as a significant basis for imposition of a higher civil sanction. *Sec'y of Labor o/b/o James Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 841, 850 (June 1996); *But see AMAX Coal Company*, 19 FMSHRC 1542, 1551 (dissenting opinion) (September 1997), *citing Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992). Thus, an important inquiry is whether an operator's history of similar violations placed that operator on notice that greater compliance efforts were required. *AMAX, 19 FMSHRC at 1551*. However, this routine inquiry is not so simple to apply in respirable dust cases.

Respirable dust concentrations vary from shift to shift and are affected by the level of coal production as well as other varying factors, such as temperature and humidity. Unlike most mine hazards caused by violative conditions, excessive respirable dust concentrations ordinarily cannot be observed. Thus, the only method of ascertaining the existence of excessive respirable dust is through MSHA's bimonthly sampling process. Moreover, excessive dust problems are MMU specific. In other words, a history of excessive dust in MMU-007 would not place an operator on notice that there was a potential dust problem in MMU-009, particularly if prior bimonthly sample results from MMU-009 were compliant.

Of course, there may be instances where a pattern of an operator's failure to abide by its dust control plan, such as a history of a failure to maintain sprayers, is an important inculcating factor, regardless of the respirable dust history of a specific MMU. However, such circumstances are not reflected in the record evidence. Although there are approximately 29 MMU violations of 70.100(a) at the Baker Mine during the two year period preceding January 1997, Smith testified the respondent had no history of violations for failure to follow its dust control plan. (Gov. Ex. 8; Tr. 154). Although Smith testified that the respondent was required, on several occasions, to increase the amount of sprayers required by its dust control plan, there is no evidence of the respondent's failure to comply. (Tr. 114-15).

With respect to the specific citations, Citation No. 9898430 cites MMU-002 at the Smith Underground No. 1 facility. There is no evidence of previous section 70.100(a) violation in this MMU. Therefore, I must conclude that prior bimonthly samples for MMU-002 did not provide notice that greater dust control efforts were called for.

Citation No. 9898420 cites MMU-009 at the Baker facility. Smith testified that MMU-009 was a relatively new mechanized mining unit with no history of pertinent violations. (Tr. 106).

Citation No. 9898402 cites MMU-007 at the Baker facility. This citation illustrates the difficulty in applying the traditional notice test based on a history of similar violations. MMU-007 was cited for excessive respirable dust in October 1994, October 1995, and Citation No. 9898402 was issued in October 1996. After the October 1994 citation, presumably, there were five compliant bimonthly samples before the October 1995 citation. Similarly, the October 1995 citation was followed by five compliant bimonthly samples prior to the issuance of Citation No. 9898402. Thus, in each prior instance, the respondent believed it had corrected the dust control problem in view of the series of compliant bimonthly samples.

Although the submission of more frequent dust samples for analysis may be prudent for mine facilities that generate large quantities of dust, the Secretary has not alleged, nor does the record reflect, that operators are encouraged to submit dust samples to MSHA more frequently than on a bimonthly basis. In this regard, although Smith alleged the Baker Mine generated large amounts of coal dust, there is no evidence of heightened monitoring by MSHA.

In summary, I do not view the respondent's history of section 70.100(a) violations, in view of Smith's admission of no history of pertinent dust control plan violations, as a factor having a significant impact on the degree of the respondent's civil penalty liability.

## 2. Appropriateness of the Size of the Penalty and Effect on Business Operations

Costain Coal Company is a large operator that produces over ten million tons of coal each year. Imposition of the civil penalties proposed in these matters is not inappropriate to the size of the respondent's business and will not affect its ability to conduct its business.

## 3. Degree of Negligence

As noted above, traditional considerations used to evaluate degrees of negligence, such as the extent of the violative condition, the length of time that it existed, whether the violation was obvious, and, whether the operator was placed on notice that greater efforts for compliance were necessary, are not helpful in matters concerning excessive coal dust conditions. *AMAX Coal Company*, 19 FMSHRC at 1551.<sup>1</sup> Smith acknowledged excessive respirable dust conditions cannot be seen, even in situations where respirable dust concentrations are relatively high. Therefore, considerations of the extent of the violation, and how long it existed, in the context of an MMU with prior compliant bimonthly sample results, are not material.

---

<sup>1</sup> While *AMAX*, and the cases cited therein, concern the parameters for unwarrantable failure, which has not been charged in these matters, the guidelines discussed in *AMAX* are essential for determining the degree of an operator's negligence.

As previously discussed, prior compliant bimonthly samples, in the absence of an identifiable equipment malfunction or other dust plan violation, do not suggest that greater compliance efforts are necessary. In fact, the Commission has vacated high negligence and unwarrantable failure findings for a section 70.100(a) MMU violation noting that the operator "had reason to believe its remedial efforts [controlling dust] were working" because of a series of compliant bimonthly sampling results immediately prior to the violative sample that gave rise to the section 70.100(a) citation. *Peabody Coal Company*, 18 FMSHRC 494, 499 (April 1996).<sup>2</sup>

Thus, it is in the context of these unique circumstances that the issue of the degree of the respondent's negligence for each of the MMU citations is discussed below. However, it must be noted that, although high negligence may provide a basis for an increased civil penalty, low negligence, or even a lack of negligence, is not a significant mitigating factor when considering respirable dust violations. The Mine Act is a strict liability statute. In the final analysis, who, if not the operator, is responsible for ensuring that miners are not exposed to excessive respirable dust? Mine operators must ensure that the maximum levels of permissible respirable dust concentrations are not exceeded. An operator's failure to do so, regardless of fault, warrants the imposition of meaningful civil penalties.

The Secretary attributed the degrees of the respondent's negligence for each of the MMU citations as follows:

- Citation No. 9898430 - MMU-002 - Smith Underground - Moderate Negligence
- Citation No. 9898420 - MMU-009 - Baker Mine - High Negligence
- Citation No. 9898402 - MMU-007 - Baker Mine - High Negligence

Prior to the issuance of Citation No. 9898430, the approved dust control plan required 32 continuous miner sprayers, with a requirement that at least 26 of the 32 sprayers remain operative. As noted, Smith did not inspect the subject mine facilities before issuing the citations. Thus, there is no evidence to attribute the excessive dust sample to an identifiable dust control plan violation. To abate Citation No. 9898430, the respondent, pursuant to an amendment of its dust control plan, increased the number of sprayers on the continuous miner from 32 to 33, and increased the minimum number of operative sprayers from 26 to 27. There is no evidence of a history of excessive respirable dust conditions at MMU-002. Accordingly, the negligence attributable to the respondent for Citation No. 9898430 is low.

---

<sup>2</sup> To attribute high negligence to an operator for a section 70.100(a) violation in the absence of a pertinent identifiable dust control plan violation, or an MMU specific history of violative dust samples providing notice that greater dust control measures at that MMU were required, is tantamount to the presumption of high negligence approach rejected by the Commission in *Peabody Coal*, 18 FMSHRC at 498.

Citation No. 9898420 concerns MMU-009, a new mechanized unit without a history of excessive dust violations. There is also no evidence of any specific equipment malfunction or inadequate dust control plan provision that contributed to the violative condition. Consequently, the record reflects the excessive dust conditions were transitory and resolved without significant abatement action.<sup>3</sup> Accordingly, the degree of negligence attributable to the respondent for Citation No. 9898420 is also low.

Citation No. 9898402 was abated by correcting a malfunction of the scrubber blade and housing on the MMU-007 continuous miner. Given the general history of previous violations concerning excessive dust at the Baker facility, the respondent was obligated to remain on a heightened state of awareness regarding potential dust control problems. The failure of the respondent to detect this malfunction, on balance, constitutes a high degree of negligence with regard to Citation No. 9898402.

#### 4. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act requires an evaluation of the seriousness of the violation. *Consolidation Coal Company*, 18 FMSHRC 1541, 1549 (September 1996). Here, the respondent concedes the S&S nature of the MMU violations. The respondent, however, seeks to mitigate the gravity associated with the violations by attempting to limit the number of persons affected to the designated occupation. Specifically, the respondent asserts the excessive respirable dust concentrations taken from samples on the person performing the designated high risk occupation cannot be extrapolated to other personnel on the section. While it is true that other occupations on the section, by definition, ordinarily have less respirable dust exposure than the designated occupation, I fail to find this argument persuasive.

The purpose of section 70.100(a) is to limit the permissible concentration of respirable dust exposure by mine personnel in active workings. Section 70.2(b) defines active workings as "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 70.2(b). Thus, the purpose of MSHA's high risk occupation bimonthly sampling program is to monitor the atmospheric conditions in active workings. Monitoring the high risk occupation ensures that, if the high risk miner is not overly exposed, no one on that MMU shift is exposed to impermissible levels of respirable dust. Put another way, monitoring the high risk continuous miner occupation at the face provides the earliest warning of excessive respirable dust in the active workings atmosphere.

---

<sup>3</sup> Respirable dust conditions are not static. They vary from shift to shift. In fact, it is not uncommon for individual shift dust samples within a bimonthly five shift sample to be above 2.0 milligrams although the five shift average is below the 2.0 milligram maximum permissible concentration. *See, eg., Gov. Ex. 7, p.2.* Thus, excessive dust conditions may exist during a particular shift, although the condition resolves without remedial action by the operator.

Virtually all MMU shift members, *e.g.*, shuttle car operators, scoop operators, roof bolt operators, are exposed to the face during the course of their duties. Consequently, the Secretary's assertion that all shift members are effected by MMU dust violations is reasonable and entitled to deference, particularly in view of the respiratory hazards associated with cumulative pulmonary exposure. Consequently, the violations cited in the subject citations affect all shift members and are serious in gravity.

Accordingly, the number of persons effected - 12 persons in Citation Nos. 9898430 and 9898420, and 14 persons effected in Citation No. 9898402 - is affirmed. These numbers represent the total number of MMU members in each of the cited units multiplied by two daily shifts.

#### 5. Good Faith Efforts to Achieve Rapid Compliance

The evidence reflects the respondent sought to modify its dust control plan where appropriate and made good faith efforts to achieve compliance.

#### C. Penalty Assessment - MMU Violations

In view of the serious gravity and the strict liability considerations related to the risk of severe pulmonary disease posed by the MMU citations, the Secretary's proposed civil penalty of \$595.00 for Citation No. 9898430 in Docket No. KENT 97-169 is affirmed. Although the Secretary proposes, apparently based on allegations of high negligence, a civil penalty of \$2,384.00 for Citation No. 9898420 in Docket No. KENT 97-132, the reduction in negligence to low discussed above warrants a similar \$595.00 civil penalty, consistent with the principle of strict liability.<sup>4</sup>

Finally, given the high negligence attributable to the respondent's failure to adequately maintain the continuous miner scrubber in view of its history of coal dust problems, the \$2,384.00 civil penalty proposed by the Secretary for Citation No. 9898402 in Docket No. KENT 97-131 is affirmed.

---

<sup>4</sup> Although I have exercised restraint in these proceedings in the civil penalties imposed on the basis of strict liability, a continuing general pattern of additional respirable dust violations may subject the respondent to significantly higher civil penalties under strict liability in the future.

#### **D. Civil Penalty Criteria - Designated Area Violation**

In addition to section 70.207(a) that specifies the bimonthly sampling requirements in mechanized mining units, Section 70.208, 30 U.S.C. § 70.208, governs the bimonthly sampling requirements in designated areas capable of generating high dust concentrations that are identified in the operator's MSHA approved dust control plan. This mandatory standard requires one bimonthly dust sample obtained from a sampling device placed at the specified location. If this single bimonthly sample exceeds 2.0 milligrams, the operator must furnish MSHA with a five dust sample, obtained from consecutive shifts, to determine if the 2.0 milligram standard in section 70.100(a) is violated.

Citation No. 9898431, issued by Smith on January 7, 1997, concerns a violative respirable dust sample of 2.2 mg/m<sup>3</sup>, based on an average of five samples, obtained at designated area 200-1, inby the No. 5 belt transfer point at the respondent's Baker Mine. Although the fact of the violation cited in Citation No. 9898431 is admitted, the degree of the respondent's negligence, and whether the violation was properly designated as S&S, are contested.

Although Smith concluded the degree of the respondent's negligence associated with this violation was high, there is no evidence of an identifiable dust control plan violation that contributed to this violation. Moreover, the violation resolved itself in a timely manner in that subsequent samples were compliant without any particular abatement action on the part of the respondent. Consequently consistent with the discussion above, I conclude the record does not support more than a finding of low negligence.

With respect to the S&S issue, Alan Shelton, the respondent's Baker Mine belt foremen, testified there is a belt walker on each of the two shifts that travels along the entire 6,000 to 7,000 feet of beltline to detect hazards or malfunctions each day. There are also belt mechanics that routinely perform maintenance. If a problem were encountered downwind of the cited designated area that required cleanup or maintenance, Shelton opined that these employees could be exposed to the excessive respirable dust conditions for approximately 45 minutes.

It is well settled that the operative time period for considering whether a violation is properly designated as S&S includes the time that the violative condition existed prior to the citation, as well as the time it would have existed if normal mining operations had continued. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 884 (June 1996) (Citations omitted). Given the fact that "respirable dust disease is insidious, furtive and incapable of precise prediction," the controlling case law concerning the presumptive S&S nature of section 70.100(a) violations that are based on excessive designated occupation samples, must also be applied to violations based on sampling devices at designated areas, particularly where employees are routinely exposed to such areas. *Consolidation Coal Company*, 8 FMSHRC at 898, 899. Accordingly, the S&S designation for Citation No. 9898431 is affirmed. Consistent with the gravity discussion for the MMU citations, the cited designated area violation is, likewise, serious in gravity.

**E. Penalty Assessment - Designated Area Violation**

The Secretary has proposed a civil penalty of \$1,019.00 for this citation. In view of the statutory civil penalty criteria discussed above, a civil penalty of \$595.00 is appropriate for the cited condition. This reduction in civil penalty is warranted due to a reduction in the respondent's degree of negligence from high to low. Although the civil penalty is being reduced, it remains meaningful and is consistent with the strict liability imposed on operators in the event of their failure to maintain safe environmental working conditions.

**F. Total Civil Penalties**

**Docket No. KENT 97-90** - The approved settlement agreement provides for a reduced civil penalty from \$937.00 to \$381.00 for the two citations in issue. The settlement terms include deleting the S&S designation from Citation No. 4067436.

**Docket No. KENT 97-131** - The parties have settled two of the three citations in issue. The settlement terms include payment of a civil penalty of \$50.00 each for Citation Nos. 4067875 and 4064262 as well as deletion of the S&S designations in these citations. A \$2,384.00 civil penalty for Citation No. 9898402 has been imposed herein. Consequently the total civil penalty for Docket No. KENT 97-131 is \$2,484.00.

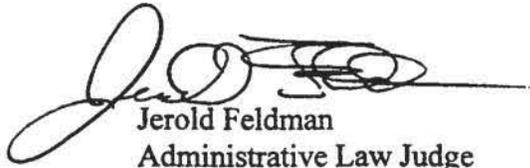
**Docket No. KENT 97-132** - The parties have agreed to settle three of the five citations in issue. The respondent has agreed to pay a total civil penalty of \$1,430.00 for Citation Nos. 4063629, 4064265 and 4064268. Civil penalties of \$595.00 for Citation No. 9898420, and \$595.00 for Citation No. 9898431, have been imposed in this decision. Thus, the total civil penalty imposed for the subject five citations is \$2,620.00.

**Docket No. KENT 97-160** - This docket concerns only Citation No. 9898430. The \$595.00 civil penalty proposed by the Secretary for Citation No. 9898430 is affirmed herein.

Thus, the total civil penalty for the four docketed cases is \$6,080.00.

**ORDER**

In view of the above, **IT IS ORDERED** that the respondent **SHALL PAY** a total civil penalty of \$6,080.00 in satisfaction of the citations in issue in these proceedings. Payment shall be remitted within 30 days of the date of this decision. Upon timely receipt of payment, Docket Nos. KENT 97- 90, KENT 97-131, KENT 97-132 and KENT 97-160 **ARE DISMISSED**.

  
Jerold Feldman  
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Nashville, TN 37215 (Certified Mail)

Carl B. Boyd, Jr., Esq., Sheffer and Hoffman, 30 First Street, Henderson, KY 42420  
(Certified Mail)

Charles E. Lowther, Esq., Mitchell, Joiner, Hardesty & Lowther, 113 East Center Street,  
P.O. Drawer 659, Madisonville, KY 42431-0659 (Certified Mail)

\mnh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 16 1997

CLYDE W. PERRY, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 96-64-DM  
: :  
PHELPS DODGE MORENCI, INC., : Morenci Branch Mine  
Respondent : Mine ID No. 02-00024

**DECISION ON REMAND**

Appearances: Clyde Perry, Silver City, New Mexico, Complainant, pro se;  
Laura E. Beverage, Esq., Jackson & Kelly, Denver, Colorado,  
for Respondent.

Before: Judge Bulluck

This discrimination proceeding is before me on a Complaint of Discrimination brought by Clyde W. Perry against Phelps Dodge Morenci, Inc., ("Phelps Dodge"), under Section 105 (c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complaint alleges unlawful discharge in retaliation for safety complaints raised with Phelps Dodge.

Perry filed his discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration ("MSHA") pursuant to Section 105(c)(2) on September 14, 1995 (Ex. R-6).<sup>1</sup> On November 6, 1995, MSHA notified Perry and Phelps Dodge that, based on its investigation of the allegations, it had concluded that a violation of Section 105(c) had not occurred (Ex. R-3). Perry instituted this proceeding before the Commission on November 17, 1995, under Section 105(c)(3), 30 U.S.C. § 815(c)(3).<sup>2</sup>

---

<sup>1</sup> Section 105(c)(2) provides, in pertinent part, that "Any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

<sup>2</sup> Section 105(c)(3) provides, in pertinent part, that "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall

Former Commission Administrative Law Judge Arthur Amchan issued an Order dated April 26, 1996, dismissing the complaint for failure to state a claim upon which relief may be granted. 18 FMSHRC 643 (April 1996). The Commission vacated the judge's Order and, noting Perry's *pro se* status, found that Perry had met his burden of alleging discrimination actionable under Section 105(c), and remanded the case for further evidentiary proceedings, including a determination of whether the instant circumstances warrant a waiver of the time requirements for filing a complaint.<sup>3</sup> On remand, the case was assigned to me.

A hearing was conducted in Tuscon, Arizona, on March 25 and 26, 1997. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that while Perry engaged in activity protected under the Act, he was not discharged by Phelps Dodge for engaging in that activity.

#### Factual Background

Phelps Dodge operates a copper mine in Morenci, Arizona. Perry began employment at Phelps Dodge in May 1984, and was employed at the Morenci facility as a spray attendant, beginning in February 1992 (Tr. 105-106). On February 16, 1993, Perry sustained a crush injury, as a result of a three-ton tire rolling over his right foot during the performance of his job duties (Tr. 108-111). Subsequent to emergency medical treatment, Perry received orthopedic treatment and physical therapy (Tr. 112-113). In March 1993, Perry returned to work and was assigned light duty until October 1993, when he assumed the position of truck driver, into which he had successfully bid in May 1993 (Tr. 107, 120; Ex. C-8). Perry drove 190 and 240 ton trucks on a rotational basis during 8 hour shifts (Tr. 122-123), and on at least one occasion, reported to mine shift foreman, Robert Spoon, that truck driving caused discomfort in his right foot (Tr. 124, 423-424).

have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission...."

<sup>3</sup> Perry filed his discrimination complaint under the Mine Act 223 days after he was discharged and 38 days after the issuance of the arbitration decision upholding his discharge (Exs. C-2, R-7). Considering Perry's *pro se* status, his testimony, and given the absence of any allegation of discrimination in his defense throughout the Phelps Dodge appeal process, I conclude that Perry formed the belief that he was discharged for having a lost-time accident and raising a related safety complaint only after he had not prevailed in arbitration. Accordingly, I find Perry's filing 163 days in excess of the 60-day time limit set forth in section 105(c) excusable and without prejudice to Phelps Dodge, and conclude that he timely filed his complaint within 60 days of exhausting Phelps Dodge's appeal process (see "discrimination complaint designating "arbitration decision 8/13/95" as date of discriminatory action at Ex. R-6).

Perry continued to perform as a truck driver on the graveyard shift (11 p.m. to 7 a.m.), until January 28, 1995, when the incident giving rise to the instant complaint occurred. At approximately 3:00 a.m., during the lunch break, Perry began to experience severe armpit and chest pain, along with blurred vision, requiring him to be transported by ambulance to the Morenci Clinic ("clinic") for emergency medical treatment; Perry was accompanied in the ambulance by assistant shift supervisor, Jimmy Gojkovich (Tr. 146-150; Ex. C-10). In the meantime, safety inspector Robert Zimmermann, who had weekend safety responsibility for the mine facility, was contacted at home and dispatched to the clinic. Upon arrival in the emergency room, in the presence of Gojkovich, attending physician assistant Terry Brooks and nurse Jenny Montano, when asked by Zimmermann whether he had taken any medication, Perry's response included the word "crystal" (Tr. 27-31, 151-152, 176-177, 136, 360, 362, 386-388; see also Ex. C-7). Based on this statement, which created the impression that Perry may have taken an illicit substance (crystal methamphetamine), Gojkovich requested that Zimmermann have Perry submit to a Phelps Dodge sponsored drug and alcohol test (Tr. 32, 388). Perry refused to sign the consent and chain of custody forms which authorize and initiate Phelps Dodge drug and alcohol testing under the administration of the Morenci Clinic (Tr. 33; Ex. C-11). During this same period, Brooks asked Perry for a urine sample, in order to provide appropriate medical treatment, and attempted to flush Perry's system by administering one liter of intravenous fluid; ultimately, Brooks was unable to prescribe medication because of Perry's repeated failure to produce a urine sample (Tr. 39, 154, 364-366). Perry left the emergency room after three hours of attention, and returned twice that day, in order to produce a urine sample. It was during his third visit, at approximately 9:30 p.m., that Perry produced a sample for Brooks, which tested negative for illicit drugs, and Brooks prescribed medication for Perry's then diminished, non life-threatening symptoms (Tr. 368-369).

In the meantime, earlier that morning at about 7:30, with Perry's consent, Zimmermann drove Perry from the clinic to a meeting with shift foreman Robert Spoon at the old Morenci mine office (Tr. 41, 154, 409-410). Spoon, with Zimmermann present, reviewed Phelps Dodge's drug and alcohol policy with Perry, explained management's concern that Perry had taken crystal methamphetamine based on Perry's own statements, explained the consequences of failure to clear himself by refusing to take a drug and alcohol test, and gave Perry repeated opportunities to return to the clinic for testing; Perry refused and insisted that he be permitted to go home (Tr. 42-46, 159-165, 177, 415; Exs. C-9 and C-11). Consequently, Spoon issued a Notice of Investigation and placed Perry on a 5-day suspension (Tr. 414-415; Ex. C-13). Ultimately, Perry was discharged by Phelps Dodge on February 3, 1995 (Ex. R-17; Tr. 418). Perry, represented by then employee representative John Shock, subsequently presented management with the negative drug and alcohol test results from his treatment by Brooks at the clinic on the night of January 28th (Tr. 84-85, 98; Ex. C-4), but was unsuccessful in overturning his suspension and discharge through Phelps Dodge's appeal process (open-door policy, problem solving, and arbitration) (Tr. 92, 445-449, 463-465; Ex. C-2). Thereafter, Perry filed his discrimination complaint under the Act, alleging that he was discharged for having a lost-time accident and raising a safety complaint.

### Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,<sup>4</sup> a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-2800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-818; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-959 (D. C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-196 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Perry has met the first step in establishing a *prima facie* case of discrimination. It is clear from the record that Perry never engaged in a protected work refusal (Tr. 178), and his testimony of numerous complaints to management, that he couldn't perform truck driving duties because of pain and that he feared he would hurt somebody, was not supported by the record (Tr. 123-126, 133-137, 178, 231-234). However, I find that Spoon's testimony established that Perry had complained to him about foot pain associated with driving trucks, at least once, sometime around late October/early November 1993. Also, I credit Perry's testimony that he told management he feared hurting somebody and conclude, therefore, that his complaint was raised in a manner sufficient to be protected under the Act. Spoon testified as follows:

---

<sup>4</sup> Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others...any statutory right afforded by this Act."

Q. What did he tell you about his foot bothering him and when?

A. He told me that it was uncomfortable for him to drive the truck because of the angle of his foot on the accelerator is the only thing I remember. As far as getting on or off the truck, he didn't say anything about that bothering him.

Q. Was that just a comment or was it a conversation? Did he go further and say, "Therefore, I'm not handling this, I want to do something else, I think its hazardous," or was it just a comment (Tr. 424)?

A. It was just a comment that I can remember. The only thing he said was it hurt his foot a little bit.

Q. What do you mean thinking about it? I mean he says to you that it hurt his foot to drive [a] truck, what would have been your response?

A. My response would have been that the doctor has more to say about whether or not the guy is able to drive the truck or not and if he has a little bit of discomfort in his ankle it seems like that would go away after awhile. I mean, I didn't feel it was unsafe for him to drive the truck at all.

Q. Did he tell you this more than one time?

A. No, just once.

Q. Did I ask you if you remember when he told you that?

A. It seemed like just right after he went back on the trucks from his light duty, just after he had been released, so that's why I didn't think much about it (Tr. 425).

Perry has failed to establish, a *prima facie* case, however, since he has not met his burden of proving the second step--that Phelps Dodge's decision to discharge him was motivated in any way by his protected complaint. Perry attempted to establish a causal connection between his protected safety complaint in October/November 1993 and discharge in February 1995 by testifying to a course of harassment by management upon his return to duty from the crush injury to his foot. Specifically, he alleges that he was forced by Phelps Dodge to return to work in March 1993 (Tr. 114 ), verbally abused by management when he was on light duty (Tr. 117-121), forced to drive trucks despite his complaints and denied retraining (Tr. 134-137), underpaid while he was on light duty (Tr. 186-189), and discharged in May/June 1994 (Tr. 128-132), in addition to the discharge of February 3, 1995.

The record indicates that Perry was returned to work on light duty upon medical release and instructions from the company physician, Dr. Snyder (Tr. 115-116; Ex. C-8). Aside from his testimony that management officials Spoon, Hill, Davenport and Sanders were giving him a hard time about faking the residual limitations of his foot injury while he was on light duty, Perry did not produce any witnesses who corroborated his testimony of verbal abuse or being forced back to duty before he was physically able, and the record as a whole fails to substantiate these allegations.

By his own testimony, Perry admitted that, while on light duty, he requested that management place him in the truck driver position, after he had obtained medical clearance to drive from his personal physician, Dr. Robertson (Tr. 119-120, 168; Ex. C-8). The evidence further establishes that Perry was properly paid as a spray attendant while in the light duty status, that Phelps Dodge held the truck driver position open for him until he was physically capable of performing those duties, and appropriately paid him at a higher rate after he had assumed the position (Tr. 184-189; Ex. C-5).

Respecting Perry's allegation that he was denied retraining, there is no evidence of such request except his bare testimony. Moreover, while Dr. Robertson's September 27, 1994, report of Perry's final examination and discharge from active medical care mentions that Perry felt he was unable to continue truck driving, Dr. Robertson recommended duties that did not require heavy lifting, prolonged standing, or prolonged heavy use of the right foot (Ex C-8). It is reasonable to conclude, from the record in its entirety, that the truck driving position did meet Dr. Robertson's vocational limitations for Perry, since Perry not only drove trucks from October 1993 until January 1995, but frequently volunteered to work through his lunch periods, rather than resting his foot (Tr. 178, 235-238, 481, 484-485).

Finally, there is no record of a prior break in duty in 1994. Perry testified that he was not actually discharged by Phelps Dodge in May/June 1994, and his testimony that he was threatened with discharge as another mode of harassment was neither credible nor supported by the record (Tr. 129-133, 346-350; see Ex. C-2).

Likewise, Perry has failed to establish that Phelps Dodge's decision to discharge him on February 3, 1995, was motivated in any part by his complaint to the company that driving trucks posed a safety hazard to himself and his coworkers. Phelps Dodge's drug policy is set forth in its Employee Handbook as follows:

Alcohol and illicit drug use and abuse constitute a significant safety hazard in the work place. An employee who uses illicit drugs or abuses alcohol is a hazard to himself and to his fellow employees. Such a situation cannot be tolerated. In the interests of all concerned, the Company intends to make a vigorous effort to keep alcohol and drugs out of the work place.

An employee who is involved in a property damage accident, or an accident which can be expected to result in lost time will be tested for the presence of alcohol or drugs in his system. An employee who has a prohibited level of alcohol or drugs in his or her system is subject to discipline up to and including discharge. An employee who fails to cooperate with the administration of an alcohol or drug test will be subject to discharge (Ex. R-1, 21-22).

Moreover, the Employee Handbook's list of "the more common types of...misconduct" constituting dischargeable offenses, includes "Violation of the Drug and Alcohol Policy" at #7 (Ex. R-1, 22).

The record establishes that new employees are given the Employee Handbook, and that the drug and alcohol policy is sent to employees' residences yearly by the company manager, the policy is posted on bulletin boards throughout the mine, and it is discussed in monthly tailgate safety meetings and communications meetings between management and its employees (Tr. 18-20, 408-409). This policy sets forth the prohibited level of drugs and/or alcohol, including any detectable amounts of an illicit drug (including amphetamines), and provides as follows:

An employee who fails to cooperate with or attempts to undermine the administration of an alcohol or drug test will be subject to discharge. An employee in possession of illicit drugs or alcohol will also be subject to discharge.

In addition, when testing is not mandatory, an employee will be subject to discipline or discharge where the employee's actions, performance or condition suggest that the employee may have used illicit drugs or abused alcohol or prescribed drugs. If the employee denies the presence of these substances, in his/her system, then he will be given an opportunity to verify the circumstances by providing the required body fluid samples for analysis (Ex. C-16).

Perry testified that he had read the Employee Handbook in May 1994, and that he was familiar with the drug and alcohol policy before the incident on January 28, 1995 (Tr. 208-210, 212; Ex. R-5).

Respecting the events of January 28, 1995, which precipitated Perry's discharge, Perry admitted, through testimony, that he used the word "crystal" during emergency medical treatment, when explaining to Zimmermann and Brooks what he had ingested:

Q. So the what happened?

A. We are at the hospital. I got down, went to the emergency room there and Mr. Zimmermann was there at the time. He started asking me questions, what kind of medication, your name, occupation. And he asked me had I been taking medication. I said, "I have been taking Darvocet, Percocet for my injuries that I

had before.” And he asked me, “Anything else you have been taking?” I said “Yes.” I mentioned those ephedrine pills, but I couldn’t remember the name at the time, so I said it was like a speed-like substance. And he said, “Well, explain to me.” And I go, “A speed-like substance like crystal,” I said. I never should have said that. He goes, “You took that?” And I go, “No, I didn’t take that. I took ephedrine pills. They are little white tablets.”

Q. You did say “ephedrine?”

A. Yes. And I told that to Mr. Brooks also.

Q. But you also said that you had taken a crystal-like substance?

A. I was trying to describe it, I said speed-like substance.

Q. Did you use the word “crystal?”

A. Yes.

Q. So you said “speed-like” and “crystal-like” substance?

A. Yes. And Mr. Zimmermann then asked me, “Was it like a powder substance?” I says, “No, like a regular tablet, “ which I bought at a gas station in Silver City (Tr. 151-152).

\* \* \* \*

Q. I’m sorry. Did you ever use the word “crystal” in the hospital?

A. Yes.

Q. You said you were trying to describe the other substance, ephedrine; is that correct?

A. Yes.

Q. Is there any possibility in your own thinking that since you used the word that you could have been misunderstood to have said that you took crystal meth?

A. Yes (Tr. 176).

Consequently, I conclude that Perry made statements to management officials that created a reasonable belief that he had taken an illicit drug (Tr. 30-32, 387-388).

Phelps Dodge asserts that it discharged Perry for failure to prove his innocence by submitting to Phelps Dodge sponsored drug and alcohol testing (Tr. 87, 418, 445-447; Ex. R-4). Zimmermann testified that during emergency treatment at the clinic (also where Phelps Dodge sponsored drug and alcohol testing is administered), when he requested that Perry take the test, Perry refused and would not sign the Consent and Chain of Custody forms (Tr. 33-38). Moreover, both Zimmermann and Spoon testified that, during the meeting at the mine office, Spoon explained the company's drug and alcohol policy, explained the consequences of refusal to take the test, and gave Perry several additional opportunities to return to the clinic for testing (Tr. 41-44, 413-415). Perry gave inconsistent and contradictory testimony as to whether he had consented to be tested while in the emergency room, by asserting that he was unaware that he was being asked by Phelps Dodge to do so (Tr. 158-159), and that he had agreed to be tested but was unable to urinate (Tr. 153, 156-158); on cross-examination, he conceded that he did not want to be tested because he had ingested a caffeinated substance (Tr. 250-251). However, despite any incoherence or confusion at the clinic, which may have been caused by Perry's medical condition, Perry admitted, through testimony, that he refused to take the test when given opportunities later that morning:

Q. When you got to the mine office with Mr. Spoon and Mr. Zimmermann--

A. Yes.

Q. -- did you agree to take it then?

A. No.

Q. Why not?

A. I felt he was being harassed. Since my injury I just--ever since my injury I have been harassed and I felt that I was on my own time.

Q. Okay. You didn't feel as though you had to take a test on your own time?

A. Right.

Q. When you got issued the notice of suspension did you still have the same feeling that you were on your own time and you weren't going to take the test?

A. Yes (Tr. 177).

Therefore, I credit the testimony of Zimmerman and Spoon that Perry refused to consent to drug and alcohol testing at the clinic and at the old Morenci mine office.

Phelps Dodge views non-compliance with its drug and alcohol policy as a serious offense that jeopardizes the safety of its workforce. The company is committed to a drug and alcohol-free work environment and, without exception, discharges employees who fail to cooperate or undermine the administration of its testing program (Tr. 24-24, 438-440, 459, 472-473). Perry's attempt to prove otherwise by citing for comparison similarly situated employees treated more favorably than he (Bobby Kuykendall, Marty Allen and Ricardo Gonzalez) has failed, because he has not produced any evidence to show that these employees were involved in similar circumstances (Tr. 180-183, 272-273). Moreover, the record establishes that Frank Cordova, cited by Perry as proof that Phelps Dodge harasses and discharges employees who have been involved in lost-time accidents, was discharged for excessive AWOLs (absences without leave) and failure to pass the company's drug and alcohol test (Tr. 314, 451, 427-428; see also Exs. R-7 to 17).

Finally, Perry's reliance on the negative drug and alcohol test that he ultimately submitted to Hill during his 5-day suspension is misplaced (Tr. 98), since the test was not sponsored by Phelps Dodge in accordance with its drug and alcohol policy (Tr. 97, 254, 368-369, 419, 422). Furthermore, Spoon testified credibly that had Perry consented to testing immediately upon request, either at the clinic or the mine office, the company would have waited as long as necessary for Perry to have produced a urine sample (Tr. 103,422).

Overall, Perry's inconsistent, illogical, and often unresponsive testimony appeared disingenuous and highly suggestive of "cutting the pattern to fit the cloth," i.e., constructing his case in retrospect. While I have given him the benefit of the doubt in finding his complaint timely filed and that he had engaged in protected activity, the combination of his testimony with the fact that he never discussed his lost-time accident, his safety complaint, nor harassment with his representative, John Shock, or with management during Phelps Dodge's appeal process, seriously undermines his credibility (Tr. 84-85, 103, 458, 467-468, 475, 478; Ex.C-6). In short, Perry never convinced me that he held a good faith belief that he was discharged for discriminatory reasons.

Assuming, *arguendo*, that Perry had established a *prima facie* case of discrimination under Section 105(c), Phelps Dodge has clearly rebutted his case by proving that Perry was discharged for a legitimate, business-related reason, all employees who violate Phelps Dodge's drug and alcohol policy are discharged, and therefore, Perry would have been discharged for violating that policy, irrespective of his complaint that his driving trucks posed a safety hazard.

**ORDER**

Accordingly, inasmuch as the Complainant has failed to establish, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Clyde W. Perry against Phelps Dodge Morenci, Inc., under Section 105(c) of the Act, is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Mr. Clyde W. Perry, P.O. Box 504, Tyrone, NM 88065 (Certified Mail)

Laura E. Beverage, Esq., Jackson & Kelly, 1660 Lincoln Street, Suite 2710, Denver, CO 20264  
(Certified Mail)

\mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 20 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-34
Petitioner	:	A. C. No. 46-01286-03969
v.	:	
	:	Windsor Mine
WINDSOR COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Alan Paez, Esq. Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia; William Hulvey, Conference and Litigation Representative, Mine Safety and Health Administration; Barbourville, Kentucky, for the Secretary; David M. Cohen, Esq., American Electric Power, Lancaster, Ohio, for Respondent.

Before: Judge Fauver

This is a civil penalty action under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., involving a section 104(d)(1) citation.<sup>1</sup>

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

**FINDINGS OF FACT**

1. Citation No. 4179895 was issued on June 21, 1996, by MSHA Inspector Ronald G. Taylor, alleging a significant and substantial (S&S) violation of 30 C.F.R. § 75.400 due to an unwarrantable failure to comply.

---

<sup>1</sup>/Section 104(d)(1) Citation No. 4179895 was originally issued as a section 104(d)(1) order. The Mine Act provides for increasingly severe enforcement sanctions under section 104(d) of the Act so that some violations hinge on the issuance of a prior citation. In this case, the section 104(d)(1) citation on which Order No. 4179895 was based subsequently was reduced to a section 104(a) citation. This had the effect of changing Order No. 4179895 to a section 104(d)(1) citation.

2. Inspector Taylor observed extensive accumulations of loose coal and coal dust along the No. 9 conveyor belt, varying from a few inches deep to as much as 54 inches deep and spread out along the length of the No. 9 conveyor belt, which approximately 3,000 feet long.

3. Tom Kacsmer, who was the UMWA escort, accompanied Inspector Taylor on his inspection of the No. 9 belt and also observed extensive accumulations of loose coal and coal dust along both sides of the belt with coal piled up under the bottom rollers. In some areas Mr. Kacsmer observed bottom rollers running in loose coal, stuck rollers and places where the belt was turning in loose coal. He noted that the belt was running in dry, loose coal.

4. Inspector Taylor measured the accumulations with a 16-foot retractable metal tape measure. He was also familiar with the distance between the belt structures, which was ten feet.

5. The No. 10 belt head conveys coal to the No. 9 belt tail, at Crosscut No. 227. The coal proceeds to the No. 9 belt head, at Crosscut 191, which feed the No. 8 belt tail, and belt No. 8 takes the coal out of the mine.

6. Inspector Taylor found accumulations of loose coal and coal dust on the No. 9 belt head up to Crosscut 206. In places, the accumulation was up to the bottom of the belt with rollers turning in coal dust and loose coal. At Crosscut 204 and 205, Inspector Taylor observed an accumulation 50 feet long, with rollers and the belt running in the accumulation. In places, the bottom of the belt was turning in or rubbing on the loose coal and coal dust. In some areas the coal was packed up around the rollers.

7. From the beginning of the No. 9 belt, at Crosscut 191, to about Crosscut 194, the accumulations were dry. The remaining accumulations varied from wet to damp to dry.

8. At the tail of the No. 9 belt, Inspector Taylor observed the deepest accumulation, which measured 54 inches deep, 12½ feet long, and 75 inches wide and was higher than the belt. The loose coal and coal dust had "humped up" and pushed the belt up.

9. At Crosscut 201, Inspector Taylor observed a bottom roller that was hot to the touch because the bearing was defective. There was loose coal and coal dust under that area.

10. Inspector Taylor observed no methane along the No. 9 belt at the time of the inspection. However, Windsor Mine liberated about 50,000 cubic feet of methane in a 24-hour period, subjecting the company to 15-day spot methane checks under the Mine Act.

11. Inspector Taylor issued 11 citations charging a violation of section 75.400 at the Windsor Mine between April 12 and June 5, 1996. After the issuance of each citation, Inspector Taylor discussed with mine management the problem of accumulations and the need to maintain the belts free of loose coal and coal dust.

12. Wayne Porter, the belt coordinator, was aware that there were major spillage problems with the No. 9 belt prior to the issuance of Citation No. 4179895. A few days before the citation, Larry Moore observed the No. 9 belt fabric had a center tear, about 150 feet long, and a second tear along the side of the belt about 5 inches wide and 500 feet long, that caused major spillages.

13. Mr. Moore observed the coal rolling off the belt, and he could hear the coal pinging against the rollers as it went down the belt line. Mr. Moore informed Foreman Barton of this problem and the foreman said he would take care of it.

14. The next day, Mr. Moore was assigned to clean up the tail area along the No. 9 belt. He observed that the tear down the middle had been repaired. However, the accumulations from the 500-foot tear on the side caused most of the spillage and that tear had not been repaired. When he told another foreman, Bob Talbert, about the problem, Mr. Talbert said he already knew about it.

15. Inspector Taylor and Tom Kacsmar, the UMWA escort, were informed on June 21, 1996, by Wayne Porter, belt coordinator, and Bob Talbert, foreman, that a piece of the No. 9 belt fabric, 5 inches wide and 500 feet long, had ripped the week before the inspection, causing spillage, and the company was trying to get by until vacation.

16. Larry Moore was assigned to help clean up the accumulations along the No. 9 belt to abate the violation cited by Inspector Taylor. Mr. Moore saw coal packed up around the tail roller and belt, and he could not see the bottom of the belt when he arrived on the scene at 3:20 a.m. The tail piece was completely covered with coal from the tail roller out to the crossover, which was about 25 feet away. Another miner who was helping to abate the violation arrived and had done a lot of shoveling on the walk side where he could still not see halfway up the frame of the tailpiece because of accumulations. On the side opposite the walk side he could not see the tailpiece because of the accumulation. Mr. Moore observed float coal dust on the belt structure and rails, and the accumulations he shoveled were comprised of loose coal and fine coal that did not contain big lumps. Mr. Moore observed rock dust on the ribs in the area around the tailpiece but saw no rock dust on the floor of the tailpiece, which sat on a cement slab. He observed coal all over the cement slab area with no rock dust underneath it, and he did not find any rock dust mixed in with the coal accumulations that he shoveled.

17. In order to abate Citation No. 4179895, Mr. Moore worked with another miner to shovel the areas on both sides and under the tailpiece for 20 to 25 feet. Mr. Moore came onto the section at about 3:20 a.m., and worked with the other miner until about 6:25 a.m., until the 25-foot area around the tailpiece was cleaned up. Both men took a 25 minute lunch break.

18. Mr. Moore was also assigned to clean the area around Crosscuts 195 and 196 near the No. 9 head drive, to abate the violation. He and another miner came from the tailpiece and began working there at about 6:40 a.m. They worked with three other miners who had been on

the site already, and the five of them worked until 7:30 a.m., when the next shift came to relieve them. These miners were directed by Mr. Porter to continue shoveling further up the belt line since Mr. Moore and the crew had nearly cleaned up the accumulations around Crosscut 195 and 196. Mr. Moore observed that the accumulations he shoveled in the area from Crosscut 192 (the drive) to Crosscut 196 were fairly dry.

19. At 10:22 a.m., on June 21, 1996, Inspector Taylor terminated Citation No. 4179895 after the cited accumulations were cleaned up. It took eight or more men on the midnight shift and ten or more men on the day shift to clean up the accumulations and abate the violation.

## **DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS**

### **Violation of Section 75.400**

The evidence shows a violation of the safety standard involved, which provides:

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

Respondent does not contest that section 75.400 was violated, but contends that the Secretary failed to prove that the violation was “significant and substantial” (“S&S”) and due to an “unwarrantable failure” to comply within the meaning of section 104(d)(1) of the Act.

### **Significant and Substantial**

The Commission has held that a violation is 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 (1981). In *Mathies Coal Company*, the Commission delineated a four-prong test for determining whether a violation is S&S:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); see also *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir.1988) (approving the *Mathies* test).

Under the third element of the *Mathies* test, evaluation of the likelihood of an injury is made assuming continued normal mining operations. (*U. S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (1985)) and the relevant time frame includes both the time that the violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. (*Halfway, Inc.*, 8 FMSHRC 8, 12, (Jan 1986)). “Reasonable likelihood” as used in the *Mathies* test does not mean “a probability greater than 50 percent” or that the Secretary must prove that it was “more probable than not” that the violation would result in injury. It simply means that the violation was “reasonably likely” to result in injury. *U. S. Steel Mining Co., Inc.*, 18 FMSHRC 865 (1996).

The extensive accumulations in this case presented discrete safety hazards of causing a fire or propagating a fire. Inspector Taylor observed stuck and broken rollers along the No. 9 belt in the areas of the cited accumulations. These could reasonably act as ignition sources. He also observed a hot bottom belt roller with a missing bearing underneath the No. 9 conveyor belt in the area of the accumulations at Crosscut 201, as noted in the body of Citation No. 4179895 and listed in Citation No. 4179894. Citation No. 4179894, issued by Inspector Taylor on the same day, and not contested, indicates that approximately 18 top and bottom rollers were either broken or stuck along the No. 9 belt. Other citations issued on the same day by Inspector Taylor and not contested add to the hazards of the loose coal and coal dust accumulations cited in Citation No. 4179895. (See Gov. Exhs. 2, 3, 4, 5, 6.) The conditions cited in Citation No. 4179893, issued that morning, increased the hazard of a belt fire along the No. 9 belt because holes in five permanent stoppings along the adjacent intake aircourse track entry would allow smoke from a fire to travel to the other sections.<sup>2</sup>

The evidence amply supports Inspector Taylor’s opinion that in the event of a fire serious injury was likely due to inhalation of smoke and fire contaminants, and possibly death due to asphyxiation. As the Court of Appeals for the Seventh Circuit observed in considering a similar case:

Nor was anything more than [the inspector’s] opinion necessary to support the common sense conclusion that a fire burning in a coal mine would present a serious risk of smoke and gas inhalation to miners who are present. Indeed, a brief review of the legislative history of the 1977 Act makes clear that fire is one of the primary safety concerns that has motivated federal regulation of the coal mining industry. [Citations omitted.]

*Buck Creek Coal, Inc. v. Secretary of Labor*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995)).

---

<sup>2</sup>/Although Inspector Taylor did not detect methane during his inspection of the No. 9 belt, he testified that methane emitted at the Windsor Mine was 521, 562 cubic feet per 24-hour period for the 3<sup>rd</sup> Quarter of FY 1996, and this placed the company on 15-day methane spot checks, pursuant to section 103(i) of the Act.

I find that the violation was reasonably likely to result in a fire or the propagation of a fire causing death or serious injuries. The violation was therefore S&S under the *Mathies* test.

### **Unwarrantable Failure**

The Commission has held that a violation is “unwarrantable” within the meaning of section 104(d)(1) of the Act if it is due to “aggravated conduct” constituting more than ordinary negligence. *Emory Mining Corp.*, 9 FMSHRC 1997, 2001-2004 (1987). “Unwarrantable failure” is characterized by conduct such as “reckless disregard,” “intentional misconduct,” “indifference,” or “a serious lack of reasonable care.” *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991).

In considering a violation of section 75.400, the extensiveness and duration of the combustible accumulations, prior notices to the operator, and the operator’s efforts to clean up and prevent accumulations are all important factors in determining whether the violation was due to an unwarrantable failure to comply. *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 485 (1997); and *Doss Fork Coal Co.*, 18 FMSHRC 122, 125 (1996).

The preshift reports revealed significant accumulations along the No. 9 belt from June 13 until June 21, 1996 — the day Inspector Taylor issued Citation No. 4179895. The on-shift records revealed that only some of the areas had been cleaned. Inspector Taylor’s visual inspection of the belt line on June 21, 1996, revealed significant accumulations along the No. 9 conveyor belt, varying from a few inches deep to as much as 54 inches and spread out along the length of the No. 9 belt. The evidence shows that Respondent failed to take adequate measures to clean up and prevent the extensive and widespread combustible materials, and that the violative accumulations existed for a substantial period before the date of the citation.

Mine management was well aware of the accumulations along the No. 9 belt prior to the issuance of Citation No. 4179895. Larry Moore was assigned to do clean up work along the No. 9 belt on two occasions several days before Citation No. 4179895 was issued. On the first occasion, he observed that the accumulations were extensive and widespread and that major spillage problems were caused by two tears in the conveyor belt. One tear was in the center of the belt. The other tear, which was much longer, was about 5 inches wide, 500 feet long, on one side of the belt. He reported the accumulations and belt tears to a supervisor on his assignment to clean up accumulations; second, before the date of the citation, Mr. Moore observed that the center tear had been repaired, but the 500 foot tear had not been repaired and that the accumulations were extensive and widespread. He reported these conditions to a supervisor, Bob Talbert, but Respondent decided to delay repairing the belt until the belt was shut down during the miners’ 2-week vacations, which was to begin July 1.

When Inspector Taylor and Mr. Kacsmar met with Supervisor Porter after the issuance of the citation, Mr. Porter told them that a rip in the belt fabric about 5 inches wide, 500 feet long caused excessive spillage of loose coal, but that the company was trying to “get by” until the belt would be shut down for repairs during the upcoming vacation period. Thus, even after its own.

employee, Larry Moore observed the excessive accumulations and belt problems on two separate shifts a few days before the issuance of Citation No. 4179895, and reported the conditions to two supervisors, Respondent failed to take the necessary measures to clean up the violative accumulations and prevent further accumulations. See: *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (1988) (unwarrantable failure where violative conditions were obvious and extensive, and operator had knowledge of conditions and history of similar conditions); and *Peabody Coal Co.*, 14 FMSHRC 1258, 1262-1263 (1992) (unwarrantable failure where the violative accumulations were “obvious” and “extensive”). The detailed description of the coal dust and loose coal accumulations in the body of the citation, in Inspector Taylor’s notes, and in the testimony of Inspector Taylor and other government witness establishes that these were extensive and obvious accumulations. Indeed, the accumulations observed by Inspector Taylor at the tailpiece alone (70 inches wide, 12 feet, 6 inches long, and 45 inches deep) are similar to the accumulations in *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487-88 (1997), where the Commission reversed an administrative law judge’s finding of no unwarrantable failure concerning an accumulation 20 feet by 15 feet and nearly 4 feet deep, which the Commission observed to be both substantial and extensive.

In addition, before the instant citation was issued, Respondent assigned only one miner (Larry Moore) to clean up around the No. 9 tailpiece and he had to cover several other belts as well. The efforts of this one person could be nothing more than an empty gesture in light of the major accumulations at the tailpiece and the number of man-hours actually required for abatement of the violative accumulations. See: *Peabody Coal Co.*, 14 FMSHRC at 1262.

I find that Respondent’s violation of section 75.400 was due to aggravated conduct beyond ordinary negligence. It was therefore an “unwarrantable” violation within the meaning of the Act.

#### Civil Penalty Criteria

Under section 110(i) of the Act, the Commission and its judges assess all civil penalties under the Act. The Commission or judge is not bound by the penalty proposed by the Secretary. Penalties are assessed de novo based upon the six criteria provided in section 110(i).<sup>3</sup> *Secretary of Labor v. Sellersburg Stone Co.*, 5 FMSHRC 287 (1983), *aff’d Sellersburg Stone Co. v. FMSHRC*, 736 f.d 1147 (7<sup>th</sup> Cir. 1984).

---

<sup>3</sup>/Section 110(i) provides: “The Commission shall have authority to assess all civil penalties provided in this Act. 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.”

The purpose of civil penalties is to deter violations of the Act and safety and health standards. To be successful in inducing effective and meaningful compliance, "a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 40-41 (1977), reprinted in *Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978).

#### **Size of the Operator**

Respondent is a large operator.

#### **History of Violations**

In the 24-month period before the inspection, Respondent's overall history of violations was moderate. However, its history of violations of 30 C.F.R. § 75.400 was poor.

#### **Gravity**

The gravity of the violation was very serious. The violation was S&S within the meaning of the Act.

#### **Good Faith Abatement**

After the citation was issued, Respondent made a good faith effort to achieve rapid compliance.

#### **Ability to Continue in Business**

Payment of the penalty assessed will not adversely affect Respondent's ability to continue in business.

#### **Negligence**

The evidence shows that the violation was due to a high degree of negligence and an unwarrantable failure to comply.

#### **Assessment of Penalty**

The Secretary submits that her proposed penalty of \$1,200 is inadequate to effectuate the intent and purpose of the Act with respect to the last factor discussed, negligence. The Secretary points out that, prior to the issuance of Citation No. 4179895, Inspector Taylor spoke to mine management not once but nearly a dozen times about the need to clean up accumulations around

the mine's conveyor belts. This last fact, which would not have been known to MSHA's assessments office when it was proposing a penalty, is a factor that must be taken into consideration in assessing a penalty.

Respondent clearly was on notice about the problem but chose to ignore the accumulations and treat the violation as part of the cost of doing business. As shown in the Findings of Fact, above, Respondent chose to delay belt repairs and clean up work necessary to abate the violation until the vacation period began, i.e., when production of coal would cease. This calculated business decision demonstrates aggravated conduct far beyond ordinary negligence. Negligence was high and the violation was "unwarrantable" within the meaning of the Act.

The record shows that section 75.400 violations began rising well before the issuance of Citation No. 4179895, nearly doubling from the 2<sup>nd</sup> to 3<sup>rd</sup> quarter of Fiscal Year 1995. Furthermore, all 11 of the recent section 75.400 citations were for coal dust and float dust accumulations along belt lines (Gov. Exh. Nos. 9-19), and 2 of the 11 were for violations specifically along the No. 9 belt (Gov. Exh. Nos. 13, 14).

Exhibit R-17 shows that three other section 104(d)(1) citations (unwarrantable violations) were issued to Windsor Coal Company in the last 24 months for section 75.400 violations. Two were assessed at \$2,000 and one at \$1,500. The proposed penalty of \$1,200 for the instant section 104(d)(1) citation is low and out of line with the others when all the relevant factors of this case are taken into consideration, especially where the inspector repeatedly spoke to mine management about the need to prevent belt accumulations and management decided to continue using the defective belt and not abate the instant violation until an upcoming vacation period, when production would cease.

Based upon the six statutory criteria, I find that a civil penalty of \$4,000 is appropriate for the violation found above.

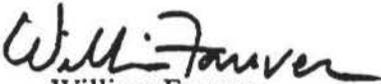
### **CONCLUSIONS OF LAW**

1. Respondent's Windsor Mine is subject to the Act.
2. Respondent violated 30 C.F.R. § 75.400 as alleged in Citation No. 4176895.

**ORDER**

**WHEREFORE IT IS ORDERED** that:

1. Citation No. 4179895 is **AFFIRMED**.
2. Respondent shall pay a civil penalty of \$4,000 within 30 days of the date of this Decision.

  
William Fauver  
Administrative Law Judge

Distribution:

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

David M. Cohen, Esq., American Electric Power, Service Corporation, Fuel Supply Department, One Memorial Drive, P. O. Box 700, Lancaster, OH 43130-0700 (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 23 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-184-M
Petitioner	:	A. C. No. 42-01429-05501 A7C
v.	:	
	:	White Mesa Mill
ENERGY TRUCKING, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;  
Bradley Reber, Vice President, Energy Trucking, Inc., Kanab, Utah, for Respondent.

Before: Judge Fauver

This is a civil penalty action under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

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

**FINDINGS OF FACT**

1. Respondent, Energy Trucking, Inc., an independent contractor, is regularly engaged in hauling uranium ore for Energy Fuels Nuclear, Inc. The uranium produced from such ore is sold and used in or with a substantial effect upon interstate commerce.

2. At all relevant times, Respondent was performing a contract to haul uranium ore for Energy Fuels Nuclear, Inc. from a stockpile near Kanab, Utah, to Energy Fuel's White Mesa Mill processing plant, about 260 miles from Kanab. Respondent hauled uranium ore 24 hours a day, 7 seven days a week and employed about 15 truck drivers to haul uranium ore. In general, the employees provided their own trucks, with a lease charge to the company.

3. On October 10, 1995, about 12:10 a.m., Energy Fuel's White Mesa Mill notified MSHA of a fatal accident that had occurred about 11:05 p.m., on October 9. A driver, Ivan F. Dial, employed by Respondent, was run over by an unattended tractor that was rolling down a grade.

4. Mr. Dial had 5 years, 7 months experience in mining. All of his mining experience was in the position of a truck driver. He had been employed by Respondent for 1 year, 7 months.

5. Mr. Dial arrived at the White Mesa Mill around 10:50 p.m., with a load of ore from the stockpile near Kanab. He checked in at the scale house and drove a "dumper tractor" owned by Energy Fuels. A dumper tractor is a tractor that has been modified to dump a semi-trailer.

6. Mr. Dial disconnected his tractor, hooked up the dumper tractor, and drove to the stockpile where he dumped the load of ore.

7. He then drove the dumper tractor with the empty trailer back to his tractor, in order to disconnect the dumper tractor and hook up his tractor to the empty trailer.

8. When Mr. Dial disconnected the dumper tractor from the trailer, the engine was running, the transmission was in neutral, the parking brakes were not engaged, and chocks were not placed under the wheels. Although the area where the trailer was parked was fairly level, dumper tractor was parked just over the crest of a six percent grade. The tractor started to roll down the grade. Mr. Dial apparently ran after it in an attempt to climb into the cab to stop the vehicle. He fell and was run over by the left outrigger wheel. He died about 45 minutes later.

#### **DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS**

The Secretary has charged three violations:

Citation No. 4665206 charges that Mr. Dial had not received the mandatory training required for a newly employed experienced miner under 30 C.F.R. § 48.26.

Citation No. 4665207 charges that the dumper tractor was improperly parked on a grade without setting the parking brakes or chocking the wheels, in violation of 30 C.F.R. § 56.14207.

Order No. 4665208 charges that six employees (besides Ivan Dial) were not given the safety training required for newly employed experienced miners under 30 C.F.R. § 48.26.

Although Respondent classified its drivers as "lessor-operators" rather than employees, its answer to the Secretary's Petition does not raise a defense that Respondent was not required to comply with the Act and safety and health standards promulgated under the Act with respect to the drivers on the ground that they were not employees. I find that the Secretary proved that they

were employed by Respondent as drivers, despite their classification, that Respondent employed them in work subject to the jurisdiction of the Act, and that Respondent was required by the Act to comply with mandatory safety and health standards with respect to the drivers' performance of such work.

**Citation No. 4665206 and Order No. 4665208**

The citations and order charge violations for failure to provide training required by 30 C.F.R § 48.26. Section 48.22 provides that a "miner" for the purpose of section 48.26 means "any person working in a surface mine . . . who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or . . . contracted by the operator to work at the mine for frequent or extended periods."

Respondent's drivers made daily trips to Energy Fuels's White Mesa Mill to transport and unload uranium ore. This work was frequent and regularly exposed them to mine hazards, such as radiation, dust, and vehicle and equipment accidents. They were therefore subject to section 48.26, which provides:

**Training of newly employed experienced miners; minimum courses of instruction.**

(a) A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties.

(b) The training program for newly employed experienced miners shall include the following:

(1) *Introduction to work environment.* The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.

(2) *Mandatory health and safety standards.* The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.

(3) *Authority and responsibility of supervisors and miners' representatives.* The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(4) *Transportation controls and communication systems.* The course shall include instruction on the procedures in effect for riding on and in mine conveyances; the controls for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(5) *Escape and emergency evacuation plans; fire warning and firefighting.* The course shall include a review of the mine escape system; escape and emergency evacuation plans in effect at the mine; and instruction in the fire warning signals and firefighting procedures.

(6) *Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.* The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) *Hazard recognition.* The course shall include the recognition and avoidance of hazards present in the mine, particularly any hazards related to explosives where explosives are used or stored at the mine.

(8) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

#### Violation

Under 48.23, the training required by section 48.26 must be approved by MSHA under a training plan submitted by the mine operator for approval, and must be taught by an instructor who has been approved by MSHA.

Energy Fuels had an approved training plan and instructors who were approved under section 48.26. However, Respondent did not have an approved training plan and its drivers had not been trained under Energy Fuels' plan. Nor were they trained by an instructor approved by MSHA.

The safety training that Respondent's drivers received did not meet the requirements of section 48.26 and did not approach the scope, detail, and content of the safety standards training required by section 48.26.

The Secretary proved a violation of section 48.26 as alleged in Citation No. 4665206 and Order No. 4665208.

### Gravity

The basic purpose of the safety training required by section 48.26 is to ensure that the employees understand the safety standards that apply to their work and have the necessary knowledge and skills to apply them in order to avoid accidents. The failure to provide safety training required by section 28.26 created a reasonable likelihood that the Respondent's drivers would not have sufficient knowledge of the safety standards and the necessary skills to apply them in order to avoid accidents. It was therefore reasonably likely that Respondent's violations of section 48.26 would result in an accident with serious injuries. Indeed, the fatality in this case indicates that the driver had not had sufficient training to understand the importance of complying with the "safety standards pertinent to the tasks assigned," which are required training subjects under section 48.26(b)(2). The violations were "significant and substantial" within the meaning of the Act.

### Negligence

The violations of section 48.26 could have been prevented by the exercise of reasonable care. Respondent's drivers had regular and frequent exposure to mine hazards at Energy Fuel's White Mesa Mill. Their duties plainly brought them within the coverage of section 48.26. I conclude that Respondent's violations of section 48.26 were due to ordinary negligence.

### Citation No. 4665207

This citation charges a violation of section 56.14207, which provides:

#### **Parking procedures for unattended equipment.**

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

When Mr. Dial left the dumper tractor unattended to unhook it from the trailer, the parking brake was not set and the wheels were not chocked or turned into a bank. However, the vehicle was just over the crest of a six percent grade and was therefore "parked on a grade."

The Secretary proved a violation of section 56.14207 as alleged in Citation No. 4665207.

The violation could have been prevented by the exercise of reasonable care. I find that it was due to ordinary negligence.

The violation was reasonably likely to result in an accident involving serious injuries. It was therefore a "significant and substantial" violation within the meaning of the Act.

## CIVIL PENALTIES

### Civil Penalties

Under section 110(i) of the Act, the Commission and its judges assess all civil penalties under the Act. The Commission or judge is not bound by the penalty proposed by the Secretary. Penalties are assessed de novo based upon six criteria provided in section 110(i): (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator's negligence, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in abatement of the violation. *Secretary of Labor v. Sellersburg Stone Co.*, 5 FMSHRC 287 (1983), *aff'd Sellersburg Stone Co. v. FMSHRC*, 736 f.d 1147 (7<sup>th</sup> Cir. 1984).

In evaluating the fourth factor, "in the absence of proof that the imposition of authorized penalties would adversely affect [an operator's ability to continue in business], it is presumed that no such adverse effect would occur." *Spurlock Mining Company, Inc.*, 16 FMSHRC 697, 700 (1994), quoting *Sellersburg Stone Co.*, 5 FMSHRC 287. The burden of proof is on the operator. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. However, "the penalties may not be eliminated . . . , because the Mine Act requires that a penalty be assessed for each violation." *Spurlock Mining*, *supra*, 16 FMSHRC at 699, citing 30 U.S.C. § 820(a); *Tazco, Inc.*, 3 FMSHRC 1895, 1897, (1981).

Tax returns and financial statements showing a loss or negative net worth are, by themselves, not sufficient to reduce penalties because they are not indicative of the ability to continue in business. *Spurlock Mining, Inc.*, 16 FMSHRC at 700, citing *Peggs Run Coal Co.*, 3 IBMA 404, 413-414 (1974).

The purpose of civil penalties is to deter the operator and others similarly situated from violating the Act and safety and health regulations. To be successful in the objective of inducing effective and meaningful compliance, "a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 40-41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978).

The ability to continue in business is only one of six criteria. Since the other criteria must also be considered, it would be inappropriate to rule that penalties should be nominal or reduced by a set percentage whenever an operator establishes that the proposed penalties would have an adverse effect on its ability to continue in business. Penalties must still be assessed for each violation, with a deterrent purpose. For example, if an operator is financially unsound and cannot pay its debts and taxes, section 110(i) still does not exempt it from penalties "sufficient to make it more economical . . . to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. *supra*.

### **Respondent's Size, Financial Condition, and Ability to Continue in Business**

At the time the two citations and order were issued, Respondent would be considered a small to medium sized independent contractor. Respondent operated 5 days a week, 11 to 13 hours a day and employed 15 drivers. Over a 52 week period, this would amount to 50,700 hours of work on its contract business.

By the time of the hearing, Respondent had reduced its drivers to three and was working about 10,140 hours per year. This activity would be considered a small sized business.

Around January 1966, Respondent had laid off all of its drivers, because Energy Fuels went into bankruptcy. However, in July 1966, Respondent resumed hauling for Energy Fuels and went from a 15-truck operation to a 3-truck operation. The three trucks are owned by Bradley Reber, Vice President of Respondent, who leases the trucks to Respondent.

Despite the bankruptcy proceedings by Energy Fuels, Respondent received all past amounts due from Energy Fuels, about \$200,000.

Respondent's tax return for 1995 shows gross receipts of \$1,342,893 and payments to "lessor-operators" of \$1,114,764, i.e., about \$74,318 per truck and driver for the 15 trucks operating in 1995. Taxable income was a negative amount, - \$2,309. Respondent is essentially a "pass through" business whereby almost all of its income passes through the company to one or more "lessor-operators." Since the hearing, almost all of Respondent's income has been paid to Vice President Bradley Reber for his lease of three trucks. Mr. Bradley owns 50 percent of the corporation's stock.

A corporation structured like Respondent's would effectively have an exemption from civil penalties under the Act if its reported net losses were accepted as proof of an inability to pay substantial penalties and continue in business. However, net operating losses are not proof of an inability to continue in business. Also, corporations are reasonably required to maintain sufficient capital to cover their potential liabilities, including civil penalties, when they work in an industry that is regulated to protect the public interest in health and safety. Respondent has not explained its failure to capitalize.

Respondent is a small sized business. I find that Respondent has failed to meet its burden of proving that the proposed civil penalties of \$12,000 would adversely affect Respondent's ability to continue in business. I also find that the proposed penalties are appropriate to the size of the business.

### **Negligence and Gravity of the Violations**

I have considered and made findings with respect to these factors.

### Good Faith Abatement and History of Violations

As to each of the violations, Respondent demonstrated a good faith effort to achieve rapid compliance after notice of the violation. Respondent's history of prior violations does not indicate a basis for raising or lowering the civil penalties.

Considering the six criteria for civil penalties in section 110(i) of the Act, I find that the proposed civil penalties are reasonable and warranted by the evidence. Accordingly, Respondent is assessed the following civil penalties:

<u>Citation/Order</u>	<u>Civil Penalty</u>
4665207	\$ 6,000
4665206	5,000
4665208	1,000

### CONCLUSIONS OF LAW

1. Respondent's business is subject to the Act.
2. The Secretary proved the violations alleged in Citation Nos. 4665206 and 4665207 and Order No. 4665208.

### ORDER

**WHEREFORE IT IS ORDERED** that:

1. Citation Nos. 4665206 and 4665207 and Order No. 4665208 are **AFFIRMED**.
2. Respondent shall pay civil penalties of \$12,000 in three consecutive monthly installments of \$4,000 each, due on the first day of each month, beginning December 1, 1997. Provided: If Respondent fails to pay any installment when due, the total amount remaining shall be due immediately with interest accruing from the default date until the remainder of the penalty is paid. The applicable interest rates will be the rates announced by the Commission's Executive Director.

  
Willaim Fauver  
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)**

**Bradley Reber, Vice President, Energy Trucking, Inc., P. O. Box 51, Kanab, UT 84741 (Certified  
Mail)**

dcp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**OCT 27 1997**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-95
Petitioner	:	A.C. No. 46-01286-03985
v.	:	
WINDSOR COAL COMPANY,	:	
Respondent	:	Windsor Mine

**DECISION**

Appearances: Alan G. Paez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Lynn Workley, Conference and Litigation Officer, for the Petitioner;  
David A. Laing, Esq., Porter, Wright, Morris and Arthur, Columbus, Ohio, for the Respondent.

Before: Judge Koutras

**Statement of the Case**

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for alleged violations of mandatory safety standards 30 C.F.R. § 75.364(b)(2) and 75.400. The respondent filed an answer contesting the alleged violations, and a hearing was held in Wheeling, West Virginia. One of the violations (75.364(b)(2)) was settled, and testimony and evidence was received with respect to the remaining violation. The parties filed posthearing briefs, and I have considered their respective arguments in my adjudication of this matter.

**Applicable Statutory and Regulatory Provisions**

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 820(i) *et seq.*
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 75.364(b)(2) and 75.400.
4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

#### Issues

The issues presented in this proceeding are (1) whether or not the respondent violated the cited mandatory safety standard; (2) whether the violation was significant and substantial (S&S); (3) whether the violation was the result of the respondent's unwarrantable failure to comply with the cited safety standard; and (4) the civil penalty to be assessed for the violation taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

#### Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.
2. Windsor Coal Company is the owner and operator of the Windsor Mine.
3. Operations of the Windsor Mine are subject to the jurisdiction of the Act.
4. Windsor Coal Company may be considered a large mine operator for purposes of 30 U.S.C. § 820(i).
5. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. § 820(a) will not affect the ability of Windsor Coal Company to remain in business.
6. MSHA Inspector Lyle R. Tipton was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Order No. 3501233.
7. A true copy of the Order listed in paragraph 6 was served on Windsor Coal Company or its agent as required by the Act.
8. The Order listed in Paragraph 6 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

9. The order listed in Paragraph 6 has not been the subject of previous review proceedings.

10. MSHA's Proposed Assessment (Form 1000-179 (MSHA)) contained in Exhibit A attached to the Secretary's petition accurately sets forth:

(a) The size of American Electric Power Company in production tons or hours worked per year.

(b) The size, in production tons or hours worked per year, of the coal or other mine at which the citations and/or orders at issue in this proceeding were issued.

(c) The total number of assessed violations for the twenty-four (24) months preceding the month of the referenced citation and/or order.

(d) The total number of inspection days for the twenty-four (24) months preceding the month of the referenced citation and/or order.

#### Discussion

Section 104(d)(1) non-"S&S" Order No. 3723270, 1:15 p.m., September 19, 1996, cites an alleged violation of 30 C.F.R. § 75.364(b)(2), and the condition or practice states as follows:

The 101(c) petition for modification which was granted on 10-26-94, in lieu of the required examination of the North Mains right side return was not being complied with. The record books required by the petition shows that the daily examinations were not being conducted on Saturdays and Sundays when persons, other than certified examiners, are working in the part of the mine ventilated by the 44 Hollow fan, or the shift prior to persons working in the part of the mine ventilated by the 44 Hollow fan. These required daily examinations are supposed to be conducted by a certified person as required by 101(c) petition No. M-93-279-C.

By motion filed pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, immediately prior to the hearing, the parties proposed to settle this violation. The initial proposed penalty assessment was \$1,000.00, and the respondent agreed to pay a penalty assessment of \$500.00, in settlement of the violation.

In support of the proposed penalty reduction, the petitioner's counsel submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the order in question. Counsel stated that he obtained additional information concerning the factual

circumstances surrounding this violation as they relate to the operator's negligence. Specifically, counsel stated that he learned that during MSHA's investigation before the granting of Petition M-93-279-C, as well as after it was granted, the respondent and MSHA had expressed their beliefs as to what circumstances would require daily examinations to take place and what would trigger an examination of the South Seals area, based on the location of miners in the other parts of the Windsor Mine ventilated by the 44 Hollow fan. These expressed beliefs were not clearly delineated so as to eliminate any misunderstandings by the parties. Accordingly, counsel asserted that the parties agree that the respondent's negligence is mitigated and that the proposed penalty assessment reduction is warranted. Under the circumstances, the petitioner requested that the order be modified to a section 104(a) citation, with a "moderate" degree of negligence.

After careful consideration of the arguments in support of the motion to approve the proposed settlement, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.31, the motion IS GRANTED, and the settlement IS APPROVED.

Section 104(d)(1) "S&S" Order No. 3501233, 11:30 a.m., September 19, 1996, cites an alleged violation of 30 C.F.R. § 75.400, and the condition or practice is described as follows:

An accumulation of combustible material consisting of float coal dust, very dark black in color, loose coal spillage, spillage of fine dry loose coal and coal dust in contact with the conveyor belt and bottom structure rollers along the mains 10 mother belt entry on the structure, rockdusted surfaces of the mine floor, roof and ribs, and connecting crosscuts left and right of the entry. The total distance of this 6,000 foot long entry containing float coal dust was 3,600 feet. The float coal dust started at the belt drive and extending inby to 260 stopping. Spillage of loose coal and fine dry loose coal was present under the majority of the bottom belt and in contact with the bottom rollers.

At 254 stopping one conveyor belt bottom structure roller had bearings clear out of the roller, visual signs of heating up and was in contact with spillage with heavy accumulations of float coal dust present.

At 268 stopping spillage of loose coal was present along the left walkway for a distance of 50 feet in length, one foot deep and one foot wide.

At 275 stopping spillage 20 feet long, 3 feet wide, and 2 feet deep in contact with rollers.

At 276 stopping spillage was 10 feet long, 3 feet wide and 2 feet deep.

248 stopping, spillage 1 foot deep, 1 foot wide and 80 feet long.

These conditions for the most part were being carried as reported in the mine record books and would have taken days to accumulate to the degree described in this action.

### Petitioner's Testimony and Evidence

MSHA Inspector Lyle R. Tipton, testified as to his experience and training and confirmed that he inspected the mine on September 19, 1996, and issued the disputed order. He stated that company representative Jim Fodor and UMWA safety committeeman Bill Cox accompanied him during his inspection. He explained that he reviewed the September 16 to 19, 1996, preshift and onshift reports for the number 10 belt prior to his inspection, and noticed a large number of entries made for conditions that were noted as reported and uncorrected (Tr. 19-25; Exhibit P-1).

Mr. Tipton stated that he began his inspection at the number 10 conveyor belt drive and then walking toward the number 11 belt. He immediately observed accumulations of float coal dust, "very dark black in color" at the belt drive and other locations along the belt as described in his order, including heavy coal spillage ranging from 20 to 80 feet in length at various belt locations, and some of the spillage was in contact with the bottom belt structure roller or conveyor. He also observed accumulated coal "fines" deposited under the belt, and they were in contact with the bottom belt. He estimated that 50 percent of the length of the belt line, or approximately 3,000 feet, was covered with float coal dust and spillage ranging from "inches upwards to an average of two feet." The coal "fines" under the belt ranged from 4 to 6 inches. He stated that he and Mr. Fodor agreed to the depth of the accumulations and counted the bed rails for the length (Tr. 26-29).

Mr. Tipton confirmed that he collected one sample of the fine dry coal dust at a defective bottom roller location to substantiate that it was coal dust, but he either "misplaced the sample or the lab never sent me the results back" (Tr.29). He determined that the accumulations were dry by sweeping the float coal dust that was present on the belt structure with his hand causing it to fly in suspension, and kicking the bottom accumulations. He stated that the coal fines under the belt were in contact with the bottom belt and rollers, and that the spillage along the belt would be in contact with the ends of the bottom rollers (Tr. 30).

Mr. Tipton stated that the belt was equipped with a point type fire sensor system, backed up by a water deluge system at the belt drive. He believed this was the least effective "old type" system for extinguishing a fire, and it did not include CO monitors. He observed no rock dust on top of any of the accumulations, but did see rock dust under the accumulations at some locations. He confirmed that he walked the entire length of the number 10 belt and issued a violation for obstructed walkways or travelways at numerous conveyor locations and a violation for unsupported roof in several conveyor locations. He further stated that a mine examiner is required to travel the belt areas each shift, and that he observed four persons working along the belt during the inspection (Tr. 30-35).

Mr. Tipton stated that he based his "significant and substantial" finding on the fact that the combustible coal accumulations were present near a very likely frictional ignition source, namely, a deteriorated bottom belt roller "with the bearings blown out of it." The roller was in direct contact with fine dry coal dust and float coal dust. He believed the coal dust accumulations created "a hazard of a possible fire and/or ignition, and he explained that the belt was "dragging on coal fines that were dry and located in the majority of that 3,000 foot area," creating a source of friction. He also believed it was obvious from his observation that the deteriorated roller bearing was heating under load (Tr. 35-37). He further stated as follows at (Tr. 111):

A. I specifically addressed that roller because it was pointed out to mine management as a highly likely or reasonably likely ignition source due to the fact that the bearings were failed and visible signs of heating were present on that particular roller, and it was in direct contact with fine, dry coal and coal dust.

Mr. Tipton was of the opinion that there was far in excess of enough accumulations of very dark black and thick coal dust and float coal dust present along the belt to cause and propagate a fire. In view of the deteriorated roller that he observed, he believed it was reasonably likely that a belt fire would have occurred if normal mining had continued (Tr. 39). If this were to occur, he further believed that the four miners he observed working along the belt would have to escape using their rescue apparatus because there was no primary adjacent escapeway along the belt. They would also be exposed to the effects of any smoke, and would have to travel to the track or adjacent entry using their personal protective devices in order to obtain their breathing apparatus to escape from the mine (Tr. 40-42).

Mr. Tipton explained his high negligence and unwarrantable failure findings as follows at (Tr. 43-44):

A. My initial observations from the preshift mine records book which indicated that a large number of conditions were present along this conveyor and there's no reported corrections in this book.

My inspection immediately following that, I found larger accumulations of combustible material which had obviously taken some time to accumulate to that degree, placing both of the preshift record books and my personal observations, I determined that it caused an unwarrantable failure and the mine operator to comply with Title 30, CFR 75.400.

\* \* \* \*

A. As the coal is transported out of the conveyor belt it's wet. The fine particles that exist in that coal will stick to the conveyor belt. As that conveyor belt travels back or on its return trip of the bottom of the belt, the normal air currents of the mine dry these fine particles out. As the bottom rollers and/or vibrations strikes the bottom belt, it causes these particles to drop to the mine floor under the mine belt.

Q. And it takes a great deal of time for those accumulations to build up then?

A. Yes, sir. You've got a belt there that's 6,000 feet in length, so it has a 6,000-foot return belt also. That's a long area for these fines to travel and become deposited.

Now, once they have reached as I observed four to six inches in depth, several days and/or shifts have went by to accumulate to that degree.

Q. Is it possible that the accumulations you observed along the Number 10 belt could have accumulated in one shift?

A. No, it's impossible.

Mr. Tipton believed the coal spillage was caused by a misalignment of the belt and stated that "it takes time to build up" the accumulations under the belt. He further believed that the accumulations resulted from a lack of regular maintenance. He stated that the violation was entered in the preshift book for September 19, 1996, and also believed that the same conditions were noted as early as September 16 (Tr. 46). He identified Exhibits P-4 through P-9 as copies of prior coal accumulations violations of section 75.400, from June to September 3, 1996 (Tr. 47-48). He confirmed that he has inspected the mine since 1978, and has cited the belt many times for violations of section 75.400, and he was of the opinion that this constituted a poor compliance record. He stated that he and Mr. Fedor discussed the coal accumulations as they traveled, and Mr. Fedor offered no explanations. The order was terminated on the next shift by Inspector James Jeffers (Tr. 50-51).

On cross-examination, Mr. Tipton reiterated his reasons for issuing the order as follows at (Tr. 52):

A. The conditions were — the determination for the issuance of the (d) action was determined first by the examination of the pre-shift mine record book which indicated that a large number of conditions were present along the Number 10 conveyor belt.

A follow-up personal inspection of that area and observing conditions identical to or very closely to identical to the same conditions listed in the book were present along the conveyor belt. These conditions, based on my experience, they appeared to have existed for a large number of days or time; and, therefore, I determined that to be an unwarrantable failure to permit these conditions to exist for that length of time.

Mr. Tipton confirmed that he arrived at the belt drive area sometime between 8:00 and 9:00 a.m., and made his unwarrantable failure decision to shut the belt down at 11:30 a.m. (Tr. 53). The belt was not running when he arrived at the area, but four men were working spreading rock dust (Tr. 55).

Mr. Tipton stated that he was not aware that a bulk duster had been assigned to the Number 10 belt for the shift in question, and before deciding to issue the order he did not check to ascertain the work assignments for that belt on the September 19, day shift. However, when he arrived on the surface the safety committee gave him a copy of the "safety run," and Mike Roxby discussed with him the work that had been done on the belt the previous day, and mentioned that four men were working on the belt (Tr. 57). He confirmed that he did not ask to review the work assignments for the September 19, day shift (Tr. 59). He was not aware that a rock duster had "flipped a rail" and had not yet arrived at the belt area when he inspected it (Tr. 62).

Mr. Tipton stated that during the course of the AAA inspection, he and Inspector Jeffers had inspected 11 of the 14 main mine belts. During the three days prior to September 19, they inspected the number 8, 9, 10, and 4B belts, for a distance of 14 miles. During this four-day inspection period, only one violation was issued for a violation of section 75.400 (Tr. 66). Mr. Tipton confirmed that during this time the mine experienced an area of unstable roof at the number 10 belt "which they managed to control to some degree and remain in production" (Tr. 67). He described the event as follows at (Tr. 67-68):

A. It was rails loading up, blowing down. A portion of the area had failed. The remainder of the belt sticking through was, oh, I'm going to guess, ten feet that was unstable or dangered off roof immediately inby that area. There was roof material down, and it was fairly extensive. They opened the breakthrough and brought a scoop car in and cut the belt and scooped the majority of that out after the stopper bolting.

Mr. Tipton confirmed that he would have reviewed the preshift and onshift books for the number 10 belt prior to entering the mine on September 19, but he could not state with certainty if he reviewed the entries further back than one day prior to that date. He further explained some notations that he made on his notes from his review of the examination books, including his

notations concerning the cited accumulations (Tr. 70-74). He further explained as follows at (Tr. 74-76):

If I find accumulations of float coal dust over a large or extensive area and these accumulations have built up to a significant magnitude to where there are heavy accumulations of float coal dust neglected by mine management, yes, it would be a contributing factor in my determining that it was an unwarrantable failure.

Q. In this particular case, was it?

A. Yes, it was.

Q. Where on the preshift report for the day shift of the Nineteenth is that specific condition?

A. "Needs cleaned, needs dusted, needs cleaned and coal spillage," these are all mine examiner terms indicating that we have accumulations of combustible materials along the conveyor.

Q. So, basically, you looked at every entry on the preshift and determined that each one of those was a reference to the float dust that you cited?

A. Each one of them indicates specifically "needs cleaned, needs dusted." Like, for instance, in here if you see "needs bolts spotted" and you see parenthesis below "needs bolts spotted," all the numbers to the left of that are the locations that bolts need spotted.

Now, when you see "needs cleaned, needs dusted, needs cleaned," parenthesis below that, all the numbers to the left of it, "OW" or "WW" mean "opposite walk" or "walk side," these are the areas that are needing cleaned or needing dusted.

Q. So your conclusion was that the conditions that you've cited in your order are contained - - every one of those is contained on the day shift preshift examiner's report for the Nineteenth?

A. I'm convinced that they are very similar if not identical in nature, yes.

Mr. Tipton confirmed that there is no methane at the cited belt location (Tr. 113). He also confirmed that the belt was idle and that the cited roller at stopping number 254 was not hot at the time of his inspection. However, he observed that the roller "showed evidence" that it was hot at one point in time, and he explained as follows at (Tr. 114):

A. Yes, you could see where the metal began to melt from the field bearing and under continued normal mining operations, that thing would have definitely heated up and been a potential ignition source.

Mr. Tipton confirmed that the walkway obstruction and roof support violations that he issued during his September 19, inspection were section 104(a) citations. Although the conditions were noted in the preshift books, he did not consider them to be unwarrantable for the following reasons (Tr. 125):

A. Areas like that are frequently marked or dangered off. Obstructions to the walkway, although they may be present, don't necessarily constitute an unwarrantable failure. It depends on the magnitude of these obstructions, whether there's been any evidence of persons trying to correct.

I think you'll find here in one area of my notes where it says some visible evidence of cleaning or shoveling in this area. I believe that was in reference to a walkway obstruction cleaning, if I'm not mistaken. Like I say, it goes back some time.

Mr. Tipton stated that the respondent has a poor compliance history compared to other mines in his inspection area. He stated that violations of section 75.400 "are commonplace at that mine, and they're commonplace on the conveyor belts at that mine in particular, and have been that way for years and years and years" (Tr. 126). He acknowledged that the respondent received a reclamation award but he was not familiar with its MSHA safety ranking (Tr. 127).

William R. Cox, testified that he is employed by the respondent and serves as a union safety committeeman. He participated in a union "safety run" on September 3, 1996, on the number 8, 9, 10 belts, and he was accompanied by union president and safety committeeman Roger Sparks, and respondent's safety director Chuck Kellman. He identified Exhibit P-1, as a list of safety hazards observed at that time that was typed up from a rough draft of the items noted. He stated that the entire number 10 belt needed cleaning and dusting on September 3, and there were some bad rollers and stands. A bottom roller in one area that had caused a fire was removed during that run. The roller at the 252 crosscut had a missing bearing and the fine coal in the area ignited due to the friction (Tr. 137-141). He stated that "there was a lot of fine coal that had accumulated under the belt in several areas over a period of shifts" (Tr. 141).

Mr. Cox stated that he accompanied Inspector Tipton during his September 19, 1996, inspection of the number 10 belt, and it was running when the inspection started but was shut down because of a problem on another belt. He described what he observed as follows at (Tr. 142-143):

A. We observed the belt from the discharge area to 260 crosscut, it was blackened in color and had float dust along it and we had bottom rollers that were frozen from fine coal being packed around them, and we had some rollers bad, some stands that were cut in two, and we had some areas that needed bolted or posted.

We had some men working on the belt, and the condition was - - like I said, the 260 crosscut, 227 needed dusted but inby was dusted and clean.

Mr. Cox stated that the accumulations under the belt did not result form a recent coal spill because they were under the bottom rollers extending the width of the belt, and spillage would occur only at the belt edges. He observed the presence of ignition sources, and described them as dry coal fines under the bottom belt, and broken or stuck rollers consisting of dry fine coal that had "caked" around the roller. He believed the accumulations could have created a mine fire or an explosion (Tr. 145).

Mr. Cox was of the opinion that the conditions of the number 10 belt on September 3, and 19, "were equal." He stated that "there had been work done but it really - - the overall maintenance was basically the same" (Tr.145). He described the work that had been done as rock dusting from crosscut 260 toward crosscut 289, which was the area from the middle of the belt towards the tail, and some repair work that was done in other areas (Tr. 146).

On cross-examination, Mr. Cox stated that other safety committee members made a safety run on the number 7 belt on September 3, and all of these inspections were in response to the safety committee's raising the issue of the condition of the belts with management. He confirmed that the notation "area between discharge and take-up needs cleaned" on Exhibit P-10, refers to an area of approximately 100 feet, and it is the only notation on the list referring to areas that needed to be cleaned on the number 10 belt (Tr. 150).

Mr. Cox confirmed that he discussed the results of his belt and haulage inspections with mine superintendent Joseph Matkovitch. He also reviewed the actions taken by management to address the items that needed attention, and confirmed that his notes reflect the corrective actions that were taken. He could not recall telling Mr. Matkovitch that he was pleased with the progress of the corrective actions taken by management (Tr. 151-153).

Mr. Cox stated that he provided Mr. Tipton with a copy of his inspection list (Exhibit P-10) on the mine surface on September 19, after his inspection. Mr. Cox discussed some of his

notations indicating some of the work that was done to address the items on his list (Tr. 155-157). He confirmed that just prior to the inspection on September 19, by Mr. Tipton, he recalled that Inspector Jeffers complimented safety manager Roxby about the conditions of the mine belts (Tr. 159). He confirmed that on September 19, the area from crosscut 260 to the tail had been rock dusted (Tr. 159).

Mr. Cox stated that there are a significant number of weekends devoted to belt work on overtime, and that 25 miners have been recalled in 1997, and some in 1996, and a lot of these men were assigned to the belts (Tr. 160). He confirmed that the respondent annually receives one of the best safety rankings of the major national coal producers (Tr. 161).

In response to further questions, Mr. Cox stated that the overall condition of the number 8 and 9 belts on September 3, were the same as the number 10 belt that day. After reviewing Exhibit P-10, he stated that other than cleaning the walk side at stoppings 273 to 278 on September 18, and danging off and roof bolting a fall at stopping 274, there is no indication of any other work on the number 10 belt between September 14 and 18, 1996 (Tr. 162). He stated that management never indicated to him that any other work had been done on the number 10 belt between September 14 and 18, 1996, to address the items listed on Exhibit P-10 (Tr. 163).

Mr. Cox stated that the notations regarding the items listed are confined to work done on those items, and it was possible that other work was being done on the number 7, 8, and 9 belts during this same time frame (Tr. 165). Mr. Cox commented on several additional notations made on the list, and he agreed that some of the conditions noted were addressed at some time or other (Tr. 167-173). Mr. Cox was not aware of any injuries or fatalities associated with coal accumulations at the mine (Tr. 173).

Mr. Cox acknowledged that coal spillage does occur along the sides of the belt when the belt is running, but that coal accumulations over a period of time would be located under the middle of the belt, and will accumulate to the point where they will be in contact with the bottom belt or packed around the rollers and sometimes "freeze" or prevent the rollers from turning. The spillage noted by Inspector Tipton at the 248, 254, 268, 275, and 276 stoppings could have occurred days or shifts earlier, or the last time coal was run on the belt (Tr. 176). Coal spillage is normally hand shoveled while the belt is running during production or idle shifts (Tr. 177).

Jimmy W. Welch, employed by the respondent as a longwall shield man for eight years, testified that he was familiar with the mine belts, including the number 10 belt, and that he maintained them when he worked as a beltman and shuttle car operator. He stated that he worked on the number 10 belt on September 19, 1996, on the afternoon shift when the order was issued, and he was assigned to help clean it up. He stated that six union and two management people were cleaning belt rollers and under the belt take-up unit. He described the coal accumulations as "dry on top and wet further down." In his opinion, the coal that he cleaned up consisted of accumulations and not spillage. In response for an opinion as to how long it would take for the accumulations to occur, he stated "just coming back on the take-up; coming back on

the bottom rollers" (Tr. 184). Mr. Welch stated that he worked one and half to two hours cleaning and rock dusting, and that 15 to 18 other miners were also cleaning the number 10 belt by shoveling the bottom roller stands and the accumulations (Tr. 185-186).

Mr. Welch stated that when he arrived at crosscuts 247 to 249, he observed "some accumulation but it wasn't bad." He also observed "a few" bottom rollers in contact with the accumulations, "but most of them were clear." He considered the coal under the belt to be accumulations rather than spillage, and speculated that it may have taken "a few shifts" to occur. He also observed float dust on the belt rails and in the breakthroughs, and stated that the area needed to be rock dusted. He observed some black places, and described the area as "dull, grayish color. It wasn't real white like it had been rock dusted" (Tr. 188). In his opinion, the conditions were the result of a lack of maintenance often enough to stop the accumulations.

In response to several bench questions, Mr. Welch stated that he had never previously worked the number 10 belt area and that he was assigned to clean the belt as part of the abatement crew after the section was shut down by Mr. Tipton's order (Tr. 189). He finished his work cleaning and shoveling three to four breaks at 11:30 p.m., and that he observed miners on three other sections were also shoveling (Tr. 191-192).

Roger E. Sparks, employed by the respondent as an electrician for 14 to 15 years, testified that he is president of the UMWA local union, and serves on the grievance and safety committees. He stated that he initially observed the condition of the number 10 belt when he arrived there at approximately 10:00 p.m. on September 19, 1996, to accompany inspector James Jeffers who was there to inspect the belt and abate the order. He stated that 20 to 30 people were working and shoveling the belt, and that the order was terminated shortly after 11:00 p.m., after a "lot of work" was done cleaning and dusting the belt, and after Mr. Jeffers examined the belt and found it in order (Tr. 193-196).

On cross-examination, Mr. Sparks stated that he was not present when Mr. Tipton inspected the belt and issued the order on September 19, 1996. He confirmed that he was present when the union safety committee inspections were made on the number 8, 9, and 10 belts on September 3, 1996. He explained that the belts were examined at that time in response to a letter sent to MSHA by a union member who described the conditions of the belts as "bad and horrible." However, the letter was rescinded after the inspections revealed that many of the conditions "were not as bad as we was led to believe" (Tr. 199).

Mr. Sparks identified Exhibit R-21, as the notes made by safety committeeman Cox during the September 3, 1996, belt inspection, and Exhibit R-22 as the notes he made during that inspection. He confirmed that he walked one side of the number 10 belt, and Mr. Cox walked the other side. He stated that the condition of the mine top was the "biggest problem" noted during that inspection. He reiterated that he had no knowledge of the number 10 belt conditions observed by Inspector Tipton on September 19, 1996, and only observed them when he was with Mr. Jeffers during his abatement inspection (Tr. 201-205)

MSHA Special Investigator James L. Jeffers, testified that he inspected the number 10 belt line on September 19, 1996, after mine superintendent Matkovitch summoned him to the mine to abate the order issued by inspector Tipton. He observed 15 to 20 people shoveling, cleaning, and rock dusting the belt, and confirmed that he terminated the order at 11:30 p.m., after the work on the belt was completed. He was of the opinion that the number of people working to abate the conditions indicated that there were a lot of coal accumulations. The number of people could also indicate that the respondent wanted the conditions corrected in a hurry. He confirmed that he did not see the belt conditions when Mr. Tipton initially inspected the belt and issued his order. He confirmed that the order was issued at 11:30 a.m., and he terminated it at 11:30 p.m. (Tr. 206-213).

On cross-examination, Mr. Jeffers stated that if the number 10 belt is shut down there is no way to transport coal out of the mine from the other sections. He confirmed that there was a shift change between the time the order was issued and his arrival at 8:30 or 9:00 p.m. (Tr. 214-215). He assumed that he had inspected other belts at the "44 hollow" mine area a day or two prior to September 19, and could not recall issuing any accumulations violations on those belts. He did recall that the belts "were in pretty good condition" (Tr. 216).

Inspector Tipton was recalled, and distinguished coal "spillage" and coal "accumulations" as follows (Tr. 219-220):

THE WITNESS: Spillage that's been left over a long period of time would then be classified as accumulation. Spillage that just occurs is something that could normally happen. Along the belt drive of whatever and you would have spillage which is a natural occurrence or something that you deal with routinely and on the spot.

JUDGE KOUTRAS: Like at 276 stopping, spillage was ten feet long, three feet wide and two feet deep. Now, is that spillage?

THE WITNESS: That would be spillage that was left instead of being cleaned up. That's normally evidenced when you can see that spillage is - - that accumulation of float coal dust on top of it or if you can see evidence where they've rock dusted over the top of the spillage, then you know that it's been at that time allowed to accumulate and it's not just spillage.

#### Respondent's Testimony and Evidence

Charles R. Kellam, respondent's Director of Human Resources, testified that he has been so employed for 15 years and is a certified miner and mine supervisor. He is responsible for safety, training, and labor relations and supervises two people in mine safety and training matters. He stated that the respondent received a 1996 State of West Virginia safety recognition for an outstanding safety record for mining over 30 million tons of coal with no fatalities, and a

company safety award for conducting the safest mining operation. In 1996, the parent company was ranked number three in safety nationwide, and the last fatality at the Windsor mine occurred in 1957 (Tr. 221-223).

Mr. Kellam stated that the mine employs 140 hourly miners in its underground operations, and has 45 surface employees. He stated that the safety committee has four miner members and that he interacts on a regular basis with that committee. He stated that the mine has 12 belt lines that are used to transport coal out of the mine, and that the number 10 belt line extends from crosscut number s 227 to 289 as shown on the mine map (Exhibit R-1) (Tr. 228).

Mr. Kellam stated that in September 1996, he discussed the condition of the number 10 belt with union representatives Cox and Sparks. They decided to examine the mine belts after a letter was written to MSHA critical of the mine belt systems. The inspection took place on September 3, 1996, and they examined the number 8, 9, and 10 belts. He identified Exhibit R-3, as his notes of the inspection, and he recalled that Mr. Sparks commented that he was impressed that the belt systems "were as good as they were compared to what he had been led to believe by other people" (Tr. 231).

Mr. Kellam stated that there were no problems with coal spillage or float coal dust on the number 10 belt on September 3, 1996 (Tr. 232). He identified Exhibit R-4, as a summary of the work done on the number 10 belt from September 10 through 19, and Exhibit R-5, as a roof fall report prepared by Mr. Roxby on September 12, concerning a fall on the number 10 belt (Tr. 235). He stated that the fall had an impact on the day-to-day work on the number 10 belt (Tr. 236).

Mr. Kellam stated that in May 1994, the mine had a major reduction in force of one-third of its employees due to the loss of a production contract, and approximately 75 miners were laid off. However, 40 to 45 were called back when another contract was received, and he identified Exhibit R-6 as a list of eight miners recalled on August 13, 1996, who were assigned primarily to work on the belt systems (Tr. 236-237). Mr. Kellam stated that three days prior to the September 19, 1996, order issued by Mr. Tipton, major belt inspections were conducted by Mr. Tipton and Mr. Jeffers, and no violations of section 75.400 were issued (Tr. 238).

On cross-examination, Mr. Kellam was of the opinion that the number 8, 9, and 10 belts were in good condition when the September 3, 1996, belt inspections were conducted. One hot roller was discovered, but the belt was shut down immediately and the roller was changed out (Tr. 239). He stated that the roof fall in question occurred at 6:38 a.m., on September 12, 1996, over an area 25 feet by 17 feet by 6 feet thick, and was cleaned up several days later (Tr. 241). He explained the work that is reflected on Exhibit R-4, as follows at (Tr. 243-245):

Q. So if someone gets a work assignment sheet, and they say they've completed work along, say, the 257 crosscut and the 240 crosscut, how would you know that work has been done in that particular shift to record in the on-shift book?

A. Well, the foreman that had it done, it would be his responsibility to put it in the on-shift book; what work he completed.

BY MR. PAEZ:

Q. So, Mr. Kellam, if I could direct your attention, then, to Exhibit R-4, it appears to me that a lot of the work that's listed here is what would be considered normal maintenance; is that correct?

A. A lot of it is normal maintenance. That's what we normally do; maintain our belt systems, yes.

Q. So is there anything in particular here that you can pick out that you were taking extra efforts to deal with the items that you found on the safety run of September 3, 1996?

A. Not that I can see right offhand, no.

Mine Superintendent Joseph B. Matkovich, testified that he has served in that capacity for 12 years, has 31 years of mining experience, and has West Virginia and Ohio mine foreman certificates. He disagreed with the unwarrantable failure order issued by Mr. Tipton for the following reasons (Tr. 249-250):

A. First of all, I felt that we were not unwarrantable on this violation of Number 10 belt being that we had people working there. We had people prior to the Nineteenth working there.

We had our safety runs that were brought up in here previously on 5, 6, 7, 8, 9 and 10 belts. All the haulage along those belts, we were working on all of those subjects at the same time. We had a fall at 209 on a haulage, the fall on 274 on the 10 belt, and we were covering everything that we could cover to the best of our ability at the time all of this occurred.

Q. Was there anything else going on with the other belts that impacted your --

A. Yes. At the same time the three days previous to the Nineteenth, nine of our belt lines were walked by Mr. Tipton and Mr. Jeffers, and any of the items that they found along those belt lines, we had to direct people in those directions and follow up on everything that was pointed out to us there.

Mr. Matkovich stated that after the September 3, 1996, belt safety inspections, he was given a list of items that needed attention (Exhibit P-10) and he compiled work lists for his supervisors to take care of the items. He met daily with safety committeeman Cox to discuss the

work that needed to be finished on all of the belts and haulage area. He confirmed that additional work may have been done on the number 10 belt that may not have been reflected on the work list. Additional work lists were compiled for the number 5 through 9 belts and haulage areas which he reviewed with Mr. Cox every day. Mr. Matkovich was under the impression that Mr. Cox seemed pleased with the safety run work that was being accomplished (Tr. 250-254).

Mr. Matkovich stated that work on the number 10 belt started on September 4 and 5, to address the items noted during the safety run of September 3. A roof fall area was dangerous off at crosscut 274, and on September 12, a second fall occurred outby that area in an intersection and that fall "settled down onto the belt" (Tr. 256). Prior to this, the belt area from the tail to the 282 crosscut was rock dusted. On September 6 or 7, another fall occurred on the number 9 belt haulage at the 209 crosscut which prevented access to the mine supplies. No supplies could be transported to the number 10 belt area until the haulage area was cleaned up and bolted, and the trolley wire repaired (Tr. 257). Mr. Matkovich stated that the number 10 belt roof fall on September 12, was significant and unusual, and he described the work that was done to clean up that area during the week-end on six shifts until it was completed by the day shift on September 16. At that time, the stopping was still being repaired and materials were being brought in to start cleaning the area (Tr. 259-261).

Mr. Matkovich stated that the roof fall prevented access to the number 10 belt areas outby crosscut 274 and the bulk rock dusters could not reach those areas. Further, miners were working in the belt entry on the same ventilation split and any rock dusting outby would have exposed those miners to the dust (Tr. 261). He further stated that work continued on the number 9 belt to abate two violations, and on the 3-B and 5 North belt abating other violations issued by Mr. Tipton. None of these violations were section 75.400 violations (Tr. 262).

Mr. Matkovich stated that he spoke with Mr. Tipton on September 19, before he went into the mine and informed him that work was in progress on the number 8, 9, and 10 belts and commented that "I'm about halfway down those belt lines on things I want to do, and we're not completely done down there on the 10 belt" (Tr. 263). He further explained as follows at (Tr. 263-264):

Q. Did you have any discussion with him after he wrote the order?

A. Well, we had some discussion outside about all the work and things that we had been doing, but Mr. Tipton just felt that the things he saw there was unwarrantable on our part in not assigning people to those areas. I tried to explain that we were working everywhere in the coal mine, trying to keep everything going. It was not just that belt was our only object that needed taken care of.

Mr. Matkovich reviewed the number 10 belt preshift and on-shift fire boss book pages for September 16 to 19, 1996, and confirmed that he reviews and countersigns the books every morning and discusses the work that needs to be done with his mine and shift foreman. He stated that he reviews "13 books on our side of the mine and 11 books on the other side of the mine"

(Tr. 268). He explained some of the entries made in the books and the work assignment lists that he prepared for his foreman and belt coordinator Porter (Tr. 266-275). The work assignments for Mr. Porter were for the afternoon shift on September 16, and midnight shift of September 17, (Exhibit R-11; Tr. 275-277).

Mr. Matkovich identified Exhibits R-12 through R-19, as work assignments made to correct conditions that were noted during the belt safety run inspections, and Exhibit R-20 as the manpower roster for the day shift. He explained the work assignments shown. He stated that the September 12, roof fall caused the number 10 belt "to run off" and resulted in coal spillage along the belt line. He confirmed that spillage can occur along the entire belt in one hour (Tr. 281).

In response to a question as to whether the number 10 belt conditions cited by Mr. Tipton on September 19, 1996, are reflected in the preshift and on-shift reports, Mr. Matkovich stated as follows (Tr. 283):

A. There's general things in there that would be similar to what Mr. Tipton had written. Back on these things here, on the R-17 it show work done on the midnight shift prior to the Nineteenth, a whole list of things that were reported corrected on that belt, on the Number 10 belt; things being worked on all through the period that we discussed from 9/3 clear to 9/19 on all our belt lines and following the inspector's violations. And we continually around the clock worked on and corrected things that needed taken care of. And there was items on there that was corrected, items that reappeared because something else happened. So, we continually worked on everything that occurred.

Mr. Matkovich further explained the work performed on the number 10 belt as reflected by the September 19, midnight on-shift report (Tr. 285-286; Exhibit R-17).

On cross-examination, Mr. Matkovich explained that the "C" and "I" notations on the work assignment reports reflect corrected and incompletd work performed, and the fact that these notations are not made at all does not mean that no work was performed (Tr. 288). He stated that he did not see the number 10 belt after Mr. Tipton issued his order on September 19, and that he last walked the belt the last week of August (Tr. 289).

Mr. Matkovich stated that the roof fall conditions that prevented the rock dusting machine from coming to the number 10 belt were taken care of and supplies could get through after September 11. However, when the fall occurred on September 12, the machine rock duster could not be used because the dust would affect the miners working in the area (Tr. 300). He reviewed some of the preshift book entries for September 16 through 18, and explained the notations made (Tr. 302-307). He stated that miners were assigned to the entire number 10 belt line in order to abate the order, and that "we did underneath and both sides dusted the entire area to make sure that the belt line was in perfect shape. So we did about twice as much as what was mentioned on the order" (Tr. 312).

Wayne G. Porter testified that he is employed by the respondent as a belt coordinator and was so employed in September, 1996. He has 24 years of mining experience and supervises the miners working on the belt lines, and personally takes care of the day and afternoon shifts. The midnight shift is taken care of by one of his foremen with whom he leaves a list of work that may be needed (Tr. 313-315).

Mr. Porter disagreed with the issuance of the order because he had preshifted the number 10 belt prior to Mr. Tipton's inspection, people were working on the belt when the order was issued, and he had people working on the belt during the prior shift (Tr. 316-317). He explained some of the work assignments reflected in Exhibits R-18 and R-19, and stated that he would have made the assignments for September 19, sometime prior to 8:00 a.m., for the miners starting the morning shift. He recalled that the rock duster never reached the number 10 belt that day (Tr. 319).

Mr. Porter confirmed that Exhibit R-16, reflects the work assignments that he made for the afternoon shift on September 18, and each of the six people assigned to work would have worked on the number 10 belt. The work assignments would have been based on the entries made in the fire boss books (Tr. 321-323).

Mr. Porter stated that in preshifting the belts, the notation "no hazardous conditions observed" means that "you found nothing hazardous to the people working underground along that belt line in that area" (tr. 325). He stated that he does not expect items listed in a preshift report to be totally corrected by the next shift and that this would be impossible. However, if he were to encounter coal dust or spillage in contact with a roller he would clean it up right away (Tr. 326).

Mr. Porter stated that his work assignments for the number 10 belt prior to September 19, were affected by the roof falls on that belt as well as the number 9 haulage belt. Further, the No. 274 fall area on the number 10 belt was dangered off and the bulk rock duster could not be used because it would expose the miners working on the belt to the dust because the air would travel in the direction of their work area. He explained that extra people were assigned to correct violations issued by Mr. Jeffers and Mr. Tipton on other belts prior to the order issued on the number 10 belt (Tr. 328-331).

Mr. Porter stated that the conditions noted in Mr. Tipton's order were not present when he examined the belt on September 18. He did not believe that any hazardous conditions existed on the number 10 belt when he examined it on September 18, and he disagreed with Mr. Tipton's statement that it would have taken days for the conditions that he cited to accumulate. He confirmed that he found the roller that Mr. Tipton said was hot, and he picked it up and found that it was not hot. In his judgment, the roller looked rusty (Tr. 332).

In commenting on the notations on the preshift examiner's report for September 16 through 18 (Exhibit R-7), that certain itemized conditions had been "reported" several times with no corrections shown, Mr. Porter explained that "by law you either have to show a correction to it or carry it over" (Tr. 334). He further stated as follows at (Tr. 335).

JUDGE KOUTRAS: For the Eighteenth, the same thing. So, am I to assume that for all of these days that same condition was being noted in the on-shift - - I mean in the preshift book and just noted as reported, so that means that nothing was done to take care of those, is that correct, those particular conditions?

THE WITNESS: That's what - - when it says "reported," that's telling you it's been reported. The on-shift sheets shows no corrections being done.

JUDGE KOUTRAS: And that the condition still existed?

THE WITNESS: That's correct.

On cross-examination, Mr. Porter stated that it was possible to hand dust the number 10 belt line that could not be dusted by the machine duster (Tr. 337). He confirmed that the belt was not running when he viewed it at 1:30 p.m., after Mr. Tipton issued his order at 11:30 a.m., and that it was possible that the hot roller in question may have cooled off during that time (Tr. 338).

In response to further questions, Mr. Porter stated that he observed no belt rollers turning in coal when he preshifted the number 10 belt on September 18, and could not recall any missing rollers without referring to the roller book. If he had observed a roller with a missing bearing, he would have left it alone if it was not hot, but would have removed it immediately if it was hot. He observed no significant differences between the conditions he observed on September 18 and September 19 (Tr. 340).

Mr. Porter stated that he observed no roller with the bearing completely out at the 254 stopping as noted in the order, and he observed none of the coal dust, float coal dust, or dry loose spillage and accumulations in contact with any rollers as noted in the order. He stated that he did observe some belt spillage but didn't note it because it was already noted in the preshift book (Tr. 342). He believed that a significant accumulation can occur under a belt in a short period of time and that "you can get a belt to run off instantaneously and spill the whole length of the belt line in whatever time it takes that belt to travel that length" (Tr. 346).

### Findings and Conclusions

#### Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.400, for failing to clean up the cited coal accumulations. Section 75.400, provides as follows:

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.

The respondent does not challenge the fact that the cited conditions constitute a violation of section 75.400 (Tr. 12-15, 102, 354; post-hearing brief, pg. 2). The respondent's dispute concerns Inspector Tipton's unwarrantable failure finding. Under the circumstances, I conclude and find that the evidence presented by the petitioner, coupled with the respondent's tacit admission, establish a violation of section 75.400, and the violation is AFFIRMED.

#### Significant and Substantial Violation

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

In Mathies Coal Co. 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

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

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986),

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission stated further as follows:

We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984).

The Commission reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

The respondent's brief does not address the "S&S" issue. After careful consideration of all of the evidence presented with respect to this citation, and for the reasons which follow, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the violation of section 75.400 was significant and substantial (S&S).

The Commission has held that "coal is, by its nature, combustible." Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994). The credible testimony of Inspector Tipton and safety committeeman Cox establishes that the cited accumulations were rather extensive, dry, black in color, and inadequately rock dusted. Although the cited belt may not have been running during the course of the inspection, Mr. Tipton observed a deteriorated bottom belt roller with a blown bearing that he believed was hot at one time. The roller was in direct contact with dry coal and dry float coal dust. He also observed coal spillage and accumulated coal fines deposited under the belt that were in contact with the bottom belt roller structure, and he indicated that the belt was "dragging" on the dry coal fines. He concluded that the defective roller and dragging belt were potential frictional ignition sources that presented a possible fire and/or ignition hazard, and that it was reasonably likely that a belt fire would have occurred if normal mining operations had continued. He further believed that four miners working on the belt line would be exposed to hazardous smoke from the fire.

Although the cited belt was equipped with a water deluge system at the belt drive, Mr. Tipton stated that a belt fire would have to be addressed by the use of water hoses hooked up at 500 foot intervals along the belt line. Given the fact that the inspector found float coal dust along 3,600 feet of the 6,000 foot belt line, I cannot conclude that water hoses hooked up at 500 foot intervals would effectively extinguish any extensive belt fire or adequately deal with any explosion resulting from float coal dust and frictional belt and roller ignition sources. Further, even though there is no evidence of any methane at the location of the belt, the fact remains that the presence of float coal dust on a running belt with potential ignition sources such as hot defective rollers, rollers turning in loose dry coal accumulations, and a belt dragging and/or in contact with loose dry coal accumulations and/or spillage, presented serious potential fire and explosion hazards.

Mr. Cox testified that during a number 10 belt safety run on September 3, 1996, a bottom belt roller with a missing bearing ignited some coal fines causing a fire. On September 19, 1996, he observed black dry float coal dust on the belt, frozen bottom rollers with dry fine coal packed around them, and some "bad" rollers and stands. He confirmed that men were working on the belt, and he believed that the dry coal fines and defective rollers were ignition sources and that the coal accumulations could have resulted in a mine fire or explosion.

Mr. Welch, who was assigned to clean up the belt to abate the order, testified that he observed some belt rollers in contact with the coal accumulations and described some of the coal as "black" in some places, and "dull, grayish" in others, rather than white, and it did not appear to be rock dusted.

Although mine superintendent Matkovich and belt coordinator Porter disagreed with Inspector Tipton's order and unwarrantable failure finding, I find no credible testimony on their part rebutting the credible testimony of Mr. Tipton and Mr. Cox, which I conclude support Mr. Tipton's "S&S" finding.

I have found that a violation of section 75.400, has been established. I further conclude and find that the existence of loose, dry, black coal, coal dust, and float coal dust accumulations and spillage at the number 10 belt line on September 19, 1996, some of which were in contact or close proximity to the aforementioned ignition sources, presented a discrete fire and explosion hazard, and that it was reasonably likely that in the course of continued normal mining operations, a serious potential for a fire or explosion was present along the belt line.

I further conclude and find that in the event of a fire or explosion at the cited belt line, it would be reasonably likely that anyone working at, or in the proximity of the belt, would be at risk and exposed to injuries of a reasonably serious nature or death. Under all of these circumstances, I conclude and find that the inspector's "S&S" finding was reasonable, and IT IS AFFIRMED.

#### Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions following Zeigler Coal Company concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogeny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. \* \* \*

In New Warwick Mining Company, 18 FMSHRC 1568, 1573 (September 1996), the Commission affirmed an unwarrantable failure violation of section 75.400, and reiterated that it "has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance."

The Commission further held that "repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they place an operator on notice that greater efforts are necessary for compliance with a standard," citing Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1991); and Drummond Co., 13 FMSHRC 1362, 1368 (September 1991).

In the New Warwick Mining Company case, the record reflected that during the

immediate preceding inspection before the issuance of the violation, MSHA found 16 violations of the same standard, and that twice during the two days preceding the issuance of the violation the inspector informed the mine operator that similar accumulations were not permitted and received assurances from the operator that preventive measure would be taken to avoid unwarrantable failure violations. In the Peabody Coal Co., case, at 14 FMSHRC 1263, the Commission took note of the fact that in finding an unwarrantable failure violation of section 75.400, the judge properly considered the fact that Peabody had been cited 17 times over the preceding six and a half months for similar violations, and that the cited conditions had been noted in approximately seven of the preceding preshift reports, and were obvious and extensive requiring significant abatement efforts.

In affirming an unwarrantable failure order for a violation of section 75.400, the Commission in Enlow Fork Mining Company, 19 FMSHRC 517 (January 1997), noted the undisputed fact that no one was cleaning the cited accumulation when the inspector arrived on the section. Regarding the operator's abatement efforts, the Commission held that where an operator has been placed on notice of an accumulation problem, the priority level that it places on abating the problem is a factor properly considered in the unwarrantable failure analysis, citing Peabody, 14 FMSHRC at 1263-64; U.S. Steel Corp., 6 FMSHRC at 1263 1423, 1437 (June 1984) (unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order). In the Enlow Fork case, the Commission rejected the operator's assertion that its prompt post-citation abatement efforts militate against an unwarrantable failure determination, and held that such efforts are not relevant in any determination of whether the operator has engaged in aggravated conduct in allowing the violative condition to occur, 19 FMSHRC 17.

In Jim Walters Resources, Inc., 19 FMSHRC 480 (March 1997), the Commission reversed a judge's determinations that three violations of section 75.400, noted in three section 104(d)(2) orders were not the result of unwarrantable failures by the operator, and reinstated each of the orders. The Commission cited its prior holdings in New Warwick Mining Company and Peabody Coal Company, and reiterated that any analysis as to whether a violation of section 75.400, constitutes an unwarrantable failure to comply must take into consideration such relevant factors as the obvious and extensive nature of the accumulations; the duration of the accumulations, and whether they were recorded in the preshift examination books; prior citations for identical accumulations conditions; a prior history of section 75.400, violations putting the operator on notice of a problem requiring heightened scrutiny to prevent such conditions; and the efforts made by the operator to abate, or otherwise take corrective or remedial actions prior to an inspector's arrival and issuance of a violation. In Amax Coal Company, 19 FMSHRC 846, 851 (May 1997), the Commission affirmed an unwarrantable failure violation of section 75.400, and citing Enlow Fork Mining Co., *supra*, held that repeated similar violations may be relevant to an unwarrantable failure finding to the extent that they serve to put an operator on notice that greater efforts were necessary for compliance.

## Petitioner's Arguments

In its post-hearing brief, the petitioner asserts that beginning on September 16, 1996, the preshift reports revealed accumulations along the length of the No. 10 belt, and they were noted in the preshift books from September 16 until September 19, 1996, the day Inspector Tipton issued his Order. Petitioner points out that Inspector Tipton noted that the preshift records revealed that these areas had not been cleaned, and upon visual inspection of the belt line, he found significant accumulations varying from a couple of inches in depth to as much as two feet in depth, as well as float coal dust along 3,600 feet of the 6,000-foot long belt. Based on the preshift and on-shift reports, as well as his visual observations, Inspector Tipton determined that respondent's failure to clean up or prevent these accumulations was due to its unwarrantable failure. Petitioner maintains that while the preshift reports showed extensive accumulations reported along the No. 10 Belt as far back as September 16, 1996, the on-shift reports demonstrate that the respondent took inadequate measures to ensure that the accumulations reported in the preshift examinations were entirely cleaned up between September 16 and September 19, 1996. Under these circumstances, and citing Drummond Co. Inc., 13 FMSHRC 1362, 1368 (Sept. 1991), and New Warwick Mining Co., 16 FMSHRC 2451, 2455 (Dec. 1994), the petitioner concludes that the violative conditions existed, in whole or in part, for a significant amount of time even though the respondent conducted a regular preshift examination of the belt.

Acknowledging that the respondent submitted work sheets showing that it made some effort to clean up the accumulations along sections of the cited belt, the petitioner asserts that the work sheets are somewhat duplicative of the work reflected in the on-shift reports, and help to confirm that areas were never cleaned underneath the belt during the period from September 16 to September 19, 1996. Further, relying on the on-shift reports, the testimony of longwall employee Jimmie Welch, and the conditions observed by both Inspector Tipton and Safety Committeeman Cox when the order was issued, petitioner concludes that the respondent's efforts were woefully incomplete and ineffective, as is evidenced by both the extent of the accumulations and the amount of time it took to abate the citation. Petitioner points out that it took 20-30 miners from approximately 11:30 a.m. until 11:30 p.m., to completely clean up the accumulations and rock dust the areas covered by the order and that this lengthy period of abatement covering two shifts demonstrates the extent of the accumulations.

Citing the testimony of union president and safety committeeman Sparks at (Tr. 202-208), the petitioner maintains that mine management was well aware of the problems along the belt prior to the issuance of the order, and that even after admitting that it was aware of the problems after the September 3, 1996, safety run, the respondent failed to take the necessary measure to clean up the violative accumulations.

Citing Peabody Coal Co., 14 FMSHRC 1258, 1262-63 (August 1992), and Jim Walter Resources, Inc., 19 FMSHRC 480 (March 1997), the petitioner argues that the respondent's failure to immediately clean up the accumulations, especially after they had been reported in the preshift reports for several days, constitutes a high level of negligence. The petitioner further believes that the detailed description of the amount of coal dust and loose coal accumulations

described in both the body of the order and in Inspector Tipton's notes establishes that these were extensive accumulations.

The petitioner asserts that the respondent failed to completely clean up the accumulations and/or ensure that the accumulations due to this spillage were being adequately cleaned while production was taking place. Even though Inspector Tipton was later told that work had been done on the belt and that four miners were assigned to rock dust, the petitioner maintains that the efforts of these four persons were clearly inadequate, especially in light of the number of man-hours it required for respondent to clean up the violative accumulations. The petitioner points out that even in the face of the safety run and the preshift reports that showed a problem with the belt, the respondent continued to run coal.

The petitioner cites the fact that from June to September 3, 1996, six prior section 75.400, citations were issued by Inspector Tipton and others, and that Mr. Tipton had issued a section 104(d)(1) order for a violation of section 75.400, just two weeks earlier than the order in this case for accumulations along another belt line. The petitioner concludes that these violations signaled to mine management that accumulations along the belt lines were a problem that needed to be addressed and that the conveyor belts needed to be kept in better shape. However, petitioner concludes that even after these numerous warnings, respondent failed to take the proper corrective action and allowed accumulations to get out of hand, forcing Inspector Tipton to issue another section 104(d)(1) order.

In response to the respondent's reliance on its overall safety record, the petitioner asserts that the mine compliance record (Exhibit P-12), shows that there was a special problem with section 75.400 violations, which totaled 99 paid violations in the 24 months prior to and including the issuance of the order on September 19, 1996. The petitioner submits that all of these factors establish unwarrantable failure on the part of the respondent.

In response to the respondent's production of UMWA work assignment sheets showing some additional work done on the belt which was not reflected in the on-shift records, the petitioner points out that no credible reason was given for why these work records were not noted in the on-shift reports, and that Safety Director Kellam admitted that the work done was nothing more than ordinary maintenance and not the extra work that needed to be done to take care of the belt, as noted in the safety run notes. Petitioner concludes that these work records still fail to establish that all the accumulations along the cited belt had been completely cleaned up prior to the inspection and that the work sheets and on-shift records reveal that respondent focused its efforts on normal maintenance and toward the area of the tailpiece, not along the length of the belt towards the head from the belt drive to the center of the belt line where Inspector Tipton noted most of the accumulations.

In conclusion, the petitioner asserts that the testimony of Inspector Tipton, Mr. Cox, and Mr. Welch establish that the accumulations were extensive and obvious. Further, the preshift reports that noted accumulations reported along the length of the belt in conjunction with the on-shift reports that showed piecemeal work done to clean up or cover up the accumulations with

hand dust establish that the respondent knew of the problems along the belt, yet failed to take adequate measures to ensure proper clean up of the violative conditions. Petitioner concludes that this indifference to obvious mine hazards and a disregard for the safety of miners by mine management constituted aggravated conduct by the respondent and supports Inspector Tipton's unwarrantable failure finding.

### Respondent's Arguments

The respondent asserts that Inspector Tipton's unwarrantable failure allegation is premised on his belief that the conditions he encountered were "identical or very close" to the conditions existing for a significant amount of time in the most recent preshift examination book, and on the fact that there were "no reported corrections" in those books. The respondent contends that the inspector "is wrong on each count." As part of its post-hearing brief, the respondent has included a summary of the conditions cited at the six specific belt locations noted in the order, a reference to when these conditions appeared in the preshift examination book, and the corrective responses made by the respondent to those conditions.

The respondent notes that although Inspector Tipton could not recall how far back he went in the most recent preshift examination book, that book commenced on the afternoon shift of September 16, 1996 (Exhibit P-1). Respondent finds it significant that Mr. Tipton's notes made following his review of that book, prior to his physical inspection of the belt, references only roof bolts and does not mention areas needing cleaning or dusting (Exhibit P-2, pg. 1). Further, even though the notes make reference to the union safety run on September 3, 1996, Mr. Tipton stated that his unwarrantable failure finding was not based in any part on that safety run (Exhibit P-2, pg. 5, Tr. 117).

With regard to the cited float coal dust starting at the belt drive (crosscut 227) to crosscut 260, the respondent points out that these conditions did not appear in the preshift book until the following preshift examination for the midnight shift on September 19, 1996, approximately eight hours before Inspector Tipton arrived at the No. 10 belt. Respondent maintains that miners on the midnight shift were assigned to dust that area, that this assignment was repeated for the day shift, and that two track men were assigned on the day shift to take a bulk duster to complete the rock dusting. (R-19). However, that bulk duster derailed and did not make it to the No. 10 belt prior to Mr. Tipton's inspection that morning, and when he issued his order, Mr. Tipton was unaware that two men had been assigned that shift to bring the duster to the belt (R-19), Tr. 54-56-7).

With respect to the alleged spillages noted in the order, the respondent asserts that the reported spillage at cross-cut 248 did not appear, if at all, until a preshift examination for the day shift on September 19, 1996; that there is no indication until that same preshift examination on September 19 that a roller was in contact with spillage at cross-cut 254; that there was no reference at all to spillage at cross-cut 254 until the preshift for the midnight shift on September 19 (at which time assignments were made to clean this area); that there is no reference in the preshift examination for the day shift on September 19 pertaining to spillage at cross-cut

268; and that spillage in the left walkway (opposite walkway side) at cross-cuts 275 and 276 appeared in the preshift examination report for the midnight shift on September 19, and was the subject of work orders for the midnight shift and for the day shift on September 19. Further, respondent points out that there is no reference prior to the preshift examination for the midnight shift on September 19 of the need to clean under the rollers at these locations.

Citing my decision in Consolidation Coal, 16 FMSHRC 54, 91 (January 1994), where I noted that recurrent coal accumulations are inherent by-products of large scale mining operations and are not unusual events justifying an unwarrantable failure order simply because no one is cleaning them up when an inspector happens on the scene and finds them, the respondent concludes that the existence of any coal accumulations on September 19, does not support any inference that like conditions existed for prior significant periods of time. The respondent asserts that the absence of the cited conditions from the preshift examination books prior to the midnight shift on September 19, 1996, was confirmed by the testimony of belt coordinator Wayne Porter, the only witness to have observed the condition of the cited belt in the several days prior to the issuance of the order. Respondent points out that Mr. Porter conducted preshift examinations of the belt on September 17, and September 18, 1996, and noted that there were no hazardous conditions observed. He also testified at the hearing that the conditions he observed on September 19, 1996 following the issuance of the order were not present during his preshift examinations.

The respondent asserts that not all of the conditions noted by a preshift examiner in a report are in fact "violations," and as an example, points out that several areas noted on September 19, 1996, as needing cleaning were not cited by Inspector Tipton (such as cross-cuts 260-264, 272-274, 277-278, 243-246, Exhibit P-1, pg. 7).

The respondent maintains that Inspector Tipton's contention that the conditions he cited existed in the preshift books for a long period of time without correction is simply wrong because most of the conditions cited appeared for the first time in the preshift examiner's report for the midnight shift on September 19, 1996, or in the preshift examiner's report for the day shift on September 19. In each instance, the respondent contends that work assignments were given, and work was commenced to address those conditions. The respondent concludes that it must be afforded a reasonable period of time to correct conditions observed during a preshift examination before the requisite "inexcusable" or "unjustifiable" conduct necessary to sustain an unwarrantable failure allegation is found, citing Consolidation Coal, 17 FMSHRC 1068, 1070 (June 1995) (ALJ Feldman). Accordingly, the respondent believes that whether by reference to the preshift examiner's reports, or the testimony of the only witness on the cited belt in the days prior to September 19, 1996, the inspector's conclusions that the cited conditions had existed for a significant period of time and were the result of high negligence and an unwarrantable failure are unsupported.

The respondent asserts that Inspector Tipton's contention that there were "no reported corrections" of the reported conditions is in error in that the on-shift report for the afternoon shift of September 18 (Exhibit P-1, p. 14) reflects the following work performed on the cited belt;

1. dusting from the head to the drive;
2. cleaning under the drive;
3. rehangng the guard protecting the drive and take up;
4. cleaning from cross-cut 269 to cross-cut 272, both sides;
5. sweeping from cross-cut 262 to cross-cut 270, both sides;
6. cleaning from cross-cut 238 to cross-cut 241, both sides;
7. cleaning the tail area, opposite walkway side; and
8. replacing a bed rail at the cross-cut 272.

Likewise, the respondent asserts that on the midnight shift on September 19, 1996, the on-shift report (Exhibit P-1, p. 16), reflects the following work:

1. cleaning from cross-cut 282 to cross-cut 260, walkway side;
2. cleaning at cross-cuts 276 and 278, walkway side.

The respondent points out that it would be virtually impossible to have corrected any conditions that appeared for the first time in the preshift examination book for the day shift on September 19, 1996, because the report was brought out at 8:00 a.m., and Inspector Tipton arrived at the belt between 8:00 a.m. and 9:00 a.m., that day (Tr. 54).

Finally, the respondent points out that the September 18, afternoon shift and September 19, midnight shift show additional work on the belt, including the changing of a total of 70 rollers and changing bad belt stands. (R-16, R-17). Further, though not "corrections" in the on-shift reports, additional significant ongoing work on the belt is reflected in the safety run (P-10) and in the records detailing the five continuous days of clean-up and restoration of the roof fall area. (R-4, R-8 through R-12). Under the circumstances, the respondent concludes that the alleged absence of any corrections to the reported belt conditions is unsupported. The respondent further concludes that the record does not support the inspector's contention that the cited conditions existed for a significant period of time without correction, but to the contrary, reflects that the respondent was devoting considerable attention to the cited No. 10 belt, as well as the other belts. Accordingly, the respondent maintains that the violation was not the result of aggravated conduct, and that the petitioner has failed to establish that the conditions cited were inexcusable, unjustifiable, or the result of willful misconduct or a serious lack of reasonable care amounting to an unwarrantable failure to comply with the requirements of section 75.400. Respondent requests that the order be modified to a Section 104(a) citation, and that the proposed penalty assessment of \$2,500.00, be significantly reduced.

### The Extensive Nature of the Accumulations

The respondent does not deny that the cited coal accumulations constituted a violation of section 75.400. The testimony and evidence adduced by the petitioner established that the cited loose coal and coal dust accumulations covered a rather extensive area along the cited 6,000 foot belt in question, including float coal dust along a 3,600 foot area of the belt. Although the sum total of the loose coal spillage at the stopping locations noted in the order is 160 feet, a relatively short distance along the 3,600 foot belt line, the float coal dust that reportedly existed was extensive.

Further, the un rebutted evidence presented by the petitioner establishes that abatement of the order was achieved after approximately 15 to 20 miners were put to work over a two-shift period correcting the conditions. While it may be true that the post-order abatement efforts included belt conditions other than coal accumulations, the fact remains that the bulk of the work was devoted to abating and terminating the order citing the coal accumulations. Under the circumstances, I conclude and find that the cited coal accumulations that constituted a significant and substantial (S&S) violation of section 75.400, covered a rather extensive area of the No. 10 belt line.

#### Notice of the Respondent's Alleged Coal Accumulations "Special Problems."

In Consolidation Coal, 16 FMSHRC 54, 91 (January 1994), I noted that recurrent coal accumulations are inherent by-products of large scale mining operations and are not unusual events justifying an unwarrantable failure order simply because no one is cleaning them up when the inspector happens on the scene and finds them.

In the instant case, the credible and un rebutted evidence establishes that the respondent's mine has 15 belts constituting approximately 14 miles of belt lines that are used to transport over one-million tons of coal out of the mine yearly. Given the large scope of this mining operation, I cannot conclude that the respondent's compliance record of ninety-eight section 75.400, violations over a previous 24-month period, is indicative of a "special accumulations problem."

The respondent's compliance record (Exhibit P-12), reflects that ninety-six of the prior violations were issued as section 104(a) citations, and eleven of these were issued as non-"S&S" violations, including a citation issued on July 1, 1996 (No. 4180027), on the Number 10 belt (Exhibit P-6). Only two prior section 104(d)(1) unwarrantable failure citations were issued during the 24-month period in question, one on December 7, 1995, and one on May 17, 1995, and there is no evidence that they were issued on the No. 10 belt. Indeed, with the exception of the July 1, 1996, non-"S&S" No. 10 belt citation, I find no evidence that any of the other prior violations were issued on that belt. With regard to the July 1, 1996, citation, I note that the inspector found that the belt "was being cleaned up with the roof fall at the time that citation was issued."

The only prior section 104(d)(1) order citing a violation of section 75.400, was issued by Inspector Tipton, on the No. 5 belt on September 3, 1996 (Exhibit P-4). That violation was settled by the parties, and the respondent paid the full civil penalty assessment. Indeed, the respondent has paid the full amount of the proposed civil penalty assessments for all of the prior section 75.400, violations noted as part of its compliance record, fifty of which were assessed at \$204.00, each, and the remaining assessments ranging from \$147.00 to \$267.00.

Respondent's belt coordinator, Wayne Porter, testified that a belt line can change its characteristics with every revolution. He further stated that a belt can "run off instantaneously" and cause significant accumulations under the belt in a very short period of time, as well as instantaneous spillage along the entire length of the belt (Tr. 346). Inspector Tipton attributed the coal spillage to a belt misalignment, as well as lack of regular maintenance, and longwall helper, Welch, believed the accumulations could have occurred over a few shifts or by the coal "just coming back on the take-up; coming back on the bottom rollers" (Tr. 184).

I am not totally convinced that Inspector Tipton actually knew how long the cited coal spillage conditions had existed. He admitted that he was uncertain as to whether he reviewed the preshift reports covering the days earlier than September 18, one day prior to the issuance of the September 19, 1996, order (Tr. 70). Nor am I convinced that he knew with any degree or reasonable certainty that the preshift entries that he reviewed prior to his inspection described the same spillage conditions at the same location that he observed during his inspection. Indeed, Mr. Tipton's order, on its face, states "that these conditions for the most part were being carried as reported in the mine books and would have taken days to accumulate to the degree described in this action." Further, when asked in the course of the hearing whether each of the conditions described in his order are noted in the September 19, preshift book, he responded "I'm convinced that they are very similar if not identical in nature" (Tr. 76).

More significantly, Inspector Tipton testified that during a three-to-four day period immediately preceding the issuance of his order on September 19, 1996, he and Inspector Jeffers inspected 11 additional belts, as well as the cited number 10 belt, covering a distance of some 14 miles, and although some violations were noted and issued, no violations of section 75.400, were issued for coal accumulations. Indeed, Inspector Tipton confirmed that his September 19, order citing a violation of section 75.400, was the only violation issued during this three or four day period (Tr. 64 - 66). I have difficulty reconciling this testimony with the petitioner's suggestion that the respondent had a serious on-going "problem" with coal accumulations that were ignored and uncorrected for unreasonably long periods of time.

With respect to the cited float coal dust conditions cited by the inspector in the order starting at the belt drive (crosscut 227), and extending inby to the No. 260 crosscut, I take note of the fact that these conditions and crosscut locations do not appear in the preshift and inshift reports for September 16, through September 18, 1996. As correctly noted by the respondent, this condition was first noted for the midnight preshift examination on September 19, 1996, and was brought out at 8:00 a.m., immediately prior to the issuance of the order at 11:30 a.m.

Further, the day shift work assignments for September 19, 1996, included the belt drive areas as places that needed corrective action.

#### The Respondent's Efforts to Address and Correct the Cited Conditions

The petitioner's suggestion that the respondent failed to take any corrective action after being made aware of the number 10 belt conditions as early as September 3, 1996, is not well taken. Local union and safety committee president, Roger Sparks, testified that in response to a union letter to MSHA regarding the conditions on the No. 8, 9 and 10 belts, a joint union-management "safety run" examination of those belts was initiated on September 3, 1996. Although some belt conditions needed to be corrected, Mr. Sparks confirmed that "it wasn't as bad as we were led to believe," and that the letter was rescinded (Tr. 199).

Mr. Sparks confirmed that following the September 3, union safety run, safety committeeman, Cox, and mine superintendent Matkovich continued to meet and monitor the work that was being done to correct the conditions noted during the safety run (Tr. 203-204). Safety committeeman Cox confirmed that this was the case, and that his meetings with Mr. Matkovich, continued to the day the order was issued on September 19. Mr. Cox explained that the meetings specifically addressed the number 10 belt, and he referred to several corrective actions, including cleaning and dusting, that was done, beginning on September 4, and continuing to September 18, 1996 (Tr. 151-152; Exhibit P-10).

Mine Superintendent Matkovich testified that the items noted by Mr. Cox were immediately addressed, and he confirmed that he met daily with Mr. Cox while the work to correct the conditions was in progress. Mr. Matkovich testified that he made notations concerning the work that was performed, and the notations reflect that cleaning the area between the belt discharge and take-up was done on September 9, 1996, and that one-half of the area was cleaned. Additional notations reflect that cross-cut areas 24 to 249, which included the area where rollers were turning in coal was addressed on September 13, 1996, and that other crosscuts not included on Mr. Cox's list were cleaned on September 9, and 18, 1996, (crosscuts 257-275 and 273-278). Further, notations reflect that two belt areas were dusted on September 4 - 5, 1996 (Exhibit P-10; Tr. 252 - 253).

The onshift report for the September 17, 1996, day shift reflects that the cleaning required at crosscut locations 274 to 287, was "worked on," and the afternoon shift report for that day reflects that the spillage at the belt head was "corrected," and that work was being done to clean the belt drive. The onshift report for the September 18, 1996, day shift reflects the same "corrected" and "Being worked on" notations, as well as a notation that the required cleaning at crosscut locations 274 -287, and 287-278 were corrected. The September 18, 4:00 p.m., on-shift report reflects that the cleaning and sweeping at the belt side locations at crosscuts 269-272, 262-270, 238-271, and outer tail walkway was completed and the conditions were all corrected.

Inspector Tipton himself testified that four men were working spreading rock dust when he arrived at the No. 10 belt area on September 19, 1996. Although the men were spreading rock

dust by hand, the respondent's credible evidence reflects that a bulk rock duster usually available could not be brought to the area because of a roof fall on the belt line.

Although Mr. Tipton testified that he did not check the work assignments scheduled for the belt on September 19, he confirmed that respondent's safety manager, Mike Roxby discussed the belt work that had taken place the previous day, and the fact that four men were working on the belt when the order was issued (Tr. 57).

Safety Committeeman, Cox, confirmed that when he walked the No. 10 belt with the inspector on September 19, prior to the issuance of the order, men were working on the belt, and the area from crosscut 260 toward the 289 crosscut to the tail had been cleaned and rock dusted (Tr. 142-146; 159).

Human Resources Manager Charles Kellam confirmed that all of the belts were inspected during the September 3, safety run, and he accompanied Mr. Sparks and Mr. Cox on the inspection of the No. 8, 9 and 10 belts, and prepared a report (Exhibits R-3); Tr. 229-234). He confirmed that work was performed on the belts to correct the conditions noted during the safety run, and that work was performed on the number 10 belt from September 10, to the midnight shift on September 19, 1996, and is recorded in a work report prepared at his direction (Exhibit R-4). This report reflects intermittent cleaning and dusting a number of areas along the number 10 belt line during these time periods.

The preshift report for September 16, 1996, reflects that crosscut locations 274 to 287, needed cleaning and that the conditions were reported. Although the same notations appear on the preshift report for September 17, 1996, the onshift report for the day shift on that day reflects that the conditions were "worked on." Mr. Tipton's order states that spillage was present at stopping 275 for a distance of 20 feet, and at stopping 276 for a distance of 10 feet. The remaining crosscut locations noted in the preshift (274, and 277-287) were not cited in the order, and Inspector Tipton agreed that it was possible that these areas could have been cleaned up when the order was issued (Tr. 83). Under the circumstances, since these crosscut locations are not included in the order, I can only conclude that the conditions were either cleaned up or overlooked by the inspector.

In Utah Power and Light Co., 11 FMSHRC 1926, 1933 (October 1989), the Commission held that the operator did not demonstrate unwarrantable failure because before and during the inspection, miners were shoveling the accumulations and attempting to abate the condition. On the facts of the case at hand, while it may be true that all of the cited coal accumulations may not have been cleaned up at the time of the September 19, 1996, inspection, the respondent's credible evidence establishes that the belt conditions were not ignored and that men were assigned to take corrective action, men were working rock-dusting the belt, some of the conditions were corrected, and work was in progress to correct the remaining conditions. Under all of these circumstances, I agree with the respondent's position in this case and cannot conclude that the petitioner has established a case of aggravated conduct supporting the inspector's unwarrantable

failure finding. Accordingly, that finding IS VACATED, and the contested order IS MODIFIED to a section 104(a) "S&S" citation.

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

The parties have stipulated that the respondent is a large mine operator and that payment of the proposed civil penalty assessment for the violation of section 75.400, will not adversely affect its ability to continue in business.

#### History of Prior Violations

Respondent's overall compliance history (Exhibit P-12), for the period September 24, 1994, to September 19, 1996, reflects that it fully paid civil penalty assessments totaling \$120,970.00, for 715 violations, 235 of which were "single penalty" non-"S&S" violations. With the exception of one section 104(d)(1) citation issued on November 29, 1995, and one issued on May 17, 1995, all of the remaining listed violations were issued as section 104(a) citations.

Although I cannot conclude that the respondent's overall history of prior violations is particularly good, for an operation of its size, I cannot conclude that it warrants any increases in the civil penalty assessment that I have made for the violation that has been affirmed.

#### Good Faith Abatement

The record reflects that the order was terminated at 11:30 p.m., on September 19, 1996, after the accumulations were removed and rock dust was applied where needed. I conclude and find that the respondent timely abated the violation in good faith after the order was issued.

#### Gravity

Based on any "S&S" findings and conclusions, I conclude and find that the violation of section 75.400, was a serious violation.

#### Negligence

Taking into account the fact that miners were assigned to correct the conditions, and that work was done by the respondent on the cited belt prior to the issuance of the order, the fact that men were rock dusting the belt the day the order was issued, and the fact that the mechanical rock dusting machine could not reach the affected belt area due to a roof fall on the belt, I conclude and find that the violation was a result of the respondent's failure to take reasonable care, and that this constitutes a moderately ordinary level of negligence.

Civil Penalty Assessment

Based on the foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$1,000.00, is reasonable and appropriate for the violation of section 75.400, that has been affirmed.

**ORDER**

IT IS ORDERED as follows:

- 1.) Section 104(d)(1) non-"S&S" Order No. 3723270, September 19, 1996, 30 C.F.R. 75.364(b)(2), IS MODIFIED to a section 104(a) non-"S&S" citation, with a moderate level of negligence. A civil penalty assessment of \$500.00, is imposed as part of the settlement that has been approved for this violation.
- 2.) Section 104(d)(1) "S&S" Order No. 3501233, September 19, 1996, 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) "S&S" citation, with a moderate level of negligence. A civil penalty assessment of \$1,000.00, is imposed for the violation.
- 3.) Payment of the aforesaid civil penalty assessments shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Alan G. Paez, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

David A. Laing, Esq., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, OH 43215 (Certified Mail)

/mca

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**OCT 28 1997**

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,	:	South Area - Gold Quarry
Respondent	:	

**DECISION**

Appearances: Jeanne M. Colby, Esq., and Mark R. Malecki, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California and Arlington, Virginia, for Petitioner; Henry Chajet, Esq., and David Farber, Esq., Patton Boggs, Washington, D.C., for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Newmont Gold Company ("Newmont"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820 (the "Mine Act"). The petitions allege four violations of the Secretary's safety and health regulations. A hearing was held in Elko, Nevada, and expert testimony was taken in Falls Church, Virginia. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

**I. FINDINGS OF FACT**

**A. The Citations and Orders**

1. On March 13, 1995, MSHA Inspector Michael Drussel issued Citation No. 4140248 at the South Area - Gold Quarry (the "mine") in Eureka County, Nevada, under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.20011. The condition or practice section of the citation states:

The old screen removed from the ZADRA was placed near the containment area at the AARL building. Visible mercury was on the screen. No warning signs were posted warning of the hazard.

The inspector determined that it was unlikely that the alleged violation would cause an injury or illness and that it was not of a significant and substantial nature ("S&S"). He determined that the violation was caused by Newmont's moderate negligence. The Secretary proposes a penalty of \$50.00 for the alleged violation. Section 56.20011 provides as follows:

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

2. On March 14, 1995, Inspector Drussel issued Citation No. 4140245 at the mine under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 56.20014. The condition or practice section of the citation states:

The office in the AARL building contained mercury vapor as measured with a Jerome mercury vapor analyzer. The average reading was 23.3  $\mu\text{g}/\text{m}^3$ . The company routinely takes six Jerome readings a day in this office as part of [its] mercury monitoring program. These readings showed mercury has been present in this office. Visible mercury was found on the desktop on February 28, 1995. The AARL operator was required to use this office for eating his lunch. No person shall be allowed to consume food or beverages in any area exposed to a toxic material. This is an unwarrantable failure.

The inspector determined that it was reasonably likely that the alleged violation would cause an injury or illness and that it was S&S. He determined that the violation was caused by Newmont's high negligence. The Secretary proposes a penalty of \$1,000.00 for the alleged violation. Section 56.20014 provides as follows:

No person shall be allowed to consume or store food or beverages in a toilet room or in any area exposed to a toxic material.

3. On March 14, 1995, Inspector Drussel issued Order No. 4140246 at the mine under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 56.20014. The condition or practice section of the citation states:

The lunchroom for the ZADRA employees contained mercury vapors as measured with a Jerome mercury vapor analyzer. The

average reading was 22.2  $\mu\text{g}/\text{m}^3$ . The company routinely takes six Jerome readings a day in this lunchroom as part of [its] mercury monitoring program. These readings show that mercury vapors have been present in this lunchroom. The ZADRA employees were required to use this lunchroom for eating their lunch. No person shall be allowed to consume food or beverages in any area exposed to a toxic material. This is an unwarrantable failure.

The inspector determined that it was reasonably likely that the alleged violation would cause an injury or illness and that it was S&S. He determined that the violation was caused by Newmont's high negligence. The Secretary proposes a penalty of \$1,200.00 for the alleged violation.

4. On March 14, 1995, Inspector Drussel issued Order No. 4140247 at the mine under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 56.20011. The condition or practice section of the citation states:

The old scrubber removed from the AARL was cleaned then tested for mercury contamination. This scrubber was stored at the boneyard. Mercury contamination test results received in November 1994 showed mercury contamination. The scrubber was not removed from the boneyard or marked of the hazard. When the scrubber was inspected to show visible mercury, Jerome readings showed mercury vapors present. This is an unwarrantable failure.

The inspector determined that it was unlikely that the alleged violation would cause an injury or illness and that it was not S&S. He determined that the violation was caused by Newmont's high negligence. The Secretary proposes a penalty of \$1,500.00 for the alleged violation.

#### B. Background

After gold-bearing rock is excavated at the mine, Newmont uses a complex benefaction process to remove the gold from the host rock. The procedure used to separate the gold from the rock includes, among other things, a cyanide leach process. As part of that process, carbon is impregnated with gold solution and then sent through the "carbon-handling" area, which consists of the AARL and ZADRA facilities. In the AARL facility, gold is chemically stripped from the carbon for further refining. In the ZADRA facility, the carbon is sized for reuse. Mercury is found in the gold-bearing rock at the mine. As a consequence, mercury is generated during the carbon-handling process. The mercury that is present is elemental mercury. Elemental mercury is commonly used in thermometers, thermostats, and batteries. It vaporizes quickly in warm conditions and, as discussed below, is harmful in its vaporized form. In contrast, organic mercury compounds are readily absorbed by dermal contact and through ingestion. Organic mercury compounds and inorganic mercury salts are not present at the mine and are not involved

in these cases. Except where I state otherwise, whenever I use the word “mercury” in this decision, I am referring to elemental mercury.

## II. SUMMARY OF THE PARTIES' ARGUMENTS

### A. The Citation and Order Alleging Violations of Section 56.20014

#### 1. The Secretary

The Secretary argues that section 56.20014 is a performance standard that requires the Secretary to establish two elements to prove a violation. First, she must establish that the area cited was a toilet room or a place where food or beverages were consumed. Second, she must establish that the cited area was “exposed to a toxic material.” She contends that there can be no dispute that the cited offices were used as lunch and break rooms where food and beverages were both consumed and stored. She also contends that these areas were exposed to mercury from the surrounding production areas. The Secretary contends that Newmont’s interpretation of the standard to require the Secretary to prove that the toxic material was present in sufficient quantities to present a clear health hazard is incorrect. She maintains that the Secretary is not required to show that the quantity of mercury detected presented a hazardous dose level. Similarly, she contends that she is not required to establish that mercury presents a serious health risk when ingested. Rather, the Secretary argues that mercury is a toxic material as a matter of law. She contends that mine operators “are obliged, under the terms of this regulation, to take all reasonable steps to prevent mercury exposure in eating and dining areas.” (S. Br. at 25). The Secretary states that the standard is clear on its face. She disagrees with Newmont’s position that unless the term “toxic material” is interpreted to have a dose level component, the standard is impermissibly vague and violates Newmont’s due process rights.

The Secretary also argues that Newmont’s failure to prevent its employees from eating in areas exposed to a toxic material demonstrates its unwarrantable failure to comply with the standard. She contends that Newmont had been aware of the conditions cited by the inspector for six years and did nothing to correct the conditions. She points to the fact that in 1992 Newmont improved the lunchroom at its refinery at the mine after determining that employees were eating and consuming beverages in areas that were exposed to mercury vapors. The Secretary also contends that Newmont’s defense that it was not in violation of the standard so long as mercury vapor did not exceed the threshold limit value (“TLV”) for mercury, incorporated by the Secretary through 30 C.F.R. §56.5001, is inherently unreasonable. The Secretary also relies on complaints made by miners to Newmont managers about the presence of mercury in the AARL and ZADRA offices (the “offices”) to establish aggravated conduct. The Secretary seeks to increase the penalty for these alleged violations to \$5,000 each.

#### 2. Newmont

Newmont argues that to establish a *prima facie* case, the Secretary must prove that the mercury alleged to be present in the offices when food and beverages were consumed was a toxic

material. It contends that the record establishes that the elemental mercury at issue in these cases was not a toxic material because it was not present in such quantities to present a health hazard. Newmont maintains that there is no dermal contact risk associated with elemental mercury. In addition, it states that ingestion of elemental mercury, at least at the levels present in the offices, does not present a health hazard. Newmont contends that inhalation of mercury vapor is the only exposure route of concern for elemental mercury. MSHA has a specific regulation addressing mercury vapor at section 56.5001. Under that regulation, the average permissible dose of mercury vapor that MSHA allows miners to be exposed to over a working shift is 50 micrograms ( $\mu\text{g}$ ).<sup>1</sup> Newmont contends that unless the amount of mercury vapor in the offices exceeds 50 micrograms, a health hazard is not present and the rooms have not been exposed to a toxic material as that term is used in the standard.

Newmont also contends that the Secretary's interpretation of section 56.20014 is arbitrary, capricious, and contrary to law. First, it contends that the Secretary failed to distinguish between the health risks associated with elemental mercury and the risks posed by other forms of mercury. Second, it argues that basic toxicology and industrial hygiene provide that the dosage of a substance determines whether it poses a health hazard. This is, because all substances are toxic to the human body at a given dosage level, a substance cannot be considered to be a toxic material unless the dose at which miners are exposed is taken into consideration. It believes that unless the Secretary establishes that the mercury detected by Inspector Drussel presented a significant risk of harm to employees, the citation and order must be vacated.

Finally, Newmont argues that the Secretary's prior inconsistent interpretation of the standard and prior inconsistent actions of her inspectors, precludes giving her present interpretation any deference. It contends that it was not provided with fair warning of the conduct that was prohibited by the standard because a reasonably prudent person familiar with the mining industry and the protective purposes of the Secretary's standards would not have known that the presence of mercury vapor below the TLV violated the standard.

## B. The Citation and Order Alleging Violations of Section 56.20011

### 1. The Secretary

The Secretary argues that Newmont violated the standard when it placed a contaminated discarded mercury scrubber from the AARL in a boneyard without providing a barricade or warning. She contends that it also violated the standard when it placed a dewatering screen from the AARL in a containment area without providing a barricade or warning. She contends that the cited equipment contained mercury that presented a health hazard. The Secretary maintains that both pieces of equipment were in open areas where employees could come in contact with them.

---

<sup>1</sup> The TLV for mercury under section 56.5001 is 0.05 milligrams per cubic meter of air ( $\text{mg}/\text{m}^3$ ). Since Inspector Drussel measured mercury vapor in micrograms, I also use micrograms throughout this decision. 50 micrograms ( $\mu\text{g}$ ) is equal to 0.05 milligrams ( $\text{mg}$ ).

Finally, the Secretary contends that Newmont's violation with respect to the scrubber was the result of its aggravated conduct because it was aware of the hazard and did nothing to prevent employees from being exposed to the hazard.

## 2. Newmont

Newmont makes many of the same arguments with respect to this citation and order as it did with respect to the alleged violations of section 56.20014. It contends that the Secretary did not establish that the cited equipment presented a health or safety hazard within the meaning of the standard. Newmont argues that the citation and order were issued because of a "potential" hazard rather than because a hazard existed. Further, Newmont argues that, after the citation and order were issued, it monitored for mercury vapor at the scrubber and screen and the results were well below the TLV. Finally, it argues that the Secretary did not provide reasonable notice that a bead of mercury on a piece of equipment would require a warning sign or a barricade.

### **III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW**

#### A. The Citation and Order Alleging Violations of Section 56.20014

##### 1. Introduction

The cited standard is quite brief. For purposes of these proceedings it provides that no person shall be allowed to consume or store food or beverages in any area exposed to a toxic material. Although Newmont introduced evidence designed to raise questions as to whether food or beverages were in fact stored or consumed in the offices on or about March 14, 1995, I find that the overwhelming evidence establishes that they were. Whether miners were encouraged by Newmont to take their meal breaks in other areas, or that consuming or storing food and beverages in the offices was not officially sanctioned by Newmont is irrelevant. The evidence shows that miners were not prohibited from drinking beverages, eating food, or storing beverages and food in the offices. The standard states that "no person shall be allowed to" consume food or beverages in an area exposed to a toxic material or to store food or beverages in such area. The record demonstrates that Newmont allowed such activities in the offices.

The issue then is whether the offices were areas "exposed to a toxic material," as that phrase is used in the standard. There is no question that mercury vapor was present in the offices. Newmont's own records show that mercury vapor was present. (Ex. S-112). Newmont took mercury vapor samples six times a day in the offices using a Jerome monitor. The question is whether the presence of mercury vapor establishes that the area was exposed to a toxic material. The Secretary maintains that the evidence establishes that mercury is a toxic material at any dosage level. She states that mercury is a universally recognized poisonous substance. She believes that there is no known universally safe level for exposure to mercury and she rejects Newmont's contention that at certain dose levels mercury is not toxic to humans. She states that the dose level at which mercury is safe for all persons has not been definitively determined.

Consequently, she believes that mercury must be presumed to be a toxic material at any dose that is detectable by standard industrial hygiene instruments. She further argues:

MSHA asserts mercury to be a "toxic material" as a matter of law. Mine operators are obliged, under the terms of this regulation, to take all reasonable steps necessary to prevent mercury exposure in eating or dining areas.

(S. Br. at 25). Accordingly, the Secretary contends that because she demonstrated that mercury vapor was present in a detectable amount in each office and that mercury is a toxic material, she established violations of section 56.20014.

Newmont strongly disagrees with the Secretary's interpretation of the standard. As stated above, Newmont contends that the Secretary must establish that the mercury vapor that was detected by Inspector Drussel on March 14 was a toxic material. It maintains that the 23.3  $\mu\text{g}/\text{m}^3$  and 22.2  $\mu\text{g}/\text{m}^3$  readings obtained by Inspector Drussel show that a toxic material was not present because at that dose mercury is not toxic. Newmont characterizes the Secretary's interpretation as a "zero tolerance policy." It contends that under this interpretation, the Secretary can issue a citation in the offices if an inspector detects any level of mercury that can be measured with a Jerome monitor. Newmont argues that this interpretation is inherently unreasonable.

Mercury can potentially enter the human body by three routes: through the skin, through the digestive tract, and through inhalation. In order to understand the issues raised in this case it is important to consider the relative risks posed by these three potential routes of entry. I discuss each in turn below.

a. Risks Posed by the Inhalation of Mercury

The inhalation of mercury fumes can present significant health risks. About 80% of all inhaled mercury vapor is absorbed into the human body through the lungs. If a person is exposed to mercury fumes at the TLV, he will absorb about 400 micrograms of mercury during an 8-hour shift.

b. Risks Posed by Dermal Contact with Mercury

I find that dermal contact with elemental mercury does not pose as significant a health risk. Very little mercury is absorbed through the skin. The dermal absorption rate is only 2.2% of the inhalation rate and only about 50% of the mercury that is absorbed into the skin enters the body. The rest stays in the skin and is sloughed off. I credit the evidence presented by Newmont that only about .8 percent of any mercury exposed to the skin is actually absorbed into the body.

c. Risks Posed by the Ingestion of Mercury

It is clear that ingestion of mercury in the quantities that would be possible in the offices does not present a health risk to miners. The ingestion rate for mercury is between .01 and .001

of a percent. If a miner ate a sandwich that contained a bead of mercury, only a negligible amount of mercury would remain in his body. I agree with Newmont's evidence that such an event is "toxicologically irrelevant." It is highly unlikely that anyone would get mercury poisoning by eating small amounts of mercury, even over a period of time.

#### d. Conclusions

I conclude that inhalation is the primary exposure route for elemental mercury that is of concern in these cases. Of course, mercury vapor can enter the offices in a number of ways. It can come in through the doors and the ventilation systems. In addition, miners can get beads of liquid mercury on their clothing. If mercury is on a miner's clothing or boots, the mercury can contaminate an otherwise clean environment.

#### 2. Did Newmont Violate Section 56.20014?

There is no dispute that mercury is a toxic material if it is detected at levels above 50  $\mu\text{g}/\text{m}^3$  over a working shift. The issue is whether mercury is a toxic material, as that term is used in the standard, if it is detected at levels significantly less than that, around 22 to 24  $\mu\text{g}/\text{m}^3$ . The Secretary maintains that the TLV is irrelevant in this case because all she needs to prove is that the offices were exposed to a toxic material. She argues that mercury is a toxic material at all detectable levels because "the dose level at which mercury is assuredly safe for all persons (including female miners of childbearing age) has not been determined." (S. Br. at 25).

Newmont argues that a material is toxic if it is poisonous to humans. A toxic material is a poisonous material. It contends that any material is poisonous to humans if the exposure is sufficient. Thus, it maintains that one must consider the dose when determining if a material is toxic. Without taking the dose into consideration, everything is toxic and the term "toxic material" becomes meaningless. It argues that it is the dose that makes the poison. It relies on the testimony of its expert witnesses in making this argument. It also points to the fact that dental amalgams (fillings) are widely reported to produce between 3 and 29  $\mu\text{g}$ s of mercury vapor within a person's mouth, 24 hours a day, 365 days a year. Such fillings are not considered to be hazardous to humans. Because Inspector Drussel detected low levels of mercury vapor in the offices, Newmont contends that no health risk was posed and a toxic material was not present.

The Secretary argues that the offices were exposed to a toxic material because Newmont failed to adequately assure that liquid mercury and mercury vapors would not enter into and remain in the offices. She contends that because of Newmont's deficient industrial hygiene practices, Newmont exposed the two offices to ambient mercury vapor and liquid mercury originating from the production areas. She points to the fact that during the years proceeding March 1995, Newmont did not have in place an industrial hygiene protocol to keep the offices clean. For example, miners would enter the offices without removing or washing their boots or personal protective equipment, which could be contaminated with mercury from the plant. Another example relied upon by the Secretary was the fact that the offices were not adequately

ventilated so that air containing mercury vapor would enter the offices from the plant. As proof of this constant contamination, the Secretary relies on Newmont's mercury monitoring results for the offices.

Although the parties presented extensive evidence at the hearing, the dispute primarily concerns the interpretation of the standard. Each side presented evidence to support its interpretation. Thus, it is important to carefully consider the legal issues raised to support the conflicting interpretations.

I find that detectable levels of mercury vapor were frequently present in the subject offices in the year preceding March 1995. (Ex. S-112). Mercury vapor was generally present in the offices during the first three months of 1995 in the range of 8 to 30  $\mu\text{g}/\text{m}^3$ , but occasionally higher readings were obtained. There were several readings between 50 and 60  $\mu\text{g}/\text{m}^3$  and one in excess of 300  $\mu\text{g}/\text{m}^3$  because the AARL office had not been recently cleaned. (Ex. S-112 at 2880 and 2940). Newmont contends that Jerome mercury monitors do not provide accurate measurements to assess personal exposures, but only provides a rough measure of potential mercury vapor sources.

Jerome monitors take an instantaneous reading. Even if several readings are taken, they may not represent the TLV because the readings are not time-weighted over the shift. I agree with Newmont that a person can obtain a wide range of Jerome readings in a single room over a period of a few minutes, even when the instrument is properly calibrated and used. The record also shows that certain chemicals used in the plants can cause a Jerome monitor to detect the presence of mercury. In this instance, however, the record contains hundreds of Jerome readings taken in the offices over a long period of time. Accordingly, I find that I can properly conclude that mercury vapor was present in the offices on a consistent basis, but that the amount of such vapor was almost always below the TLV. Even in those instances where readings above 50  $\mu\text{g}/\text{m}^3$  were made, the TLV may not have been exceeded because the readings were not time-weighted.

#### a. Plain Meaning of Standard

Because the Secretary asserts that mercury is a toxic material as a matter of law, she argues that she is not required to establish that mercury was present at hazardous levels the time the citations were issued. She interprets section 56.20014 to presume that a hazard exists when detectable mercury vapor is found. She contends that the plain meaning of the words in the standard supports her interpretation. In addition, she states that the standard must be interpreted so as to "effectuate its purposes." (S. Br. at 26). In the alternative, the Secretary argues that the Commission should defer to her reasonable interpretation of the standard.

I find that the plain language of the standard does not automatically lead to the Secretary's interpretation. The concept of an area being "exposed to a toxic material" is somewhat ambiguous. In addition, the purpose of the standard is not entirely clear. Newmont interprets the standard to apply only to ingestion hazards. It believes that the standard is designed

to keep food and beverages from becoming contaminated with toxic substances. Accordingly, I give Newmont's arguments the benefit of the doubt and reject the Secretary's position that the plain language of the standard precludes any interpretation of the standard other than her own interpretation.

b. Deference

It is well established that an agency's interpretation of its own regulations should be given "deference ... unless it is plainly wrong" and so long as it is "logically consistent with the language of the regulation and ... serves a permissible regulatory function." *General Electric Co. v EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995)(citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978).

Newmont contends that no deference is owed the Secretary's interpretation because her interpretation of this standard has been inconsistent. Newmont relies on a number of factors in making this argument. First, it states that Inspector Drussel inspected these offices on many occasions; he knew or had reason to know that a low level of mercury vapor was generally present, and he drank coffee in the offices. Second, it states that the Secretary's prior written interpretation of the standard does not support her present interpretation. Third, it maintains that the Secretary's interpretation of an identical standard under OSHA is inconsistent with her interpretation under MSHA. Finally, it states that the Secretary does not consistently apply her interpretation.

I find that although the Secretary's policies have not always been clearly enunciated, her policies have been sufficiently consistent to consider the application of deference. Inspector Drussel admitted that prior to March 1995, he knew that miners ate in the offices. (Tr. 1185). He admitted that prior to March 1995, he believed that the offices were in compliance with MSHA standards. *Id.* He also admitted that prior to March 1995, he believed that the "action level" for mercury vapor was 50  $\mu\text{g}/\text{m}^3$  for personal samples. Finally, Inspector Drussel testified that prior to March 1995, he knew that mercury vapor was in the AARL office and he personally drank coffee in that office, but he did not issue any citations for violating section 56.20014. (Tr. 1202-03). From this testimony, Newmont concludes that the Secretary did not consider mercury vapor at levels below 50  $\mu\text{g}/\text{m}^3$  to present a hazard in areas where food or beverages are consumed and did not believe that the conditions in Newmont's offices violated the standard. Newmont contends that this shows that the Secretary's prior interpretation of the standard is inconsistent with her present interpretation.

Newmont has stretched Inspector Drussel's testimony beyond recognition. The fact that one inspector drank coffee in an area in which mercury vapor was present does not indicate that the Secretary has changed her interpretation of the standard. From this testimony, it appears that

the local MSHA office relied on personal samples taken in accordance with section 56.5001 when testing for mercury. At most, it shows that MSHA was not enforcing section 56.20014 at the Newmont facility. An agency's failure to strictly enforce a particular standard cannot be the basis for finding that its prior interpretations of the standard were inconsistent. As I stated at the hearing, an MSHA inspector's failure to issue any citations at a mine does not establish that the Secretary has determined that the mine operator is in compliance with all MSHA safety and health regulations. The fact that previous citations had not been issued cannot be the basis for rejecting deference to the Secretary's interpretation.

Newmont also relies on a prior written interpretation issued by the Secretary. In 1981, the Secretary issued a *Metal and Nonmetal Mine Safety and Health Inspection and Investigation Manual ("I & I Manual")*. For section 56.20-14, the old section number for the standard, the *I & I Manual* states: "The purpose of this mandatory standard is to ensure that foods or beverages are not stored or consumed in areas where toxic materials or unsanitary conditions could contaminate the food and cause illness." (Ex. R-59A at 66-S-4). Newmont contends that the *I & I Manual* shows that the standard has previously been interpreted as a food contamination standard, not an airborne contaminant standard. It argues that this interpretation is entirely inconsistent with the position that the Secretary is taking in this case.

In July 1988, the Secretary issued MSHA's *Program Policy Manual* (the "*Manual*"), which superseded the *I & I Manual*. The *Manual* does not contain any interpretation of the standard at issue and states on the cover page that it "includes all policies currently in effect which were issued prior to July 1, 1988." Paul Balanger, one of the drafters of the *Manual*, testified that any applications contained in the old *I & I Manual* that were not applicable or were deemed unnecessary were not included in the new *Manual*. (Tr. 1421-1422). Thus, to the extent that the *I & I Manual* included an inconsistent interpretation, it was deleted about seven years prior to the date the citation and order were issued.

The introduction for the section of the *I & I Manual* discussing mandatory standards states:

The following application of standards is to assist inspectors in determining the intent and purpose of the given standard. They do not have the force of law and do not supersede or override the standards themselves, and are subject to policy change.

(Ex. R-59A at 66-A-1). Thus, the *I & I Manual* specifically provided that the applications were not binding, did not override the language of the standard, and could change over time.

Although I find that there is some tension between the application set forth in the *I & I Manual* and the Secretary's present interpretation of section 56.20014, it is not so inconsistent as to hold that the Secretary's interpretation in this case is not entitled to any deference. In the cases cited by Newmont to support its position, the agency in question had a history of prior

inconsistent enforcement, the agency changed procedures through an internal staff memorandum that had been established by regulation, or the agency refused to adhere to the precedent of its own internal review board even though it followed such precedent in previous and subsequent cases that were very similar.

In this case, MSHA issued a policy statement in 1981 that was revoked in 1988 that generally indicated that the focus of the standard was to prevent the contamination of food. There has not been any showing of prior inconsistent enforcement. If there is any inconsistency, it is that the agency did not direct its resources to the enforcement of the cited standard until recently.

Newmont also relies on the Secretary's enforcement of the same standard under OSHA. It points to the analogous regulation of the Department of Labor's Occupational Safety and Health Administration ("OSHA") that defines "toxic material" to mean a material that is present in a concentration that exceeds the TLV or, in the absence of an applicable standard, "which is of such toxicity so as to constitute a recognized hazard that is causing or is likely to cause death or serious physical harm." (N. Br. at 27, quoting 29 C.F.R. § 1910.141(a)(2)(viii)). Thus, the Secretary limits OSHA's similar standard, at 29 C.F.R. § 1910.141(g)(2), to situations where mercury is detected above the TLV. If mercury is detected in eating or drinking areas at levels below the TLV, the equivalent OSHA standard is not violated.

The Commission and the courts owe deference to the Secretary, not to the Assistant Secretary for Mine Safety and Health or to his staff. Thus, Newmont's argument has some appeal. I find, however, that there are some important differences between the underlying OSHA and MSHA statutes. Under the OSHA statute, a safety or health standard must be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). The Supreme Court has interpreted this requirement to mean that the Secretary, when promulgating a health standard, must determine that the standard is "reasonably necessary and appropriate to remedy a significant risk of material health impairment." *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980). The Mine Act does not include such a requirement. The Secretary is not required to establish during rulemaking that a proposed MSHA standard is necessary to "remedy a significant risk." *Id.* Under the Mine Act, the Secretary is authorized to promulgate standards "as may be appropriate ... for the protection of life and prevention of injuries...." 30 U.S.C. § 811(a); *National Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 527 (D.C. Cir. 1997). The Secretary of the Interior originally promulgated section 56.20014, under the Federal Metal and Nonmetal Mine Safety Act, using the OSHA standard as a starting point. He did not incorporate the OSHA definition of "hazardous material" in the standard. Accordingly, I find that the Secretary's different interpretation of a similar standard under the OSHA statute is grounded in that statute and should not be the basis for refusing to defer to the Secretary's interpretation of the standard in this case.

Finally, Newmont contends that deference is not owed the Secretary's interpretation of the standard because she does not consistently apply this interpretation. Newmont provides examples of inconsistent enforcement. Oxygen and carbon dioxide, for example, are hazardous

at high doses, yet MSHA does not issue citations if oxygen or carbon dioxide are detected in a lunchroom. Silica dust is another example. It is well documented that silica presents a health hazard, yet MSHA does not cite mine operators if silica dust is detected in a lunchroom at levels below the TLV. Newmont asserts that the Secretary is enforcing the standard on an arbitrary and *ad hoc* basis. The Secretary contends that she is not required to apply the standard to all other toxic materials in the same manner as mercury. She states that "MSHA's consistency of application from substance to substance is based on a decision-making process that will look to factors such as the nature of the material, its physical properties, warning properties, paths of exposure, feasibility of detection and control, and the standard of care." (S. Reply Br. at 26). She also states that she will "rationally apply the regulation to these other substances in other environments on the basis of the nature of the toxic material, including its health effects and routes of absorption, the nature of the environment and feasibility of detection and control, as well as the recognized levels and types of control mandated by reasonably prudent industrial hygiene and occupational health practice." (S. Br. at 35).

I agree with the Secretary that the fact that she does not enforce section 56.20014 with respect to silica dust, for example, in the same way that she enforces the standard with respect to mercury is not important when considering deference. There are many reasons why the Secretary may not be as stringent with silica dust in lunchrooms including, but not limited to, the impracticality of controlling low levels of silica dust at mines. It appears to me that the Secretary is concerned that Newmont was not doing all that it could to eliminate elemental mercury in the offices. She believes that Newmont was not following recognized industrial hygiene practices with respect to the control of mercury in the offices. Her interpretation is entitled to deference even though she may not interpret the standard as stringently with respect to other toxic materials.

In conclusion, I find that Newmont has not presented sufficient reason to not apply the concept of deference to the Secretary's interpretation of section 56.20014. In addition, I find that the Secretary's interpretation is reasonable and consistent with the purpose of the Mine Act. The prevention of occupational illness is one of the fundamental purposes of the Mine Act. *Consolidation Coal Co.*, 8 FMSHRC 890, 895 (June 1986). Standards under the Mine Act are broadly interpreted to achieve the goal of protecting the safety and health of miners. Section 56.20014 does not contain a dose level and there is no implication that the term "hazardous material" only applies if the material is detected at a level above the TLV. Thus, I conclude that the Secretary's interpretation of the standard is reasonable. Newmont is not contending that reducing the level of mercury to detectable levels was technically or economically infeasible. The record makes clear that significant reductions in mercury vapor levels can be obtained using available industrial hygiene practices. Other gold mines in northeast Nevada have successfully implemented these practices at their lunchrooms. Such practices include, for example, separating offices and control rooms from eating areas, locating changing rooms and boot washes adjacent to eating areas, and establishing positive pressure ventilation systems for eating areas. Newmont had previously instituted some of these measures for the lunchroom at its refinery and instituted such measures to abate the citation and order at issue here.

It is important to keep in mind that the Mine Act is a strict liability statute. *Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). When a violation of a standard occurs, the “operator is automatically assessed a civil penalty.” (*Id.* at 1197). The Mine Act imposes no general requirement that a violation of a standard create a safety or health hazard in order for the citation to be valid. *Allied Products Co.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982). Thus, if a condition violates a standard, a citation is proper. Newmont’s argument that the Secretary’s interpretation is unreasonable and not entitled to deference because she failed to demonstrate that the health of miners was directly affected is misplaced. I find that the Secretary established that the cited offices had been exposed to a toxic material as that term is used in the standard.

3. Would a Reasonably Prudent Person Have Reason to Know that Section 56.20014 Applied when Mercury is Detected at Levels Below the TLV?

As stated above, the plain language of the standard does not automatically lead to the interpretation that the Secretary advanced in this proceeding. I held that the Secretary’s interpretation is entitled to deference, however, because it is reasonable and consistent with the purposes of the Mine Act. A final and distinct inquiry is whether the Secretary provided mine operators with sufficient notice of the requirements of the standard. Would a person of ordinary intelligence know what was required by the standard or would he have to guess at its meaning?

The language of section 56.20014 is “simple and brief in order to be broadly adaptable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In “order to afford adequate notice and pass constitutional muster, a mandatory [health] standard cannot be ‘so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application’” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.”

*Id.* (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. “The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated.” *Diamond Roofing Co. V. OSHRC*, 528 F.2d 645, 649 (5<sup>th</sup> Cir. 1976).

Newmont argues that the Secretary failed to provide notice to mine operators that the safety standard applies when mercury is present in levels below the TLV. Newmont argues that based on MSHA's past enforcement actions, prior policy statements, and the Secretary's interpretation of the similar OSHA standard, a reasonably prudent person would agree with Newmont's interpretation. Newmont relies on the *I & I Manual*, discussed above, arguing that the only written guidance the Secretary has issued is contrary to her current interpretation. Newmont argues that the mining industry reasonably believed that the section 56.20014 was a food contamination standard and that mercury vapor below the TLV was never an issue with MSHA inspectors. It states that no policy statements were issued and no public announcements were made by the MSHA concerning its "new" interpretation of the standard.

Newmont also relies on the testimony of a number of witnesses. First, it points to the testimony of Margie Zalesak, MSHA's chief of health, that the Secretary's interpretation of the standard with respect to lunchrooms was never specifically communicated to the mining community. (Tr. 2758). Newmont argues that Ms. Zalesak could not articulate how MSHA exercises its enforcement discretion under the standard. (Tr. 2770-71). Michael Simmons, who was a foreman in the carbon-handling area at the time the citation and order were issued, testified on behalf of the Secretary. He testified that at the time the citation and order were issued he believed that the mine was in compliance with MSHA standards, as long as mercury vapor in the offices was kept below the TLV. (Tr. 1018-19). Dennis J. Tobin, MSHA's manager of the Elko, Nevada, field office, testified that he had always thought in terms of the TLV and had not thought about applying section 56.20014 to levels below the TLV. (Tobin Dep. at 21-22).<sup>2</sup> Mr. Tobin further testified that if a mine operator were to ask him what the word "toxic" means in section 56.20014, he would refer to the TLV book. (*Id.* at 54-55). Inspector Drussel testified that, in March 1995, his application of the "lunch room standard" changed. (Tr. 1203). Newmont contends that this change was made without any advance notice to Newmont or the mining community in general.

Thomas H. Koenning, chief of the toxic materials division of MSHA's Denver Safety and Health Technology Center ("Denver Tech"), testified that MSHA would not normally cite a work area where mercury was detected below the TLV because such levels are generally considered to be safe. (Koenning Dep. at 67). Galen Trabant, an industrial hygienist with Denver Tech, testified that the MSHA standard for mercury is 50  $\mu\text{g}/\text{m}^3$  and that he is not aware of any other MSHA standard for mercury exposure. (Trabant Dep. at 23). Mr. Trabant visited the South Area Gold Quarry on March 28, 1995, along with other MSHA officials and conducted a mercury health hazard survey, as described in the Denver Tech report. (Ex. R-4).

The Secretary approaches the notice issue from a different direction. She contends that Newmont knew that mercury vapor was present in the offices. She believes that she established that Newmont had "subjective knowledge that it needed to take effective steps to remedy

---

<sup>2</sup> At the hearing, upon joint motion of the parties, the deposition transcripts of a number of individuals were admitted into evidence in lieu of testimony.

mercury exposures in lunchrooms.” (S. Br. At 36). The Secretary points to steps Newmont took in 1992 to clean up an eating area in its refinery. She states that the fact that Newmont implemented the measures required by the standard at the refinery shows that it knew what the standard required. For example, a change area was provided at the lunchroom in the refinery and employees are required to remove coveralls and personal protective equipment before entering the lunchroom. The Secretary also states that although Newmont’s industrial hygienist advised employees not to eat or drink in “any mercury exposure area,” Newmont failed to provide an area for miners in carbon-handling where they could follow the industrial hygienist’s advice. (Ex. S-127 p. 1).

The Secretary also relies on a memorandum sent to Kim Redding, a miner at the facility, on March 2, 1995, from Frank Hanagarne, who was manager of carbon-handling and the refinery. (Ex. S-127 pp. 46-49). In that memo, Mr. Hanagarne discussed measures that Newmont uses to control employee exposure to mercury. Under the heading “Personal Hygiene,” Mr. Hanagarne stated that the company is “concerned about the lack of a separate clean area for a lunch room for the workers.” (*Id.* at 48). He went on to explain that Newmont purchased a trailer for this purpose and that it would be installed as soon as other necessary work was completed. The Secretary maintains that this memo shows that mine management knew that the offices were exposed to mercury, were “potentially contaminated,” and knew that remedial steps were necessary. (S. Br. at 37). The Secretary also contends that Newmont was put on notice of the requirements of the standard when, at an August 1994 meeting, Mr. Redding claimed that the offices violated section 56.20014 and read the standard aloud to management. (Tr. 377, 491-92, 920-21).

In addition, the Secretary relies on a NIOSH criteria document that “indicates that food and beverages should not be consumed in mercury work areas.” (S. Br. at 38; Ex. R-6 appendix III, Art. 7(a)). She also relies on the material safety data sheet for mercury that states: “Do not eat, drink, or smoke in any work area.” (Tr. 2628). In conclusion, the Secretary maintains that the text of the section 56.20014 and the factors set forth above provided more than enough notice of the requirements of the standard.

The Secretary’s argument that Newmont had subjective knowledge of the requirements of the standard is not well taken. The fact that Newmont took actions to improve the lunchroom for the refinery, that internal memoranda stated that managers were concerned about the lack of a clean lunchroom, or that Newmont was in the process of installing a trailer for use as a lunchroom does not establish that Newmont had knowledge of the Secretary’s interpretation of section 56.20014. In *Lanham*, a citation was issued for the failure of an independent contractor to wear a safety line while placing a tarp over the bed of a haul truck. There is no dispute that a reasonably prudent person would see a danger of falling when standing on the top of a haulage truck unrolling a tarp. Indeed, in that case the driver of the truck fell about ten feet to his death while unrolling the tarp. The issue in that case was whether a reasonably prudent person would know that the safety standard required the use of safety belts and lines when placing a tarp on a truck. The MSHA inspector testified that he had never observed a safety belt or line being used

on a truck and had not previously “considered the standard applicable to the tarping of trucks.”  
13 FMSHRC 1343.

The issue under the reasonably prudent person test in the present case is not whether Newmont was on notice that mercury is hazardous or that mercury was present in the offices. The issue is whether a reasonably prudent person would have reason to know that mercury vapor in a range of 22 to 24  $\mu\text{g}/\text{m}^3$  was a toxic material that was prohibited in an area where food or beverages are consumed or stored. An agency provides notice of the meaning of the standard through the language of the standard itself, written interpretations that it has issued, prior enforcement actions, and other actions it has taken that shed light on its interpretation. Although this is a close issue, I find by a preponderance of the evidence that a reasonably prudent person with knowledge of the mining industry and the protective purposes of the standard would have recognized that beads of liquid mercury and mercury vapor in the range of 22 to 24  $\mu\text{g}/\text{m}^3$  were prohibited where food or beverages were stored or consumed under the standard.

First, the language of the standard itself indicates that areas where food or beverages are consumed require more stringent controls against toxic materials than work areas at a mine. If, as argued by Newmont, only substances above the TLV were prohibited in eating areas, then the regulation is redundant. The same standard of care would be required in lunchrooms as in the plant itself. If mercury is not a hazardous material, as that term is used in the standard, unless it is present in a quantity or dose greater than the established TLV, then section 56.20014 serves no purpose with respect to areas where people eat and store food and beverages. Such a reading does not square with the purposes of the Mine Act or the language of the standard when read in conjunction with section 56.5001. Construing sections 56.5001 and .20014 harmoniously, a reasonably prudent person would conclude that areas where persons eat or store food cannot be exposed to toxic materials, including mercury, even if the TLV were not exceeded. That is, section 56.20014 should not be construed to incorporate the TLV for mercury as a floor below which exposure is permitted under the standard. Such a person would realize that section 56.20014 is more stringent than section 56.5001 where food is stored and eaten.

The mercury readings obtained by Inspector Drussel were not a rare excursion above the norm; his readings were consistent with the readings that had been taken in the offices by Newmont for the previous year. In addition, the bead of mercury that was noted was not such an unusual event as to constitute an aberration. A reasonably prudent person would recognize that mercury is a toxic material. The fact that Inspector Drussel may not have detected a quantity of mercury that is universally considered to be a harmful dose at the time of his inspection does not change that fact. I find that a reasonably prudent person would interpret the standard to require an operator to reduce the amount of mercury in eating and drinking areas to levels that are as low as can reasonably be obtained. As stated above, existing technology allows mine operators to reduce the amount of mercury in eating areas to levels that are significantly below that measured by Inspector Drussel. The standard gives sufficient notice to reasonable persons that mine operators are required to take steps to prevent eating areas from being exposed to mercury, at least in the quantities detected by the inspector.

Newmont's argument that MSHA's prior inconsistencies were misleading is not well taken. Although I recognize that the *I & I Manual* was relied upon by the metal mining industry for a number of years, a reasonably prudent person would not rely on an interpretive manual in 1995 that was explicitly superseded in 1988. An interpretive manual is generally not binding on the Secretary when it is in effect, and it is unreasonable to rely on such a manual six years after it has been replaced.

In addition, the testimony cited by Newmont does not support its argument. Ms. Zalesak simply stated that MSHA had not issued a policy letter with respect to section 56.20014. The Secretary is not under a duty to issue interpretive bulletins for safety and health standards. The testimony of Mr. Tobin must be read in context. At the time of the inspection, Mr. Tobin worked in a different MSHA district where mercury contamination was not an issue. He stated that he had not read the subject standard prior to becoming a field office supervisor in Nevada and was not experienced with mercury issues. (Tobin Dep. at 24, 50). A reasonably prudent person under the Commission's test is someone who is familiar with the subject matter at hand, not a person who has not thought about the issue.

Mr. Simmons testified that although he believed the mine was in compliance as long as the TLV was not exceeded, he had his "own suspicions, but ... kept his mouth shut." (Tr. 1020). Mr. Simmons questioned in his own mind whether the conditions in the offices created a hazard. Finally, the testimony of MSHA personnel from Denver Tech does not support Newmont's position. They testified about section 56.5001 and the TLV. They did not state that unless the TLV is violated, there can be no violation of section 56.20014.

Inspector Drussel testified that he had not applied section 56.20014 to the cited offices prior to March 1995. (Tr. 1203). Prior to the time of his inspection, he did not believe that readings below the TLV violated the standard. (Tr. 1205-06). As with Mr. Tobin, he had not previously considered whether section 56.20014 should be applied to mercury vapor in eating areas. MSHA's failure to enforce a standard does not establish MSHA policy that can be relied upon by a reasonably prudent person. A mine operator cannot reasonably rely on the lack of enforcement by MSHA to establish that a standard was not violated.

I believe that this case presents a different situation than in *Lanham*. In that case, the only testimony on the issue was from the MSHA inspector. He testified that he had never cited an operator for failing to tie off when tarping a truck and that "he had never observed safety belts or lines used in such situations in more than 40 years of mining experience." 13 FMSHRC 1710-11 (ALJ on remand). The issue was whether a reasonably prudent "person would have recognized that attaching a tarp to a truck without utilizing safety belts and lines was prohibited by the regulation." *Id.* at 1711. Based on the evidence, the judge determined that the "practice of using safety belts and lines while tarping trucks is rarely if ever followed in the coal industry." *Id.* at 1712. In the present case, on the other hand, the record contains at least some evidence that other gold mine operators provided a separate eating area for its employees that was kept as free of mercury as was reasonably possible. (Tr. 160-63, 1533, 1542-45). The testimony cited by Newmont establishes that Inspector Drussel, had not previously considered how to apply the

standard to Newmont's offices when mercury was present at levels below the TLV. He did not testify that he had previously thought about the issue and determined that the standard was not violated in such circumstances. Moreover, neither Inspector Drussel nor any other witness testified that metal mines rarely, if ever, provide clean lunchrooms for employees.

As stated above, I find that the mining industry was provided with sufficient notice of the requirements of section 56.20014. I believe, however, that the issue is a close one and that MSHA could and should have done a better job of communicating the standard's requirements to the mining community for the benefit of miners. The failure to provide such guidance unnecessarily delayed the day when all mines provide clean lunchrooms for miners. I have taken Newmont's arguments into consideration when evaluating the unwarrantable failure allegations and the negligence criterion of section 110(i), as discussed below.

#### 4. Were the Violations of a Significant and Substantial Nature?

An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

In order to establish that the violations are S&S, the Secretary must establish: (1) the underlying violation of the health standard; (2) a discrete health hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. *Consolidation Coal Co.*, 8 FMSHRC 890, 897 (June 1986).

I find that the Secretary established the first two elements of the Commission's S&S test, but did not establish the third element. Under the third element, the Secretary must establish that it is reasonably likely that the hazard contributed to by the violation will result in an illness, but is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In support of her position, the Secretary argues that Congress unambiguously declared itself in favor of preventing disability from any occupationally related disease. She contends that "the evidence supports the conclusion that the failure to control mercury exposures in the two break areas, if allowed to continue, assuming normal continued mining operations, could reasonably be expected to cause mercury-related illness." (S. Br. at 41). The Secretary relies on the level of mercury that was present in the offices in the weeks prior to March 14, 1995, the reports of beads of liquid mercury in the offices, and the lack of precautions to prevent employees from bringing contaminated clothing

and personal protective equipment into the offices. The Secretary also relies on a different TLV for mercury that has not been adopted by MSHA.

I agree that the elimination of occupational illnesses is one of the key goals of the Mine Act. Nevertheless, there has not been any showing that the exposures resulting from the violations contributed to any mercury related illness. It is important to put the violations into context. Newmont violated section 56.20014 because it permitted employees to eat, drink, and store food and beverages in an area exposed to a toxic material. The fact that mercury was present in the offices was a violation only because of the presence of food and beverages. The testimony established that employees spent a significant amount of time in the offices, not because they were eating or drinking beverages, but because their work required them to be in the offices. If Newmont had established a separate lunchroom in 1994, the employees' exposure to mercury would not have been significantly reduced at the time of the inspection. Employees would only be in the lunchroom while eating lunch and perhaps during breaks.<sup>3</sup>

Assuming continued normal mining operations, employees would be working in the offices and the plants throughout the day and would be exposed to mercury vapor at about the same levels as detected by Inspector Drussel and measured by Newmont. There is nothing in the record to indicate that employees would have changed their behavior in the offices if food and beverages had been prohibited in the offices. They would have taken off their personal protective equipment, including respirators, upon entering the offices and worked at the desks and control panels. It is also highly likely that employees would have taken breaks in the offices, even though they could not eat or drink. Thus, employees would have been exposed to the same levels of mercury, except during their lunch break, without violating MSHA standards. The Secretary's witnesses were concerned about the exposures in the offices because employees take off their protective equipment and let "down their guard" when they eat and consume beverages. (Tr. 2370-71, 2377-78). But, as stated above, I find that these concerns would have existed in the offices whether or not Newmont violated section 56.20014. (Tr. 3109-10). Newmont abated the violations by establishing a separate lunchroom in a trailer adjacent to the AARL building. The issue is whether the two violations were S&S, not whether exposures to  $24 \mu\text{g}/\text{m}^3$  of mercury are S&S in the abstract. There has been no showing that food or beverages were being contaminated with mercury and it is highly unlikely that anyone would become ill by ingesting small amounts of mercury.

The Secretary sought to establish the S&S nature of the violations by introducing evidence of the medical records of Kim Redding. I held that such records were not admissible, because they are not relevant. Even if I assume that Kim Redding suffered from a mercury-

---

<sup>3</sup> I can safely assume that Newmont would not allow its employees to spend lengthy periods of time in a separate lunch room away from the plants and offices. Employers require employees to remain at their duty stations except during established breaks. In addition, the Secretary established that Newmont required its carbon-handling employees to remain in the offices or the plants at all times while the plants were running.

related illness, I cannot relate such an illness back to the violations at issue. Mr. Redding spent a considerable amount of time in the plants where his exposure to mercury was generally greater. He also spent a considerable amount of time in the offices. As stated above, he would have spent about the same amount of time in the offices even if the standard were not violated. Prior to mid-1994, Newmont employees were not required to use respirators while in the plant, so Mr. Redding was exposed to mercury vapor throughout the working day, even when he was not in the offices.

The Secretary also relies on the TLV established by the American Conference of Governmental Industrial Hygienists ("ACGIH") for mercury in 1996. This TLV has not been adopted by MSHA. The 1996 TLV is  $25 \mu\text{g}/\text{m}^3$  for an eight-hour shift. In early 1995, the employees in the Carbon-Handling Department were working 12-hour shifts. The Secretary argues that for a 12-hour shift, the 1996 TLV should be  $16.5 \mu\text{g}/\text{m}^3$  because each shift is 50 percent longer.

I reject the Secretary's argument for several reasons. First, as stated above, employees spend the vast majority of their time in the offices working, not eating or drinking. If Newmont had previously established a separate lunchroom, the employees' exposure to mercury vapor would not have been significantly different. The Secretary did not establish a connection between the violations and the exposure. Second, the Secretary has not adopted the 1996 TLV for mercury. The Secretary cannot contend that the health of an employee is protected throughout the plant including areas where personal protective equipment is not generally worn so long as he is not exposed to more than  $50 \mu\text{g}/\text{m}^3$  over an eight-hour period, but that any exposure above  $25 \mu\text{g}/\text{m}^3$  in an area where food or beverages are consumed creates a significant and substantial health hazard.<sup>4</sup> If food or beverages are not consumed or stored in the offices, the Secretary allows employees to be exposed to up to  $50 \mu\text{g}/\text{m}^3$ . Thus, if I accept the Secretary's argument, employees can be legally exposed to levels of mercury in the plants that are reasonably likely to result in an illness. Under the Secretary's regulatory scheme not only are such exposures not S&S, they are not even violations. If the Secretary believes that a miner's health is endangered if he is exposed to more than  $25 \mu\text{g}/\text{m}^3$  of mercury vapor over an eight-hour shift, she should amend section 56.5001 through rulemaking.

Finally, Newmont established by a preponderance of the evidence that it had in place a mercury medical monitoring program to protect the health of all employees. Newmont established this program in mid-1994 under the supervision Dr. James Craner, an occupational health physician, and Dr. David Hogle, a local physician. The program was designed to monitor the mercury levels in Newmont employees. Employees in the carbon-handling department were given annual physical examinations to test for possible toxic effects of mercury and submitted 24-hour urine samples. The samples were analyzed for mercury content using a Biological

---

<sup>4</sup> Although Newmont took a large number of mercury readings in the offices, these readings are not a time-weighted average. Thus, a high mercury reading may be an abnormal, short-term, excursion that would not be reflected in a time-weighted mercury reading.

Exposure Index ("BEI"). The BEI is a well-recognized method, developed by the ACGIH, of measuring the exposure of an individual to a hazardous substance such as mercury. It takes into consideration all exposure routes, not just inhalation of mercury vapor. Dr. Melissa McDairmid, an associate professor of medicine at the University of Maryland and former chief medical officer with OSHA, testified on behalf of the Secretary. (Tr. 2269-70). She testified that the BEI is a better indicator of individual exposure to a toxic substance than determining an individual's exposure through the TLV for that substance because it "measures exactly what got into the worker." (Tr. 2313). The BEI for mercury is 35 micrograms per gram of creatinine in the urine. Newmont set its internal standard at 20 micrograms for an extra measure of protection. Dr. McDairmid testified that 20 micrograms is a well-recognized cut-off point for mercury. (Tr. 2347-48). In 1994 and 1995, no employee exceeded 30 micrograms while eight employees tested between 20 and 30 micrograms in 1994, and 2 employees tested in that range in 1995. (Ex. R-6 p. 7). Of course, this procedure measured mercury exposure from throughout the plants, not just from the offices.

Newmont also collected weekly urine samples from carbon-handling employees. These samples were not analyzed using the BEI in micrograms per gram of creatinine in the urine. Instead, mercury levels were measured in parts per billion. This measurement does not take into consideration such factors as the weight of the individual, the amount of liquid consumed, and the individual's age. (Tr. 2348-51). Without correcting for creatinine, outside factors can influence the reading and significantly skew the results plus or minus 30%. (Tr. 3001-04). Nevertheless, such measurements provide a rough indication of an individual's mercury intake, at least if enough samples are taken over a period of time. Several individuals had readings above 35 micrograms. (Tr. 2356-57; Ex. S-206). If a group of individuals consistently provides samples at that level over a period of time and these samples are confirmed by samples that are corrected for creatinine, it is reasonably likely that some of the group will develop health problems. (Tr. 2358-59). These high readings, however, could have been caused by mercury exposure in areas of the AARL and ZADRA facilities where employees may be legally exposed to up to 50  $\mu\text{g}/\text{m}^3$  of mercury vapor. There is no evidence to tie these readings to the offices, much less to exposure caused by the consumption or storage of food and beverages.

Dr. Jonathan B. Borak, associate clinical professor of internal medicine at Yale University, testified on behalf of Newmont. Dr. Borak teaches occupational medicine and is involved in developing practice standards in occupational medicine. He reviewed the medical monitoring program in place in Newmont and concluded that the program was a "very specific and complete protocol" and it "exceeded the standard of care." (Tr. 2999-3001, 3083-85). I credit Dr. Borak's testimony in this regard. While Newmont's program did not guarantee that no employee would be overexposed to mercury, it reduced the risk of overexposure.

Dr. McDairmid testified that one cannot determine an exposure limit, whether by TLV or BEI, "below which you can reliably guarantee that no one will suffer abnormal health consequences." (Tr. 2309). She further stated that "it is very difficult to choose a specific exposure level and be able to say with surety that no [employees] will suffer health consequences if they are exposed below that concentration." (Tr. 2308, 2467-68). Such concerns cannot be the

basis for an S&S finding in this case because they are too vague and undefined. There has been no showing that the violations in these cases presented a reasonable likelihood that the hazard contributed to by the violations will result in an illness, assuming continued mining operations.

#### 4. Were the Violations the Result of Newmont's Unwarrantable Failure?

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (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 Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has held that "a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

The Secretary argues that Newmont knew that mercury vapor was present in the offices for at least four years prior to the date the citation and order were issued. Newmont's "failure to remove employees from the hazard of exposure to mercury, a well-recognized toxic material, in view of the long history of exposure in the cited areas, was unjustifiable." (S. Br. at 46). She also argues that Newmont had been warned of the violation. For example, the Secretary refers to a memorandum of a former industrial hygienist for the company warning that drawing air into the AARL office from the plant "could potentially increase the mercury exposure" for employees in the office. (Ex. S-127 p. 3). The Secretary also relies on the changes made at the refinery lunchroom in 1992 and the complaints made by employees. The Secretary also maintains that Newmont's reliance on the TLV was misplaced and that, in any event, some of the Jerome readings in the offices were above the TLV.

I have no difficulty in concluding that the Secretary did not meet her burden of proving that these violations were the result of Newmont's unwarrantable failure. In reaching this conclusion, I have relied on a number of factors. First, for the reasons set forth above in discussing the reasonably prudent person test, I find that the Secretary made little effort to advise the mining industry of the requirements of section 56.20014. The Secretary had not been enforcing this standard with respect to mercury at gold mines. Newmont's mine had been inspected on a number of occasions and MSHA inspectors had been in the subject offices. Inspector Drussel, for example, testified that he had not applied the provisions of the standard to the offices prior to 1995, because he did not believe that readings below the TLV violated the standard. (Tr. 1203-06). Although I found that the mining industry was provided with sufficient notice of the terms of the standard to meet the reasonably prudent person test, I hold that the evidence discussed with respect to that issue is relevant here. I find that such evidence helps to establish that Newmont's failure to keep the level of mercury in the offices below that detected by Inspector Drussel was not the result of its reckless disregard or indifference to the requirements of the standard or a serious lack of reasonable care.

Second, Newmont relied, to a large extent, on its medical evaluation program to make sure that employees were not over-exposed to mercury. Rather than separately focusing on the offices, Newmont took into consideration employee exposure to mercury from all sources. This program is described in detail above. While Newmont's program was not perfect, it demonstrates that Newmont was concerned about employee exposure to mercury, at least since mid-1994.

Third, the Secretary's argument that some of the Jerome readings in the offices "exceeded the TLV" is misplaced. The fact that Jerome readings above  $50 \mu\text{g}/\text{m}^3$  are detected does not indicate that the TLV was exceeded because Jerome readings are not time-weighted. In addition, the citation and order charge that certain specified amounts of mercury vapor were detected in the offices. Although the historic readings kept by Newmont help validate Inspector Drussel's measurements and establish a history of mercury vapor in the offices, I base my decision in this case on the conditions described in the citation and order. Newmont has never been cited for a violation of the TLV for mercury anywhere in its carbon-handling operations. It established a respirator program in mid-1994 to protect employees in the AARL and ZADRA plants. Although this is not an important factor in my decision, it establishes that Newmont was not indifferent to mercury exposure.

Fourth, Newmont was in the process of installing a trailer outside the AARL building in March 1995 to be used for storing and consuming food and beverages. The trailer was not being used at the time of the inspection because water and power lines needed to be connected. The trailer was used to abate the citation on the day the citation and order were issued.

I conclude that the Secretary did not establish that the violations were caused by Newmont's aggravated conduct. Although the violations had existed for a considerable length of time, there were mitigating notice issues, as discussed above. Newmont had been making considerable efforts to monitor and control mercury exposure throughout the carbon-handling department without focusing specifically on the offices. Finally, Newmont had not been put on notice that greater efforts were necessary beyond what it was in the process of implementing at the time of the MSHA inspection. Although a case could be made that Newmont was not doing enough prior to August 1994, the record makes clear that it was making significant improvements in the fall of that year and in the first quarter of 1995.

I find that the Secretary established, however, that the violations were caused by Newmont's moderate negligence. First, I agree with the Secretary that, given the presence of food and beverages in the offices, Newmont was not doing enough to control the entry of mercury into the offices. Standard industrial hygiene practices require that when employees enter eating areas certain "housekeeping" precautions be taken. Personal protective equipment and any contaminated clothing should be removed prior to entering the eating area. Employees should be able to clean their boots and wash their hands prior to entry. In addition, the eating area should be designed so that it can be easily kept clean. Michael Lynham, an industrial hygienist with Denver Tech, described an optimal program for constructing and maintaining a clean lunch area. (Tr. 2047-65; Exs. S-20 & S-25). Although section 56.20014 does not necessarily require a

program as elaborate as the one described by Mr. Lynham, I find that Newmont could have been doing more to control mercury in the offices due to the fact that food and beverages were there.

Second, general principles of industrial hygiene provide that individuals should not eat or drink in the presence of mercury. The material safety data sheet and the NIOSH criteria document for mercury state that employees should not eat or drink in any mercury work area. (Tr. 2628; Ex. R-6 appendix III, Art. 7(a)). Moreover, MSHA developed a health hazard information card for mercury entitled "Working with Mercury." (Ex. S-76). This card states, on the back, that "[f]ood should not be stored, dispensed, or eaten in any place that might be contaminated with mercury." (*Id.*; see also 2631-34) While these sources relate to all forms of mercury, not just elemental mercury, they help to establish that Newmont's failure to provide a cleaner area for eating and storing food was the result of its moderate negligence.

## B. The Citation and Order Alleging Violations of Section 56.20011

### 1. Introduction

The boneyard where the scrubber was stored is in remote areas of the mine property. Employees are not generally in the boneyard unless they are looking for a piece of equipment that may be of use. A piece of equipment may be removed from this area for reuse from time-to-time or parts from the equipment may be removed. In some instances, a torch may be used on the equipment to remove a piece. Thus, the boneyard was used as a salvage yard on an occasional basis.

At the time of the inspection, the boneyard was enclosed with a berm and was equipped with a gate. The gate was not locked and there were no warning signs indicating that mercury was present or could be present in the area. Inspector Drussel observed beads of mercury inside the pontoons of the scrubber. (Tr. 1137-40; Ex. S-5). He took a mercury reading with his Jerome meter at a hole in the pontoon and obtained a reading of 145  $\mu\text{g}/\text{m}^3$ . (Tr. 1142-43; Ex. S-3 p. 8). He took another reading of 514  $\mu\text{g}/\text{m}^3$ . *Id.* The scrubber had been originally used in the AARL and was placed on a leach pad for cleaning several months before the MSHA inspection. Baseline testing for mercury was conducted by Newmont's industrial hygiene department and readings around 3  $\mu\text{g}/\text{m}^3$  were obtained. (Tr. 1786; Harmon Dep. 113; Ex. R-28). The scrubber leaked mercury while it was at the leach pad. (Ex. S-126 "Investigation Report" dated 8/4/94). Newmont cleaned the scrubber and also engaged an independent contractor to clean the scrubber at some point after that occurrence but before it was moved to the boneyard. (Tr. 954-56, 979) Wipe samples of the scrubber were taken for analysis in October 1994. (Tr. 1151-53; 614, Ex. S-110 pp 1-7). The scrubber was moved to the boneyard prior to Inspector Drussel's inspection on March 14, 1995. The inspector issued Order No. 4140246 under section 104(d)(1) of the Mine Act alleging a non-S&S violation of section 56.20011. The condition was abated by moving the scrubber to a different location and labeling it as a hazard.

On the previous day, Inspector Drussel saw an old dewatering screen from the ZADRA facility near the AARL building. The screen was next to the ball storage area for the ball mills.

He observed beads of mercury on the screen. (Tr. 941, 1114). He did not take any samples for mercury. (Tr. 1246-47). The area was not posted or barricaded. Inspector Drussel issued Citation No. 4140248 under section 104(a) of the Mine Act alleging a non-S&S violation of section 56.20011. The condition was abated by moving the screen to a different location and labeling it as a hazard.

## 2. Did Newmont Violate Section 56.20011?

The cited standard provides, as relevant here, that areas “where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches.” Newmont contends that it did not violate this standard because the Secretary’s witnesses only testified that the scrubber and screen presented a “potential hazard” to employees. Newmont contends that the language of the standard makes clear that an actual hazard must exist. In addition, it points to the Secretary’s *Program Policy Manual*, which provides that the standard applies to areas where “health or safety hazards exist but are not obvious.” Newmont maintains that any mercury on the scrubber or screen did not pose a hazard to anyone in those areas. As proof of its argument, Newmont refers to the sampling done at the scrubber and screen by its safety director after the order was issued. Devices used to measure an employee’s exposure to mercury were hung directly above the equipment for a full eight-hour shift, as if someone were standing above each piece for an entire shift. In both instances the results were below the TLV for mercury.

I find that the Secretary established a violation in each instance. Newmont’s argument that tries to draw a distinction between a hazard and a “potential” hazard is without merit. A potential hazard is simply a hazard that may cause harm. Any hazard will fit that definition. If a wooden box filled with explosives were present in the boneyard, it would present a potential hazard. Such a box could sit there for 20 years and not harm anyone, or someone could be killed the day after it is put there. The issue is whether the scrubber and screen presented a health hazard that was not immediately obvious. I find that the mercury on this equipment presented a hazard to employees. (Tr. 2691-99). An employee trying to move the equipment, for example, could get mercury on his hands or clothing. As a consequence, the employee could breathe the mercury fumes for a considerable length of time. If this exposure is the employee’s only exposure to mercury, it is highly unlikely that he will be harmed in any way. Employees at the mine, however, are exposed to mercury vapor from many sources so such an exposure would add to their total body burden. The fact that, at the time of the inspection, the mercury on the screen had formed an amalgam is not controlling. In addition, I find that the hazard presented by the mercury vapor, which cannot be seen or smelled, was not immediately obvious.

The Secretary interprets the phrase “health or safety hazard” in the standard broadly for the protection of miners. Given the purposes of the Mine Act, the Secretary’s interpretation is reasonable. She is not required to establish that the alleged hazard created an imminent danger or that the hazard was likely to cause an employee immediate harm. As stated with respect to the violations of section 56.20014, I concluded that mercury vapor is a toxic material. I incorporate my analysis of those violations here and conclude that the mercury observed by Inspector Drussel

created a health hazard for employees. As with the section 56.20014 violations, I find that the Secretary is not required to show that mercury vapor violated the TLV in order to establish a violation of section 56.20011. I believe that the regulation is rather clear on its face and I defer to the Secretary's interpretation, in any event. I also conclude that section 56.20011 does not present the notice issues that were presented by section 56.20014. I find that the language of the standard provides a reasonably prudent person with sufficient notice of its requirements. In addition, the *Program Policy Manual* makes clear that storage facilities and dumps commonly contain toxic substances such as acids, gases, dusts, and radiation that create imperceptible health hazards. A reasonably prudent person would recognize that equipment in the boneyard that had mercury on its surfaces presented a hazard that was not immediately obvious.

I find that these violations were not serious. It was unlikely that anyone would be harmed by the mercury on the screen and scrubber because of their location, the small quantity of mercury present, and the low levels of fumes emitted. It must be remembered that Inspector Drussel took his Jerome readings at the scrubber next to a hole that had been cut into the pontoons so the readings were much higher than what an employee would likely be exposed to if he were working on or around the scrubber. Inspector Drussel determined that the violations were not S&S.

### 3. Was the violation in the Boneyard the Result of Newmont's Unwarrantable Failure?

The Secretary contends that the scrubber violation was caused by Newmont's unwarrantable failure because she believes that Newmont was aware of the hazard created by the scrubber but did nothing to prevent employees from being exposed. The Secretary relies to a large extent on conditions that existed when the scrubber was still at the leach pad, such as the report that mercury was leaking from the scrubber in August 1994. (Ex. S-126 "Investigation Report" dated 8/4/94). The Secretary contends that this report demonstrates that Newmont knew that the scrubber created a hazard and that it needed to be posted. The Secretary points to the testimony of a Newmont supervisor that he wanted the scrubber to be encased in concrete. (Sawyer Dep. at 182-83). The Secretary also maintains that the wipe samples that were taken after the scrubber was cleaned by a contractor indicated that mercury was still present.

I find that the Secretary did not establish that this violation was caused by Newmont's unwarrantable failure to comply with section 56.20011. First, the condition of the scrubber in August 1994 is of little relevance. While it might have been a good idea to encase the scrubber in concrete, the fact that Newmont did not do so does not establish its unwarrantable failure. Instead, Newmont attempted to clean the scrubber. When testing indicated that mercury residue was still present on the scrubber, Newmont had a contractor clean the scrubber more thoroughly before it was moved to the boneyard. (Tr. 979, 1043-45, 1635-36, 1784-87; Ex. R-28).

The Secretary states that a conversation between Inspector Drussel and Newmont officials demonstrates that Newmont was aware that the scrubber still contained a significant amount of mercury after it was cleaned a second time. (Tr. 1151-52, 614; Ex S-110 pp 1-7). This evidence is too imprecise to make an unwarrantable failure finding. The record does not reveal when the

scrubber was cleaned by the contractor or when it was moved to the boneyard. The exhibit is not of much help because I am unable to interpret it or determine when the samples were taken in relation to the events at issue. It is not clear to me that Newmont management knew that the scrubber contained significant amounts of mercury when it was moved to the boneyard. The Secretary bears the burden of proof on this issue. I find that the Secretary established that both violations of section 56.20011 were the result of Newmont's moderate negligence.

#### **IV. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. I find that Newmont was issued about 58 citations and orders in the 24 months preceding March 14, 1995. (Tr. 1500-07; Ex. S-2). I also find that Newmont is a large gold mine operator. I further find that the penalties assessed in this decision will have no effect on Newmont's ability to continue in business and that all of the violations alleged in the citations and orders were quickly abated in good faith. I find that the gravity of the section 56.10014 violations was low for the same reasons that I found that the violations were not S&S, as set forth above. I find that Newmont's negligence with respect to these violations was moderate for the reasons set forth in the unwarrantable failure discussion, set forth above. I find that the gravity of the section 56.20011 violations to be low, as acknowledged by Inspector Drussel. I also find that Newmont's negligence with respect to these violations was moderate. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

#### **V. ORDER**

The parties presented a great deal of evidence in these cases. Because of the size of the record, I could not discuss in this decision all of the testimony and exhibits that were admitted into evidence. Any evidence in the record that is not consistent with my findings and conclusions in these cases is hereby rejected. The parties also presented a large number of motions in these cases. These motions were made in writing or were presented orally at the hearing. Such motions were made prior to the hearing, during the hearing, and after the hearing. I ruled on the vast majority of these motions. Any motions that were not granted or otherwise ruled upon are hereby denied.

Based on my findings and conclusions set forth above and the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I enter the following order:

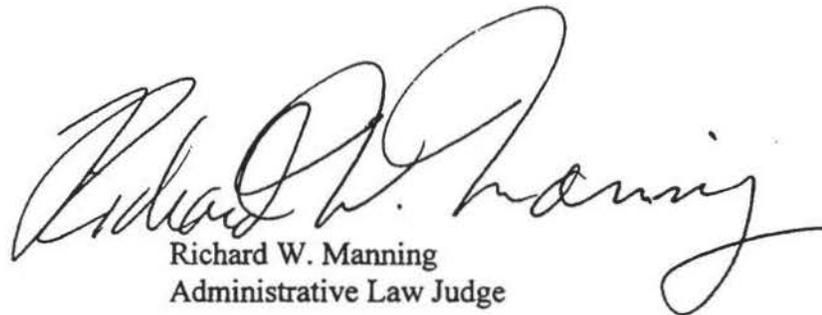
1. Citation No. 4140245 - This citation is affirmed, but is modified to a section 104(a) citation. The S&S and unwarrantable failure determinations are deleted, the gravity is found to be low, and the violation is found to have been caused by Newmont's moderate negligence. A penalty of \$600.00 is assessed for this violation of 30 C.F.R. § 56.20014.

2. Order No. 4140246 - This order is affirmed, but is modified to a section 104(a) citation. The S&S and unwarrantable failure determinations are deleted, the gravity is found to be low, and the violation is found to have been caused by Newmont's moderate negligence. A penalty of \$600.00 is assessed for this violation of 30 C.F.R. § 56.20014.

3. Order No. 4140247 - This order is affirmed, but is modified to a section 104(a) citation. The unwarrantable failure designation is deleted and the violation is found to have been caused by Newmont's moderate negligence. A penalty of \$300.00 is assessed for this violation of 30 C.F.R. § 56.20011.

4. Citation No. 4140248 - This citation is affirmed and a penalty of \$300.00 is assessed for this violation of 30 C.F.R. § 56.20011.

Accordingly, the citations and orders set forth above are hereby **AFFIRMED**, as modified in this decision, and Newmont Gold Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,800.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

Distribution:

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

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Certified Mail)

Henry Chajet, Esq., and David Farber, Esq., Patton Boggs, 2550 M Street, NW, Washington, DC 20037-1350 (Certified Mail)

RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
1730 K STREET, N.W., 6TH FLOOR  
WASHINGTON, D.C. 20006

October 30, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
Mine Safety and Health	:	
Administration, (MSHA),	:	Docket No. KENT 93-369
Petitioner	:	A.C. No. 15-14074-03634
	:	
v.	:	
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	Martwick Underground

**ORDER**

Before: Judge Merlin

It is hereby **ORDERED** that a penalty of \$189, the original penalty amount, be **ASSESSED** in this case and that the operator **PAY** this amount within 30 days of the date of this order.

It is further **ORDERED**, that this case be **DISMISSED**.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Caroline A. Henrich, Esq., Peabody Coal Company, P.O. Box 1233, Charleston, WV 25324

jhe