

NOVEMBER 1997

COMMISSION DECISIONS

11-14-97	Jim Walter Resources, Inc.	SE 95-140	Pg. 1761
11-20-97	Lion Mining Company	PENN 94-71-R	Pg. 1774
11-24-97	Cyprus Cumberland Resources Corp.	PENN 95-75	Pg. 1781

ADMINISTRATIVE LAW JUDGE DECISIONS

11-03-97	Bob Bak Construction	CENT 97-61-M	Pg. 1791
11-04-97	Faith Coal Company	SE 91-97	Pg. 1797
11-18-97	Stillwater Mining Company	WEST 96-281-RM	Pg. 1803
11-25-97	Harlan Cumberland Coal	KENT 94-996	Pg. 1817
11-26-97	Basin Resources, Inc.	WEST 96-179	Pg. 1823

ADMINISTRATIVE LAW JUDGE ORDERS

11-07-97	Bailey's Limestone Quarry	CENT 97-116-M	Pg. 1855
11-12-97	Independence Coal Company	WEVA 97-130	Pg. 1858

NOVEMBER 1997

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

Newmont Gold Company v. Secretary of Labor, MSHA, Docket No. WEST 97-164-RM,
etc. (Judge Cetti, October 14, 1997)

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket No. SE 94-244-R.
(Judge Melick, October 15, 1997)

Review was denied in the following cases during the month of November:

Clyde Perry v. Phelps Dodge Morenci, Inc., Docket No. WEST 96-64-DM.
(Judge Bulluck, October 16, 1997)

Secretary of Labor, MSHA v. Windsor Coal Company, Docket No. WEVA 97-34.
(Judge Fauver, October 20, 1997)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 14, 1997

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

v.

JIM WALTER RESOURCES, INC.

:
:
:
:
:
:
:
:
:

Docket No. SE 95-140

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

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is Commission Administrative Law Judge T. Todd Hodgdon's determination that Jim Walter Resources, Inc. ("JWR" or "Jim Walter"), violated 30 C.F.R. §§ 75.323 and 75.342 and that the violations were the result of JWR's unwarrantable failure.¹ 18 FMSHRC 21 (January 1996) (ALJ). The Commission granted JWR's petition for discretionary review ("PDR") challenging those findings. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

The No. 2 longwall in JWR's No. 7 Mine, an underground coal mine in Alabama, was inspected by Kirby Smith, an MSHA inspector, on August 25, 1994. 18 FMSHRC at 23. While walking the length of the No. 2 longwall, from headgate to tailgate, at about the longwall's mid-point Smith began noticing that plastic line curtains had been rolled out on the mine floor. *Id.*; Tr. 40-41, 145. The width of the curtain covered the area from the longwall chain line, across the longwall pontoons, to the place where the longwall shield jacklegs joined the pontoons. 18

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

FMSHRC at 23. Because there was loose coal, water and muck on the mine floor, the inspector was not certain that the curtains were continuously deployed on the floor. Tr. 46-47.

Farther down the longwall, Smith saw that line curtains had also been hung on the longwall from where the jacklegs joined the shield down to the pontoons. 18 FMSHRC at 23; Tr. 47-48. The curtains were so hung for a length of 20 or 25 shields, past shield 184, the final shield. *Id.*; Gov't Ex. 4. Thus, the curtain extended past the tailgate methane monitor, located between shields 183 and 184. 18 FMSHRC at 23; Tr. 49, 51; Gov't Ex. 1.² Methane monitors are required to sound an alarm when detecting 1% or more of methane and trigger an automatic shut down of power to the longwall when 2% or more methane is detected. 30 C.F.R. § 75.342.

During his inspection Smith took methane measurements with his hand-held detector. 18 FMSHRC at 23; Tr. 34-35. At roughly the mid-point of the longwall, he detected .4% methane 12 inches from the mine roof and 1.1% methane 12 inches from the mine floor. 18 FMSHRC at 23; Tr. 80. Behind the curtains hanging from shield 184 he detected 2.2% methane, while at the tailgate sensor he detected 1.2% methane. 18 FMSHRC at 23; Tr. 38-39, 61. Those measurements were later confirmed by bottle samples that Smith took at the time of his inspection. *Id.*; Gov't Ex. 3.

During the course of his inspection, the inspector learned that JWR had been having problems controlling methane bleeding from the mine floor at the No. 2 longwall. Tr. 42-43, 46. The effect of JWR's deployment of line curtains was to direct the methane along the floor and behind the curtains hung from the shields, diverting the methane away from the tailgate methane monitor and into the longwall gob and tailgate entry, which was serving as a return. Tr. 25, 43, 51-53, 69-70, 149. The deployment of the line curtains on the mine floor explained why, at the mid-point of the longwall, Smith found the level of methane at the mine floor to be higher than at its roof. Tr. 144-45. Methane, being lighter than air, is normally found in higher concentrations closer to the mine roof. Tr. 145.

The inspector consequently issued Order No. 3189434 under section 104(d)(2), 30 U.S.C. § 814(d)(2), alleging that JWR violated section 75.323.³ 18 FMSHRC at 23-24; Gov't Ex. 2 at 1.

² There was also a methane sensing element on the longwall shear. Tr. 26-28; Gov't Ex. 1.

³ Section 75.323(b) provides:

- (1) When 1.0 percent or more methane is present in a working place or an intake air course, . . . —
 - (i) Except intrinsically safe atmospheric monitoring systems (AMS), electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off;

Section 75.323(b) sets forth the actions that must be taken when various maximum methane levels are exceeded. When 1.0% or more methane is present in a working place, electrical equipment must be deenergized and ventilation changes made to reduce methane below 1.0%, with no work permitted until methane is so reduced. 30 C.F.R. § 75.323(b)(1). At trial, the Secretary contended that, because the operator failed to take the prescribed actions until the inspector alerted JWR personnel to his measurements of impermissibly high levels of methane, JWR violated the regulation. S. Post Hearing Br. at 9-10.

The inspector also issued Order No. 3189435 under section 104(d)(2) charging a violation of section 75.342(b),⁴ on the ground that by deploying line curtain to divert accumulations of

(ii) Changes or adjustments shall be made at once to the ventilation system to reduce the concentration of methane to less than 1.0 percent; and

(iii) No other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent.

(2) When 1.5 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed —

(i) Everyone except those persons referred to in § 104(c) of the Act shall be withdrawn from the affected area; and

(ii) Except for intrinsically safe AMS, electrically powered equipment in the affected area shall be disconnected at the power source.

⁴ Section 75.342 provides:

(a)(1) MSHA approved methane monitors shall be installed on all face cutting machines, continuous miners, longwall face equipment, loading machines, and other mechanized equipment used to extract or load coal within the working place.

(2) The sensing device for methane monitors on longwall shearing machines shall be installed at the return air end of the longwall face. An additional sensing device also shall be installed on the longwall shearing machine, downwind and as close to the cutting head as practicable. . . .

....

(4) Methane monitors shall be maintained in permissible and proper operating condition

....

(b)(1) When the methane concentration at any methane monitor reaches 1.0 percent the monitor shall give a warning

methane outby the tailgate methane sensor, JWR rendered inaccurate the methane monitor's response to methane along the longwall face. 18 FMSHRC at 24; Gov't Ex. 5. At trial, the Secretary alleged that JWR's use of line curtain in such a manner violated section 75.342(a)(4)'s requirement that "[m]ethane monitors shall be maintained in permissible and proper operating condition" Tr. 216-17. JWR contended that, because there was nothing physically wrong with the tailgate methane monitor, the regulation had not been violated. JWR Post Hearing Br. at 4.

The judge rejected JWR's argument that there was no violation of section 75.342. 18 FMSHRC at 25-26. The judge concluded that, while JWR had met many of the requirements of the regulation, by deliberately directing the methane away from the tailgate methane monitor JWR had intentionally precluded the monitor from performing its function. *Id.* Because the judge found JWR's actions to be the equivalent of rendering the monitor inoperable, he determined that JWR had failed to maintain the monitor in proper operating condition. *Id.*

The judge determined that JWR had also violated section 75.323. *Id.* at 26-27. The judge found, based on the testimony and the relevant longwall section report, that the equipment at the longwall was energized when the inspector took his methane readings and issued the orders. *Id.* at 26 n.2. The judge concluded that JWR "should have known that methane of 1.0 percent or more was present in the working area," because either "someone with a methane detector could have taken a reading, or . . . one of the monitors on the longwall could have sensed it." *Id.* at 26-27. The judge held that JWR violated the regulation because "[h]aving taken steps to make the methane monitor not operate properly, Jim Walter cannot now claim that it did not comply with Section 75.323 because it did not know that methane was present. The fact is that it would have but for its actions to avoid knowing." *Id.* at 27.

In addition, the judge concluded that both violations resulted from JWR's unwarrantable failure. *Id.* at 28-29. In determining that the violations were unwarrantable, the judge found the line curtain to have been intentionally deployed for the purpose of preventing the detection of methane in order that longwall operations could continue. *Id.* The judge also found it significant that none of the non-JWR witnesses had ever heard of using line curtain in that fashion. *Id.* at 29.

signal.

(2) The warning signal device of the methane monitor shall be visible to a person who can deenergize the equipment on which the monitor is mounted.

(c) The methane monitor shall automatically deenergize the machine on which it is mounted when —

(1) The methane concentration at any methane monitor reaches 2.0 percent; or

(2) The monitor is not operating properly.

II.

Disposition

A. Violations

1. Section 75.342

JWR contends that the judge erred in finding that the placement of the line curtain along the longwall face constituted a violation of section 75.342, as nothing in the regulation prohibits using line curtain to direct methane away from a methane sensing unit and its tailgate methane monitor met all the requirements of section 75.342, including the maintenance requirement of section 75.342(a)(4). JWR PDR at 2-4.⁵ The Secretary argues that, because the judge interpreted section 75.342 in a manner which furthers the purpose of that regulation, his decision should be upheld. S. Am. Br. at 6-9.

The issue before us is whether the judge correctly concluded that an operator violates section 75.342 by intentionally routing air the operator has reason to believe contains methane on a path which prevents a monitor from detecting that methane. The Commission has recognized that, where the language of a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Similarly, if a statute is clear and unambiguous, effect must be given to its terms. *Chevron*, 467 U.S. at 842-43. *Accord Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

Section 75.342(a)(4)'s requirement that "[m]ethane monitors shall be maintained in permissible and proper operating condition" is derived from section 303(l) of the Mine Act, 30 U.S.C. § 863(l), which provides that methane monitors "shall be kept operative and properly maintained." The language of section 75.342(a)(4) and section 303(l) of the Act is sufficiently clear to establish that JWR violated the standard by using line curtain to deflect methane away from a methane monitor. In the absence of statutory or regulatory definitions or technical usage, we apply the ordinary meanings of words chosen by the drafters. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). The term "maintain" is not defined in 30 C.F.R. Part 75, but one of the dictionary meanings is "to keep in a state of repair, efficiency or validity." *Webster's Third New International Dictionary (Unabridged)* 1362 (1986). Similarly, the dictionary meaning of the term "condition," which is likewise undefined in 30 C.F.R. Part 75, is not limited to merely physical attributes, but includes "a mode or state of being." *Id.* at 473. Lastly, the

⁵ JWR designated its PDR as its brief.

statutory term “operative” is not defined in the Mine Act, but its primary dictionary definition is “producing an appropriate or designed effect.” *Id.* at 1581.

Any methane monitor knowingly deployed in a fashion that renders it unable to accomplish its intended purpose — to detect and alert miners to the presence of methane — cannot be said, under the terms of the regulation, to be “ke[pt] in a state of . . . efficiency” or in a “proper operating state of being.” Likewise, such a monitor is in violation of the standard’s statutory source, as in such an instance the monitor would not be capable of “producing the appropriate or designed effect” of alerting miners when methane reaches dangerous levels. Because JWR deployed its longwall tailgate methane monitor in a manner that defeated its intended purpose, we conclude that the monitor was not being “maintained” in “proper operating condition.” *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997) (where dictionary definitions include functional component indicating that term means that item will be adequate to achieve intended purpose, functional interpretation is consistent with plain meaning of language of standard).

Interpreting section 75.342 to proscribe deflecting methane from a monitor is also consistent with the intent of the standard’s drafters. The language of section 303(l) of the Mine Act was carried over without change from section 303(l) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 863(l) (1976). Its legislative history reveals the emphasis Congress placed on the function served by methane monitors:

Experience has shown that in almost every instance when ignitions and explosions occur, it was because dangerous concentrations of methane accumulate before miners are aware of the condition. Thus, the need for a methane monitor on electric face equipment, particularly the continuous miner and cutting machine, is evident. *Even more important, it must be kept operative to be effective.* The monitor would include a methane detector or sensing device which would *continuously* sample the atmosphere . . .

S. Rep. No. 411, 91st Cong. 1st Sess. 60 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 186 (1975) (emphasis added).⁶ Accordingly, we affirm the judge’s conclusion that JWR violated section 75.342.

⁶ MSHA similarly explained its intent in promulgating section 75.342 as part of revising its ventilation regulations in 1992, stating that “[c]onstant monitoring of methane during mining activities is an important safeguard against methane ignitions and explosions that could endanger miners.” 57 Fed. Reg. 20,868, 20,890 (1992) (emphasis added). Consequently, MSHA based its adoption of some of the requirements of section 75.342 on its desire to “maximize the effectiveness of monitoring sensors,” and “ensure that monitors provide accurate monitoring of methane.” *Id.*

2. Section 75.323

According to JWR, section 75.323 is only violated when an operator fails to act upon learning methane exceeds the levels set forth in that standard. JWR PDR at 6. JWR argues that, because it did not know of the excessive methane at the No. 2 longwall until the inspector pointed out the condition, it did not violate section 75.323. *Id.* at 5-6. JWR also contends that substantial evidence does not support the judge's conclusion that the longwall was energized at the time the inspector issued the orders. *Id.* at 4-5.

The Secretary takes the position that Smith's detection of excessive methane established a violation, based on the judge's finding that JWR would have known that methane was present but for its actions to avoid knowing. S. Am. Br. at 10-11 & n.7. The Secretary also maintains that substantial evidence supports the judge's finding that the longwall was energized when the methane was found by the inspector. *Id.* at 10.

Section 75.323(b)(1) obligates an operator to take specified actions "[w]hen 1.0 percent or more methane is present in a working place or an intake air course." Taken literally, the standard would seem to be applicable upon the mere presence of methane above that level. However, MSHA has taken the position that the provision should not be read literally.⁷ In further revising its ventilation regulations in 1996, but leaving untouched the language at issue in section 75.323, MSHA agreed with comments submitted in that rulemaking that

a methane problem cannot be corrected unless it has been detected and that the mere presence of methane does not constitute a violation [of section 75.323]. Only the failure to [take the actions required by section 75.323] once being made aware of the presence of methane in excess of allowable levels is a violation.

61 Fed. Reg. 9,764, 9,778 (1996). Consequently, JWR can only be held to have violated section 75.323 if there is substantial evidence to support the conclusion that it had knowledge of excessive methane and failed to take any of the required actions.⁸

⁷ Section 75.323(b)(1) was promulgated by MSHA in 1992 as part of a revision of its ventilation regulations. Prior to that, the required actions were expressly conditioned upon the presence of methane found by a test. See 30 C.F.R. § 75.308 (1991) (methane accumulations in face area).

⁸ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

a. Whether Section 75.323(b) Requires Actual Knowledge of Methane

The judge never reached the question of whether JWR had actual knowledge of the presence of methane at actionable levels prior to the time that Inspector Smith issued the order alleging a violation of section 75.323. Rather, the judge concluded that any lack of such actual knowledge was the result of JWR's own actions in preventing the tailgate monitor from detecting methane. 18 FMSHRC at 27. JWR does not contest that conclusion, which is supported by substantial evidence.⁹

We interpret the judge's conclusion as a finding that JWR had constructive knowledge of the actionable levels of methane. JWR, however, argues that a section 75.323(b) violation was not established because it did not have actual knowledge of the presence of methane. Section 75.323(b) paraphrases section 303(h)(2) of the Mine Act, 30 U.S.C. § 863(h)(2). While MSHA has stated that knowledge of methane is a prerequisite to the obligations imposed by section 75.323(b), neither section 75.323(b) nor its statutory source address whether only actual knowledge triggers those obligations.

Because Congress has not directly spoken to the issue, we examine whether MSHA's interpretation is a reasonable one. See *Chevron*, 467 U.S. at 842-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (April 1996); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), cert. denied, 117 S. Ct. 1691 (1997). See also *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

We find the Secretary's interpretation of section 75.323(b) reasonable. Looking first at the language of the regulation and its statutory source, we note that neither explicitly contains a requirement of operator knowledge at all, much less actual knowledge. Thus, the Secretary's interpretation is consistent with the regulatory language. We also conclude that the Secretary's interpretation here is a sensible one that furthers the safety-promoting purposes of the Mine Act in general and section 75.323(b) in particular. That section's thrust is to require operators to take specified measures once they are aware that methane has reached certain levels, in order to

⁹ At trial, JWR's foreman, Maynard Thomas, admitted that JWR's deployment of line curtains was intended to prevent methane that it knew was seeping from the mine floor from being detected by a methane monitor. Tr. 270-71. Thomas also stated that JWR had used line curtain in such a fashion in its No. 7 Mine on many occasions in the past in order to cover up a methane bleeder in the floor that was "close to a sniffer[.]", i.e., a methane monitor. Tr. 286-87, 291-94.

minimize the likelihood of explosion. We agree with the Secretary that to permit an operator to evade the required measures by taking intentional steps to keep itself ignorant of methane levels would permit circumvention of section 75.323 “by [a] cynical expedient.” See S. Am. Br. at 10-11 n.7.

Moreover, the Secretary’s construction of section 75.323 is consistent with Commission and court interpretations of the term “knowingly.” In *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff’d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), the Commission interpreted “knowingly” as used in section 110(c) of the Mine Act, 30 U.S.C. § 820(c), to mean “knowing or having reason to know.” The D.C. Circuit recently deferred to this interpretation in *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363-64 (1997). In affirming the Commission, the court noted that “courts have . . . found that ‘knowingly’ encompasses more than actual knowledge.” *Id.* at 363 (citations omitted).

b. Whether JWR Failed to Take any Measure Required by the Standard

JWR contends that the judge also erred in finding a violation of section 75.323 because the evidence does not support his conclusion that the longwall was energized when Smith took his methane measurements in the tailgate area. We need not address that question. Section 75.323(b) requires that, when excessive methane levels are encountered, in addition to de-energizing the longwall, *an operator must make ventilation changes or adjustments to reduce methane below 1%*. 30 C.F.R. § 75.323(b)(1)(ii). Below, the Secretary contended that JWR made no such changes or adjustments, even though it was aware it had a methane problem, while JWR argued that it satisfied the standard by making the required ventilation changes or adjustments after it learned of the excessive methane levels from the inspector. S. Post-Hearing Br. 10-14; JWR Post-Hearing Br. at 6. Because he found the longwall was energized, the judge did not address the subject.

JWR continues to take the position that it complied with section 75.323(b) by making the required ventilation changes or adjustments upon learning of the excessive methane levels from the inspector. JWR PDR at 5-6. However, our conclusion that JWR had knowledge of excessive methane prior to that time means that JWR should have been making such changes or adjustments earlier. JWR’s failure to do so establishes a violation of the standard, regardless of whether the longwall was energized during the inspection.¹⁰ Accordingly, we affirm in result the judge’s finding of a section 75.323(b) violation.

¹⁰ The Secretary having raised this argument below, we are free to rely on it as a basis for review. See 19 James Wm. Moore et al., *Moore’s Federal Practice* § 205.05[1] (3d ed. 1997) (citing *United States v. Williams*, 504 U.S. 36, 40 (1992)).

B. Unwarrantable Failure

JWR maintains that its conduct in violating section 75.342 was not aggravated, as line curtain has been used in mines to route air around methane monitors for many years. JWR PDR at 4. It also contends that, because it immediately acted to correct the problem upon learning of the methane buildup, its good faith precludes a finding of aggravated conduct in connection with the section 75.323 violation. *Id.* at 6. The Secretary asserts that the judge's finding of unwarrantable failure is supported by JWR's intentional actions and his finding that JWR was engaging in a dangerous practice. S. Am. Br. at 11-14.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991) ("R&P"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In addition, the Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous").

Substantial evidence supports the judge's finding that JWR acted intentionally in using line curtain to attempt to avoid application of sections 75.342 and 75.323, and therefore engaged in aggravated conduct. *See R&P*, 13 FMSHRC at 194 (intentional conduct may be aggravated and constitute unwarrantable failure). Foreman Thomas acknowledged that JWR intended to avoid detection of excessive methane. 18 FMSHRC at 28; Tr. 270-71. Moreover, as the judge found, JWR took evasive action because, with the amount of intake air already at the maximum allowable amount of 131,000 cubic feet per minute, it otherwise would have had to shut down the longwall until the amount of intake air relative to the amount of methane was sufficient to dilute the methane below 1 percent. 18 FMSHRC at 25, 28-29; Tr. 264. Thus, in order to continue production, a conscious decision was made to evade a device designed to act as an important preventive safeguard.

We reject JWR's contention that, because it was simply engaging in "a common practice that has been used in the mines for many years" (JWR PDR at 4), its violation of section 75.342 was not the result of aggravated conduct. The only evidence JWR presented in support of that

claim was its foreman's testimony that he had used line curtain on mine floor methane bleeders 50 to 100 times previously. Tr. 292. Although an operator's good-faith, albeit mistaken, belief that cited conduct complied with the Mine Act is a defense to an unwarrantable failure allegation, the Commission has held that such a belief must be reasonable. *Cypress Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (August 1994). Given the clear commands of section 75.342 and the high degree of danger posed to miners by JWR's conduct,¹¹ we do not think the record supports a conclusion other than that any such belief of JWR's foreman was unreasonable. *See, e.g., id.* (unreasonable belief that roof plan permitted miners under unsupported roof no defense to unwarrantable failure).

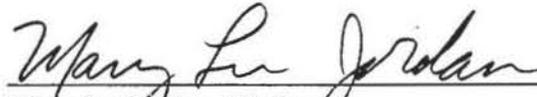
We also reject JWR's argument that its immediate abatement of the section 75.323 violation establishes that it acted in good faith. JWR undertook to abate the violative condition only after Inspector Smith issued the verbal orders. "Post-citation [abatement] efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in allowing the violative condition to occur." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (January 1997).

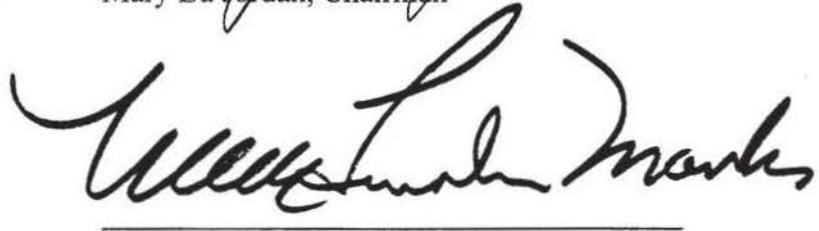
¹¹ Even JWR described it as "a potentially dangerous situation." JWR PDR at 6.

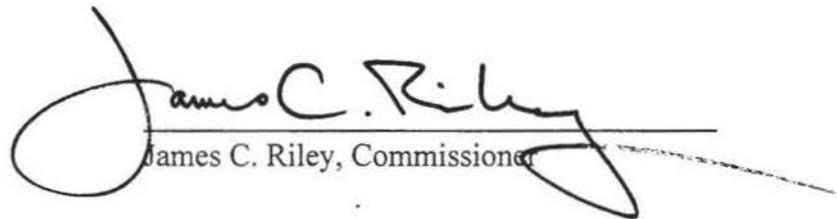
III.

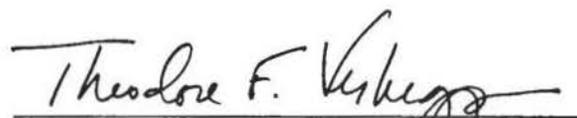
Conclusion

For the foregoing reasons, we affirm the judge's determinations that JWR violated sections 75.342 and 75.323 and that both violations were the result of unwarrantable failure.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Distribution

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

Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 20, 1997

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

v.

LION MINING COMPANY

:
:
:
:
:
:
:

Docket No. PENN 94-71-R

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

DECISION

BY THE COMMISSION:

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a roof control plan violation by Lion Mining Company ("Lion"). At issue here is Administrative Law Judge T. Todd Hodgdon's determination on remand that the conceded violation was a result of Lion's unwarrantable failure.¹ 18 FMSHRC 1260, 1263-69 (July 1996) (ALJ). The Commission granted Lion's petition for discretionary review challenging that determination. For the reasons that follow, we affirm the judge's determination of unwarrantability.

I.

Factual and Procedural Background

On November 17, 1993, MSHA Inspector Kenneth Fetsko was inspecting the 4-1/2 right pillar ("4-1/2") section at Lion's Grove No. 1 underground coal mine near Jennerstown, Pennsylvania. 18 FMSHRC at 696. While he was standing at the crosscut between pillar block ("block") 37 and block 44, Fetsko observed a continuous miner loading coal into three or four

¹ Remand was of the judge's earlier decision that the violation was neither unwarrantable nor significant and substantial ("S&S"). 18 FMSHRC 695 (May 1996), *vacating and remanding* 16 FMSHRC 641 (March 1994) (ALJ). On remand, the judge found the violation to be both unwarrantable and S&S. 18 FMSHRC at 1263, 1269. Lion has appealed only the unwarrantability determination.

shuttle cars in the roadway between blocks 37 and 38. *Id.* From his vantage point, Fetsko could not see the front of the continuous miner to determine from where the coal was coming. 16 FMSHRC at 642. Fetsko did notice mine superintendent Art Jones and section foreman Ted Marines across the roadway standing in the crosscut between blocks 38 and 39. 18 FMSHRC at 696. Marines left for a short time and, upon returning, ordered roadway posts delivered to the crosscut. *Id.*

Recognizing that roadway posts had not been installed, Fetsko went to the crosscut between blocks 38 and 39. *Id.*; 16 FMSHRC at 642. At that point Fetsko observed the continuous miner make a notch cut from the right side of block 37. 18 FMSHRC at 696. Because note 7 to drawing A of Lion's roof control plan required that roadway posts be installed in roof bolted entries, rooms, and crosscuts to limit the roadway width to 18 feet, Fetsko issued a citation to Lion under section 104(d)(1) of the Act for violating its roof control plan, and thus 30 C.F.R. § 75.220(a)(1),² by failing to install roadway posts in the 38/39 crosscut before making the notch cut. 18 FMSHRC at 696 & n.3. Fetsko designated the violation S&S³ and alleged that it was the result of Lion's unwarrantable failure. *Id.* at 696. Lion abated the violation by installing four roadway posts in the crosscut. *Id.*

In his first decision, in addition to concluding that the violation was not S&S, the judge determined that the violation did not result from Lion's unwarrantable failure, but rather from moderate negligence. 16 FMSHRC at 647-48. He concluded that the record was insufficient to demonstrate either that mine superintendent Jones or section foreman Marines "deliberately and consciously failed to act or engaged in aggravated conduct." *Id.* at 647.

In remanding the case to the judge for reconsideration of his negative S&S and unwarrantable failure determinations, the Commission held that the judge had erred in determining that Lion had never been cited for failing to install roadway posts. 18 FMSHRC at 700. Among the reasons the Commission gave for remanding the unwarrantability issue was the judge's failure to consider evidence that foreman Marines observed the violation in progress and failed to immediately order cessation of mining. *Id.* at 701. In addition, the Commission took issue with the judge's decision to discount superintendent Jones' role based on Jones' testimony that he did not know about the roof control plan provisions concerning roadway posts and was not required to know all provisions of the plan. *Id.* at 700-01. The Commission noted that Jones also witnessed the notch being mined and did not order mining stopped. *Id.* at 700.

² Section 75.220(a)(1) requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

On remand, the judge concluded that the roof control plan violation was S&S and a result of Lion's unwarrantable failure. 18 FMSHRC at 1263, 1269. The judge summarized his findings in support of his unwarrantability determination as follows:

[T]he miner operator mined a notch out of block 37 with no apparent intent of stopping after the notch was removed; no one told him to stop mining; Jones, Marines and [mine foreman] Lambert were all present while this occurred; at a minimum both Marines and Lambert knew what the roof control plan required, yet no action was taken to install the roadway posts until after the notch was mined, and the reason for installing them then was at least partially the result of the inspector being present. Further, as the Commission has already held, the company's previous roof control violations and roof falls should have put it on notice that greater efforts were necessary for compliance.

Id. at 1269 (footnote omitted). The judge also concluded that he did not need to address whether Jones' professed ignorance of the roof plan requirements constituted more than ordinary negligence, given that other Lion supervisory personnel with knowledge of the roof control plan requirements were present when the violation occurred. *Id.* at 1267.

II.

Disposition

Focusing on the short duration and limited extent of the violation, Lion urges reversal of the judge's finding of unwarrantable failure. L. Br. at 16-17. Arguing that there is no evidence that it has ever been previously cited for failure to timely install roadway posts, Lion contends that the judge erred in taking previous violations into account in determining unwarrantability. *Id.* at 16. Lion describes as further error the judge's consideration of foreman Marines' presence during the violation, stating that "[a] reasonable and logical reading of Mr. Marines['] testimony shows that he did not observe the actual cutting of the notch." *Id.* at 14-15.

In response, the Secretary contends that the judge's unwarrantable failure determination is supported by the evidence of the numerous roof control violations and roof falls on the 4-1/2 section, as well as by evidence that both Jones and Marines stood by and permitted the violation to take place. S. Br. at 15. The Secretary also requests the Commission to overturn the judge's finding that superintendent Jones did not know that he was witnessing a roof control plan violation. *Id.* at 9 & n.3. The Secretary claims that, based on Jones' experience in other mines and his testimony, it would have been unreasonable for Jones to think otherwise. *Id.* at 9-12.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In

Emery Mining Corp., 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). In determining whether a roof control violation is unwarrantable, the Commission has taken into account the high degree of danger normally posed by such violations and whether the operator had been placed on notice that greater roof control efforts were needed. *See, e.g., Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). In addition, the Commission has considered whether supervisory personnel were present when the roof control violation took place. *See, e.g., Youghioghery & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

A. Whether Lion Had Prior Notice of a Need for Greater Roof Control Efforts

In its original decision, the Commission found that Lion had received two citations for failing to install roadway posts on the 4-1/2 section within 2 months of the citation at issue, had been cited for four other roof control violations on the section during the preceding 9 months, and had experienced five roof failures on the section within 2 years of the citation, including one the day before the subject citation was issued. 18 FMSHRC at 700. The Commission concluded that such a history of roof violations and falls should have placed Lion on notice that greater efforts were necessary for compliance with its roof control plan. *Id.*

Nevertheless, Lion objects to the judge having taken this history into account in finding the instant violation unwarrantable. L. Br. at 16. Lion made the same argument to the judge that it makes here, but the judge did not address it, relying simply on the Commission’s earlier conclusion that “the company’s previous roof control violations and roof falls should have put it on notice that greater efforts were necessary for compliance.” 18 FMSHRC at 1269.

The judge correctly declined to revisit the previous history question. Under the law of the case, he was precluded from reaching a different result on the issue. *See Secretary of Labor on behalf of Mullins v. Consolidation Coal Co.*, 4 FMSHRC 1622, 1624 n.2 (September 1982) (issues and questions resolved by higher authority become unassailable law of the case). The issue having already been decided by the Commission, Lion’s proper recourse was to move the Commission to reconsider its original decision, rather than making the argument on remand to the judge, and then again on further appeal. Because the time for such a motion has long since passed, we will not reconsider the issue, but will simply rely on the Commission’s earlier finding. *See* 29 C.F.R. § 2700.78 (petition for reconsideration of Commission decision must be filed within 10 days).

B. Whether Foreman Marines Observed the Violation

Because of the high standard of care to which foremen and other supervisory personnel are held, the Commission takes into account whether such personnel were present when the violation took place in determining unwarrantability. See *Youghioghney*, 9 FMSHRC at 2011 (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)); *S&H Mining*, 17 FMSHRC at 1923. We reject Lion's claim that the record does not support the judge's finding that Marines observed the violation taking place. Marines testified that the miner operator was extracting coal from the pillar when he returned to the area, that he then told the shuttle car operator to bring timber up to the face because the miner operator had "started to notch out the 37 stump," and that he instructed the miner operator to cease mining only after the operator had completed the loading of a shuttle car. Tr. 133-34, 137. Thus, Marines witnessed the violation yet did not act to immediately stop it.⁴ The judge therefore correctly considered Marines' conduct as a factor tending to establish an unwarrantable failure on the part of Lion.

C. Other Factors

Though not addressed by the judge, a third factor supporting the judge's unwarrantability determination is the high degree of danger posed by the violation. That the roof control violation posed a high degree of danger under the circumstances is implicit in the judge's S&S determination. The judge based that determination on the well-known danger posed by even good mine roofs, the documented history of roof falls in the mine at issue, and evidence that the rib was rolling between blocks 38 and 39, the precise area where the roadway posts should have been installed prior to the notch being cut. 18 FMSHRC at 1262-63.

While, as Lion contends, its roof control violation may have been brief and not extensive, under Commission precedent the Secretary satisfies her burden of establishing the unwarrantability of a roof control violation where a foreman knew of the violative condition, the violation occurred in a mine with a history of roof falls, and the violation created a hazard characterized by high danger. See *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610 (August 1994). Because all of those elements are present here, we conclude that substantial evidence supports the judge's unwarrantability determination.⁵ That Lion's violation may have been brief

⁴ Lion does not contest the judge's conclusion that Marines understood the roof control plan to require that the posts be erected before any mining was performed. 18 FMSHRC at 1267 & n.4.

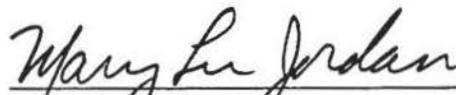
⁵ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support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

in duration and not extensive does not compel a different result. *See id.* at 1611-12, 1616 (unwarrantability finding where installation of ventilation tubing under unsupported roof took only several minutes to complete).⁶

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Lion's violation was the result of its unwarrantable failure.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

⁶ In light of our holding, there is no need to take up the parties' request that we address other findings that the judge made in his decision on remand.

Distribution

Joseph A. Yuhas, Esq.
1809 Chestnut Avenue
P.O. Box 25
Barnesboro, PA 15714

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 24, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 95-75
 :
CYPRUS CUMBERLAND RESOURCES :
CORPORATION :

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994). At issue is the validity of a safeguard issued by the Mine Safety and Health Administration ("MSHA") at the Cumberland Mine, owned and operated by Cyprus Cumberland Resources Corporation ("Cyprus Cumberland"), and whether Cyprus Cumberland violated the safeguard. Commission Administrative Law Judge Jerold Feldman concluded that the safeguard was valid and that Cyprus Cumberland violated it, and assessed a \$100 penalty. 18 FMSHRC 718, 725-26, 730-31 (May 1996) (ALJ). The Commission granted Cyprus Cumberland's petition for discretionary review challenging the judge's determinations regarding the validity and violation of the safeguard. For the reasons that follow, we affirm the judge's conclusion that the safeguard is valid, and reverse his determination that Cyprus Cumberland violated it.

I.

Factual and Procedural Background

Cyprus Cumberland operates the Cumberland Mine, an underground coal mine in Greene County, Pennsylvania. The mine uses a track haulage system to transport miners and equipment. 18 FMSHRC at 719; Tr. 63. Four types of vehicles are used on the track system: mantrips that carry personnel (Tr. 95, 269-70); modified mantrips called "duckbills" that have a modified open compartment at one end for carrying supplies (Tr. 95, 97, 177, 270); small locomotive-type

vehicles called “motors” that are used to haul equipment such as rockdust cars through the mine (Tr. 96, 244); and small, slow-moving personnel carriers called “crickets” (Tr. 95, 270).

In 1980, Cyprus Cumberland installed a system of signal lights to control traffic on the track system at the Cumberland Mine. 18 FMSHRC at 719. Red lights at each end of track sections designated as “blocks” can be turned on or off at either end of the blocks. *Id.* Operators of track vehicles are supposed to turn a block’s lights on upon entering a block, then turn the lights off upon exiting the block. *Id.* An activated block light signals track vehicle operators that another vehicle is in a block they are approaching. Under company policy, more than one vehicle can occupy a block at the same time. *Id.* at 721. An operator approaching a block with its signal light on must “wait for a reasonable length of time, then proceed with caution.” *Id.* at 719. Cyprus Cumberland warns its equipment operators to

[s]top before pulling onto the main line from any switch. Make sure nothing is coming before pulling out. Remember there may be more than one piece of equipment in a block light.

Id.

On October 25, 1993, MSHA Inspector Robert Santee encountered a block light that apparently had been left on by a track vehicle operator after exiting a block. *Id.* at 720. In response, Santee issued a safeguard requiring, in relevant part,

. . . track haulage equip[ment] operators to use the block lights installed along supply track haulage at the mine, to clear such lights (turn off after each use) in order to assure approaching haulage equipment a clear road exists and also only 1 piece of haulage equipment shall be operated in the same block light except [motors]. . . .

18 FMSHRC at 720 (quoting Safeguard No. 3655478). This safeguard was modified on November 1, 1993 to delete the requirement that only one piece of equipment at a time be operated in a block, and to further require that vehicles operating in the same block maintain a minimum distance of 300 feet and communicate “by some means, to be assured the signal block light will be turned off after the last haulage equipment exits the light block.” Subsequent Action No. 3655478-01 (modifying Safeguard No. 3655478).¹

¹ The judge misquoted the modification as stating, in relevant part: “Haulage equipment operating in the same block light shall communicate, by some means, to be assured the signal block light will be turned off after the last haulage equipment exits the *last* block.” 18 FMSHRC at 721 (emphasis added to misquoted word).

On July 14, 1994, as Inspector Santee was conducting an inspection of the mine, the mine's maintenance foreman, Doug Conklin, entered the mine in a duckbill operated by mechanic Mark Zuspan and traveled down the 57 Mains track to where it intersected the 1A block of the 55 North track. *Id.* at 722. After curving off to the left of the 57 Mains, the 55 North track runs in a straight line for 1,200 feet. *Id.* As Conklin and Zuspan approached the intersection, they saw a motor hauling two rock dust cars and a trailing motor stopped just inby the intersection. Tr. 177. Conklin testified that the motors and rock dust cars (the "haulage train") were waiting for the duckbill "to switch out of their way, so they could continue out of the mine." *Id.*

As the haulage train moved past the duckbill, the operator of the first motor signaled to Conklin and Zuspan that he would leave the 1A block light on for them. 18 FMSHRC at 722. The operator of the second motor, however, apparently turned off the light, unbeknownst to Conklin or Zuspan. *Id.* Before Conklin and Zuspan passed the light, a cricket entered the far end of the block and its operator turned on the block light that had just been turned off by the operator of the second motor. *Id.* In the cricket was Inspector Santee, accompanied by representatives of the company and the miners. *Id.* Conklin and Zuspan then passed the block light under the mistaken belief that it had been left on for them by the operator of the first motor. *Id.* At first, Conklin and Zuspan could not see down the full length of the 1A block due to the short curve at the intersection of the two tracks. *Id.* at 723. As soon as they entered the 55 North straightaway, however, they saw the cricket approaching them; Santee also saw the duckbill pulling into the block. *Id.* Although the two vehicles were approaching each other, "Zuspan had plenty of time and pulled into the 55 North switch [to wait] for the cricket to pass." *Id.*; see also Ex. J-1. Thereafter, Santee issued Order No. 3672055, charging an unwarrantable and significant and substantial ("S&S") violation of Safeguard No. 3655478.² 18 FMSHRC at 723. The Secretary subsequently proposed a \$2800 penalty, which Cyprus Cumberland contested.

The judge found that the safeguard on which the contested order was based was valid. *Id.* at 724-25. He reasoned that, although Cyprus Cumberland had no obligation to install a block light system, once it did so, the company became "responsible for maintaining the system and ensuring that its personnel comply with its block light safety procedures." *Id.* at 724. The judge found that because the light that had been left on "manifested a failure to adhere to Cumberland's block light procedures," Inspector Santee acted within his discretion when he concluded that this failure posed a transportation hazard and that a safeguard was needed to ensure compliance with the mine's block light procedures. *Id.* Finally, the judge concluded that "the safeguard, as amended, adequately set forth the corrective measures required." *Id.* at 724-25.

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

The judge also found that a violation occurred as alleged in Order No. 3672055. *Id.* at 725-26. The judge determined that the safeguard set forth four requirements: (1) that equipment operators use the block signal lights; (2) that they turn the lights off after exiting a block; (3) that equipment operating in the same block maintain a safe distance to allow them to stop within the limits of visibility, but never closer than 300 feet; and (4) that operators in the same block communicate by some means to assure that the lights will be turned off after the last equipment exits the block. *Id.* at 725. He found that Conklin and Zuspan complied with all but the last of these requirements. *Id.* at 725-26. The judge concluded that because “there was a failure of communication between them and the dustcar motormen to assure that there was no misunderstanding concerning the status of the [1A] block lights,” the Secretary had proven a violation of the safeguard. *Id.* at 726. Concluding that the violation was not S&S or the result of the operator’s unwarrantable failure, the judge assessed a \$100 penalty. *Id.* at 727-31.

II.

Disposition

On review, Cyprus Cumberland argues that the judge erred in affirming Safeguard No. 3655478 because it was not validly issued. C.C. Br. at 10-22. The company contends that the judge failed to scrutinize Inspector Santee’s assessment of whether a hazard existed under an objective standard, as the company argues he should have. *Id.* at 12-16. Purporting to apply such a standard, Cyprus Cumberland argues that leaving a block signal light on did not create a hazard. *Id.* at 16-18. The company also argues that Santee failed to justify either his issuance of the safeguard or the terms of the safeguard itself. *Id.* at 18-22. As to the violation, Cyprus Cumberland argues that the judge impermissibly broadened the scope of the safeguard to apply to vehicles outside a particular block, and that because the safeguard did not apply to the duckbill operated by Conklin and Zuspan, the judge erred in finding a violation. *Id.* at 23-26.

In response, the Secretary argues that Santee was justified in issuing the safeguard because of his concern that “the miners were routinely leaving block lights illuminated regardless of whether the block was cleared of equipment, [and that] a miner would eventually ‘take it for granted’ that a block that had its light illuminated was cleared of equipment and enter it when it was in fact not cleared of equipment.” S. Br. at 11. As to whether Cyprus Cumberland violated the safeguard, the Secretary contends that “[t]he failure to communicate in this case . . . occurred *within* the 1A block,” and therefore the judge was correct in finding a violation. *Id.* at 16 (emphasis in original).

A. Validity of the Underlying Safeguard

Under section 314(b) of the Mine Act, the Secretary may issue “[o]ther safeguards, adequate in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). In order to issue such

a safeguard, an inspector must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992) (“*SOCCO I*”). He must also specify the corrective measures an operator must take. *Id.* The Commission reviews the Secretary’s issuance of a safeguard under an abuse of discretion standard. *Id.* at 9.

Inspector Santee considered that a transportation hazard was created when a block light was left on after an equipment operator had departed that block. 18 FMSHRC at 724; Tr. 57-58. The judge’s conclusion that Santee’s determination was within the inspector’s discretion is both legally sound and supported by substantial evidence.³ Santee’s concern that if the lights were not used, equipment operators could have been lulled into habitually disregarding them (Tr. 57), appears well grounded and not overly speculative. Regardless of Cyprus Cumberland’s policies, Santee did not abuse his broad discretion to issue the safeguard based on his concern. *See SOCCO II*, 14 FMSHRC at 8 (“An MSHA inspector possesses authority to decide whether a safeguard should be issued at a mine without consulting with representatives of the operator.”). Accordingly, we affirm the judge’s conclusion that Safeguard No. 3655478 was validly issued.

B. Violation of the Safeguard

We have held that, because safeguards are issued by MSHA inspectors without the procedural protections of notice and comment rulemaking, they must be strictly construed in determining whether a violation has occurred. *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985) (“*SOCCO I*”). Here, the judge interpreted the safeguard as requiring, among other things, track haulage equipment operators to “communicate, by some means,” with haulage equipment operating in the same block “to be assured the signal block light will be turned off after the last haulage equipment exits the light block.” 18 FMSHRC at 725. The judge concluded that Cyprus Cumberland violated this requirement because “there was a failure of communication between [Conklin and Zuspan] and the dustcar motormen to assure that there was no misunderstanding concerning the status of the block lights as [the] duckbill entered the 1A block.” *Id.* at 726.

Strictly construed, the safeguard refers to “equipment operating in the same block light” and the signal lights for that block. Subsequent Action No. 3655478-01 (modifying Safeguard No. 3655478). The safeguard addresses communications that must occur between operators of track haulage equipment operating in the same block regarding the signal lights for the block within which they are operating. Counsel for the Secretary conceded at oral argument before the

³ When reviewing a judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Commission that, to make out a violation, the Secretary had the burden of establishing that both the haulage train and duckbill were in the same block at the time of the failure to communicate, and that they failed to communicate about the lights for the block they shared. Oral Arg. Tr. at 21-22. Whether a violation has occurred thus depends on the exact locations of the duckbill and haulage train when the alleged failure to communicate occurred.

The parties disagree on this dispositive factual issue. The Secretary argues that “[t]he failure to communicate in this case . . . occurred *within* the 1A block.” S. Br. at 16 (emphasis in original). Cyprus Cumberland responds that “[w]hen the front motorman waved at Mr. Zuspan as he pulled past, they were both outside the 1A block.” C.C. Reply Br. at 5. The judge made no explicit finding on this issue, but impliedly found that the pieces of equipment were outside the 1A block when the failure to communicate occurred. *See* 18 FMSHRC at 722.⁴

Substantial evidence supports the judge’s conclusion. When they entered the mine, Conklin and Zuspan traveled down the 57 Mains to its intersection with the 1A block of the 55 North haulage track, where they met the haulage train. *Id.* The leading motor of the train was stopped on the 55 North haulage track just inby the intersection. Tr. 177. The trailing motor, behind two rock dust cars, was inby the block light for the 1A block, which was illuminated. *Id.* at 180. Conklin and Zuspan maneuvered their duckbill further up the 57 Mains inby the intersection to allow the haulage train to pass. 18 FMSHRC at 722. In fact, since the haulage train was traveling outby, the only place the duckbill could have been moved was further along the 57 Mains inby its intersection with 55 North. Ex. J-1. In testimony not rebutted by the Secretary, Conklin explained:

I got out of the motor, I threw the switch. Mark [Zuspan] proceeded inby the switch up the straight [of 57 Mains]. I threw the switch back for the turn. The rock dust crew pulled out of the switch, proceeded outby on the 57 [Mains] Haulage, I threw the switch back for the straight. Mark brought the duckbill back up the straight, passed the switch, I threw it for the turn, went to the duckbill and we proceeded around the turn.

Tr. 180-81; *see also* Ex. J-1. By the time Conklin and Zuspan entered the 1A block, believing that the block light had been left on for them by the operator of the first motor, the cricket carrying Inspector Santee had turned on the light. 18 FMSHRC at 722. Thus, contrary to the

⁴ The judge found that as the duckbill approached the intersection of the 57 Mains and 55 North, the haulage train was “about to enter the 57 Mains.” 18 FMSHRC at 722. The judge found that “Conklin [then] exited the duckbill to throw the track switch so Zuspan could pull the duckbill past the 55 North haulage.” *Id.* Thus, the judge found that, before the duckbill entered 55 North, it moved to a location beyond the intersection. The only such location to which the duckbill could have moved was the 57 Mains just inby the intersection since the haulage train was blocking access to the 55 North haulage.

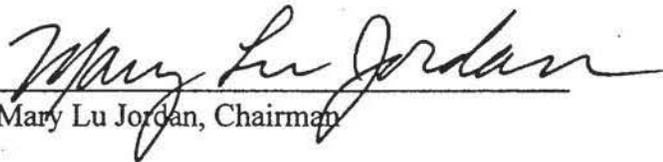
Secretary's assertion that when the alleged violation occurred, both the duckbill and motors were within the 1A block, it would have been physically impossible for the duckbill to have been in the 1A block as the haulage train was exiting that block. The only block in which the two vehicles could have been operating simultaneously was the 57 Mains.

Although the judge found this to be the case, he nevertheless found a violation. Under the terms of the safeguard, however, and as the Secretary has conceded (Oral Arg. Tr. at 21-22), the duckbill operators and the motormen were not obligated to communicate regarding the status of the 1A block lights because they were not operating in that block simultaneously. Accordingly, we reverse the judge's finding of a violation of the safeguard.

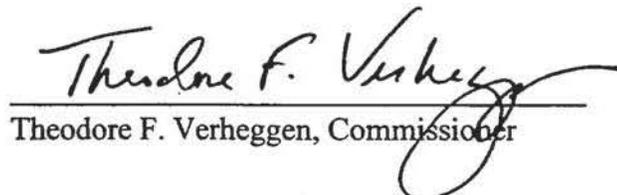
III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Safeguard No. 3655478 was validly issued, and we reverse his conclusion that Cyprus Cumberland violated the safeguard.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

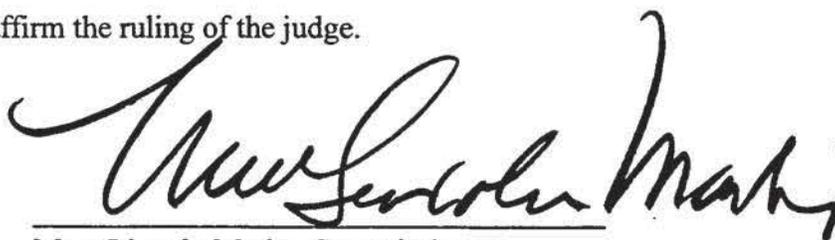
Commissioner Marks, concurring in part and dissenting in part:

For the reasons expressed in the majority opinion, I concur in the conclusion that Safeguard No. 3655478 was validly issued and join in affirming the judge's decision on that ground.

However, I part company with my colleagues because I would also affirm the judge's decision that the Safeguard was violated by the facts of this case. As the majority acknowledges, when the failure to communicate over the block light occurred, the two vehicles were operating simultaneously in the same block of the 57 Mains. Slip op. at 6; 18 FMSHRC at 722. The Safeguard requires that "haulage equipment operating in the same block light shall communicate . . . to be assured the signal block light will be turned off after the last haulage equipment exits the light block." 18 FMSHRC at 721; Subsequent Action No. 3655478-01 (modifying Safeguard No. 3655478). The Safeguard directly applies here; both vehicles were operating in the same block and there was a miscommunication that resulted in having the adjacent block light 1A turned off when a vehicle was entering that block rather than when exiting the block. Therefore, the judge's finding of a violation of the Safeguard is supported by substantial evidence in the record and is a sensible interpretation of the Safeguard.

Under the auspices of strict construction, the majority would only apply the Safeguard's protection when equipment and lights are located in the same block. Slip op. at 6. Such a narrow reading defies common sense because it overlooks that vehicles traveling in the same block will often need to communicate about lights on adjacent and intersecting blocks so as to prevent potentially fatal crashes. Strict construction should not be slavishly adhered to at the expense of safety. In fact, the majority has taken a stricter view than even the language of the Safeguard warrants. The Safeguard does not specify that the "same" signal block light be extinguished after the last vehicle exits the block light. Subsequent Action 3655478-01. The more reasonable view is that of the judge — that the Safeguard is violated when two haulage equipment operators operating in the same block fail to communicate such that a light in an adjoining block, which one of the vehicles has just exited and one is about to enter, gives the wrong signal, thus permitting a third vehicle to enter and potentially cause a serious collision. See 18 FMSHRC at 726. The Safeguard does not expressly preclude the judge's reading and I believe it is the only reasonable construction of the Safeguard that would further the safety and remedial goals of the Mine Act.

Accordingly, I dissent and would affirm the ruling of the judge.

A handwritten signature in black ink, reading "Marc Lincoln Marks". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Marc Lincoln Marks, Commissioner

Distribution

R. Henry Moore, Esq.
Buchanan Ingersoll
301 Grant St., 20th Floor
Pittsburgh, PA 15219-1410

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 3 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 97-61-M
Petitioner : A.C. No. 39-01328-05527
v. :
 : Crusher No. 3
BOB BAK CONSTRUCTION, :
Respondent :

DECISION

Appearances: Edward Falkowski, Esq., U.S. Department of Labor, Denver, Colorado,
for the Petitioner;
Elsie Bak, Bob Bak Construction, Pierre, South Dakota, for the
Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of penalty filed by the Secretary of Labor (Petitioner), seeking the imposition of civil penalties against Bob Bak Construction (Respondent), and alleging that Respondent violated various mandatory safety standards set forth in title 30 of the Code of Federal Regulations. Subsequent to notice, the case was initially scheduled for hearing on August 20, 1997. Respondent requested an adjournment, and after discussion in a telephone conference call with representatives of both parties, the case was rescheduled and heard in Fort Pierre, South Dakota on September 17, 1997.

Findings of fact and Conclusions of Law

Order No. 4410644

On August 14, 1996, Roger G. Nowell, an MSHA inspector, inspected Respondent's crusher No. 3, a sand and gravel operation located in Wagner, South Dakota. According to Nowell, the trap feed self-cleaning tail pulley, located in an enclosed structure, was not provided with a guard. He indicated that this condition was "easily observable" (Tr. 14). According to Nowell, should a person place his arm on top of the pulley brace or perpendicular to it, there is a possibility that his arm would become entangled in the fins of the pulley resulting in severe

injuries to the arm. Nowell issued an order under Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 alleging a violation of 30 C.F.R. § 56.14107(a).

Section 56.14107(a) supra provides as follows: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Respondent elected not to cross-examine Nowell, and not to present any evidence to impeach or contradict his testimony. Therefore, I accept Nowell's testimony. I find that the tail pulley can cause injury, and that it was not guarded to protect persons from contacting it. I thus find that Respondent did violate Section 56.14107(a) supra.

According to Nowell, persons entered the enclosure wherein the pulley in question was located, in order to clean, maintain, or lubricate the pulley. He indicated that a person traveling under the belt to clean it would be within six to eight inches from the belt and the pulley. In this connection, he noted the width of the entry alongside the belt and pulley was only approximately two feet wide. He concluded that the area was confined, and that a person working there would be in close proximity to the unguarded pulley. He thus concluded that it was reasonably likely for an injury such as loss of an arm to have resulted.

Inasmuch as Nowell's testimony was not impeached on cross examination, nor was it contradicted by Respondent, as Respondent did not introduce any evidence, I accept Nowell's testimony. I thus find that Petitioner has established a violation of a mandatory safety standard, i.e., Section 56.14107(a) supra, that this violation contributed to the hazard of an injury occasioned by contact with the unguarded pulley, that it was reasonably likely that this hazard would result in an injury, and that it was reasonably likely that the injury would be of a reasonably serious nature. I thus find that it has been established that the violation was significant and substantial (*Cement Division, Nat'l Gypsum Co.*, 3 FMSHRC, 822, 825 (April 1981)).

According to Nowell, in essence, a previous Section 104(d)(1) withdrawal order had been issued to Respondent. Nowell indicated that Respondent had been cited 16 times prior to August 14, 1996, for guarding violations. He also opined that Respondent's foreman, Lawrence Roghair, helped set up the crusher, and was aware that the tail pulley was not provided with a guard. He opined that the violation was the result of Respondent's unwarrantable failure.

Inasmuch as Respondent did not cross-examine Nowell, nor did it adduce any evidence to impeach or contradict Petitioner's evidence, I accept Nowell's testimony. I find, within the framework of his testimony, that it has been established that Respondent was negligent relating to the violation herein, and that its negligence reached the level of aggravated conduct. Hence I find that the violation resulted from the Respondent's unwarrantable failure. (*Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987)).

The record establishes that the violation was abated promptly. According to Nowell, MSHA records indicate that the crusher in issue was in operation for 4,000 production hours. I find, based upon Nowell's testimony, that the violation was of a high level of gravity, as it could have resulted in a serious injury such as a loss of a limb. I also find, as indicated above, that the level of Respondent's negligence was high.

Respondent proffered, post-hearing, an income tax return for 1996 for Robert Bak and Elsie Bak which indicates that the former is the proprietor of Bob Bak Construction. This return indicates business income i.e., net profit, of \$66,222, but a net operating loss of \$251,807. Petitioner did not rebut or impeach these figures. I find that imposition of a penalty would have a negative effect, to some degree, on Respondent's ability to continue in business.

Weighing all the above factors, I find that a penalty of \$480 is appropriate.

Order No. 4410645

According to Nowell, the top portion of the stacker belt tail pulley on the crusher was not guarded. He indicated that a person coming in close proximity to the pulley could be caught up by the belt splices, and become entangled in the fins, or pinch point. Since Nowell's testimony was neither impeached nor contradicted, I accept it. I thus find that the stacker belt pulley was not guarded, exposing persons to possible injury as a result of contact with the unguarded belt and pinch point. I thus find that it has been established that Respondent violated Section 56.14107(a) supra.

According to Nowell, the loader operator on the site, Gerry Freeman, told him that the pulley guard in issue had been removed in transporting the crusher at issue. Since it had not been replaced at the time of Nowell's inspection, and for the reasons set forth above, infra, I find that it has been established that the violation resulted from Respondent's unwarrantable failure. (See, Emery, supra).

For the reasons set forth above, infra, I find that Respondent's negligence was of a high degree, and that the violation was of a high level of gravity since an injury could have resulted. Considering also the effect of a penalty on the Respondent's ability to continue in business, as discussed above, infra, I find that a penalty of \$400 is appropriate.

Order No. 4644414

MSHA inspector Jeran Sprague inspected the subject site on August 14, 1996. He indicated that he observed a 175 Clark front-end loader in operation, and that the door was open. According to Sprague, the operator of the loader did not have his seat belt on. He issued an order under Section 104(d)(2) alleging a violation of 30 C.F.R. Section 56.14130(g).

30 C.F.R. § 56.14130(g) provides, as pertinent, that “[s]eat belts shall be worn by the equipment operator. . .”. Sprague’s testimony was not impeached or contradicted, and hence I accept it. I find that the operator of the front-end loader in question was not wearing a seat belt. Hence, it has been established that Respondent violated Section 56.14130(g) supra.

According to Sprague, the front-end loader was operated over uneven terrain, and traveled down a 15 percent grade for a distance of 50 feet on a ramp located five feet above the adjacent ground. He indicated that since the loader articulates, when the bucket is raised in normal operations, the loader could tip or turn over. In such an event, the operator not wearing a seat belt could be thrown from the vehicle especially if the door was open as observed by Sprague. Since the testimony of Sprague was not impeached or contradicted by the Respondent’s evidence, I accept it. In the context of Sprague’s testimony, I find that it has been established that the violation is significant and substantial. (National Gypsum, supra).

According to Nowell, when he inspected Respondent’s operation on June 5, 1995, Roghair was operating a front-end loader but was not wearing a seat belt. According to Sprague, Respondent had previously been cited for a violation of the same standard at issue i.e., Section 56.14130(g) supra. He indicated that the citation was issued “probably” prior to 1994. Sprague testified that after he observed a Mr. Freeman operating the loader at issue without a seat belt on August 14, 1996, the former did not put on his seat belt until Roghair told him to.

Elsie Bak, Respondent’s office manager, testified that all operators are instructed to wear seat belts, and if they do not wear belts they are told “to buckle up” (Tr. 59).

Since Respondent did not impeach or contradict Petitioner’s evidence that Respondent had previously been cited for a seat belt violation I accept Petitioner’s evidence. For the same reason, I accept Petitioner’s evidence that on June 5, 1995, Roghair was observed not wearing a seat belt. I also accept the Inspector’s testimony that on August 14, Freeman continued to operate the loader without wearing a seat belt until told to do so by Roghair. Within this framework, I find that it has been established that the violation herein resulted from Respondent’s unwarrantable failure (See, Emery supra).

I find that the level of Respondent’s negligence was high, and that the violation was of a high level of gravity inasmuch as the operator of the loader could have been seriously injured. Considering also the effect of a penalty on Respondent’s ability to continue in business, I find that a penalty of \$480 is appropriate.

Order No. 4644415

On August 14, 1996, Sprague observed a lubricating truck that was located approximately 75 to 100 feet from the stacker. According to Mrs. Bak, the truck was located in a parking area, and was used to change tires on trucks that haul material from the stockpile to locations off the subject site.

According to Sprague, he opened the side door of the truck and observed an oxygen bottle that was protected with a cap, lying on the floor. He indicated that the bottle was covered with oil, and was lying unsecured on the floor of the truck in an accumulation of oil. In addition, Sprague observed a bottle of acetylene, oil drums, and tubes of grease, inside the truck. According to Sprague, both the bottle of acetylene and the oxygen bottle were full.

Sprague issued a Section 104(d)(2) order alleging a violation of 30 C.F.R. § 56.4601 which provides as follows: “[o]xygen cylinders shall not be stored in rooms or areas used or designated for storage of flammable or combustible liquids, including grease”.

Respondent did not impeach or contradict Sprague’s testimony that he observed an oxygen bottle on the floor of a truck that also contained oil drums and tubes of grease. I thus find that it has been established that Respondent did violate Section 56.4601 supra.

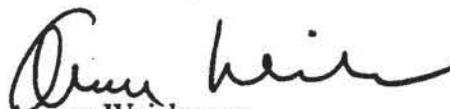
Sprague indicated that oxygen is highly volatile. He indicated that in hooking up a gauge to the oxygen cylinder should a wrench slip, it could cause sparks resulting in an explosion. He indicated that these cylinders “. . . sail like a rocket when they explode” (Tr. 66). He indicated that such an event was reasonably likely to have occurred since, in essence, the heat generated by attaching gauges to the oxygen cylinder, could have caused a spark which, taking into account the presence of oil, could have led to an explosion.

Although the cylinders were protected with a cap, I accept the testimony of Sprague, inasmuch as it was not impeached or contradicted, that, in essence, due to the presence of oil on the cylinder at issue, an explosion was reasonably likely to have occurred. I find that, given an explosion, a reasonably serious injury could have resulted as, according to Sprague, two miners were in the area. I thus find that it has been established that the violation was significant and substantial. (See National Gypsum supra.)

I find that the violation was of a high level of gravity inasmuch as a serious injury could have resulted. I also find that the violation was of a high level of negligence. Considering also the effect of the penalty on Respondent’s ability to continue in business, I find that a penalty of \$480 is appropriate.

Order

It is ORDERED that the orders at issue are affirmed as written. It is further ORDERED that within 30 days of this decision Respondent shall pay a total civil penalty of \$1,840.


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)

Robert Bak Owner, Bob Bak Construction, P.O. Box 159, Pierre, SD 57501 (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

NOV 4 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 91-97
Petitioner	:	A. C. No. 40-02755-03525
v.	:	
	:	Docket No. SE 91-533
FAITH COAL COMPANY,	:	A. C. No. 40-02755-03527
Respondent	:	
	:	Docket No. SE 92-315
	:	A. C. No. 40-02755-03536
	:	
	:	Docket No. SE 92-316
	:	A. C. No. 40-02755-03537
	:	
	:	Docket No. SE 92-343
	:	A. C. No. 40-02755-03538
	:	
	:	Docket No. SE 92-372
	:	A. C. No. 40-02755-03540
	:	
	:	Docket No. SE 92-373
	:	A. C. No. 40-02755-03541
	:	
	:	Docket No. SE 92-375
	:	A. C. No. 40-02755-03542
	:	
	:	Docket No. SE 92-463
	:	A. C. No. 40-02755-03543
	:	
	:	Docket No. SE 92-464
	:	A. C. No. 40-02755-03544
	:	
	:	Docket No. SE 92-488
	:	A. C. No. 40-02755-03545
	:	
	:	Docket No. SE 93-78
	:	A. C. No. 40-02755-03547
	:	
	:	Docket No. SE 93-79
	:	A. C. No. 40-02755-03548

: Docket No. SE-93-194
: A. C. No. 40-02755-03549
:
: Docket No. SE-93-195
: A. C. No. 40-02755-03550
:
: Docket No. SE 93-257
: A. C. No. 40-02755-03552
:
: Docket No. SE 93-300
: A. C. No. 40-02755-03553
:
: Docket No. SE 93-348
: A. C. No. 40-02755-03555
:
: Docket No. SE 93-365
: A. C. No. 40-02755-03556
:
: Docket No. SE 93-366
: A. C. No. 40-02755-03557
:
: Docket No. SE 93-411
: A. C. No. 40-02755-03558
:
: Docket No. SE 94-42
: A. C. No. 40-02755-03561
:
: Docket No. SE 94-75
: A. C. No. 40-02755-03562
:
: Docket No. SE 94-96
: A. C. No. 40-02755-03563
:
: Docket No. SE 94-256
: A. C. No. 40-02755-03564
:
: Docket No. SE 94-257
: A. C. No. 40-02755-03565
:
: No. 15 Mine

DECISION ON REMAND

BEFORE: Judge Barbour

This remand involves one citation (Citation No. 3202337) in one docket (Docket No. SE 94-256). In the citation, the Secretary alleged a violation of 30 C.F.R. § 75.313 because the methane monitor on a scoop loader was inoperable (Joint Exh. 62). Section 75.313 relates to fan stoppages while miners are underground, not to methane monitors on loading machines. The latter requirements are found in 30 C.F.R. § 75.342 and its subsections. Therefore, in my original decision, I found the Secretary cited the wrong standard, and I vacated the citation (17 FMSHRC 1146, 1183 (July 1995)).

The Commission reversed. It held I should have issued an order directing the Secretary to show cause why the citation should not be amended to conform to the evidence and to charge a violation of section 75.342(a)(4). Because the Commission concluded Faith Coal Company understood the nature of the violation charged and was not prejudiced, the Commission reinstated the citation and directed me to find whether Faith violated section 75.342(a)(4) (19 FMSHRC 1357, 1360-62 (August 1997)).

After the case was returned to me, I ordered the parties to determine if they could settle the matter. If they could not, I ordered them to submit briefs or statements regarding whether a violation of section 75.342(a)(4) occurred and, if so, what an appropriate civil penalty should be, taking into account the criteria set forth in section 110(i) of the Mine Act (30 U.S.C. § 820(i)).

Counsel for the Secretary filed a response advising me the parties were unable to settle their differences. She argued a violation of section 75.342(a)(4) occurred, and she requested Faith be assessed a civil penalty of \$4,000 for the violation. Also, she included in her response a statement by Faith's representative maintaining the company did not violate the standard and requesting he be allowed more time to respond to the Secretary's response (Response to Order On Remand 2). The request is denied. The representative has had ample opportunity to make known the company's position regarding the issues on remand, and it is time to end this matter.

THE VIOLATION

Section 75.342(a)(4) requires "Methane monitors . . . [to] be maintained in permissible and proper operating condition." I fully set forth the relevant testimony in my previous decision, and it need not be repeated here (17 FMSHRC at 1182). It is sufficient to note the inspector testified that he saw the scoop operating, he tested the scoop's methane monitor, and the monitor did not deenergize the scoop (Vol. II Tr. 413-414). He also testified the company's representative was not present at the time the scoop was operating, but later arrived and told the inspector that he, the representative, had "jumped out" the monitor (meaning the monitor mechanism had been bypassed electrically so that the scoop would continue to operate regardless of the presence of methane) (17 FMSHRC at 1182).

The representative acknowledged the monitor had been bypassed. He testified he bypassed it because he was going to use the scoop as a means of transportation rather than as a mechanism to load coal. He maintained the monitor was working when the scoop was loading coal and it did not need to work when the scoop was used for transportation (Vol. II Tr. 428).

I find the Secretary proved a violation of section 75.342(a)(4). The testimony of the inspector regarding the conditions he observed was entirely credible and not overcome by the representative. Although the representative asserted the scoop was not loading coal with an inoperable monitor, he was not on the section when the inspector saw the scoop. Nor was he there when the inspector tested the monitor and found it did not work (Vol. II Tr. 413-414, 417). In short, the inspector's testimony conclusively establishes the monitor was not "maintained in permissible and operating condition," as required by the standard (30 C.F.R. § 75.342(a)(4)).

Even if the scoop was not loading coal but was used or was going to be used for transportation purposes, I would still conclude its lack of a functioning methane monitor violated section 75.342(a)(4). The standard is directed at detecting methane in working places, that is at detecting methane in by the last open crosscut (30 C.F.R. § 75.2). The standard's goal is to prevent potentially disastrous explosions and fires by warning of the presence of gas before it reaches dangerous concentrations. Interpreting the standard to allow removal of this protection when use of the equipment is altered temporarily but its functional capabilities remain the same, would not promote the protective purpose of the Act or the standard. I suspect this is why the standard does not, as it might, require a monitor to be present and functioning only when the equipment is in use within a working place.

GRAVITY

The inspector determined the violation was not a significant and substantial contribution to a mine safety hazard (S&S violation) because the mine normally does not liberate methane and no methane was detected at the time the violation was cited (Vol. II Tr. 419). The inspector testified that if methane was detected at the mine it was in "very small quantities" (Vol. II Tr. 419). These factors properly influenced the inspector's assessment of the S&S nature of the violation -- that is, whether the hazard created by the violation was reasonably likely to result in a reasonably serious injury.

However, the same factors do not compel a conclusion the violation was none serious. The violation consisted of the company's deliberate failure to maintain the methane monitor in proper operating condition. Because methane's past is not always its prologue, proper maintenance of a methane monitor is one of the Act's most important protections. An operator cannot unilaterally remove the protection. While I recognize the gravity of the violation was mitigated by the lack of past and present methane, nevertheless, it was a serious violation.

UNWARRANTABLE FAILURE AND NEGLIGENCE

In her initial brief the Secretary's counsel argued the representative's testimony he intentionally bypassed the monitor should result in a finding of unwarrantable failure (Sec. Br. 150). I did not reach the issue, because I did not find a violation. However, in dicta, I stated if I had found a violation, I would not have found it the result of unwarrantable failure. ("The original citation did not charge unwarrantable failure and Faith was not given notice such . . . an allegation was at issue" (17 FMSHRC at 1183)).

On remand, counsel renews her argument. She asks the citation "be modified to conform to the proof; i.e., that it be modified to a [s]ection 104(d) citation to reflect [the representative's] unwarrantable failure to comply with the regulation" (Response to Order on Remand 5). Again, she cites the representative's testimony he intentionally bypassed the monitor (Id. 5-6).

Counsel's request comes much too late. While it is true the representative testified he intentionally bypassed the monitor, he did so without knowing unwarrantable failure was at issue. As the Commission noted in reversing in part my original decision, the Federal Rules of Civil Procedure are applied so far as practicable on procedural questions not governed by the Commission's rules or the Act (19 FMSHRC at 1352 n.10). Rule 15(b) of the Federal Rules provides for conformance of the pleadings to the evidence adduced at trial, but the Commission has stated that when determining whether a Rule 15(b) amendment is to be allowed, "emphasis [is] upon the parties understanding that the unpleaded claim is, in fact, being litigated" (19 FMSHRC at 1362 n.10 (citing to Magma Copper Co., 8 FMSHRC 656, 659 n.6 (May 1986))).

Here, the representative did not know, nor should he have know, the government would charge the company with unwarrantable failure. No such charge was on the citation, in the pleadings, or mentioned during the hearing. The only issue regarding culpability of which the representative had notice was that of the company's negligence. Under the Mine Act the concepts of negligence and unwarrantable failure are not identical. To allow modification of the citation at this point would be to eliminate the distinction between them and to prejudice the representative, who, had he known unwarrantable failure was an issue, might well have presented the company's case and his testimony differently.

Finally, there is a fundamental statutory problem with counsel's request. To issue a citation under section 104(d)(1), the inspector must make an S&S as well as an unwarrantable finding (30 U.S.C. § 814(d)(1)). In issuing Citation No. 3202337, the inspector did not find the violation was S&S, nor did the Secretary allege such was its nature (Vol. II Tr. 419; Response to Order on Remand 3).

Turning to the criteria of negligence, the inspector's and representative's testimony establishes that the representative intentionally bypassed the monitor (Vol. II Tr. 417, 425). Therefore, I find the representative, and through him the company, exhibited high negligence in allowing the violation to exist.

GOOD FAITH ABATEMENT

The violation was abated when the scoop was removed from service and not returned to the mine (Vol. II Tr. 420). This constituted good faith abatement.

OTHER CIVIL PENALTY CRITERIA

My findings regarding the civil penalty criteria of ability to continue in business, size, and history of previous violations were not disturbed on review and are applicable here (17 FMSHRC at 1208-10).

PENALTY ASSESSMENT

Counsel requested a civil penalty of \$4,000 (Response to Order on Remand 7). The request is highly excessive, especially in view of my previous findings regarding the adverse consequences of the Secretary's proposed penalties on the company's ability to continue in business (17 FMSRHC at 1208-10), and in view of the mitigated gravity of the violation. A civil penalty of \$150 is consistent with penalties previously assessed and settlements previously approved, and is in accord with criteria particularly applicable to the violation. Accordingly, Faith is **ORDERED** to pay such a penalty, along with all other penalties assessed in these proceedings, within 30 days. Upon payment of the penalties, these proceedings are **DISMISSED**.


David F. Barbour
Administrative Law Judge

Distribution:

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

Mr. Lonnie Stockwell, Faith Coal Company, Route 1, Box 196, Palmer, TN 37365 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

303-844-3577/FAX 303-844-5268

NOV 18 1997

STILLWATER MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 96-281-RM
v.	:	Citation No. 7900016; 5/21/96
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Stillwater Mine
ADMINISTRATION (MSHA),	:	Mine I.D. No. 24-01490
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-179-M
Petitioner	:	A.C. 24-01490-05583
	:	
v.	:	
	:	
	:	Stillwater Mine
STILLWATER MINING COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Manning

By order dated November 11, 1997, I granted the Secretary of Labor's motion for summary decision on all issues except the degree of negligence attributable to the violation. In the order, I held that there are no genuine issues as to any material fact in these cases. I also held that the Secretary established a violation of 30 C.F.R. §50.11(b) as a matter of law. My order granting, in part, the Secretary's motion for summary decision is attached to and made a part of this decision.

Citation No. 7900016, issued May 21, 1996, alleged that Stillwater Mining Company ("Stillwater") failed to make available to the Mine Safety and Health Administration ("MSHA") an accident investigation report of the Kenneth Goode fatality. Stillwater made a number of documents available to MSHA, but the Secretary alleged in the citation that these documents did not comply with the requirements of section 50.11(b). The citation alleged that the violation was

not serious and was not of a significant and substantial nature. The citation also alleged that the violation was the result of Stillwater's high negligence. The Secretary proposed a penalty of \$50 for the alleged violation.

In my order of November 11, I held that there were no genuine factual issues in these cases and that the Secretary was entitled to summary decision as a matter of law on the issue of whether Stillwater violated section 50.11(b). I denied the Secretary's motion with respect to her determination that the violation was the result of Stillwater's high negligence. I determined that the Secretary had not established high negligence.

By letter dated November 13, 1997, counsel for the Secretary advised me that the citation will be modified to show that the violation was the result of Stillwater's moderate negligence. With this modification, I hereby find that there are no genuine issues as to any material fact with respect to Stillwater's negligence and that the Secretary is entitled to summary decision on this issue as a matter of law. MSHA advised Stillwater by letter dated May 6, 1996, that it needed to submit its report of the Kenneth Goode fatality to MSHA on or before May 20, 1996. The letter referred to section 50.11 and stated that the regulation "requires that the report be complete and contain information listed in the criteria section of 50.11(b)." (Sec. Ex. A-1). MSHA did not receive a report from Stillwater on or before May 20 and did not receive a request for an extension of time from Stillwater. By letter dated May 23, counsel for Stillwater stated that the requested documents had already been produced in litigation pending before Former Commission Administrative Law Judge Arthur Amchan. Stillwater also provided these documents to MSHA before the end of September 1995.

As stated in my order granting summary decision, the documents previously submitted by Stillwater do not comply with the requirements of section 50.11(b) and cannot be deemed to be a report of Stillwater's accident investigation under that section. Mine operators have been providing accident reports as required by section 50.11(b) for years and Stillwater's failure to provide such a report upon MSHA's request constitutes moderate negligence.

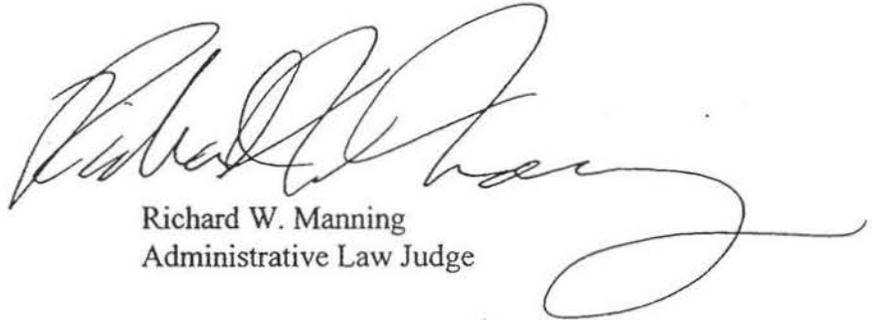
APPROPRIATE CIVIL PENALTY

Section 110(i) of the Federal Mine Safety and Health Act sets out six criteria to be considered in determining an appropriate civil penalty. The Secretary proposed a nominal penalty of \$50.00 for the violation. Given that I have granted the Secretary's motion for summary decision, I have reviewed the six criteria to ensure that there is support for the Secretary's proposed penalty. I find that Stillwater employed about 271 miners underground during the second quarter of 1995 and reported 131,116 man-hours of underground production during that quarter. (Sec. Ex. A-3 at 121). In his decision involving the Kenneth Goode fatality, Judge Amchan determined that Stillwater is a "relatively large operator." *Stillwater Mining Co.* 18 FMSHRC 1291, 1298 (July 1996). The Secretary did not submit evidence concerning Stillwater's history of previous violations and I assume that the penalty should not be raised or lowered as a result of this criteria. *Id.* The proposed penalty will not affect Stillwater's ability to

continue in business. The violation was not serious and was the result of Stillwater's moderate negligence. The violation was abated in good faith when Stillwater supplemented its response to MSHA's request for a report, as described in my order of November 11. Accordingly, I find that the Secretary's proposed penalty of \$50.00 is supported by the record.

ORDER

The hearing scheduled in these cases is **CANCELED**. Citation No. 7900016 is **AFFIRMED**, as modified to show moderate negligence. The notice of contest filed by Stillwater Mining Company in WEST 96-281-RM is **DISMISSED** and Stillwater Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$50.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

James J. Gonzales, HOLLAND & HART, P.O. Box 8749, Denver, CO 80201-8749 (Certified Mail)

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

RWM

a report of each investigation. No operator may use Form 7000-1 as a report.... No operator may use an investigation or an investigation report conducted or prepared by MSHA to comply with this paragraph. An operator shall submit a copy of any investigation report to MSHA at its request. Each report prepared by an operator shall include:

- (1) The date and hour of occurrence;
- (2) The date the investigation began;
- (3) The names of individuals participating in the investigation;
- (4) A description of the site;
- (5) An explanation of the accident or injury, including a description of any equipment involved and relevant events before and after the occurrence, and any explanation of the cause of any injury, the cause of any accident or cause of any event which caused an injury;
- (6) The name, occupation, and experience of any miner involved;
- (7) A sketch, where pertinent, including dimensions depicting the occurrence;
- (8) A description of the steps taken to prevent a similar occurrence in the future; and
- (9) Identification of any report submitted under §50.20 of this part.

The Secretary of Labor filed a motion for summary decision in this case pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. In her motion for summary decision, the Secretary contends that no material facts are in dispute and that the Secretary is entitled to summary decision as a matter of law. She argues that Stillwater did not prepare a report of the accident as required by section 50.11(b), but merely submitted some documents, including a transcript of an audiotaped interview of a miner who witnessed the accident. This hourly employee was interviewed by Stillwater officials on the night of the accident. The Secretary contends that given "the plain terms of the standard, and given MSHA's explicit, written request for Stillwater's section 50.11(b) report, there is no genuine issue as to any material fact regarding whether Stillwater violated section 50.11(b)...." (Sec. Memo. at 18).

Stillwater maintains that the Secretary failed to establish that there is no genuine dispute of material fact that would allow entry of summary decision in favor of the Secretary. It also argues that the Secretary failed to establish that she is entitled to summary decision as a matter of law. Stillwater disputes the Secretary's interpretation of the regulation that requires an accident report to be a "new, distinct document that specifically addresses the enumerated items set out in

section 50.11(b).” (Stillwater response at 2). It contends that the Secretary’s interpretation of section 50.11(b) lacks notice and deserves no deference.

Rule 67(b) sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

I. UNDISPUTED MATERIAL FACTS

I find that the record in this case establishes that there is no genuine issue as to any material fact. I have summarized the material facts below.

Stillwater operates an underground platinum mine near Nye, Montana. On August 21, 1995, Kenneth Goode, a Stillwater employee, was killed in an accident at the mine. Mr. Goode was buried under tons of ore when the assembly securing the gate of an ore chute failed. Stillwater contested two citations that were issued as a result of MSHA’s investigation of the accident. Former Commission Administrative Law Judge Arthur Amchan affirmed one citation and vacated the other. *Stillwater Mining Co.*, 18 FMSHRC 1291 (July 1996), *appeal pending sub nom. Stillwater Mining Co. v. FMSHRC*, 9th Cir. No. 96-70805. The instant citation was not involved in that proceeding.

In August or September 1995, Stillwater provided to MSHA representatives what it considered to be its report of the accident. (Stillwater Ex. 1). This “report” is what has become known as the “Kenneth Goode Packet.” This packet included: (1) a cover page entitled “Kenneth Goode;” (2) a completed MSHA Form 7000-1; (3) a transcript of an informal interview of a Stillwater miner who witnessed the accident; (4) certificates of training for Kenneth Goode, Duane Hudson, and Randy Johnson; (5) a Stillwater organization chart; (6) various training documents and plans; (7) records of weekly safety meetings; (8) an invoice for two lower chute assemblies with arc gates; (9) photographs of the accident site; (9) an MSHA form describing the number of man-hours worked for the second quarter of 1995; and (10) a list of names on a sheet of paper entitled “close-out.” (Sec. Ex. A-3). This packet also included some additional diagrams and drawings of the accident site. (Stillwater Response at 4).

The hearing in the case before Judge Amchan occurred in early May 1996. At about that time, MSHA reviewed its files concerning the Goode accident and determined that it had never received a section 50.11(b) report from Stillwater. On May 3, 1996, Inspector Ferreira called Christopher Allen, Stillwater’s manager of safety, and requested a copy of the company’s

accident report. On or about May 6, Jake DeHerrera, MSHA's Assistant District Manager for the Rocky Mountain District, wrote a letter to Mr. Allen. The letter referenced Inspector's Ferreira's request and further stated:

As you are aware, CFR 30, 50.11 requires mine operators who employ twenty or more miners, to investigate each accident which occurs at the mine and prepare an accident investigation report. It prohibits using the 7000-1 report [or] the MSHA investigation report for compliance. The regulation requires that the report be complete and contain information listed in the criteria section of 50.11(b). It further requires the mine operator [to] submit the report at MSHA's request.

(Sec. Ex. A-1). The letter asked Stillwater to submit the report to MSHA by May 20, 1996.

Stillwater filed a motion with Judge Amchan objecting to MSHA's request. In the motion, Stillwater stated that it provided its accident report to the Secretary during discovery. This "report" consisted of the Kenneth Goode Packet, described above. The motion went on to state that the Secretary introduce the transcript, maps, diagrams, and photographs from the "report" into evidence in the case. It states that this transcript was "a fundamental part of the accident investigation report previously produced by Stillwater ... to the Secretary." (Sec. Ex. C at 1-2).

MSHA did not receive any other report from Stillwater on or before May 21, 1996. On May 21, Inspector Ferreira, after discussing the matter with Mr. DeHerrera, issued Citation No. 7900016 alleging a violation of section 50.11(b). The citation required abatement by Friday, May 24, 1996, at 9:00 a.m. The citation was mailed to Stillwater but was not received at the mine until midday on May 24. At the time Inspector Ferreira issued the citation, he called Ralph McKenzie, Stillwater's Safety Coordinator. He advised Mr. McKenzie that he had issued the citation and read it to him.

On May 23, Mr. James J. Gonzales, counsel for Stillwater, sent a letter to Mr. DeHerrera stating that a copy of the company's accident report had already been delivered to counsel for the Secretary during the litigation before Judge Amchan. This "report" was the Kenneth Goode Packet. Mr. Gonzales enclosed another copy of this packet with the letter.

On May 24, Mr. Allen sent a letter to Mr. DeHerrera via fax in response to the citation. In the letter, Mr. Allen stated that he received the citation after the time set for abatement. He also stated that the company previously supplied a report of the accident as required by section 50.11(b). He also stated that Mr. DeHerrera, during a telephone conversation earlier that day, threatened to issue a section 104(b) order if the citation was not abated. Mr. Allen stated that the company was not given sufficient time to abate the citation. The letter then set forth a "restatement and summary" of its previously submitted "report." This restatement and summary

consisted of nine numbered paragraphs that conformed to the subsections of the cited regulation. This summary referred to specific documents in the Kenneth Goode Packet. (Sec. Ex. A-4).

On June 17, 1996, Mr. DeHerrera sent a letter to Mr. Allen in response to his letter of May 24. Mr. DeHerrera stated that MSHA will allow Stillwater "appropriate time" to comply with the requirements of section 50.11(b). The letter also set forth five deficiencies contained in the restatement and summary contained in Mr. Allen's letter, which prevented MSHA from terminating the citation. For example, the letter stated that the referenced portions of the transcript were difficult to follow, the summary was not sufficiently detailed, and the black and white photocopies of the photographs taken at the accident site were useless. He extended the abatement date to July 3, 1996. (Sec. Ex. A-5).

On July 3, 1996, Mr. Gonzales sent a letter to Mr. DeHerrera stating that Stillwater fully complied with the requirements of section 50.11(b). The letter also addressed the deficiencies set forth in Mr. DeHerrera's letter of June 17. For example, the letter contained a paragraph discussing the cause of the accident. Drawings of the accident site and color photographs that had been introduced at the hearing before Judge Amchan were attached. (Sec. Ex. A-6).

MSHA terminated the citation on August 1, 1996, based on the information contained in Mr. Gonzales's letter of July 3, Mr. Allen's letter of May 24, and the Kenneth Goode Packet. Mr. DeHerrera was less than fully satisfied with the company's responses but believed that it had substantially complied with the regulation.

Stillwater alleges that because there are disputed facts in this case, summary decision is not proper. I find, however, that the facts that Stillwater alleges to be disputed are not material to this case, but are peripheral to the issue of whether it violated section 50.11(b). First, it contends that there is a dispute between the sworn statements of the Secretary's witnesses. (Stillwater Response at 4-5). This alleged dispute does not raise an issue of fact, because it is really a disagreement as to whether the Kenneth Goode Packet is a "report" as that term is used in the regulation. In his deposition, Mr. DeHerrera admitted that MSHA had obtained the documents contained in the Kenneth Goode Packet prior to the time that the citation was issued. (DeHerrera Dep. Sec. Ex. E at 16-17, 27, 40-43). For the purposes of the Secretary's motion, I will assume that, in September 1995, Stillwater provided MSHA with all of the material that Stillwater contends was in the Kenneth Goode Packet.

Stillwater also contends that the affidavit of Mr. DeHerrera that counsel for the Secretary attached to the motion conflicts with his testimony at his deposition. In the affidavit Mr. DeHerrera stated that the letters from Mr. Allen and Mr. Gonzales, described above, together with the Kenneth Goode Packet substantially complied with the requirements of section 50.11(b). (Sec. Ex. A at 3-4). Stillwater believes that this affidavit conflicts with the deposition testimony so that his affidavit "is impeached by his own sworn deposition testimony." (Stillwater Response at 10). Mr. DeHerrera's deposition testimony is entirely consistent with what he stated in his affidavit. For example, when asked why the citation was terminated by MSHA, Mr. DeHerrera replied that MSHA officials believed that they "had received information from the company and

from [Mr. Gonzales], although incomplete, and we decided to go ahead and terminate the citation rather than let it drag on.” (Sec. Ex. E at 53). When asked if he believed that Stillwater was continuing to violate the regulation, Mr. DeHerrera replied: “No, I felt that the company had complied although I was not satisfied with the way they complied.” (*Id.* at 53-54). These responses are not so different as to impeach his affidavit. Although he was not completely satisfied with the responses he had received from Stillwater, he believed that the documents that had been submitted substantially complied with the requirements of section 50.11(b). In addition, the manner in which Stillwater abated the citation is not really at issue here and any minor disparities between Mr. DeHerrera’s affidavit and deposition testimony are not material.

I find that the Secretary met her burden under Rule 67(b)(1) and established that “there is no genuine issue as to any material fact” in these cases. All other factual issues raised by Stillwater are not material to the only issue in the cases: whether the material provided to MSHA about the subject accident prior to the issuance of the citation complied with the requirements of section 50.11(b).

II. ISSUES OF LAW

As stated above, the issue in these cases is whether the material Stillwater provided to MSHA prior to May 21, 1996, was a “report” as that term is used in section 50.11(b). There is no question that Stillwater was required to prepare a report following the accident. The Secretary has defined the term “accident” as used in her Part 50 regulations to include a “death of an individual at a mine.” 30 C.F.R. §50.2(h)(1). Section 50.11(b), by its own terms, requires an operator to prepare a report of its investigation of every accident at the mine. Kenneth Goode’s death at the mine triggered Stillwater’s obligation to investigate the accident and prepare a report of its investigation.

It is also clear that the Secretary’s regulation requiring mine operators to prepare a report of accident investigations is grounded in the Mine Act. Section 103(d) of the Mine Act provides, in pertinent part, that all “accidents ... shall be investigated by the operator or his agents to determine the cause and the means of preventing a recurrence.” 30 U.S.C. §813(d). This provision further provides that “[r]ecords of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative....” *Id.* Finally, section 103(h) of the Mine Act provides that in “addition to such records as are specifically required by this Act, every operator of a ... mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under this Act.” 30 U.S.C. §813(h).

The essence of the dispute is what is meant by the term “report” in section 50.11(b). The Secretary argues that the term “report” means “a new, distinct document that specifically addresses the enumerated items set out in Section 50.11(b).” (Sec. Memo. at 2). She contends that a mine operator cannot comply with the obligation of the regulation by “compiling a set of existing documents — one or more of which may only incidentally address some of the items

listed in Section 50.11(b) — and then offering the set of documents to MSHA as its Section 50.11(b) ‘report.’” (*Id.* at 10). At the deposition of Mr. DeHerrera, counsel for the Secretary stated:

The parties stipulate that the position of the Secretary concerning the issuance of Citation 7900016 for a violation of section 50.11(b) is that the operator is required to prepare a narrative report containing information addressing each of the elements in 50.11(b), and that even if the information provided to MSHA by Stillwater Mining Company contained all of the information referenced in 50.11(b), the citation would have issued anyway, because the Secretary does not consider the information provided by Stillwater Mining Company to be an adequate narrative form.

(Sec. Memo. Ex. E at 64).

Stillwater argues that the Secretary’s interpretation of the term “report” lacks notice and deserves no deference. Stillwater contends that the evidence shows that it “promptly conducted an accident investigation concerning the August 21, 1995 incident, prepared a transcript of its investigation, assembled an investigation report, and provided the investigation report upon request to MSHA no later than September 1995.” (Stillwater Response at 16).

For the reasons discussed below, I find that the Secretary met her burden under Rule 67(b)(2) and established that she “is entitled to summary decision as a matter of law.” Stillwater provided MSHA with voluminous data about the accident, but it did not provide a report that set forth, in narrative form, the information required by the regulation. (Sec. Motion Ex. A-3). The interview of the miner who witnessed the accident is not a report. The typed version of the interview is single-spaced and is about ten pages long. *Id.* Even if one assumes that the interview contained all of the requisite information, an MSHA official reviewing it would have difficulty extracting the information from the interview. As stated by Mr. DeHerrera, “[s]ome information had been submitted but piecemealed to us which took a lot of research to obtain the information.” (Sec. Motion Ex. E at 54). He went on to state that “the information was scattered throughout the report ... [i]t was not in the proper ... format where I could review it.” (*Id.* at 58-59). In effect, Stillwater improperly shifted the burden of preparing a report from itself to MSHA. Anyone reading the Kenneth Goode Packet would be required to spend a significant amount of time reviewing the material, extracting the required information, and reorganizing the extracted information to determine if all of the required information was provided. Each mine operator is required to “develop a report” that provides the required information and it cannot delegate that responsibility to MSHA. 30 C.F.R. §50.11(b).

A second reason why the Kenneth Goode Packet does not comply with the requirements of the regulation is that it does not set forth the operator’s “explanation of ... the cause of any accident,” as required by section 50.11(b)(5). Even if I assume that the transcript of the miner’s

interview contained an explanation of the cause of the accident, Stillwater may not agree with the explanation stated by the miner. The regulation requires *Stillwater* to develop a report that contains an explanation of the cause of the accident. The MSHA official reviewing the transcript of the interview of the miner would not know whether Stillwater agreed with his explanation. The same deficiency exists with respect to section 50.11(b)(8), which requires the operator to describe the steps being taken to prevent a similar occurrence in the future. Even if the subject transcript included a description of the steps that Stillwater was taking to prevent similar accidents, MSHA would not know if his description was complete because a miner may not be in a position to describe all of the remedial steps that have been taken. Thus, the materials submitted to MSHA by Stillwater do not contain management's responses to these important inquiries. MSHA officials would be required to guess how management would respond to these two enumerated elements of the regulation.

I find that Stillwater failed to develop a report of its investigation of the accident that contained its responses to subsections one through nine of section 50.11(b). I also find that the plain language of the regulation makes clear that such a report is required. I do not believe that the standard is ambiguous in this regard.

Even if I were to find that the regulation is ambiguous, I would owe deference to the Secretary's interpretation of the regulation. 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, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978). The Mine Act expressly authorizes the Secretary to require mine operators to make such reports and provide such information as she reasonably requires to perform her functions under the Mine Act. Requiring mine operators to provide the information required by section 50.11(b) in a format that can be easily reviewed and analyzed is eminently reasonable. The Mine Act was enacted to help prevent accidents, such as the Kenneth Goode fatality, and a mine operator's accident report helps MSHA personnel understand the causes of accidents. The Secretary's interpretation of section 50.11(b) as applied to the facts of this case is reasonable and consistent with the purposes of the Mine Act.¹

¹ Stillwater relies heavily on the stipulation entered between the parties at the deposition of Mr. DeHerrera in making its arguments. I am not required to consider the limits of the Secretary's stipulation in the present case. As stated above, as applied to the information submitted by Stillwater in the Kenneth Goode Packet, the Secretary's position is reasonable and entitled to deference.

Stillwater also contends that the mining community has never been provided with adequate notice of the Secretary's interpretation. It points to the fact that MSHA has never issued any interpretative bulletins or otherwise provided any guidance to mine operators. I disagree. As stated above, I find that the language of the regulation is plain on its face. A reasonably prudent person familiar with the mining industry and the protective purposes of the Mine Act would recognize that the regulation requires a mine operator to develop a report that provides the required information.² He would also understand that the report is required to present the information in a manner that can be easily understood and analyzed by MSHA. I believe that if such a reasonably prudent person were given a copy of the regulation and the Kenneth Goode Packet, he would have no difficulty concluding that the Packet did not comply with the requirements of the regulation. Mine operators have been providing accident reports under section 50.11(b) for years without much difficulty and I do not understand why Stillwater and its counsel think that MSHA's regulation is mystifying. (*See e.g.* Sec. Motion Exs. A-7 and A-8).

In conclusion, I find that the Secretary established a violation of section 50.11(b) as a matter of law. The issue in these cases is not whether the time given Stillwater by MSHA to prepare a report was reasonable. *See Steele Branch Mining*, 15 FMSHRC 597, 601-02 (April 1993). Stillwater contested the citation because it believed it had complied with the regulation. As stated above, the issue is whether the Kenneth Goode Packet was a report as required by the regulation. I find that it was not such a report. Accordingly, the citation is affirmed.

III. STILLWATER'S NEGLIGENCE

The Secretary also seeks summary decision with respect to MSHA's determination that the violation was the result of Stillwater's high negligence. She contends that Stillwater's high negligence is demonstrated by the fact that it requested the report on or about May 6, 1996, and it did not provide a report until after the citation was issued on May 21, 1996. She contends that even if the language of the regulation was ambiguous, Stillwater was put on notice by the May 6 letter that a new separate report was required in addition to the Kenneth Goode Packet. She argues that Stillwater's "refusal to prepare and submit a report to MSHA despite the plain language of the standard, and in face of MSHA's May 6 letter, can be characterized as nothing less than high negligence." (Sec. Memo at 14)(citation omitted).

There are no genuine issues of material fact on this issue. I find, however, that the Secretary is not entitled to summary decision as a matter of law. Stillwater sincerely believed that the documents it provided in its Kenneth Goode Packet complied with the requirements of the regulation. The letter Mr. DeHerrera sent to Stillwater on May 6 did not spell out in any more detail what was expected. It simply stated that the regulation "requires that the report be

² When faced with a challenge that a regulation fails to provide adequate notice of required conduct, the Commission applies an objective standard, the reasonably prudent person test. *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

complete and contain information listed in the criteria section of 50.11(b).” (Sec. Motion Ex. A-1). The letter requested Stillwater to submit the report by May 20. As stated in Mr. Gonzales’s letter of May 23, Stillwater believed that it had already produced the required report. (Sec. Motion Ex. A-2). Stillwater’s actions do not demonstrate high negligence. There has been no showing that it deliberately or intentionally failed to provide a report with the knowledge that such a report was required or that its interpretation of the regulation was not correct. The hearing in the case before Judge Amchan had just been completed at the time of MSHA’s request and Stillwater apparently believed that the request was being made for purposes of that case.

For the reasons set forth above, the Secretary’s motion for summary decision with respect to her high negligence determination is denied. I believe that it is neither necessary nor desirable to hold a hearing on the negligence issue. I believe that there are several ways to resolve this issue without the necessity of a hearing. First, the Secretary could modify the citation to delete the high negligence determination and substitute a moderate negligence determination. If counsel for the Secretary represents that such a modification will be made, I will hold that the violation was the result of Stillwater’s moderate (ordinary) negligence and assess a penalty of \$50.00. Second, the parties could waive their right to a hearing on this issue, in which case I will enter a finding on the negligence criterion based on the present record. Third, the parties could file further stipulations and/or argument on this issue, in which case I will enter a finding on the negligence criterion based on the present record and any additional stipulations and argument.

I would like to resolve this issue as quickly as possible so that I can issue my final decision in these cases. If the parties would like to discuss the negligence criterion with me, I am available for a conference call.

IV. ORDER

The Secretary’s motion for summary decision with respect to the issue of whether Stillwater Mining Company violated section 50.11(b) as alleged in Citation No. 7900016 is hereby **GRANTED**. The Secretary’s motion for summary decision with respect to the MSHA’s determination that the violation was caused by Stillwater’s high negligence is hereby **DENIED**.



Richard W. Manning
Administrative Law Judge

Distribution:

James J. Gonzales, HOLLAND & HART, P.O. Box 8749, Denver, CO 80201-8749

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

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

WASHINGTON, D. C. 20006-3868

November 25, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-996
Petitioner	:	A. C. No. 15-07201-03644
	:	
v.	:	Docket No. KENT 94-997
HARLAN CUMBERLAND COAL,	:	A. C. No. 15-07201-03645
Respondent	:	
	:	Docket No. KENT 94-998
	:	A. C. No. 15-07201-03646
	:	
	:	Docket No. KENT 94-1024
	:	A. C. No. 15-07201-03647
	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 94-1307
	:	A. C. No. 15-08415-03624
	:	
	:	D-1 Mine

DECISION ON REMAND

Before: Judge Merlin

These cases are before me pursuant to the Commission's decision dated September 25, 1997.

In these matters the Secretary of Labor filed a petition for assessment of civil penalties against the operator for not submitting respirable dust samples in accordance with applicable regulations. One citation charged a violation of 30 C.F.R. § 70.207(a) which requires that an operator take five valid respirable dust samples during a bimonthly period from a designated occupation. Two citations charged violations of 30 C.F.R. § 70.208(a) which requires that valid samples be taken bimonthly from designated areas.

In its decision dated September 25, 1997, the Commission held that the operator had violated the cited sections of the regulations. According to the Commission, in order to comply with the Act, the operator must collect samples and must submit them to the Mine Safety and Health Administration (hereafter referred to as "MSHA") in the manner specified by the regulations. In addition, the operator's samples must not be voided by MSHA for any reason. The Commission stated that MSHA cannot determine whether to void a sample unless it receives and examines the sample.

With respect to the appropriate amount of penalties the Commission found that the administrative law judge had made no findings with respect to size, good faith abatement, and history of prior violations. The parties had stipulated that a reasonable penalty would not affect the operator's ability to continue in business and the Commission directed that this should be taken into account when penalties were assessed.

The Commission stated that the judge made no gravity findings for the section 70.208(a) violations. In addition, the Commission pointed out that although the judge concluded the section 70.207(a) violation was serious, he offered no specific factual findings to support his conclusion.

The Commission then said that the judge offered no explanation to support his finding of moderate negligence for the violation of section 70.207(a) and an inadequate explanation of his moderate negligence finding for the violations of section 70.208(a). The Commission discussed the various findings that could be made with respect to negligence depending on the acceptance and interpretation of factual alternatives. The Commission remanded the cases for reassessment of penalties consistent with its decision.

On October 14, 1997, after a telephone conference call with counsel for both parties, I issued an order directing the parties to submit stipulations as had been discussed in the conference call. The parties now have submitted stipulations which provide as follows:

1. Harlan Cumberland Coal Company's C-2 Mine received 265 citations over 264 inspection days during the period from January 1991 to May 1994.
2. Harlan Cumberland Coal Company and its C-2 Mine abated the subject violations in good faith and in a timely manner.
3. Harlan Cumberland Coal Company's C-2 Mine produced 223,927.81 tons of coal from December 9, 1992 to December 9, 1993 and 245,125.35 tons of coal from January 14, 1993 to January 14, 1994.

4. Harlan Cumberland Coal Company produced a total of 428,001.70 tons of coal from December 9, 1992 to December 9, 1993 and a total of 436,517.47 tons of coal from January 14, 1993 to January 14, 1994.
5. Harlan Cumberland Coal Company states that Eddie Sargent's log book listing the subject dust cassettes was destroyed and, therefore, is not available for review in these cases.
6. The parties agree that a hearing and briefs are not necessary for the administrative law judge to issue a decision on remand in these cases.

I accept the stipulations.

Based upon the information in Stipulation No. 1, I find that the operator's overall history of prior violations was moderate.

Based upon Stipulation No. 2, I find that the violations were abated in good faith.

Based upon the information in Stipulation No. 4, I find that the mine was medium in size and that the operator was small.

At the hearing the judge accepted the stipulation that imposition of a reasonable penalty would not affect the operator's ability to continue in business. I also accept this stipulation and find that the operator's ability to continue in business will not be affected by imposition of a reasonable penalty.

In determining whether the violations here are serious, the decision of the Commission in Consolidation Coal Company, 8 FMSHRC 890 (June 1986), is instructive. The Commission held in that case that each instance where the permissible level of respirable dust is exceeded, constitutes a violation that is presumptively significant and substantial. The Commission stated that Congress recognized the direct relationship between reductions of respirable dust in mine atmosphere and corresponding reductions in the incidence of disabling respiratory disease. Id. at 896. In the Mine Act the Commission found an unambiguous legislative declaration in favor of preventing disability from pneumoconiosis or any other occupation related disease. Id. at 897. The Commission recognized that the onset of respirable dust disease was incapable of precise prediction, proof of a single incident of overexposure did not conclusively establish the reasonable likelihood of respirable disease, and the development and progress of respiratory disease was due to the cumulative dosage of dust a miner inhales. Accordingly, the Commission decided that if the Secretary proves a violative overexposure to respirable dust, a presumption arises that there is a

reasonable likelihood that the hazard created by the violation will result in illness, i.e. the violation is presumed to be significant and substantial. The Commission's decision was affirmed by the Court of Appeals in Consolidation Coal Company v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987).

In these cases the Commission's mandate is to determine the existence and extent of gravity attributable to the violations. As already set forth, the operator violated the Act by not submitting respirable dust samples that were not voided by MSHA. These samples are used to test whether the respirable dust levels in the mine are within permissible limits. Without samples, the levels of respirable dust cannot be measured and it cannot be determined whether miners have been exposed to excessive dust levels. The taking and submitting of valid samples therefore, constitute an indispensable part of the process whereby compliance with permissible dust levels is determined. As the Commission recognized in Consolidation Coal Company, the prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act. Id. at 895. It is not possible to determine the effect of a single instance, or a few instances, where valid samples are not submitted. However, like dust levels, gravity may be gauged by the cumulative effect of absent valid samples. Because the absence of valid samples inhibits the testing process and compromises the ascertainment of respirable dust levels which must be known in order to prevent respirable illness, the failure to submit such samples has a distinct element of gravity. I do bear in mind, however, that the absence of samples does not, in and of itself, show that there was overexposure, rather only that the level of exposure could not be tested. Accordingly, I conclude the violations were of ordinary gravity.

Since the Commission did not disturb the judge's finding that the operator took the samples, I find there was no negligence with respect to this aspect of the operator's responsibilities. The Commission stated that if the operator mailed the samples it was not negligent, but that any failure to place the samples in the mail would constitute some degree of negligence. As now appears from Stipulation No. 5, the operator has no proof that the samples were mailed. The unsupported allegations of the operator's witnesses are insufficient to establish mailing and consequently, I find that there was no mailing and that the operator was negligent.¹ In addition, the record shows that in 1993 the operator received seven previous citations for absent samples. A citation was issued in four of the five months preceding December 1993 when the first two citations in these cases were issued. All but one of the prior citations were issued to other mines of the operator, but it appears from the record that samples from the operator's various mines were handled by the same individuals and were mailed from the same office (Tr. 123, 138-142). In light of these circumstances, I find that the prior citations for other mines placed the operator on notice that a problem existed with its mailing of respirable samples. The operator should have taken

¹ Even if the operator's assertions with respect to record keeping and mailing were accepted, the operator would be guilty of negligence for destroying the records.

corrective action. The number of prior citations and their proximity in time to the ones in this case compels a finding that negligence was high. Lion Mining Company, 19 FMSHRC _____, No. PENN 94-71-R (November 20, 1997).

Based upon the prior citations, I find that the operator had a significant history of prior violations with respect to the mandatory standards involved in these cases.

As the Commission stated in its decision of remand, the determination of the amount of penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the statutory criteria of section 110(i) of the Act. In addition, it is well established that penalty proceedings before the Commission and its judges are de novo and that the Secretary's proposed penalties are not binding on the Commission and its judges. Sellersburg Stone Company, 5 FMSHRC 287, 290-29 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., 6 FMSHRC 1148, 1150 (May 1984); Missouri Rock, Inc., 11 FMSHRC 136, 140 (February 1989); Doss Fork Coal Company, 18 FMSHRC 122, 130 (February 1996); Wallace Brothers Inc., 18 FMSHRC 481, 483-484 (April 1996); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 881 (June 1996).

As set forth herein, I have considered and made findings with respect to the six criteria. It is my reasoned judgment that a penalty of \$850 is appropriate for each of the violations. I believe these amounts are consistent with the ordinary degree of gravity and high degree of negligence. They are also consistent with the operator's small size. In addition, in reaching these amounts I have taken into account the operator's overall and specific history of previous violations, its good faith abatement and the fact that imposition of a reasonable penalty will not affect its ability to continue in business. In my opinion these substantial penalties are sufficient to have the desired deterrent effect.

ORDER

It is **ORDERED** that a penalty of \$850 be assessed for each of the violations involved for a total penalty of \$2, 550.

It is further **ORDERED** that the operator **PAY** these penalties within 30 days of the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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

H. Kent Hendrickson, Esq., Rice & Hendrickson, P. O. Box 980, Harlan, KY 40831

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 26 1997

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

v.

BASIN RESOURCES, INCORPORATED,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 96-179
A.C. No. 05-04461-03526

Docket No. WEST 96-241
A.C. No. 05-02820-03786

Docket No. WEST 96-248
A.C. No. 05-02820-03787

Docket No. WEST 96-249
A.C. No. 05-02820-03788

Docket No. WEST 96-250
A.C. No. 05-02820-03789

Docket No. WEST 96-251
A.C. No. 05-02820-03790

Docket No. WEST 96-271
A.C. No. 05-04461-03527

Docket No. WEST 96-285
A.C. No. 05-02820-03791

Docket No. WEST 97-51
A.C. No. 05-02820-03792

Golden Eagle Mine/New Elk
Preparation Plant

DECISION

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

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Inc. ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820. The petitions allege 112 violations of the Secretary's safety and health regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

The Secretary filed a motion to amend the petitions for penalty to add Entech, Inc., and Montana Power Company as respondents in these and other Basin Resources cases. For the reasons set forth in *Basin Resources, Inc.*, 19 FMSHRC 699, 699-704 (April 1997), the Secretary's motion is denied.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. WEST 96-179, New Elk Preparation Plant

1. Citation No. 4057430

On January 18, 1995, MSHA Inspector Earl Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.1606(c). In the citation, the inspector alleged that the off-side bottom step on a refuse haulage truck was broken off. The citation states that the off-side steps are used to fuel the truck, clean the windows, and to check the air conditioner. He determined that the violation was not significant and substantial ("S&S") and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$288 for the alleged violation. The safety standard states that equipment defects affecting safety shall be corrected before the equipment is used.

Inspector Simmons testified that he was concerned that someone could suffer an injury when fueling the truck. (Tr. 36). The steps were not used to enter or exit the cab of the truck. Tom Sciacca, the mine's former accident prevention coordinator, testified that the mine used a fuel truck when putting fuel into the cited truck. As a consequence, he stated that the off-side steps were never used to fuel the refuse truck. (Tr. 43). He also testified that the off-side steps were not used for any of the other purposes.

Basin Resources contends that it did not violate the safety standard because the alleged defect did not affect safety. I disagree and I find that the broken step was a defect affecting safety. Although I credit the testimony of Mr. Sciacca, I find that an employee could attempt to use the steps to fuel the truck or to perform some sort of maintenance function, even though that was not the typical practice. The interpretation of safety standards under the Mine Act "cannot ignore the vagaries of human conduct." *Thompson Brothers Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984)(citations omitted). Without thinking about the risks, an employee could attempt to use the off-side steps to perform a task. I find that the Secretary established a violation, but that the violation was not serious. A penalty of \$75 is appropriate for this violation.

2. Citation No. 4057433

On January 18, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.215-1. In the citation, the inspector alleged that the permanent identification markers for a refuse pile did not set forth the name associated with the refuse pile or the name of the owner of the refuse pile. He determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$204 for the alleged violation. The safety standard states, in part, that a permanent identification marker must be located at all refuse piles that shows the identification number, the name associated with the pile, and the person owning, operating, or controlling the pile.

Inspector Simmons testified that there was a sign at the entrance to the preparation plant marked "New Elk Mine," but there was no separate identification marker for the refuse pile. (Tr. 48-49; Ex. R-A). He stated that the sign adjacent to the refuse pile contained the identification number for the pile but that the name of the owner was not legible. He also stated that the refuse pile was used to dump mine refuse. Mr. Sciacca testified that there was a sign near the refuse pile at the entrance to the mine that gave the name of the mine operator and the mine's I.D. number. (Tr. 56-57; Ex. R-A). He also testified that there was a sign on the public highway a short distance away that provided the name of the mine and the mine operator. *Id.* Basin Resources argues that the citation should be vacated because all of the required information was provided, albeit not on the same sign.

I find that the Secretary established a violation, but that the violation was of a technical nature only. All of the required information was provided in the immediate vicinity of the refuse pile. It was readily obvious who owned the refuse pile. Nevertheless, the designated marker was not complete as set forth by Inspector Simmons. I find that the violation was not serious and that Basin Resources was not negligent. A penalty of \$20 is appropriate.

3. Citation No. 4057435

On January 23, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.400(c). In the citation, the inspector alleged that the guard for the inside belt press conveyor drive roller did not extend a sufficient distance to protect persons from

coming in contact with the belt and roller. The citation states that openings were present on both sides of the drive roller directly in front of the belt pinch-points. He determined that the violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$431 for the alleged violation. The safety standard states, in part, that guards at conveyor-drive pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

Inspector Simmons testified that the opening on the right side was one by six feet and that the opening on the left side was eight inches by six feet. (Tr. 61). He stated that he observed two people working in the area. He believed that they could reach in or fall into the cited pinch points and sustain a serious injury. (Tr. 62-63). Mr. Sciacca testified that there was a steel structure around the belt that supported the rollers. (Tr. 66-67). He stated that the rollers were at least 16 to 20 inches inside this steel structure so that an employee could not reach the pinch points unless he were deliberately trying to do so.

The safety standard provides that guards shall extend a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. I credit the testimony of Mr. Sciacca that the pinch-points were protected by the steel structure of the belt. Nevertheless, there is little dispute that contact was possible. Accordingly, I affirm the violation, but I find that it was not S&S. The record shows that it was not reasonably likely that anyone would come into contact with the pinch-points. A penalty of \$75 is appropriate.

4. Citation No. 4057436

On January 23, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.400(c). In the citation, the inspector alleged that the guard for the silo transfer belt was not extended a sufficient distance to prevent a person from reaching over the top of the side guards and contacting the belt and tail pulley on both sides. He determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$288 for the alleged violation.

Inspector Simmons testified that the guarding was sufficient around the sides but that he was concerned that someone could reach over the guards and come in contact with the pinch-points. (Tr. 77). He stated that a miner would have to intentionally reach over the guard to come into contact with the pinch-point, which he agreed was unlikely. Mr. Sciacca testified that there was no reason why a miner would reach over the guarding at the cited location. (Tr. 81-82). He testified that this condition had existed for about two years and had never been cited by MSHA. He stated that the area has been inspected by MSHA about twice a year.

I find that the Secretary established a violation since someone could reach around the guard and come into contact with the pinch-point. I find that the violation was not serious and that Basin Resources' negligence was less than moderate because of the nature of the violation and the fact that it had never been cited. A penalty of \$50 is appropriate.

5. Other Citations

Basin Resources also contested 11 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

B. Docket No. WEST 96-241, Golden Eagle Mine

1. Citation No. 3590049

On October 24, 1995, MSHA Inspector Jeffery Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.1100-2(e)(2). In the citation, the inspector alleged that a portable fire extinguisher and 240 pounds of rock dust were not provided at the electric trickle duster in the 5th left development section in entry No. 3, between crosscut Nos. 17 and 18. He determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides that a portable fire extinguisher and rock dust shall be provided at each temporary electrical installation.

Inspector Fleshman testified that there was rock dust and a fire extinguisher about 20 feet away but that these materials were for a different electrical installation. (Tr. 10-11, 13). Jeffery Salerno, a former safety inspector with Basin Resources, testified that there was a fire extinguisher at the auxiliary fan about ten feet away. (Tr. 22; Ex. R-B). Kay Hallows, Basin Resources' former safety director, testified that it is not safe to have rock dust and an extinguisher right at an electrical installation because it might not be available in case of a fire. (Tr. 24). If an extinguisher is too close the heat and flame will prevent it from being used. He admitted that there was only one fire extinguisher for the fan and the trickle duster. Inspector Fleshman considered the fan and trickle duster to be two electrical installations that require two extinguishers. (Tr. 29).

Inspector Fleshman issued the citation because the electric trickle duster, a temporary electrical installation, was not provided with a fire extinguisher or rock dust. He did not dispute Mr. Hallows' testimony that it is appropriate to have these materials some distance away so that they are accessible in the event of a fire. Since the fan was a separate temporary electrical installation, Basin Resources could not rely on the extinguisher or rock dust provided for that installation. I affirm the violation, but I find that it was not serious and that Basin Resources' negligence was low. Firefighting supplies were readily available. A penalty of \$50 is appropriate.

2. Citation No. 4057356

On December 28, 1995, MSHA Inspector Melvin Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.1100(2)(f). In the citation, the inspector alleged that fire protection was not provided where five-gallon cans of hydraulic oil and automatic transmission fluid were stored in crosscut No. 1, off entry No. 9, in the west mains. He determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that two portable fire extinguishers and 240 pounds of rock dust shall be provided at each permanent underground oil storage station.

Inspector Shiveley testified that it appeared to him that Basin Resources had established an oil storage area and failed to provide the required fire protection. (Tr. 85). It appeared that the oil cans had been in the area for some time. There were six five-gallon containers present and they were not all full. The cited area was not in a working section (Tr. 87). Mr. Hallows testified that the cited area was not a permanent oil-storage station. (Tr. 93). Someone had simply set down six cans temporarily. James Peterson, a former safety inspector for Basin Resources, testified that the mine had several areas designated as oil-storage stations and that the cited area was not one of them. (Tr. 389).

I find that the Secretary did not establish a violation. There is no indication that the cited area was a permanent oil-storage station and it did not qualify as a temporary storage station in a working section. I credit the testimony of Messrs. Hallows and Peterson that the cans were temporarily in the cited area. Accordingly, the citation is vacated.

3. Citation No. 4057237

On February 12, 1996, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.351(f)(3). At the hearing, the parties stipulated that a violation occurred, but that Basin Resources' negligence was low. (Tr. 98). The inspector determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$903 for the alleged violation. Based on the stipulation, I find that a penalty of \$50 is appropriate for this violation.

4. Citation No. 4057397

On March 28, 1996, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.364(g). In the citation, the inspector alleged that the weekly examiner failed to certify the SE 7 seal in the east mains by his date, time, and initials that the seal had been examined every seven days. The citation states that the last recorded date was March 18, 1996. He determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$431 for the alleged violation. The safety standard provides, in part, that the person making weekly examinations indicate, by his initials, the date and time of the examination.

Inspector Simmons testified that Mr. Sciacca believed that the examiner put an incorrect date on the board. (Tr. 99). Because the board showed two sets of initials with the same date, the inspector believed that it was quite possible that the examination had been made but that the date of the most recent examination was incorrect. (Tr. 101). The inspector is not disputing that the examination was made. (Tr. 102). Mr. Salerno testified that he performed the weekly examination within seven days but that he accidentally put down the date of his prior examination. (Tr. 103; Ex. R-E).

I credit the testimony of Mr. Salerno. Basin Resources contends that the citation should be vacated because the examination had been made. The cited safety standard, however, requires that examinations be recorded. This case can be distinguished from *LJ'S Corp.*, 14 FMSHRC 1278 (August 1992) cited by Basin Resources. In that case the operator was charged with a failure to make a required examination. I find that the Secretary established a technical violation of the safety standard, but that the evidence established that the examination had in fact been made. I find that the violation was not serious and that any negligence was very low. A penalty of \$20 is appropriate.

5. Other Citations

Basin Resources also contested six other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

C. Docket No. WEST 96-248, Golden Eagle Mine

1. Citation No. 4058009

On October 6, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.400(a). In the citation, the inspector alleged that the guard for the Amerigear on both sides of the rope drum shaft were not adequate to prevent a person from reaching over or under the railings and contacting the moving shaft gear. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that gears, sprockets, pulleys, shafts, and similar moving parts which may be contacted by persons and which may cause injury to persons shall be guarded.

Inspector Simmons testified that he was concerned that someone could reach over the railing that was present and come in contact with bolt heads that protruded from the drive shaft. (Tr. 110; Ex. R-F). He admitted that the hoistman is the only person normally in the area and

that his controls are not in the cited area. Mr. Hallows testified that the cited drum shaft rotates at a slow rate of speed and that it can be stopped instantaneously. (Tr. 116-17).

The evidence establishes that the cable drum drive shaft was not fully guarded to prevent persons from contacting it. A persons's clothing could become entangled and an injury could result. I find that the violation was not serious because of the location of the moving parts. The record shows that it was not reasonably likely that anyone would be injured as a result of this violation. A penalty of \$200 is appropriate.

2. Citation No. 4058010

On October 10, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.512. In the citation, the inspector alleged that a complete weekly electrical examination had not been conducted on all electrical equipment. The citation states that the I.S. (intrinsically safe) circuit in the bleeders from N.W. 1 through N.W. 6 had not been examined since August 30, 1995. He determined that the violation was not S&S and was caused by Basin Resources' low negligence. The Secretary proposes a penalty of \$431 for the alleged violation. Section 75.512 provides, at 512-2, that all electric equipment be examined on a weekly basis.

Inspector Simmons testified that the AMS monitoring system was operating and that the operator could not inspect the entire circuit because of a previously issued imminent danger order. (Tr. 123-24). He stated that because the operator built only one entry into the area and that entry was closed off, the examinations had not been performed. He believed that the violation created a hazard. (Tr. 125-26). Mr. Hallows testified that the AMS monitoring system provided information about the conditions in the area, including methane and oxygen levels, to a computer on the surface, so that one did not need to fully examine the circuit underground. (Tr. 129-30).

Basin Resources argues that the citation should be vacated because it could not examine the circuit as a result of the imminent danger order that prevented miners from entering the area. For the reasons set forth in another Basin Resources case, I find that the Secretary established a violation. 19 FMSHRC 1391, 1405 (August 1997). I have taken into consideration the fact that the entry was blocked and subject to an imminent danger order when evaluating the operator's negligence. A penalty of \$50 is appropriate.

3. Citation No. 4058011

On October 10, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that loose coal ribs were present in the intake travelway of the 4th left No. 2 entry between crosscuts 28 and 30 and between crosscuts 36 and 37. The citation states that the loose rib was on the left side of the entry and varied in size. It states that the loose ribs were up to six feet high and seven feet wide and six inches thick. He determined that the violation was S&S and was caused by Basin

Resources' moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation. Section 75.202(a) provides, in part, that the roof and ribs of "areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls" of roof or ribs.

Inspector Simmons estimated that the loose rib extended for a distance of about 300 feet. (Tr. 132). He stated that the loose ribs were along the intake travelway. He believed that a miner could be seriously injured if a rib fell and hit him and that the loose areas were leaning towards the travelway. (Tr. 133). He did not know how long the condition existed and he did not observe anyone pulling down the ribs. Mr. Salerno testified that one cannot determine whether a rib in the Golden Eagle Mine is loose without testing it with a rod or other device. (Tr. 138, 144). He stated that you usually cannot determine whether a rib is loose by merely looking at the rib. A cracked rib could be tied into the seam at the side or the bottom. (Tr. 139). He stated that after the citation was issued, the condition was abated by barring down the ribs. Mr. Salerno testified that it took a considerable amount of effort to get the ribs down. (Tr. 141; Ex. R-K). He also testified that a Basin Resources employee was in the process of barring down some of the ribs at the time of the inspection. *Id.* Mr. Hallows testified that he spoke with the employee who was barring down the area. Mr. Hallows stated that some of the ribs caused concern to the employee and that he barred them down. (Tr. 145). Thus, the employee removed all of the loose ribs that were of concern to him.

I find that the Secretary established a violation, but that the violation was not S&S. I credit the testimony of the inspector and find that at least some of the cited ribs were loose or in danger of falling. It is not always necessary to test a rib to determine whether it is loose. Inspector Simmons was experienced in examining ribs at coal mines. (Tr. 173). The Secretary did not establish that it was reasonably likely that anyone would be injured by the violation. I credit the testimony of Basin Resources' witnesses that an employee had barred down the areas where the ribs were most likely to fall. At least some of the cited ribs were loose but they did not present a hazard of immediate collapse. There has been no showing that Basin Resources failed to regularly examine the ribs. Thus, the hazard was not great because Basin Resources would have barred down any of the cited areas if they became so loose as to create a direct hazard. I also find that Basin Resource's negligence was low because a miner had barred down the area and removed those ribs that were in most danger of falling. A penalty of \$200 is appropriate for this violation.

4. Citation No. 4058015

On October 16, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that loose coal and coal fines had accumulated in the Nos. 1 and 3 entries and in the crosscut to the No. 2 entry at crosscut No. 17 in the 012-0 mmu. The citation states that the coal was dry and was up to 16 inches deep. It also states that energized electrical equipment was operating in the area. He determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$2,173 for the alleged violation. Section 75.400

provides, in part, that coal dust, including float coal dust, and loose coal shall be cleaned up and not be allowed to accumulate in active workings.

Inspector Simmons testified that he measured the depth of the accumulations at seven locations and took a sample of the coal. (Tr. 150; Ex. P-8 & P-10). The sample he took indicates that the material in the accumulations was 58 percent combustible. He stated that the accumulations were a concern because electrical equipment was operating in the area. (Tr. 151). He believed that the accumulations created a fire and explosion hazard. Mr. Salerno testified that the company had been mining in entry No. 1 with a continuous mining machine. (Tr. 160). The mining machine was moved to the area of the No. 3 entry because that is the next area where mining was to take place. A roof bolter was in the No. 1 entry to secure the roof so that clean-up operations could take place. Mr. Salerno testified that the accumulations in the No. 1 entry were left over from mining and that they could not be cleaned up with a scoop until the roof was bolted. He stated that the continuous mining machine does not do a thorough job of cleaning up loose coal. He testified that the continuous mining machine would have cleaned up most of the accumulations in the No. 3 entry when it started mining. Mr. Salerno testified that the inspector issued the citation in the middle of the clean-up cycle and that the accumulations had not been present for very long. (Tr. 166). He said that there is no way to remove the accumulations any faster without endangering the safety of miners.

I find that the Secretary established a violation. There is no question that the accumulations existed, as described by Inspector Simmons. Mr. Salerno's explanation for the accumulations is mostly conjecture. His testimony is based on the position of the equipment at the time of the inspection. He made a lot of assumptions based on what he believed to be happening in the entries. He did not have actual knowledge of the circumstances that gave rise to the citations. Accordingly, I have not given much weight to his testimony.

I also find that the violation was S&S. The Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). I find that the Secretary established the third and fourth elements of this test. Assuming continued normal mining operations, it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. The accumulations were extensive and combustible, ignition sources were present, and miners were working in the area. A penalty of \$1,200 is appropriate for this violation.

5. Citation No. 4057945

On October 17, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that ribs were loose in the last open crosscut on the 011-0 mmu between the Nos. 1 and 3 entries. The citation states that the loose ribs varied in size up to seven feet high, twelve feet wide, and twelve inches thick. It also states that the loose ribs had pulled away from the coal pillars about four inches on the top and two inches on the sides. He determined that the violation was S&S and was caused by Basin

Resources' moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Simmons testified that he determined that the ribs were loose because they were broken away on both sides and the top and were leaning out towards the walkways. (Tr. 172). He stated that he did not need to sound the ribs because they had broken away from the pillars and were not tied to anything. He estimated that each area he cited was about 80 feet long. He stated that the last open crosscut is frequently used as a travelway during a working shift. Mr. Salerno testified that the ribs were cracked but that they were not loose. (Tr. 179). He stated that the ribs required watching because they would become loose eventually but that they were not loose on October 17. Mr. Salerno testified Basin Resources' employees, including the section foreman, did not consider the ribs to be loose.

I find that the Secretary established a violation. I credit the testimony of Inspector Simmons as to the condition of the ribs. Mr. Salerno did not seriously dispute the inspector's description of the condition of the ribs. (Tr. 181). I find that the cited ribs were loose.

I also find that the Secretary established that the violation was S&S. Basin Resources' position is that there was no evidence that the ribs were about to fall. *Id.* The evidence establishes that there was a reasonable likelihood that the ribs would fall, assuming continued mining operations, and that someone would sustain a serious injury. The ribs had broken away from the pillars and were leaning towards the travelway. These ribs could have fallen within a short period of time and caused a serious injury. A penalty of \$1,000 is appropriate.

6. Other Citations

Basin Resources also contested 14 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section of this decision.

D. Docket No. WEST 96-249, Golden Eagle Mine

1. Citation No. 4057959 and Order No. 4057968

On November 11, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.400. In the citation, the inspector alleged that loose coal and coal fines had been allowed to accumulate on the 012-0 mmu in the No. 1 entry beginning at crosscut No. 23 and extending inby 120 feet and in the crosscut between the Nos. 1 and 2 entries for a distance to 108 feet. The citation states that the accumulations were on along both ribs up to a depth of 29 inches and were up to a width of three feet. The citation states that the accumulations were

present because the ribs were not pushed up after cuts were taken from the coal. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence.

Inspector Simmons testified that he took two spot samples of the accumulations that showed that the accumulations were 77.8 and 68.8 percent combustible at the tested areas. (Tr. 184; Ex. P-11). He testified that he believed that the accumulations had been present for several shifts but that he was not sure if there were any ignition sources in the area. (Tr. 185-87). The inspector issued a section 104(b) order of withdrawal on November 20 because Basin Resources failed to remove the cited accumulations within the time allowed for abatement. (Tr. 187-88). He stated that the accumulations appeared to be first cuttings because they had not been disturbed by mining equipment. He testified that, although Basin Resources may have cleaned up accumulations in the middle of the entries, the cited accumulations along the ribs were not cleaned up between November 11 and November 20. (Tr. 200-01).

Mr. Hallows testified that the bottom of the entries consisted of soft coal that deteriorates and becomes loose when equipment runs over it. (Tr. 204). He further testified that the accumulations observed by the inspector on November 20 were not the same accumulations that were there on November 11, but were new accumulations. (Tr. 207-11). He relied on his review of the company's preshift and onshift reports. (Ex. R-Y and R-Y1).

I credit the testimony of Mr. Hallows and the exhibits he relied upon and I find that the accumulations were not the same. The preshift and onshift reports between November 11 and November 20 show that the cited accumulations had been cleaned up and that accumulations did not exist in the cited area for several days. The coal along the bottom of the entries at the mine is soft and I credit Mr. Hallows' testimony that mining equipment running through the area could have created the accumulations.

Accordingly, Citation No. 4057959 is affirmed, but Order No. 4057968 is vacated. I find that the violation was not S&S and was caused by Basin Resources' moderate negligence. A penalty of \$400 is appropriate.

2. Citation No. 4057965

On November 20, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.380(d)(4). In the citation, the inspector alleged that the alternate escapeway for the No. 4 belt conveyor entry was less than six feet wide in several locations. The citation also states that the escapeway was not four feet wide where supplemental support was installed. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$2,384 for the alleged violation.

Inspector Simmons measured the width of the escapeway at a number of locations and referenced his measurements in the citation. (Tr. 213). Basin Resources does not dispute the

violation but contends that its negligence was low because the escapeway had been inspected by MSHA in this condition for years and no citations had ever been issued. Inspector Simmons testified that the neither the escapeway nor the cribbing were new. (Tr. 217-18). Mr. Salerno testified that the escapeway had been in the same condition for a number of years, that it had been inspected by MSHA inspectors, and that it had never been cited. (Tr. 219-20; Ex. R-M). I credit the testimony of Mr. Salerno and find that the negligence of the operator should be reduced somewhat because it believed, based on the actions of MSHA, that the cited escapeway met or exceeded all regulatory requirements. The citation is affirmed as modified. A penalty of \$200 is appropriate.

3. Citation No. 4057966

On November 20, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.380(d)(1). In the citation, the inspector alleged that the same alternate escapeway was not being maintained in a safe condition because of a tripping hazard presented by the bottom rollers of the belt, 2.5-inch hoses, cables, and omega blocks located in several areas. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation.

Inspector Simmons testified that a person would have to watch where he stepped when walking down the escapeway due to the material that was in the walkway. (Tr. 222). He determined that the violation was not S&S because of the height of the entry and the fact that it was an alternate escapeway. He felt that a person using the escapeway would not experience any significant difficulties walking through the area. He testified that in the unlikely event that the alternate escapeway was used to transport a miner out of the mine on a stretcher, the people carrying the stretcher could trip and fall over the materials.

Basin Resources argues that the Secretary did not establish that the escapeway was in an unsafe condition. It argues that the tripping hazard was minimal because the hoses were parallel with the entry. It relies, in part, on the testimony of Inspector Simmons that miners could walk through the area without tripping or stumbling. I reject Basin Resources' arguments. An escapeway, including the alternate escapeway, must be kept in a safe condition so that miners can be evacuated from the working section. Miners may be compelled to leave in a hurry and stretchers may be necessary. In emergency situations, the cited obstacles could present a hazard. The citation is affirmed. A penalty of \$400 is appropriate.

4. Other Citations

Basin Resources also contested 16 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence,

and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

E. Docket No. WEST 96-250, Golden Eagle Mine

1. Citation No. 4057215

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.215(g). In the citation, the inspector alleged that extraneous combustible material consisting of wood, paper, and plastic was deposited in a refuse pile. The citation states that the pieces of wood are up to three feet in length and that the material is present throughout the refuse pile. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides that no extraneous combustible material may be deposited on refuse piles.

Inspector Simmons testified that he was concerned that if there were a fire in the refuse pile, the material could burn and cause the pile to become less stable. (Tr. 234). He stated that the refuse pile is designed to contain rock, mud, and coal. He was concerned that a slide could occur as a result of the cited condition. Mr. Sciacca testified that the refuse pile was about five acres in size and that less than one percent of the material in the pile could be classified as extraneous combustible material. (Tr. 241). The material that was removed to abate the citation was placed in a single pickup truck. (Tr. 242; Ex. R-O). He also testified that the material entered the refuse pile because, during its normal operation, the longwall breaks up cribs in the tailgate entry and the belt carries the material to the transfer building. (Tr. 243-44). He said that waste from the transfer building is taken by truck to the refuse pile. Thus, he testified that the miscellaneous waste was not "deposited" on the refuse pile but was transported to the pile during ordinary operations along with rock and coal.

Basin Resources argues that the cited material was not extraneous combustible material and that it was not deposited on the refuse pile. The term "refuse" as used with respect to coal mining refers to waste material in the coal that is removed during the preparation process. *A Dictionary of Mining, Mineral, and Related Terms*, 908 (1968). Thus, material which is removed from the coal, such as rock, at a preparation plant is transported to a refuse pile. This pile may contain combustible coal waste and the Secretary has promulgated regulations governing such piles. I was unable to find any cases interpreting section 77.215(g).

I find that Basin Resources did not violate the safety standard. It appears to me that the cited standard is designed to prohibit an operator from dumping other combustible material into its refuse pile. For example, it cannot use the refuse pile as a general garbage dump to get rid of such items as rock dust bags, pallets, and cardboard boxes. In this case, the vast majority of the cited material was wood. (Ex. R-O). I credit the testimony of Messrs. Sciacca and Hallows that the wood came out of the mine on the belt with the coal and was removed during the preparation process. It was transported to the refuse pile along with other "refuse," as that term is used in the

standard. The wood was not “extraneous” and it was not “deposited on” the refuse pile. It was part of the refuse. Accordingly, the citation is vacated.

2. Citation No. 4057217

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.1103(d). In the citation, the inspector alleged that combustible dry grass, weeds, and brush were present within 25 feet of the main energized substation near the mine office building. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources’ moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that areas surrounding electric substations and transformers “shall be kept free from grass (dry), weeds, underbrush, and other combustible material” for at least 25 feet in all directions.

Inspector Simmons testified that there was snow in the area but it was melting. (Tr. 248). Dry grass and brush were sticking out of the snow. The fact that the grass was about two feet high indicated to him that it had been present for a considerable length of time. He felt that when the snow melted, the grass and brush presented a fire hazard. (Tr. 248-49). Tom Sciacca testified that only sunflower stalks were sticking out of the snow. (Tr. 261-62). Kay Hallows testified that he took a small propane torch and tried to ignite one of the sunflower stalks. He testified that the stalk disintegrated but did not catch fire. (Tr. 265-66).

I find that the Secretary established a violation. I credit the testimony of Inspector Simmons with respect to the conditions he observed, in part, because the witnesses for Basin Resources were somewhat confused as to which substations he inspected. In any event, assuming continued normal mining operations, the cited area would have dried out and presented a fire hazard. The violation was not serious. A penalty of \$100.00 is appropriate.

3. Citation No. 4057218

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.1103(d). In the citation, the inspector alleged that combustible dry grass, weeds, and brush were present within 25 feet of the energized substation near the 3rd North emergency escapeway hoist. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources’ moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation.

The testimony with respect to this citation was consistent with the testimony for the previous citation. For the reasons set forth above, the citation is affirmed. The violation is not serious and a penalty of \$100.00 is assessed.

4. Citation No. 4057219

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.202(a). In the citation, the inspector alleged that a loose brow, about 12 inches thick, 7 feet wide, and 4 feet long, was not supported or otherwise controlled on the 011-0 mmu in the outby corner of the No. 1 entry at crosscut No. 68. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Simmons testified that when he saw a crack around the brow, he was concerned that the brow could fall and seriously injure a miner. (Tr. 275, 277). The inspector stated that the brow was not sufficiently supported or taken down. He further stated that the brow could have fallen at any time and injured a miner. Because the rib beneath the brow had sloughed off, the roof bolts adjacent to the brow were about eight feet from the rib line. He believed that broken bones were the most likely injury. Mr. Sciacca testified that the Basin Resources employee had examined the area and did not report that the brow was loose. (Tr. 286). The examiner had extensive experience. Mr. Sciacca also testified that when the condition was abated, timbers were placed under the brow because it could not be barred down. He stated that the brow was not loose nor in danger of falling.

The Secretary is not required to establish that a brow is so loose that it is in danger of immediate collapse. The safety standard is preventive to ensure that mine operators adequately support roof and ribs so that they do not fall. In this case, part of the rib had sloughed off leaving a brow of rock. The roof-control plan requires that roof bolts be installed on 5-foot centers but roof bolts were eight feet from the rib as a result of the sloughage. I credit the testimony of the inspector that a crack was present and that the brow could fall and injure a miner. He admitted that the brow might not fall immediately but that he was concerned that it could fall at any time. I find that the Secretary established a violation.

The Secretary did not establish that the violation was S&S. The inspector testified that the brow could fall and injure someone, but he did not know how often miners traveled through the area or how many miners would be in the area. Assuming continued normal mining operations, the Secretary did not show that it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. A penalty of \$400 is appropriate for this violation.

5. Citation No. 4057220

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.410(c). In the citation, the inspector alleged that a forklift was used at the mine without an operative back-up alarm. The citation states that persons were observed in the immediate area where the forklift was being operated. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary

proposes a penalty of \$1,298 for the alleged violation. The safety standard provides that warning devices on mobile equipment shall be maintained in functional condition.

Inspector Simmons testified that a back-up alarm had been installed on the forklift but that it was not working at the time the citation was issued. (Tr. 308). He stated that a number of miners were in the area. He further testified that it was reasonably likely that someone could be seriously injured as a result of the violation. Mr. Sciacca testified that the view from the operator's compartment of the forklift was unobstructed. (Tr. 313). He also stated that because the equipment was a very loud diesel forklift, a miner in the area would know if it was getting close to him. He testified that it was unlikely that anyone would be injured as a result of the condition.

Basin Resources does not contest the violation but contends that it was not S&S because the operator's view to the rear was not obstructed and the noise of the forklift would alert a pedestrian of its presence. I disagree. The issue is not whether the lack of an operable back-up alarm makes it more likely than not that a serious injury will occur, but whether such an injury is reasonably likely assuming continued normal mining operations. I credit the testimony of Inspector Simmons and find that the Secretary established that it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. A penalty of \$1,000 is appropriate for this violation.

6. Citation No. 4057682

On December 6, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.400. In the citation, the inspector alleged that loose coal and coal fines were present on the 011-0 mmu in crosscut 68 between the Nos. 3 and 4 entries. The citation states that the accumulations were up to 14 inches deep for a distance of 80 feet and that they were about 18 feet wide. The citation also alleges that a shuttle car was observed traveling over the accumulations, trailing cables were in the area, and no rock dust had been applied. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Simmons took a sample of the accumulations. MSHA determined that the material was 77.3 percent combustible. (Tr. 321). The inspector believed that anyone in the crosscut could be severely injured in the event of a fire. He determined that the violation was S&S because of the ignition sources in the area: energized equipment and trailing cables. (Tr. 323). The inspector did not observe any defects in the cables or equipment in the area. He believes that the accumulations should have been cleaned up on the regular mining cycle.

Mr. Peterson testified that the cited area was wet and muddy. A roof-bolter became stuck in the mud in this crosscut because of the extremely wet conditions. (Tr. 394). Basin Resources left some of the bottom coal in the crosscut to keep equipment from getting bogged down. He testified that the coal was so wet and muddy that there was little chance of it burning. (Tr. 398). He also testified that once the roof-bolter had been removed from the area, the area would have

been cleaned up. The loose coal in the area was not first cuttings but had sloughed off the ribs and had been churned up from the bottom.

I find that the Secretary established a violation, but that it was not S&S. There was no evidence that the electrical equipment in the area would ignite the coal. Methane was not present in this area. The coal was extremely wet. I credit Mr. Peterson's testimony that after the roof-bolter was removed from the area, the loose coal would have been removed. Assuming continued normal mining operations, it has not been shown that it was reasonably likely that anyone would be injured as a result of the violation. A penalty of \$400 is appropriate.

7. Citation No. 4057689

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.1710(i). In the citation, the inspector alleged that seatbelts were not provided for an excavator that had been used at the mine. The citation states that the excavator had been on mine property for about one year. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard states that seatbelts must be worn in a vehicle where there is a danger of overturning and where roll protection is provided.

Inspector Simmons testified that the excavator was owned by a contractor and was not equipped with a seatbelt. (Tr. 332-33). He believes that the vehicle was not equipped with a seatbelt when it was brought to the mine and had been used for about a year in that condition. He based his conclusion, in part, on discussions with the foreman for the contractor. (Tr.335). He stated that there was a danger of overturning the vehicle and that it was provided with roll protection. The vehicle was tagged-out at the time the citation was issued. (Tr. 338).

Mr. Salerno testified that in his 21 years of mining experience an MSHA inspector had never inspected tagged-out equipment. (Tr. 341). He stated that when he discussed this matter with the inspector and his supervisor, they questioned whether the equipment was really tagged-out. Although I agree with Basin Resources that equipment that has been tagged-out cannot generally be cited for safety defects, there is little question that this equipment had been operated without seatbelts before it was removed from service. (Tr. 350-51). Accordingly, I affirm the citation because the excavator had been used without seatbelts. I find that Basin Resources' negligence was low because this was a truck operated by the contractor's employees. A penalty of \$100 is appropriate.

8. Citation No. 4057690

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.205(b). In the citation, the inspector alleged that stumbling and tripping hazards were present in the walkway provided for the second floor of the warehouse. The citation states that 250 feet of power cable and 10 fan belts were present. Inspector Simmons determined that the violation was S&S and that the violation was caused by Basin Resources'

moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation. The safety standard provides that travelways and platforms or other means of access to areas where persons are required to travel or work shall be clear of all extraneous material and other stumbling or slipping hazards.

Inspector Simmons testified that the cited material presented a tripping hazard. (Tr. 360). Mr. Hallows testified that the cited material was present because of an inventory reorganization. (Tr. 363). The material had been removed from shelves during this inventory and had not yet been restocked. He did not believe that an injury was reasonably likely because the only individuals that would be in the area were those involved in the inventory reorganization, who were aware of any hazards. No other persons were allowed in the area. (Tr. 364). The inspector believed that an injury was reasonably likely because the loops in the extraneous material made it easy to trip. (Tr. 361).

I find that the Secretary established a violation but that it was not S&S. The material was deliberately placed there while inventory was shifted around. I credit the testimony of Mr. Hallows that miners would not be in the cited area. Basin Resources' negligence was low. A penalty of \$100.00 is appropriate.

9. Other Citations

Basin Resources also contested 11 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

F. Docket No. WEST 96-251, Golden Eagle Mine

1. Citation No. 4058085

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 49.2(h). In the citation, the inspector alleged that the operator had not submitted to the MSHA District Manager a statement describing the mine's method of compliance with 30 C.F.R. Part 49. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' low negligence. The citation further states that the mine had lost service of "an independently provided mine-rescue coverage on approximately 11-28-95. The Secretary proposes a penalty of \$252 for the alleged violation. Section 49.2(h) provides, in part, that each operator of an underground mine who provides rescue teams shall send the district manager a statement of the mine's method of compliance with the rescue-team requirement.

Inspector Simmons testified that the mine was covered by the rescue team for another mine and that Basin Resources failed to notify MSHA when that team no longer existed. (Tr. 367). Mr. Hallows testified that a change was made in the mine's rescue team when the Cimarron Mine, operated by Pittsburg & Midway Coal Mining Company, advised Basin Resources that it was closing down. (Tr. 374). This mine provided "second team" support for the Golden Eagle Mine. Because Cimarron Mine would no longer be able to provide this support, the Golden Eagle Mine had to reestablish a second team with its own miners.

MSHA modified the citation on February 2, 1996. In the modification, MSHA stated that the mine was in the process of developing a new second team at the time the citation was issued and that the eight working days between the date that it lost secondary coverage from the Cimarron rescue team and the date that the citation was issued "was not an extensive amount of time." Basin Resources argues that the citation should be vacated because section 49.2(h) does not set forth any time limits and MSHA acknowledged in the modification that the eight working days was not excessive.

I agree with the arguments of Basin Resources and vacate the citation. The cited regulation does not contain a requirement to alert MSHA whenever there is a change in rescue team status. In any event, the citation was issued eight working days after the secondary coverage terminated. Basin Resources was organizing its own in-house secondary rescue team. At a minimum, Basin Resources should have been afforded a reasonable amount of time to provide any notification to MSHA. The Secretary did not establish a violation.

2. Citation No. 4058088

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.516. In the citation, the inspector alleged that an electrical extension cord used in a warehouse did not comply with the National Electrical Code ("NEC"). The cord had been in use for about two months and was supplying power to a battery charger inside a metal cabinet. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. Section 77.516 provides, in part, that wiring and electrical equipment must meet the requirements of the NEC in effect at the time of the installation.

Inspector Simmons testified that the cited condition violated Article 400-4 of the 1968 NEC. (Tr. 469). That provision provides, in part, that "flexible cord shall not be used (1) as a substitute for the fixed wiring of a structure; (2) where run through holes in walls, ceilings, or floors; (3) where run through doorways, windows, or similar openings; (4) where attached to building surfaces; or (4) where concealed behind building walls, ceilings, or floors." (Ex. P-17). Inspector Simmons testified that Basin Resources violated subsection (2) of this provision because the wire ran through a hole in a cabinet. (Tr. 470). He stated that the extension cord was not damaged. He believes that because subsection (5) uses the term "behind building walls" the term "walls" in subsection (2) refers to any wall, including the wall of a cabinet.

I find that the inspector's interpretation of the standard is contrary to the plain language of the standard. Subsection (2) provides that flexible cord shall not be used as a substitute for fixed wiring of a *structure* where the cord runs through holes in *walls*, ceilings or floors. This cord was not used as a substitute for fixing wiring in the warehouse and did not run through a wall, ceiling, or a floor. The wording of the NEC provision does not support the inspector's interpretation that it also applies to an extension cord entering a cabinet. One end of the cord was plugged into a wall socket and the battery charger for a two-way radio was plugged into the other end of the cord. Because the charger was in a cabinet, the cord ran through a hole in the back of the cabinet. Article 400-4 of the NEC simply does not cover this situation and the inspector's interpretation is unreasonable. The citation is vacated.

3. Citation No. 4058089

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.516. In the citation, the inspector alleged that a clear working space of at least 30 inches was not provided in front of the breaker box in the accounting office in violation of the NEC. The citation states that a desk was under the breaker box and computers were on top of the desk. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903.

Inspector Simmons testified that the presence of the desk violated Article 110-16(a) of the NEC. (Tr. 481). This provision provides, in part, that sufficient "access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment." (Ex. P-17). The provision states that the "dimension of the working space in the direction of access to live parts shall not be less than" two and one-half feet (30 inches). The provision further states that distances "are to measured from the ... enclosure front or opening" of the electrical equipment when the equipment is enclosed.

The breaker box was enclosed and nothing prevented anyone from opening the door to the box to reach the breakers. (Ex. R-T). The desk in front of the box was 32 inches wide and 20 inches deep. A person could open the box and switch the breakers by standing in front of the desk. The inspector interpreted the NEC provision to require 30 inches of clearance all the way to the floor of the office for the width of the breaker box. (Tr. 487). The NEC provision states that access and working space is required to permit ready and safe operation and maintenance of the equipment. In particular, working space "in the direction of access to live parts" must be at least 30 inches, measured from the door of the box. Access is to the front of the box, not the bottom or the floor. One needs to open the cited breaker box in the accounting office to switch off the power in the event of an emergency. The Secretary did not show that this desk would prevent anyone from performing that task. In his interpretation of this provision of the NEC, Inspector Simmons relied on another book that is "three inches thick," which more fully describes the provisions of the NEC. (Tr. 489). The inspector had consulted this other electrical book at some time in the past when arriving at his interpretation. The plain language of Article 110-16 does not indicate that there can be no furniture below a breaker box in an office.

I find that the Secretary did not establish a violation. The language of the NEC states that measurements are to be made from the front or opening of the equipment. There has been no showing that there was not 30 inches of clearance in front of the breaker box, or even straight down from the box. The language of the cited provision in the NEC does not support the inspector's interpretation. The citation is vacated.

4. Citation No. 4058090

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.208(d). In the citation, the inspector alleged that six compressed nitrogen bottles and two acetylene bottles observed near the warehouse were not secured. The citation states that the tanks were standing upright on a platform without a strap to keep them from falling. The Secretary proposes a penalty of \$903 for the alleged violation. Section 77.208(d) provides that compressed and liquid gas cylinders shall be secured in a safe manner.

Inspector Simmons testified that the cylinders were in a bin designated for the storage of such bottles but that the chain across the front of the bin was not securely fastened. (Tr. 377). One end of the chain was not tightly secured. (Tr. 379, 382). Mr. Salerno testified that a chain was in place but had slid down. (Tr. 383; Ex. R-W).

I find that the Secretary established a violation, but that the violation was not serious. The cylinders were in a bin designed for storing such items. There was a chain present at the front of this bin but it was a little too loose to keep the cylinders secure. Basin Resources' negligence was low. A penalty of \$100 is appropriate for this violation.

5. Other Citations

Basin Resources also contested two other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

G. Docket No. WEST 96-271, New Elk Preparation Plant

1. Citation No. 4057141

On November 20, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.215-2(c). In the citation, the inspector alleged that the operator failed to report conditions of the refuse pile to the MSHA District Manager. The date of the last report was November 1, 1994. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$288 for

the alleged violation. The standard states that specified information about certain refuse piles must be reported to the district manager "every twelfth month from the date of the original submission."

Basin Resources does not contest the fact that a report had to be filed, but argues that the report had to be filed before the end of November 1995. I agree. The regulation requires such reports to be filed every twelfth month from the date of the original report. Even if the original report was filed in early November of a previous year, the operator would have until the end of the twelfth month to file its report. The inspector interpreted the regulation to require the report to be filed within 365 days of the previous report, but that is not what the regulation states. (Tr. 419). Accordingly, the citation is vacated.

2. Citation No. 4057735

On November 20, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.1607. In the citation, the inspector alleged that the unguarded conveyor walkway was not provided with an emergency stop cord for a distance of 80 feet along the raw coal belt at the truck loadout. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation. The standard states that unguarded conveyors with walkways shall be equipped with stop cords along their full length.

Basin Resources alleges that the condition had existed for years and had been inspected by MSHA several times but had never been cited. Basin Resources argues that its negligence is low. Mr. Hallows testified that MSHA inspectors had inspected the walkway in the past and had never mentioned the fact that a stop cord was required in the cited area. (Tr. 426-27). I disagree. Although MSHA's failure to cite a condition can be used to reduce the negligence attributable to an operator, I do not believe that such a reduction is warranted in this case. The safety standard is clear on its face. There can be no doubt that a stop cord must be present along an unguarded conveyor walkway for its entire length. Thus, the fact that MSHA inspectors did not notice this condition in the past should not serve to reduce the negligence. I find that the violation was not S&S and was the result of Basin Resources' moderate negligence. A penalty of \$100 is appropriate.

3. Citation No. 4057736

On November 20, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.207. In the citation, the inspector alleged that sufficient illumination was not provided in the oil storage room. The citation states that oil filters and equipment were stored in the room and there was no lighting for the room. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation. The standard states, in part, that illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, walkways and working areas.

Basin Resources contends that the oil storage room was provided with two windows and that illumination was sufficient during the day. At night, it contends that a miner could use a cap lamp on those infrequent occasions he would need to be in the room at night. I find that the evidence establishes that the area was sufficiently illuminated during the daylight hours. I find, however, that the room was not sufficiently illuminated at night. I affirm the citation, but I find that the violation was not serious and that Basin Resources' negligence was low. A penalty of \$75 is appropriate.

4. Citation No. 4057147

On November 22, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.1103(d). In the citation, the inspector alleged that the area surrounding the No. 1 electric substation and transformer was not kept free from dry grass and weeds for at least 25 feet. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation.

For the reasons set forth above with respect to Citation Nos. 4057217 and 4057218 in Docket No. WEST 96-250, the citation is affirmed. The violation was not serious. A penalty of \$75 is appropriate.

5. Citation No. 4057148

On November 22, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.1607(c). In the citation, the inspector alleged operating speeds and visibility on the haul road at the north end of the refuse pile were not consistent with the conditions on the road. The citation states the road contains blind curves and that the speed of the haulage truck was in excess of the conditions present. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$309 for the alleged violation. The standard states, in part, that equipment operating speeds shall be prudent and consistent with the conditions of the roadway, grades, clearance, and visibility.

Inspector Shiveley stated that there was only one truck operating on the haul road. (Tr. 451). He testified that when the pickup truck that he was in drove up the road, the haul truck came down the hill and almost collided with the pickup. He stated that he was surprised to see the haul truck. (Tr. 455). The haul truck is not for use on public highways and the cab is high off the ground. Mr. Sciacca drove the pickup truck in which the inspector was riding. Mr. Sciacca testified that he saw the haul truck coming down the road and that the haul truck driver saw the pickup. (Tr. 460). Both vehicles stopped without skidding. Mr. Sciacca backed out of the way so that the haul truck could pass. *Id.* Mr. Sciacca testified that the inspector stopped the haul truck and told the driver to slow down.

Although this is a close issue, I find that the Secretary did not establish a violation. The inspector based his conclusion that the haul truck was going too fast on the fact that he was surprised to see the haul truck. Inspector Shiveley was not driving the pickup and did not expect to stop to avoid the truck. There is no proof that the haul truck was driving too fast. Accordingly, the citation is vacated.

6. Other Citations

Basin Resources also contested 14 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

H. Docket No. WEST 96-285, Golden Eagle Mine

1. Order No. 4057950

On October 19, 1995, Inspector Simmons issued a section 104(d)(2) order of withdrawal alleging a violation of section 77.202. In the order, the inspector alleged that accumulations of dry loose coal, coal dust, and float-coal dust were present on the first floor of the tippie breaker building under the truck loadout belt. The order states that the accumulations under the belt were up to 9 inches deep for a distance of about 70 feet. It also states that belt rollers were rubbing against the accumulations. The order states that dry coal dust and float coal dust covered the entire first floor of the breaker building and the tops of electrical panels and control boxes. It alleges that an employee made some effort to clean by pushing a broom through the area. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources' high negligence. The Secretary proposes a penalty of \$4,000 for the alleged violation.

Basin Resources does not contest the fact of violation or the inspector's S&S determination. It contends that the violation was not the result of its unwarrantable failure. Inspector Simmons determined that the violation was the result of Basin Resources' unwarrantable failure because an employee knew of the accumulations, as evidenced by the fact that some of the accumulations had been swept up, and the foreman's admission that he had taken methane readings in the building. (Tr. 513-14). Thus, the inspector concluded that Basin Resources knew about the accumulations but did little to nothing to remove them. The inspector believed that it would have taken two to four working shifts for that much coal and coal dust to accumulate. Inspector Shiveley testified that he has cited the breaker building on many occasions for excessive accumulations of coal and coal dust. (Tr. 521). He testified that such accumulations occurred in the building on a regular basis because of the design of the ventilation and that the area required frequent cleaning. Accumulations would build up every few shifts if the area was not cleaned.

Mr. Hallows testified that MSHA conducted an investigation under section 110(c) of the Mine Act and concluded that the foreman, Robert Trujillo, should not be charged with a violation. (Tr. 527-33). Mr. Hallows stated that the investigation revealed that the foreman did not take a methane reading on the day that the citation was issued and that he did not know about the accumulations. (Tr. 533-36). Mr. Hallows testified that Mr. Trujillo advised the special investigator that he was in the building on October 18 and that there were very few accumulations because he washed the area down that morning. (Tr. 536-37; Ex. R-BB). He further testified that no management employees had been in the breaker building on October 19. Mr. Hallows stated that the belt was damaged, which allowed a significant amount of spillage of coal and coal dust. (Tr. 539-40). Mr. Hallows believes that management had no knowledge of the existence of the accumulations until the order was issued. (Tr. 544).

I credit the testimony of Mr. Hallows, as well as Basin Resources' exhibits, that the foreman was not in the area on the day the order was issued and that he believed that the area was clean when he left on October 18. Nevertheless, I find that the Secretary established that the violation was caused by Basin Resources' 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).

Basin Resources has received a number of citations and orders concerning accumulations in the breaker building. Accumulations were a recurring problem. Apparently, the company was working on engineering solutions for the problem. In the meantime, Basin Resources had an obligation to make greater efforts to keep the area clean. The area should have been continuously monitored to ensure that extensive accumulations did not build up. I find that the accumulations were extensive and at least some of the accumulations had existed for two to four shifts. I also find that Basin Resources was put on notice that greater efforts were necessary to eliminate such accumulations. Basin Resources' conduct exhibited a serious lack of reasonable care. A penalty of \$4,000 is appropriate.

2. Citation No. 4057442

On January 5, 1996, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.502-2. In the citation, Inspector Shiveley alleged that the monthly electrical examination of surface areas for December 1995 was not recorded in the record book. He determined that the violation was not S&S and that the violation was caused by Basin

Resources' moderate negligence. The Secretary proposes a penalty of \$595 for the alleged violation.

Basin Resources does not deny that the examinations were not recorded. The miners at the mine were laid off at the end of December 1995 and mine management did not have any advance notice of this lay-off. (Tr. 549-60). As a consequence, Basin Resources argues that the violation was not serious and that its negligence was low. I agree and I have lowered the penalty. A penalty of \$100 is appropriate.

3. Citation No. 4057456

On February 1, 1996, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 75.202(a). In the citation, Inspector Shiveley alleged that the mine roof in entry No. 1 of the East Mains at Crosscut No. 23 was not supported or controlled. The citation states that timber had been set in an area where a small roof fall had occurred to allow the examiner to travel through the area. The citation alleges that three of these timbers had loosened and fallen. Inspector Shiveley determined that the violation was S&S and that the violation was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Shiveley testified that he was concerned that the weekly examiner was required to travel through the area and that the unsupported roof could fall on him. (Tr. 553-54). Mr. Salerno testified that he was the weekly examiner for the area and that he had last examined the area on January 29, 1996. (Tr. 557). He testified that the timbers supporting the roof were in place on that date and that he did not believe that the area needed any additional support at that time. The mine was shut down on or about December 31, 1996, so only a few employees were present to maintain the mine.

I find that the Secretary established a violation but that the violation was not S&S and Basin Resources' negligence was low. The roof was not adequately supported, but it was not reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. The mine was shut down and only the weekly examiner passed through the area. I credit the testimony of Mr. Salerno that the cited condition did not exist at the time of his examination. A penalty of \$200 is appropriate.

I. Docket No. WEST 97-51, Golden Eagle Mine

1. Citation No. 3850007

On July 2, 1996, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.410(a)(1). In the citation, the inspector alleged that a sandblasting truck used at the mine was not equipped with a back-up alarm. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation.

Inspector Simmons testified the vehicle was not provided with a back-up alarm. (Tr. 570). The vehicle was owned by an independent contractor. He admitted that the mine was closed and there were only a few people at the mine. (Tr. 572). Mr. Hallows testified that there were seven people employed at the mine in July 1996. (Tr. 575). The mine was in the process of cleaning up its mobile equipment for sale. He testified that the sandblaster was not put into reverse gear because it was being used as stationary equipment. He stated that it was stationary while it was at the mine, except when it was brought onto the property and taken off the property. All of the diesel equipment was driven to the sandblaster for cleaning prior to being sold.

I find that the Secretary established a violation. The sandblaster was mobile equipment, even if it was not moved while at the mine. I credit the testimony of Mr. Hallows, however, and find that the condition did not create a hazard to miners. Basin Resources' negligence was low. A penalty of \$100 is appropriate.

2. Citation No.3850006

Basin Resources also contested this citation. At the hearing, Basin Resources agreed that it would not contest the fact of violation in this citation or the other determinations made by the inspector. It only contests the penalty proposed by the Secretary, which it contends is too high. Based on the description of the violation in the citation, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalty set forth in section III of this decision.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that about 977 citations and orders were issued at the Golden Eagle Mine in the 24 months preceding December 11, 1995, and about 102 citations and orders were issued at the New Elk Preparation Plant in the 24 months preceding October 21, 1995. (Exs. P-1 & P-4). I also find that Basin Resources was a medium to large mine operator. (Ex. J-1). The Golden Eagle Mine and the preparation plant shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. The Secretary has not alleged that Basin Resources failed to timely abate the citations and orders, except for Citation No. 4057959 in WEST 96-249. Unless otherwise noted above, all of the violations were serious and the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

III. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
<u>WEST 96-179, New Elk Preparation Plant</u>		
4057692	77.400(a)	\$75.00
4057421	77.1110	75.00
4057422	77.208(d)	75.00
4057423	77.1605(d)	75.00
4057424	77.1104	100.00
4057700	77.1109(e)(1)	75.00
4058097	77.400(a)	75.00
4058098	77.208(e)	75.00
4058099	77.1109(d)	75.00
4058100	77.516	75.00
4057430	77.1606(c)	75.00
4057431	77.1104	400.00
4057433	77.215-1	20.00
4057435	77.400(c)	75.00
4057436	77.400(c)	50.00
<u>WEST 96-241, Golden Eagle Mine</u>		
3590046	75.202(a)	400.00
3590047	75.370(a)(1)	400.00
3590048	75.370(a)(1)	1,000.00
3590049	75.1100-2(e)(2)	50.00
4057354	75.1001-1(b)	200.00
4057355	75.1001-1(b)	200.00
4057356	75.1100-2(f)	Vacated
4057357	75.370(a)(1)	400.00
4057237	75.351(f)(3)	50.00
4057397	75.364(g)	20.00
<u>WEST 96-248, Golden Eagle Mine</u>		
4058005	75.400	400.00
4058006	75.1100-3	400.00
4058007	75.1100-2(f)	400.00
4058008	75.1722(b)	1,000.00

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4058009	77.400(a)	200.00
4058010	75.512	50.00
4058011	75.202(a)	200.00
4058012	77.208(d)	200.00
4058013	75.1722(c)	1,000.00
4058014	75.1722(b)	400.00
4058015	75.400	1,200.00
4058016	75.370(a)(1)	400.00
4058017	75.1722(a)	1,000.00
4058018	75.400	400.00
4058019	75.809	200.00
4057941	77.1110	200.00
4057942	77.1109(d)	400.00
4057943	75.809	200.00
4057945	75.202(a)	1,000.00

WEST 96-249, Golden Eagle Mine

4057946	75.370(a)(1)	400.00
4058020	77.205(e)	200.00
4057948	75.503	400.00
4057949	77.400(d)	400.00
4057951	77.512	400.00
4057952	77.1605(d)	400.00
4057954	75.208	400.00
4057955	75.503	400.00
4057956	75.400	400.00
4057957	75.809	200.00
4057959	75.400	400.00
4057960	75.1725(a)	400.00
4057965	75.380(d)(4)	200.00
4057966	75.380(d)(1)	400.00
4057967	75.380(d)(4)(ii)	400.00
4057969	75.400	1,200.00
4057204	75.360(g)	200.00
4057209	77.1110	400.00
4057211	77.1110	400.00

WEST 96-250, Golden Eagle Mine

4057212	77.208(d)	400.00
4057213	77.1110	400.00

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4057214	77.1109(e)(1)	400.00
4057215	77.215(g)	Vacated
4057216	77.1110	400.00
4057217	77.1103(d)	100.00
4057218	77.1103(d)	100.00
4057219	75.202(a)	400.00
4057220	77.410(c)	1,000.00
4057681	75.403	400.00
4057682	75.400	400.00
4057683	77.1110	400.00
4057684	75.400	1,000.00
4057685	77.215-1	200.00
4057686	77.1110	400.00
4057687	77.208(d)	400.00
4057689	77.1710(i)	100.00
4057690	77.206(b)	100.00
4057691	77.1110	400.00

WEST 96-251, Golden Eagle Mine

4058085	49.2(h)	Vacated
4058086	45.4(b)	100.00
4058088	77.516	Vacated
4058089	77.516	Vacated
4058090	77.208(d)	100.00
4058091	77.1606(c)	400.00

WEST 96-271, New Elk Preparation Plant

4047756	77.502	75.00
4057758	75.1711-1	75.00
4057141	77.215-2(c)	Vacated
4057732	77.701	100.00
4057733	77.1104	100.00
4057734	77.502	75.00
4057735	77.1607(cc)	100.00
4057736	77.207	75.00
4057737	77.205(b)	75.00
4057738	77.205(b)	75.00
4057739	77.513	75.00
4057740	77.502-2	75.00
4057142	77.502	75.00

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4057143	77.516	200.00
4057144	77.502	75.00
4057145	77.202	200.00
4057146	77.502	200.00
4057147	77.1103(d)	75.00
4057148	77.1607(c)	Vacated

WEST 96-285, Golden Eagle Mine

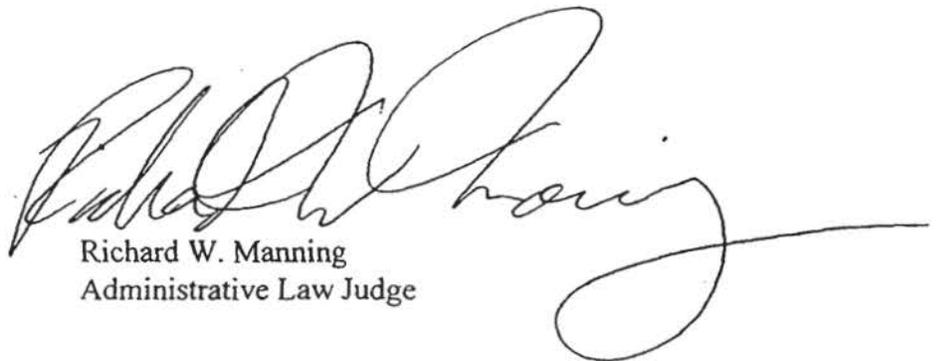
4057950	77.202(a)	4,000.00
4057442	77.502-2	100.00
4057456	75.202(a)	200.00

WEST 97-51, Golden Eagle Mine

3850006	77.403(a)(1)	400.00
3850007	77.410(a)(1)	100.00

Total Penalty \$35,090.00

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and orders listed above are hereby **VACATED, AFFIRMED, or MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$35,090.00 within 40 days of the date of this decision.



Richard W. Manning
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)

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 7 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-116-M
Petitioner	:	A. C. No. 34-01794-05503
v.	:	
	:	Bailey's Limestone Quarry
BAILEY'S LIMESTONE QUARRY,	:	
Respondent	:	

ORDER DENYING MOTION TO APPROVE SETTLEMENT

This case concerns a proposal for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)), seeking the assessment of two alleged violations of mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The alleged violations arose out of the Secretary's investigation of a fatal accident that occurred on June 29, 1996, at the Respondent's limestone quarry. The Secretary alleges, in part, that a laborer was fatally injured when he was crushed between the bucket of a front end loader and the metal frame of the primary crusher's v-belt drive unit.

Citation No. 4448695 alleges a violation of section 56.14211(b) in that the loader bucket was in a raised position and was not blocked to prevent accidental lowering or provided with a load locking device. In addition, the Secretary alleges the violation was a significant and substantial contribution to a mine safety hazard (S&S violation) and the result of the operator's unwarrantable failure to comply in that a foreman was working at the site at time of the accident and should have recognized the hazard.

Citation No. 4448696 alleges a violation of section 50.10 because the accident, which occurred on June 29, was not reported to MSHA until July 9, 1996.

The Secretary specially assessed both alleged violations (30 C.F.R. § 100.5). The violation alleged in Citation No. 4448695 was assessed at \$20,000, and the violation alleged in Citation No. 4448696 was assessed at \$2,500.

After the matters were scheduled for hearing, the parties settled the case. Accordingly, the hearing was canceled. The parties then moved for approval of the settlement. The motion states, "The parties propose the settlement of these citations by reducing the penalties to the total amount of \$3,500.00. No other changes to the citations are proposed."

The settlement motion does not indicate how the total amount is to be apportioned between the alleged violations, something both I and the Secretary's Office of Assessment need to know. In addition, although the motion contains a contention that imposition of the originally proposed penalty will adversely affect the Respondent's ability to continue in business, it does not provide adequate support for such a finding. The motion states only, "The Respondent is a small business with substantial debt and currently has a severe cash shortage. In order to avoid the costs of further defending the citations, Respondent is willing to settle his case by paying the penalties as amended rather than asserting the defenses to the citations" (Motion To Approve Settlement Agreement 2).

A case arising under the Mine Act is primarily — but not entirely — the province of the parties. While, in general, they may try or not try a case as they choose, any settlement they reach must reflect not only their particular interests, but those of the public's as well (S. Rep. No. 95-181, 95th Cong., 1st Sess. 45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 633 (1978). This latter interest is implemented by requiring the administrative law judge to approve the settlement (30 U.S.C. § 820(k)), based upon "[f]acts in support of the penalty agreed to by the parties" (29 C.F.R. § 2700.31(b)(3)).

As noted, this case involves a fatality and the charge that the foreman unwarrantably failed to correct a violative practice that resulted in the death. More than in a normal case, sufficient justification must be provided before the penalties can be reduced. The parties propose a reduction of approximately 84 percent in the total penalty, yet they offer no figures or supporting documents regarding the Respondent's "substantial debt" and "severe cash shortage". While the assertions in this regard may well be true, the public interest requires their confirmation.

Until the parties provide more facts to support the proposed penalty, I cannot approve the settlement.

ORDER

Accordingly, the motion to approve the settlement is **DENIED**. The parties are **ORDERED** to resubmit the motion, including supporting figures and/or documents within 15 days of the date of this Order. The resubmitted motion must indicate how to apportion the total proposed penalty. Failure to comply with this order will result in the case immediately being scheduled for hearing.



David Barbour
Administrative Law Judge

Distribution:

Thomas A. Paige, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Danny Bailey, Bailey's Limestone Quarry, P. O. Box 996, Wewuka, OK 74884 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 12, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-130
Petitioner	:	A.C. No. 46-08586-03506
v.	:	
	:	
INDEPENDENCE COAL COMPANY,	:	
INC.,	:	
Respondent	:	Twilight-Winifrede Mine

DECISION DENYING MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Melick

Eleven days before hearings scheduled in the captioned case and pursuant to Commission Rule 67, 29 C.F.R. § 2200.67, the Secretary filed the instant motion for partial summary decision. In her motion the Secretary argues, in essence, that since imminent danger Order No. 4400658 became a final order of the Commission (because it had not been challenged pursuant to Section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, the "Act") it was equivalent to a final judgment on a litigated issue, i.e., that the condition cited in the order constituted an "imminent danger." She further argues that since the condition was an "imminent danger" the same condition charged in Citation No. 4400659, (at issue in this civil penalty proceeding), therefore, also presented a hazard which would reasonably likely result in a serious injury. The Secretary is presumably relying upon either the doctrine of *res judicata* or collateral estoppel in seeking to prohibit the operator from now challenging whether an "imminent danger" (or a hazard which would reasonably likely result in a serious injury) actually existed.

The same issue was examined in a concurring opinion by Commissioners Doyle and Holen, in *Secretary of Labor v. Wyoming Fuel Company, n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, at 1632-1633 (August 1994) (Commissioners Doyle and Holen, concurring), I find the legal analysis therein to be persuasive. It is set forth, in relevant part, below:

Section 107(e)(1) of the Mine Act provides operators with the opportunity to challenge section 107(a) imminent danger orders within 30 days after issuance. 30 U.S.C. § 817. The finality of such orders is not referenced in the Mine Act, except in section 111, as a basis for compensation to miners who are idled as a consequence. 30 U.S.C. § 821. The judge's opinion appears to be based on a theory that the imminent danger order, as a final order of the Commission, is equivalent to a final judgment on a litigated issue. Under this theory, Basin is

prohibited, presumably under the doctrine of either *res judicata* or collateral estoppel, from challenging whether an imminent danger actually existed on June 25. We disagree that this is the effect of a final imminent danger order.

The judge offers no legal theory or other basis for his conclusion that the allegations set forth in a final imminent danger order can be used in another proceeding to irrebuttably establish those allegations. The Mine Act and Commission precedent address the finality of an imminent danger order only in the context of compensation proceedings arising under Section 111. The doctrines of *res judicata* and collateral estoppel would not preclude challenge to such a final order because those doctrines require the claim or issue to have been previously litigated. Moreover, those doctrines have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979), citing *Blonder-Tongue Lab., Inc., v. University of Ill. Found.*, 402 U.S. 313, 328-329 (1971).

Here, neither purpose would be served. Presently, an operator has, in most instances, no reason to contest an imminent danger order unless compensation is in issue. Penalties are not assessed in connection with an imminent danger order. Nor are alleged violations giving rise to an imminent danger order part of the imminent danger order itself, but rather are set forth in other citations and orders issued in connection with the dangerous condition, as was the case here. Under the judge's logic, operators desiring to avoid a *per se* finding of reasonable likelihood of injury, the third element of the Commission's S&S test, would need to litigate each and every imminent danger order, irrespective of whether compensation were in issue. Where no imminent danger was found, the reasonable likelihood allegation, which could be based on a less dangerous and less immediate threat to safety, would still be in issue and subject to litigation.

To the extent our colleague's opinion suggests that *Ranger Fuel Corp.*, 12 FMSHRC 363 (March 1990), would support the judge's conclusion, we believe it is in error. Slip op. at 9. *Ranger* is not relevant here. That case involved section 111 compensation to miners arising from an imminent danger withdrawal order. Under section 111, limited compensation is payable to miners irrespective of the validity of the withdrawal order but the further compensation sought in *Ranger* was contingent upon the relevant order becoming "final." 30 U.S.C. § 821; 12 FMSHRC at 373. The operator attempted to contest the validity of a final imminent danger order in the compensation proceeding although, under section 111, the challenged compensation was contingent only upon the order being final, not on the actual existence of an imminent danger. See U.S.C § 821. The Commission denied *Ranger's* challenge. 12 FMSHRC at 373. Here, the issue is

not whether the order is final but whether a final unlitigated imminent danger order can be used in a penalty proceeding to irrebuttably establish that an imminent danger actually existed.

Within this legal framework, therefore, final unlitigated imminent danger Order No. 4400659 cannot be used in a subsequent penalty proceeding, for a citation charging the same condition, to irrebuttably establish that the condition presented a hazard which would reasonably likely result in a serious injury or that a "significant and substantial" violation actually existed. Accordingly, this aspect of the Secretary's motion for partial summary decision must be denied as a matter of law. Commission Rule 67, 29 C.F.R. § 2700.67.

The Secretary also argues in her motion for partial summary decision that admissions in the deposition testimony of mine superintendent Christopher Sloan that the cited condition was in fact an "imminent danger" also constitutes an admission of the "existence of a hazard and that it is reasonably likely that this hazard could contribute to a serious injury." Presumably the Secretary is relying upon the deposition testimony of Sloan cited at page 9, indicated by the following colloquy:

Q: And would you say that it looked like what it does in these photographs?

A: [By Christopher Sloan] Yes.

Q: Would you consider this a dangerous situation?

A: Yes, I would.

The Secretary also cites Sloan's deposition at page 16, in which the following colloquy occurs:

Q: Do you agree that there was imminent danger there?

A: [By Christopher Sloan] Yes.

Q: You do?

A: As long as trucks were trying to haul by it, yes.

Q: Would you also agree that that is a significant and substantial violation?

A: What?

Q: The fact that there wasn't a berm on this road.

A: If trucks were hauling by it, yes, in fact, there wasn't a - - the road was shut down.

Finally, the Secretary quotes Sloan's deposition at page 24:

Q: When you say it would be stupid, it would be stupid for a truck driver to drive over it; is that what you are saying?

A: [By Christopher Sloan] Yes, if I saw that, I wouldn't go up.

In its response, Independence Coal Company Inc., states as follows:

Review of Sloan's testimony demonstrates that a considerable number of factual and legal issues remain in dispute, and thus renders any type of summary decision inappropriate. First, as Sloan's deposition testimony indicates, a significant hazard was presented only if haul trucks were using the road. Deposition at 16. Sloan himself stated he only used the road occasionally (*id.* at 6), had no personal knowledge that the trucks were using the road (*id.* at 7), and indicates that the road might have been shut down (*id.* at 16). Consequently, the operator is not prepared to concede that trucks were using the road at the relevant times, and the Secretary must meet her burden of proof on this point.

Second, Sloan's deposition testimony highlights a point the Secretary apparently disregards: the company's right to contest its responsibility for the road, and to argue that the inspector abused his discretion in citing independence. *Id.* at 16.

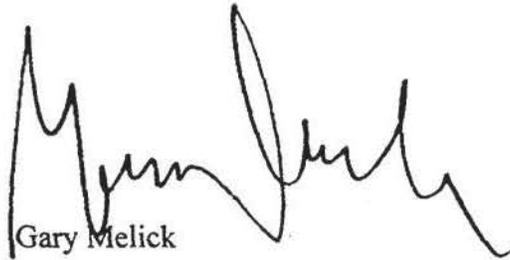
Finally, and most importantly, Sloan's testimony reveals a fundamental flaw in the Secretary's argument for summary decision: the defect that so concerned the inspector is not the condition that was cited and that the Secretary argues forms the basis for the inspector's "significant and substantial" determination. Throughout Sloan's deposition, the Secretary sought out information regarding a slip in the road and efforts to repair the slip. However, the citation at issue alleges a violation of 30 C.F.R. § 77.1605(k), which requires the "(b)erms or guards shall be provided on the outer bank of elevated roadways."

The Secretary pointed out at footnote 3 of her Motion for Partial Summary Decision that, in order to establish that a violation is significant and substantial, the Secretary has the burden of proving "(2) a discrete safety hazard - - that is, a measure of danger to safety - - **contributed to by the violation**" Secretary's Motion at 4, n.3. Emphasis added. Sloan's deposition makes clear that the hazard that concerned the inspector was posed, not so much by the lack of a berm or guard, but, allegedly, by the lack of a few feet of the roadway itself. Consequently, a significant factual question is presented as to whether the discrete safety hazard that concerned the inspector was contributed to by the condition that he cited.

Under Commission Rule 67, 29 C.F.R. § 2700.67, a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law. As Respondent notes, the proffered deposition testimony of Christopher Sloan is not, to say the least, without ambiguity on the issues presented. Accordingly, the factual conclusions the Secretary seeks in this case cannot be made and may not, in any event, be germane to the issues raised by Respondent. Genuine issues of material fact remain and, accordingly, this portion of the Secretary's motion for summary decision must also be denied.

ORDER

The Secretary's motion for partial summary decision is **DENIED**. Hearings will proceed as scheduled on January 21, 1998, in Charleston, West Virginia.

A handwritten signature in black ink, appearing to read 'Gary Melick', written in a cursive style.

Gary Melick
Administrative Law Judge

Distribution:

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

William Miller, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

\mca