DECEMBER 1989

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

DECEMBER 1989

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

Secretary of Labor, MSHA v. Midwest Minerals, Inc., Docket No. CENT 89-67-M. (Judge Melick, November 1, 1989)

Secretary of Labor, MSHA v. ASARCO, Incorporated, Docket Nos. SE 88-82-RM, SE 88-83-RM, SE 88-67-M. (Judge Weisberger, November 21, 1989)

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

Buford Smith v. R.J.F. Coal Company, Docket No. KENT 88-201-D. (Judge Weisberger, October 24, 1989)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 89-52. (Judge Weisberger, November 15, 1989)

Reconsideration was denied in Secretary of Labor v. Dillingham Construction, Docket No. SE 88-59-M, SE 89-23-M. (Commission denial on September 8, 1989)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 19, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	Docket No. WEST 87-88
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
MID-CONTINENT RESOURCES, INC.	:	

BEFORE: Ford B. Ford, Chairman; Backley, Doyle, and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), the American Mining Congress ("AMC") and Mid-Continent Resources, Inc. ("Mid-Continent") filed petitions for discretionary review of a decision by Commission Administrative Law Judge John Morris. 10 FMSHRC 881 (July 1988)(ALJ). The Commission granted both petitions for review, briefing has been completed in the case, and oral argument is scheduled for December 21, 1989. After review was directed, the Secretary of Labor filed a motion seeking dismissal of the AMC's petition for review. In addition, ASARCO, Inc. ("ASARCO") filed a motion requesting leave to file an amicus curiae brief out of time in support of the AMC's and Mid-Continent's positions as to the merits of the case. For the reasons that follow, we grant the Secretary's motion to dismiss the AMC's petition for discretionary review but conclude that, under the circumstances, the AMC may continue its participation as an amicus curiae and may participate in the scheduled oral argument in this proceeding. We deny ASARCO's motion requesting leave to file an amicus curiae brief out of time.

I.

Background

This proceeding arises from a citation issued to Mid-Continent by the Department of Labor's Mine Safety and Health Administration ("MSHA") on May 13, 1986, charging the operator with a violation of section 103(f) of the Act, 30 U.S.C.§ 813(f). The citation alleged that on May 13, 1986, Mid-Continent had denied Robert Butero, a designated representative of miners, access to Mid-Continent's Dutch Creek No. 1 Mine near Redstone, Colorado, for purposes of accompanying an MSHA inspector on walkaround during the latter's inspection of the mine. About one month earlier, the United Mine Workers of America ("UMWA") had notified both MSHA and Mid-Continent, pursuant to the Secretary's regulations at 30 C.F.R. Part 40, that it had been designated by two employees at the Dutch Creek No. 1 Mine as these miners' representative under the Mine Act. 1/ The notification designated Mr. Butero as the specific representative of the miners. Shortly after issuance of the citation, the inspector issued a withdrawal order to Mid-Continent, pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), alleging that Mid-Continent had continued to refuse Butero the right to accompany the inspector during inspection of the mine.

On March 16, 1987, the Secretary filed a civil penalty petition against Mid-Continent in connection with the citation. Mid-Continent filed an answer and the matter was assigned to Judge Morris. In October 1987, the judge granted the UMWA party status as an intervenor, and the AMC was permitted to appear as amicus curiae. On November 23, 1987, the Secretary filed a motion with the judge seeking to withdraw the civil penalty petition. The Secretary conceded that one of the two individuals who had signed the designation form was not an active miner at the time that the form was filed and, thus, that the designation did not comply with the requirements of 30 C.F.R. § 40.1(b) (see n.1). In response to an order to show cause why the motion should not be granted, Mid-Continent opposed the Secretary's motion and moved for declaratory relief. Mid-Continent argued that a nominal number of employees should not be permitted under color of 30 C.F.R. Part 40 to designate as the miners' representative a union that did not also represent the employees for collective bargaining purposes under the National Labor Relations Act ("NLRA"). Mid-Continent contended that the Mine Act miners' representative process was being improperly manipulated to facilitate organizational activity for NLRA purposes.

On July 1, 1988, the judge entered an order of dismissal in which he granted the Secretary's motion to withdraw the civil penalty petition, vacated the proposed penalty, denied declaratory relief, and dismissed the proceeding. 10 FMSHRC 881. The Commission received and granted petitions for discretionary review from both Mid-Continent and the AMC, which, as noted, had participated as amicus curiae below. The

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1/ 30 C.F.R. § 40.1(b) defines "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act...."

AMC also filed a motion to consolidate the two petitions, which the Commission granted. Briefs of Mid-Continent and the AMC were received by the Commission on September 16, 1988. Opposing briefs of the UMWA and the Secretary were received by the Commission on November 1 and 7, 1988, respectively. On November 7, 1988, the Secretary filed a motion to dismiss the AMC's petition for discretionary review and, on that same date, ASARCO filed a motion for leave to file an amicus curiae brief out of time.

Intervenor UMWA has filed a response in support of the Secretary's dismissal motion, while the AMC and Mid-Continent have filed oppositions to the motion. The AMC and Mid-Continent support ASARCO's motion to file its amicus curiae brief, while the Secretary and the UMWA oppose it. We turn first to consideration of the Secretary's motion to dismiss the AMC's petition.

II.

AMC's Standing to Petition the Commission for Review

Section 113(d)(2)(A)(i) of the Mine Act provides that "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission...." 30 U.S.C. § 823(d)(2)(A)(i) (emphasis added). The specific question presented is whether, in the circumstances of this case, the AMC is a "person adversely affected or aggrieved" by Judge Morris' decision and, hence, possessed of standing to petition for review of that decision. We answer that question in the negative.

In our view, the Mine Act does not contemplate that any nonparty dissatisfied with a judge's decision is empowered to seek Commission review merely by virtue of such dissatisfaction and the fact that the Act uses the term "person" instead of "party" in section 113(d). We conclude that, in order to petition the Commission for review under section 113, an "adversely affected or aggrieved" nonparty must demonstrate a sufficiently direct and concrete interest in the proceedings below and show that the interest is adversely affected by the outcome of the proceedings.

Our analysis begins with the language of the Mine Act and the general federal law of appeal. Section 113(d) uses the term "person" rather than "party" and the plain meaning of this terminology suggests that circumstances may obtain where a nonparty may petition the Commission for review of a judge's decision. Nothing in the text of section 113 or the scant legislative history on the subject specifically explains the intended scope of the language in question. However, viewing the Act as an integral whole, we perceive two prominent statutory themes that guide resolution of the issue.

First, appeals to the Commission from judges' decisions pursuant to section 113(d) arise in an adjudicative context in which traditional adversarial litigation, conducted in a two-tiered administrative arena of trial-type hearings and discretionary review, is the vehicle for

dispute resolution. Second, the Mine Act throughout mandates efficient and expeditious litigation and adjudication. Within this general framework, we discern no warrant for an interpretation of section 113(d)'s review procedure that is out of line with normal litigation processes or that is likely to complicate or prolong the resolution of disputes under the Act.

The general rule of federal appellate law is that only a litigant who was a party to the proceedings below and who is aggrieved by the judgment or order may appeal. E.g., Hispanic Soc v. New York City, 806 F.2d 1147, 1152 (2d Cir. 1986); United States v. LTV Corp., 746 F.2d 51, 53-54 (D.C. Cir. 1984); SEC v. Lincoln Thrift Ass'n, 577 F.2d 600, 602 (9th Cir. 1978). See generally 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice Par. 203.06 (2d ed. 1988). This rule protects both the litigating parties' normal right to control the direction of litigation, including appeal, and judicial management of an efficient appellate process. The primary exception to this general rule is where a non-party demonstrates a legally recognizable interest adversely affected by the trial court's judgment. E.g., Hispanic Soc., supra, 806 F.2d at 1152.

The AMC contends, however, that the Commission should apply to the administrative appellate review structure of the Act the "zone of interest" standing test developed by the Supreme Court in Clarke v. Security Indus. Ass'n, 479 U.S. 388 (1987), and Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Stated simply, this test requires that, to establish standing to challenge agency action in the federal courts, a plaintiff must show injury in fact as a result of the action and that the interest sought to be protected is arguably within the zone of interests protected or regulated by the statute in question. E.g., Clarke, supra, 479 U.S. at 394-400. We find this approach inapposite in the context of section 113(d) of the Mine Act.

As the AMC acknowledges in its response to the Secretary's dismissal motion, the zone of interest test was developed in the context of the judicial review provisions of section 10(a) of the APA, 5 U.S.C. § 702. 2/ Section 702 addresses judicial review of agency action in the federal courts in the first instance, often in circumstances where such judicial review is the only available mechanism for challenge of agency action. See, e.g., Data Processing, supra, 397 U.S. at 156-58. The test has been applied, for example, in contexts where the statute at issue specifically incorporates section 702 within its judicial review structure (e.g., Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 921 (D.C. Cir. 1989)); where there is no other avenue of judicial challenge to agency action, yet Congress did not intend to preclude judicial review (e.g., Data Processing, supra); and for a multiplicity

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2/ 5 U.S.C. § 702 states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

of challenges in the first instance to agency legislative-type rulemaking actions (e.g., Calumet Indus. v. Brock, 807 F.2d 225 (D.C. Cir. 1986)).

The AMC fails to recognize, however, the problems with incorporating these concepts into the section 113(d) administrative review setting. First, the Mine Act provides that "[e]xcept as otherwise provided in this Act, the provisions of sections ... 701-706 of [the APA] shall not apply to" proceedings under the Act. 30 U.S.C. § 956. Section 113(d) of the Act does not otherwise incorporate section 702 of the APA into the administrative mechanism of the Act. Thus, the statutory basis underlying the zone of interest test is expressly excluded from the Mine Act. Second, section 702 of the APA concerns judicial review of agency action, not agency review of administrative law judge decisions. Third, many of the applications of the "zone of interest" principles have occurred in the legislative rulemaking arena. By their very nature, legislative rules, as opposed to adjudications of specific enforcement actions, often affect a universe of interested persons.

In our judgment, allowing all nonparties that might satisfy a "zone of interest" test to appeal judge's decisions to the Commission would serve to strip the litigating parties of control of the litigation in question and encumber the Commission's adjudicative process with numerous appeals from a wide variety of persons, groups, or associations "interested" in the development of the law. Accordingly, we find the usual and general principles of federal appeal, summarized previously, to be a preferable guide to resolution of the question of nonparty administrative appeal under section 113(d) of the Mine Act.

Applying these principles to the case at hand, the question is whether the AMC, a nonparty below, has shown a direct and concrete interest in this litigation and demonstrated that the outcome below has had an adverse impact on that interest. We stress at the outset that not every disagreement with a judge's decision amounts to a legally recognizable interest that is adversely affected. Rather, more substantial involvements such as a direct stake in the property or events that are the subject of the litigation, some concrete involvement in the controversy between the parties, or some direct effect of the judgment on a recognizable interest of the nonparty are required.

Here, literally speaking, there is not a "case or controversy" involving the AMC under the Mine Act in the context of the present proceeding. Nor has the AMC demonstrated how the judge's dismissal of the Secretary's enforcement proceeding has had an adverse impact on it. Instead, the AMC argues that it is "adversely affected or aggrieved" because it has an interest in the legal principles involved in this proceeding, i.e., the questions surrounding the identification of miners' representatives under the Act. However, every Commission proceeding, to some extent, involves an interpretation of the Mine Act, a mandatory standard, or some legal principle affecting the enforcement or meaning of the Mine Act. Under the AMC's position, mining trade associations, mine operators, and miners generally would have a sufficient interest in Commission proceedings to bestow upon them the

right to file a petition for review of most administrative law judge decisions. We are confident that Congress, in enacting the Mine Act, did not intend to create such a potential litigation "free-for-all" in review proceedings before the Commission. We therefore conclude that the AMC has not presented a specific and concrete legal interest enabling it to appeal the judge's decision.

This holding does not preclude the AMC or similar organizations from participating in the Commission's adjudicatory processes. Amicus participation is liberally granted in Commission proceedings. We note, also, that our ruling on the Secretary's dismissal motion deals solely with the problem of admitting new parties on appeal after trial, and we intimate no view at this time as to the specific criteria that ought to control intervention at trial. 3/

In sum, we grant the Secretary's motion to dismiss the AMC's petition for discretionary review and vacate that part of our Direction for Review granting the AMC's petition as well as our subsequent order of consolidation. Mid-Continent's petition remains for review. However, in the circumstances presented, the AMC may continue in its role as an amicus and we will permit it to participate in the oral argument on the merits of this proceeding. The AMC's petition and briefs will be considered as amicus briefs. AMC's request for oral argument on the Secretary's motion to dismiss is denied.

III.

ASARCO's Motion to File an Amicus Brief Out of Time

We deny ASARCO's motion for leave to submit an amicus curiae brief out of time. Although the Commission's rules do not address the time for filing of an amicus brief, the Commission may properly look for guidance to Fed. R. App. P. 29 ("Rule 29"). 4/ ASARCO recognizes that

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3/ Further, even an intervenor may be required to demonstrate an "appealable interest" for purposes of seeking administrative or judicial review in situations where all the other parties have decided not to appeal. Cf. United States v. Imperial Irrigation Dist., 559 F.2d 509, 521 (9th Cir. 1977).

4/ Rule 29 provides:

> Brief of an Amicus Curiae
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> A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the

its brief has been tendered out of time. The fourth sentence of Rule 29 states that "[s]ave as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing...." ASARCO's brief was not submitted until almost two months after the time allowed Mid-Continent (the party whose position it supports) to file its brief. The Secretary and the UMWA oppose ASARCO's motion.

We conclude that ASARCO could reasonably have been expected to be aware of the litigation in this proceeding and to have sought participation on a more timely basis. Because ASARCO's brief was tendered almost two months out of time, and both the Secretary and UMWA, parties to the proceeding, oppose ASARCO's participation as an amicus, ASARCO's motion is denied.

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applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

IV.

Conclusion

For the reasons explained above, we grant the Secretary's motion to dismiss the petition for discretionary review filed by the AMC. The AMC may continue as an amicus on review and may participate in oral argument on the merits of this proceeding. The caption of this proceeding is revised to delete the AMC as a party. ASARCO's motion for leave to file an amicus brief is denied. ASARCO's brief and any reference to the brief are stricken from the record. 5/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

5/ Commissioner Nelson did not participate in the disposition of these motions.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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December 20, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. PENN 88-42-R
	:	PENN 88-43-R
	:	
	:	PENN 88-73-R thru
v.	:	PENN 88-89-R
	:	
WESTWOOD ENERGY PROPERTIES	:	PENN 88-148

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), and involves the validity of 18 citations and one withdrawal order issued to Westwood Energy Properties ("Westwood") concerning conditions at its refuse culm bank. 1/ The question before us is whether the Secretary of Labor ("Secretary") properly issued the citations and the withdrawal order to Westwood under the Mine Act. Commission Administrative Law Judge James A. Broderick upheld the Secretary's action in proceeding against Westwood under the Act. 11 FMSHRC 105 (January 1989)(ALJ). Westwood petitioned for review of the judge's decision asserting that its operations at the culm bank are but one component of the operation of an electric generating facility subject to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1982)(the "OSHAct"), rather than the Mine Act. We granted Westwood's petition and heard oral argument. For the reasons that follow, we vacate the judge's decision and remand for the taking of additional evidence on the important question presented and for the entry of a new decision.

1/ "Culm" is described as "[t]he waste or slack of the Pennsylvania anthracite mines, consisting of fine coal, more or less pure, and coal dust and dirt...." U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 289 (1968).

Westwood is the owner of land near Tremont, Schuylkill County, Pennsylvania. A culm bank is located on the land, in addition to an electric generating station where electricity is generated by steam-driven turbines. The steam is produced by the burning of material taken from the culm bank. The culm bank consists of coal mine refuse, including rock, wood, metal, and a small percentage of coal and other carbonaceous material. 11 FMSHRC at 107. The culm bank is 4,500 feet in circumference at the bottom, 350 feet at the top, and approximately 275 feet high. At the time of the hearing before the judge, Westwood had removed 240,000 tons of material from the culm bank.

The land formerly was the site of the Westwood Colliery, an underground anthracite coal mine and processing plant. Underground mining and coal preparation had been conducted at the site for over 30 years, ending in 1947. The culm bank resulted from this mining activity. When the underground mine closed, the coal processing plant was demolished and its remains became part of the culm bank. Sometime after Westwood Colliery had discontinued operations, a company named Manbeck operated a plant at the site, separating fine coal from waste material and selling the coal. Manbeck's operations were inspected by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") and its predecessor agency.

Westwood began construction of its electric generating facility in February 1986, and the facility became fully operational in July 1988. Electric power generated at the facility is sold to Metropolitan Edison Company. Westwood bulldozes culm from the top of the bank, and the material is then scooped by a front-end loader. The front-end loader dumps the culm into one of two hoppers or into a truck, which hauls the culm to the hoppers. After being dumped into a hopper, the culm passes through a grid that filters out rock, wood, and other particles larger than 12 inches by 12 inches. The culm next falls onto a conveyor which carries it under a magnet and through metal detecting and removing devices so that metal objects that would damage the equipment can be removed. The culm is then transported by another conveyor to a fuel storage silo where it is stored in bins. The stored material is gradually released from the bins into two "primary crushers," which break the culm into pieces approximately 3/4 inch to 1 inch in diameter. The crushed culm is then transported by conveyors to the power plant where it is crushed to a particle size of 1/8 inch in diameter. After crushing, the culm is transported by conveyors into the combustor, where it is burned. 2/ Ash by-products remaining after burning are hauled by truck to an ash pit.

On October 26, 1987, MSHA inspector Joseph Uholic arrived at Westwood's facility to conduct an inspection of the culm bank site. Westwood denied Uholic entry. On October 27, 1987, Uholic returned accompanied by MSHA inspector Charles Rosini and, pursuant to

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2/ Westwood's combustion process, known as the "circulating fluidized bed process" is a developing technology. The process allows Westwood to efficiently burn the culm without separating fine coal from the remainder of the culm. Tr. 93-94, O.A. Tr. 5.

instructions from their supervisor, the inspectors sought admission to the site. Westwood informed the inspectors that, on the advice of counsel, an inspection would not be permitted because the operation was not subject to MSHA jurisdiction. Uholic issued Westwood a citation charging a violation of section 103(a) of the Mine Act for failure to permit an MSHA inspector to enter. After approximately 40 minutes, Uholic issued a withdrawal order to Westwood for failure to abate the denial of entry violation alleged in the citation. 3/

On November 13, 1987, the Secretary sought and obtained, with Westwood's consent, a temporary restraining order from the United States District Court for the Eastern District of Pennsylvania. The order permits MSHA inspectors to enter and inspect Westwood's facility pending a final adjudication by the Commission of the issue of MSHA jurisdiction.

On November 14, 1987, Uholic and Rosini returned and inspected Westwood's culm bank site. They issued 17 citations charging violations of various mandatory safety standards applicable to surface coal mines. The withdrawal order and several of the citations also contained the inspectors' findings, made pursuant to section 104(d) of the Mine Act, that the violations were of a significant and substantial nature. Westwood contested the validity of the withdrawal order and the citations arguing that the culm bank site is not subject to Mine Act jurisdiction. Westwood also contested the significant and substantial findings and the Secretary's subsequently proposed civil penalties.

Following an evidentiary hearing, the administrative law judge issued his decision upholding the Secretary's assertion of jurisdiction

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3/ Section 103(a) of the Act states in part:

> Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this [Act].... For the purpose of making any inspection or investigation under this [Act], the Secretary ... with respect to fulfilling his responsibilities under this [Act], or any authorized representative of the Secretary ..., shall have a right of entry to, upon, or through any coal or other mine.

30 U.S.C. § 813(a).

under the Mine Act. The judge stated that "the primary issue in the case is whether Westwood's facility is a mine within the meaning of that term in the Mine Act, and therefore subject to the jurisdiction of MSHA." 11 FMSHRC at 107. The judge noted that while the culm bank would not be considered a mine in ordinary parlance, the statutory definition of "mine" is broad and includes "lands, ... facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground ... resulting from the work of extracting ... minerals from their natural deposits, ... or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals...." 11 FMSHRC at 110; 30 U.S.C. § 802(h)(1). The judge found that the "Westwood culm bank clearly resulted from the work of extracting anthracite coal from its natural deposit in the earth" and that a "literal construction of the statutory language would seem to cover Westwood's culm bank." 11 FMSHRC at 110.

The judge further noted that the statutory definition of "work of preparing the coal" includes "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. §§ 802(i); 11 FMSHRC at 110. The judge stated that the culm material contains anthracite coal, that Westwood breaks, crushes, sizes, stores and loads the coal in preparation for its use as fuel, and that a literal reading of the statutory definition of "work of preparing the coal" would seem to cover Westwood's operation. 11 FMSHRC at 111.

The judge rejected Westwood's argument that it is outside the coverage of the Mine Act because it is a power plant burning fuel rather than an operation engaged in the production of a marketable mineral. The judge noted that "it is not uncommon for mine operators to themselves consume the product of their mines" and that, in any event, Westwood "does more than burn the culm material; it prepares it 'for a particular use.'" 11 FMSHRC at 115. Finding that Westwood's facility meets the Act's definition of a "coal or other mine" and that Westwood engages in the "work of preparing the coal," the judge concluded that Westwood's facility is subject to the Mine Act. 11 FMSHRC at 115.

The dispute before us concerns the judge's upholding of the Secretary's assertion that the Mine Act applies to Westwood's culm bank operations. The Secretary does not assert jurisdiction under the Mine Act with respect to the working conditions inside the power generating facility itself. The Secretary asserts that working conditions inside the power generation facility are properly regulated by her under the OSHAct. Westwood, on the other hand, asserts that the entire facility, including the culm bank situated on the site, is properly regulated under the OSHAct.

A similar type of question was before us recently in Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989). In Pennsylvania Electric, we concluded that while the Secretary of Labor properly could exercise her authority to apply mine safety standards to the part of the utility operation in dispute therein, the record was unclear as to whether the

Secretary had, in fact, done so. Therefore, we remanded the matter to the administrative law judge for further proceedings, including the taking of additional evidence on the jurisdictional question and for the entry of a new decision. 11 FMSHRC at 1882-86. Here, for similar reasons, we reach the same conclusion and order the same course of procedure.

As in Pennsylvania Electric, a brief overview of the statutory interplay between the Mine Act and the OSHAct is necessary to a proper analysis of the issue. The OSHAct is the most broadly applicable statute regulating the safety and health aspects of the working conditions of American workers. The OSHAct, like the Mine Act, is enforced by the Secretary of Labor. Although broadly applicable, section 4(b)(1) of the OSHAct provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1). Therefore, OSHA standards pertaining to the working conditions at the culm bank would be applicable unless another federal agency, with a proper grant of jurisdiction over such working conditions, exercises its authority in a manner displacing OSHA coverage. See, e.g., Southern Pacific Transportation Co. v. Usery, 539 F.2d 386, 389 (5th Cir. 1976), cert. denied, 434 U.S. 874, 98 S. Ct. 221, 54 L. Ed. 2d 154 (1977); Southern Ry. Co. v. OSHRC, 539 F.2d 335, 336 (4th Cir. 1976), cert. denied, 429 U.S. 999, 97 S. Ct. 525, 50 L. Ed. 2d 609 (1976). Here, the Secretary claims that MSHA has properly exercised its statutory authority to regulate the culm bank site and that the withdrawal order and citations issued under the Mine Act must therefore be upheld.

Section 4 of the Mine Act provides that each "coal or other mine" affecting commerce is subject to the Act. 30 U.S.C. § 803. Section 3(h) of the Mine Act broadly defines "coal or other mine" as including the area of land from which minerals are extracted, roads appurtenant to such area, lands, facilities, equipment and machines used in, or resulting from, the work of extracting such minerals from their natural deposits, milling, or preparation of coal. 4/ More specifically, the

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4/ Section 3(h), 30 U.S.C. § 802(h), states:

> (1) "[C]oal or other mine" means (A) an area of land from which materials are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such areas, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and

definition of "coal mine" in section 3(h)(2) includes "land ... and other property ... resulting from, the work of extracting in such area ... anthracite from its natural deposits in the earth ... and the work of preparing the coal so extracted...."

The parties agree that Westwood's culm bank is comprised of materials resulting from Westwood Colliery's extraction of anthracite coal from its underground coal mine. Accordingly, the culm bank literally falls within the statutory definition of "mine" since "it result[s] from the work of extracting ... minerals from their natural deposits...." 30 U.S.C. § 802(h)(1). See Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986)(coal refuse pile is a "mine").

The term "work of preparing the coal" is defined in section 3(i) of the Mine Act as follows:

> [1] "Work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storage and loading of bituminous coal, lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. § 802(i)(bracketed numbers added). The judge found that Westwood in its use of the culm "breaks, crushes, sizes, stores, and loads anthracite" and therefore that Westwood's activities fall within the literal definition of coal preparation set forth in clause [1] of section 3(i). 11 FMSHRC at 115. He further found that Westwood "does other work of preparing coal usually done by the operator of a coal mine" (Id.), therefore meeting clause [2]'s criterion. Westwood argues, however, that the nature of an operation must also be examined when applying the definition of "work of preparing the coal," and that the judge erred in finding its activities to be the type of work usually

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> tailings ponds, on the surface or underground, used in, or to be used in or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities....
>
> (2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities[.]

done by the operator of a mine. Westwood particularly takes issue with the judge's conclusion that it "prepares [the culm] 'for a particular use,'" and is therefore subject to the Mine Act. 11 FMSHRC at 115.

In Oliver M. Elam, Jr., 4 FMSHRC 5, 7 (January 1982), the Commission recognized that under clause [2] of the definition of "work of preparing the coal" considerations additional to mere performance of the work activities specified in clause [1] come into play in determining whether coal preparation is taking place. The Commission concluded that inherent in the determination whether a company is engaged in coal preparation is an inquiry "not only into whether the operator performs one or more of the listed work activities [of section 3(i)] but also into the nature of the operation performing such activities." Id. (Emphasis added). Accord, Donovan v. Inland Terminals, 3 BNA MSHC 1893 (S.D. Ind. March 28, 1985). The Commission held in Elam that "work of preparing the coal" signifies "a process ... undertaken to make coal suitable for a particular use or to meet market specifications." 4 FMSHRC at 8. Because the Elam operation was an all-purpose commercial dock facility at which coal was stored, broken and crushed simply to facilitate the loading of the coal onto barges for shipment, the Commission concluded that Elam did not make the coal suitable for any particular use and was not engaged in the type of coal preparation usually done by a mine operator. Id. Therefore, the Elam loading dock was found to not be a mine.

Subsequently, in Alexander Brothers, 4 FMSHRC 541 (April 1982), the Commission applied the Elam holding and found that the Secretary had properly exercised jurisdiction under the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"), 30 U.S.C. § 801 et seq. (1976) (amended 1977), in a case involving the reclamation of materials from a refuse pile. The refuse pile had been created during the operation of an underground coal mine. After the mine had been abandoned, Alexander Brothers reclaimed coal from the pile. It removed refuse material from the pile by use of a front end-loader and trucked it to a screening plant, where rocks, scrap metal, and other waste were removed. The remaining refuse was then crushed and transported to a cleaning plant, where the additional non-coal material was removed by various processes and where further crushing took place. The resulting coal was then sold to brokers.

The Commission found that the processes undertaken by Alexander Brothers were those specified in the statutory definition of "work of preparing coal." The Commission also found that Alexander Brothers undertook those processes in order to make coal-bearing refuse marketable. Consequently, the Commission concluded that Alexander Brothers was subject to the 1969 Coal Act. 4 FMSHRC at 545. See also Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 584 (3rd Cir. 1979) cert. denied, 444 U.S. 1015 (1980)(operation that separates sand, gravel and a low grade fuel from dredged refuse is subject to Mine Act).

We conclude that Westwood literally engages in the "work of preparing the coal" in that the processes undertaken by Westwood on the mine waste material, including coal, are among those specified in the statutory definition. We further conclude that although Westwood does

not undertake to prepare the coal contained in the mine refuse to meet market specifications, it does engage in the enumerated processes, as does the normal coal mine operator, for the purpose of making the mined material suitable for a particular use; here, as a fuel to be consumed at an electric generating facility.

Although Westwood further argues that it is exempt from Mine Act jurisdiction because it does not prepare the culm for resale but rather is the ultimate consumer of the culm, we rejected a similar "ultimate consumer" argument in Pennsylvania Electric. 11 FMSHRC at 1881. We noted that under the Mine Act consumers of coal who otherwise meet the applicable definition of "mine" or "work of preparing the coal" are not provided any per se exclusion from the Act's jurisdiction. We held instead that the determination of Mine Act jurisdiction is governed by the two part analysis first set forth in Elam and followed in subsequent cases. 5/

Thus, we conclude that Westwood's activities fall within the Mine Act's definitions and therefore that the Secretary of Labor possesses statutory authority to make mine safety standards applicable to the disputed area. As in Pennsylvania Electric, however, we are unable to determine from the record presently before us whether the Secretary has, in fact, chosen to exercise her authority to regulate Westwood's operation under the Mine Act instead of the OSHAct.

Both OSHA and MSHA have asserted jurisdiction at Westwood's facility. The extent of their respective assertions of authority and the rationale behind them, however, are far from clear. Before the judge, Westwood's counsel and Westwood's resident construction manager asserted that OSHA had begun inspecting Westwood's facility in August 1986. Tr. 18-19, 104-05, 119. They stated that these inspections resulted in citations for violations of OSHA regulations. Tr. 18, 105. The construction manager further testified that each time OSHA conducted an inspection, it inspected the whole project and did not limit the

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5/ In support of its argument for Commission recognition of a consumer exemption to Mine Act jurisdiction, Westwood refers us, as did Pennsylvania Electric, to cases decided under the Black Lung Benefits Act. 30 U.S.C. § 901 et seq. (1983). Westwood argues that in interpreting the phrase "work of preparing the coal" for Black Lung Benefits Act purposes, courts have generally held that the work of processing coal done by the end-purchaser in connection with its own consumption does not meet the statutory definition of coal preparation. We concluded in Pennsylvania Electric, however, that the cited Black Lung Benefits Act cases lack precedential value in resolving the type of Mine Act jurisdictional dispute before us. 11 FMSHRC at 1881-82 n.7. We noted the different purposes of the Black Lung Benefits Act and the Mine Act, and we emphasized that, unlike the Black Lung Benefits Act, the Mine Act has no statutory financial scheme logically requiring that coal preparation activities be closely tied to a coal producer. Hence, we conclude here, as we did in Pennsylvania Electric, that the Black Lung cases provide no basis from which to extrapolate the exemption from Mine Act coverage argued for by Westwood. Id.

areas inspected except that OSHA never inspected the culm bank itself. Tr. 18, 19, 104-105, 121, 140. The construction manager further testified that since Westwood started removing materials from the culm bank, there had apparently been only one inspection by OSHA and that this inspection, in August 1988, involved the facility's ash silo. Tr. 120-21. Based on this testimony, the judge found that Westwood's "operation had been previously inspected by OSHA," but he did not delineate the precise scope of OSHA's inspections. 11 FMSHRC at 116.

The record further reflects that MSHA did not assert Mine Act jurisdiction at Westwood's facility until Inspector Uholic's arrival precipitated the events leading to this case. Uholic had been conducting an inspection at a neighboring mine and, while there, had been told that Westwood was extracting material from the culm bank. Uholic was asked when he was going to inspect Westwood's facility. Uholic then proceeded to Westwood's facility and requested permission to conduct an inspection under the Mine Act. Uholic told Westwood that since Westwood was taking material from the culm bank, he was "supposed to make an inspection." Tr. 33. Uholic did not specify the scope of his intended inspection. It was not until the issuance of the November 13, 1987, court order, which was consented to by Westwood, that specific areas for MSHA inspection were delineated. Tr. 82-83, 85-86, 104. The areas include the culm bank and buildings and equipment, up to the point where the fuel enters the "boiler building." Tr. 20-21, 82.

Within these areas are facilities over which OSHA apparently also has asserted its authority, yet, nowhere in the record is there any indication that MSHA and OSHA mutually determined the extent of each agency's regulatory authority at the Westwood facility. The agencies have formally published an MSHA-OSHA Interagency Agreement (the "Agreement") setting forth a procedure for resolving general jurisdictional questions between the two agencies. The Agreement states in pertinent part:

> When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those states with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy. Jurisdictional questions that can not be decided at the local level shall be promptly transmitted to the respective National Offices which will attempt to resolve the matter. If unresolved, the matter shall be referred to the Secretary of Labor for decision.

44 Fed. Reg. 22827, 22828 (1979). The Agreement itself does not expressly address the question of MSHA-OSHA jurisdiction at facilities using the fluidized-bed combustion process for the burning of mine waste to generate electricity. This process is a relatively new technology that may be more common in the future and that may require special attention in terms of resolving potential overlapping areas of jurisdiction. See American Mining Congress Journal, October 1989, at 20

(describing construction of a cogeneration plant powered by burning of coal mine refuse). Furthermore, no supplement to the Agreement has been published addressing this specialized process. Compare, Interagency Agreement; Revision Concerning Surface Retorting of Oil Shale, 48 Fed. Reg. 7521 (1983).

The record contains no indication that the procedures specified in the Agreement for the resolution of jurisdictional conflicts between MSHA and OSHA were followed or even consulted. See, 44 Fed. Reg. 22827 (1979). In fact, MSHA Inspectors Uholic and Rosini testified that they had never heard of the Agreement. Thus, the record does not reflect if their inspection of Westwood's facility reflects a reasoned resolution of the jurisdictional question by the Secretary and her agencies or simply resulted from an ad hoc unilateral assertion of jurisdiction by MSHA. Tr. 56, 83.

Without an interagency resolution of the question, the potential for possible conflicts between OSHA and MSHA in the exercise of their jurisdiction at Westwood's facility is great. Indeed, conflict has already arisen in that both OSHA and MSHA have inspected Westwood's trucking operations at the facility. Tr. 105, Ex. G-14, 17, 18. OSHA has asserted jurisdiction over trucks and drivers removing ash from the ash silo, while MSHA has asserted jurisdiction over trucks and drivers hauling and dumping culm, even though the same trucks and drivers perform both operations over the same haulage roads and under the supervision of the same employer. Tr. 105-06, 121-23.

Moreover, the reasons for MSHA's decision to assert inspection authority in the disputed area are not well explained. At oral argument before us, counsel for the Secretary asserted that the inspection of Westwood's culm bank operations reflects MSHA's policy of inspecting those areas of a power plant that involve the preparation of coal and of leaving to OSHA the inspection of those areas involving the handling of already prepared coal. O.A. Tr. 17, 26. However, according to Rosini, a power plant engaged in coal crushing operations would not be subject to MSHA inspection nor would its use of front end loaders to load coal into a hopper warrant an inspection. Tr. 84.

Also, as we noted in Pennsylvania Electric, the Commission was advised (by a different Secretarial counsel in a prior case involving a coal handling power plant) that MSHA traditionally has not inspected power plants, that while MSHA has recognized part of the process utilized to produce electric power from coal requires handling and processing coal, it has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power generating process is more feasibly regulated by OSHA. 11 FMSHRC at 1884 (quoting Utility Fuels, Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss (November 29, 1985)).

Furthermore, the jurisdictional question presented in this case is heightened by the fact that subsequent to the initiation of the litigation before us, the Secretary, through OSHA, proposed new, comprehensive safety standards applicable to the operation and maintenance of electrical power generation facilities. 54 Fed. Reg.

4974-5024 (1989). Westwood's facility generates electricity and apparently is classified by the Federal Energy Regulatory Commission as a small power production facility. Tr. 95. The culm bank operation at the facility is integral to Westwood's production of electricity. Westwood's operation involves fuel handling and processing using equipment such as conveyors and crushers. Proposed OSHA standard 29 C.F.R. § 1910.269(a)(1)(i) reads in part, "This section covers work practices, installations, and equipment associated with the operation and maintenance of electric power generation.... These provisions apply to ... (A) Power generation, transmission, and distribution installations ... and (B) ... (1) ... Fuel and ash handling and processing installations, such as coal conveyors and crushers." 54 Fed. Reg. at 5009.

Far from recognizing a division of jurisdiction between OSHA and MSHA, the proposed regulations appear to be all encompassing. As noted, section 1910.269 states that it is applicable to "fuel and ash handling and processing installations, such as coal conveyors and crushers." 29 C.F.R. § 1910.269(a)(1)(i)(B)(1). In summarizing the proposed rules, the Assistant Secretary of Labor for Occupational Safety and Health explained that fuel handling operations within an electric power installation would be covered by the proposed regulations. 54 Fed. Reg. at 4980. The OSHA Assistant Secretary's view of the effect of the proposed regulations complements and coincides with the view of OSHA/MSHA jurisdiction propounded to the Commission in Utility Fuels, supra. Thus, the proposed rules suggest that the Secretary of Labor may still view electric generating operations such as Westwood's as subject to OSHA jurisdiction or, at least, that coverage by OSHA, rather than MSHA, may be more appropriate and effective.

These conflicting indications of Secretarial intent raise serious questions as to which agency in the Department of Labor exercises safety and health authority over the facilities at power generating stations such as Westwood's. The answer is of great consequence to Westwood and its employees. It also is of importance to a growing number of similarly situated operators of facilities using the fluidized bed combustion process to burn coal mine waste for the production of energy. These companies, along with Westwood, must know which Department of Labor safety and health standards must be complied with and which statute prescribes the rights and duties to which they and their employees must conform their conduct. 6/

Section 113 of the Mine Act provides that "[i]f the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge." 30 U.S.C. § 823(d)(2)(C). Because of the pervasive

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6/ The jurisdictional confusion generated in this case may not be restricted to coal and coal mine waste-fired powerplants. Other coal consuming entities may also be implicated in Mine Act coverage if they engage in "the work of preparing coal." At oral argument counsel for the Secretary indicated that steel plants and aluminum plants may fall into this category. O.A. Tr. pp. 22-23, 25-26.

ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Westwood's power plant, and the importance of this question, we find it appropriate to order further proceedings. As we did in Pennsylvania Electric, we encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OSHA-MSHA Interagency Agreement to resolve the conflicting positions taken on her behalf.

Accordingly, the judge's decision is vacated and the matter is remanded to the judge for further proceedings consistent with this opinion including the taking of further evidence on the jurisdictional question presented and the entry of a new decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Commissioner Doyle, dissenting:

Westwood Energy Properties (Westwood) is a small electric power generating plant that burns culm to generate electric power. It is located adjacent to a culm bank or refuse pile that was produced by Westwood Colliery, an unrelated entity, as a result of its mining operations between 1913 and 1947. Tr. 95. When the mine closed, the coal preparation plant was demolished and the remains added to the culm bank which also contains rock, slate, shale, wood, metal, granite and quartz along with a small percentage of coal and other carbonaceous material. 11 FMSHRC 107. It is from that culm bank that Westwood produces electric power and sells it to an electric utility. Tr. 95, 96.

In October, 1987, the Mine Safety and Health Administration ("MSHA") for the first time attempted to inspect Westwood's culm bank, not as a result of a policy decision by the Secretary of Labor, nor of a decision reached between the MSHA District Manager and the OSHA District Manager pursuant to the MSHA-OSHA Interagency Agreement setting forth the procedure for resolving such jurisdictional questions, nor of a decision by the District Manager that such action was within MSHA's jurisdiction, but rather as a result of an individual inspector's decision to carry out the inspection after having been asked about it while he was inspecting a nearby mine.

The majority of the Commission concludes that "... Westwood literally engages in the 'work of preparing the coal' in that the processes undertaken by Westwood ... are among those specified in the statutory definition." Slip. op. at 7. After finding that Westwood does not prepare the culm to meet market specifications, as is usually done by a mine operator, the majority bases its decision on the fact that Westwood performs some of the enumerated processes in order to make the material suitable for consumption, as fuel, in its power plant. Slip. op. at 8. They discount any exemption for the ultimate consumer of coal and conclude that the Secretary of Labor could properly exercise her authority to apply mine safety standards to Westwood's power generating facility. Because of what they term the "pervasive ambiguity" in the record as to whether the Secretary has, in fact, asserted Mine Act jurisdiction, they remand the matter to the administrative law judge for the taking of further evidence on the jurisdictional question and the entry of a new decision.

I disagree with the majority's conclusion that Westwood's culm bank is subject to the jurisdiction of the Mine Act, based on either of its theories, i.e., that the culm bank "results from" the mining activity of an unrelated entity some forty years earlier, or that Westwood is engaged in "coal processing" because the culm passes over a one foot by one foot grizzly (to remove timbers and large rocks), passes over a magnet (to remove foreign objects such as spikes, mule shoes and nails) and is then loaded, stored and crushed before it is burned.

I further believe that the case should be decided on the record before us, rather than being remanded for the taking of additional evidence.

Section 3(h), 30 U.S.C. §802(h), states:

> (1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;
> (2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

The "work of preparing coal" is defined in section 3(i), 30 U.S.C. §802(i), as follows:

> [i] "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

A portion of the legislative history pertaining to these sections has been widely quoted in determining Mine Act coverage. That language states that the definition of a mine is to be given the broadest pos-

sible interpretation and that doubts should be resolved in favor of inclusion. However, examination of that entire passage of the legislative history indicates a context in which Congress was contemplating regulation of mines in a more traditional sense. The complete passage reads as follows:

> Thus, for example, the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of 'mine' are lands. excavations, shafts, slopes, and other property including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to clarify its intent. The collapse of an unstable dam at Buffalo Creek, West Virginia, in February of 1972 resulted in a large number of deaths, and untold hardship to downstream residents, and the Committee is greatly concerned that at that time, the scope of the authority of the Bureau of Mines to regulate such structures under the Coal Act was questioned. Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414.

While that language is expansive, it is mine oriented, and it cannot be forgotten that the Act was intended to establish a "single mine safety and health law, applicable to all mining activity." S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added). "The statute is aimed at an industry with an acknowledged history of serious accidents." Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 594 (3d Cir. 1979). There is no indication of any intention to regulate other industries using coal, such as electric power generating plants (or even steel mills as only recently asserted by the Secretary). Or. Arg., Tr. 26. Indeed, the courts have recognized that it is "clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984).

I recognize that, in addition to considering Congress' concerns as set forth in the legislative history, deference is generally to be accorded interpretations by the agency charged with enforcing the law. Here, however, the record contains no evidence that, since the Mine Act became effective in 1978, the Secretary has made any previous attempts, either by the issuance of regulations or otherwise, to include electric power generating plants within the Act's coverage or to put the operators of such facilities on notice of liability under the Mine Act. Nor does the record indicate that the efforts first of a single inspector and subsequently of his district manager to bring Westwood's facility within its coverage actually represent the Secretary of Labor's interpretation of the Mine Act.

It should be noted that the Secretary's counsel argued that resolution of the jurisdictional issue rests solely on the language of the Mine Act itself, which he asserted mandates coverage, and does not involve deference to the Secretary's interpretation of the Mine Act. 1/ It is not surprising that the Secretary eschews deference to her interpretation of the Mine Act in this instance since the Secretary's policy with respect to whether electric power plants come within Mine Act coverage has been exhibited in a variety of ways as follows:

1. Her implied interpretation that coal handling at electric power generating facilities does not come within the Mine Act, based on her failure to assert such jurisdiction for almost ten years after passage of the Mine Act.

2. Her position, as set forth in an earlier Commission case, that:

> MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency.
>
> MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.

Utility Fuels Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss, November 29, 1985).

1/ This position was advanced by the Secretary during oral argument before the Commission in a similar case, Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989), Or. Arg. Tr. 32.

3. Her position that an electric power generating facility's handling of a product containing coal comes within coverage of the Mine Act, as asserted in this case.

4. Her position that coal handling at electric power generating facilities is governed by the OSHAct, as set forth in regulations recently proposed by the Occupational Safety and Health Administration ("OSHA") for the operation and maintenance of electrical power generation facilities, which regulations include detailed provisions governing coal handling and processing at those facilities. 54 Fed. Reg. 4974-5024 (1989).

5. Her position that OSHA's proposed rules would apply only to electric generating facilities using already processed coal and that facilities using run-of-mine coal would be subject to Mine Act jurisdiction, as asserted by her counsel at oral argument before the Commission in Pennsylvania Electric Co., Or. Arg. Tr. 24, 29, 33.

Because her interpretations have been neither longstanding nor consistent, any deference that would ordinarily be due to the Secretary in interpreting the Mine Act is not appropriate to this instance. See, e.g., I.N.S. v. Cardozo-Fonseca, 480 U.S. 421 (1987); American Mining Congress v. EPA, 824 F.2d 1177, 1182 (D.C. Cir. 1987); Sec. v. BethEnergy Mines, 11 FMSHRC 1445, 1451 (August 1989); Sec. v. Florence Mining Co., 5 FMSHRC 189, 196 (February 1983).

If literalism marked the beginning and end of our inquiry, I would have to concede that Westwood's facility falls within the Mine Act's coverage. Westwood's culm bank, having been created from the waste products of a mine that ceased operation more than four decades ago, does amount to property that "result[s] from" the work of extracting minerals from their natural deposit and, therefore, in a strictly literal sense, falls within the language used to define a coal mine. Section 3(h), 30 U.S.C. §802(h). 2/ Similarly, although very little is done to the culm bank material before it is burned, it is undisputed that there is some loading, storing and crushing of the

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2/ This type of literal translation could bring many diverse facilities, including airports, within the coverage of the Mine Act. As noted by the United States Court of Appeals for the District of Columbia Circuit, statutes "must be interpreted in light of the spirit in which they were written and the reasons for their enactment." General Serv. Emp. U. Local No. 73 v. N.L.R.B., 578 F. 2d 361, 366 (D.C. Cir. 1978). In the same vein, Judge Learned Hand observed that "the duty of ascertaining [the] meaning [of a statute] is difficult at best and one certain way of missing it is by reading it literally..." See Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 (2d Cir. 1963).

culm, as is the case in most coal consumption. Those activities are, in fact, among the items enumerated in the definition of the "work of preparing coal" set forth in section 3(i), 30 U.S.C. §802(i).

The majority itself recognizes, however, that it is not sufficient to simply check off whether the activities listed in section 3(i) are being performed and the case of MSHA v. Oliver M. Elam. Jr., Co., requires that there be an examination into the nature of the operation performing such activities. 4 FMSHRC 5, 7 (January 1982), Slip. op. at 7, 8. No such examination is made by the majority, however.

Rather, the majority proceeds to examine Alexander Brothers, Inc., 4 FMSHRC 541 (April, 1982), a case that involved a refuse pile, but as part of a comprehensive coal processing operation in which material was removed from a refuse pile, loaded on trucks, transported to a screening plant, then screened and passed under a magnet. From there, the material was again screened and hand picked. It was then crushed, stockpiled and subsequently transported to a cleaning plant where it was washed, separated, dried, crushed, remixed and loaded into railroad cars for shipment to a broker. At issue in Alexander Brothers was not whether the operator was preparing coal within the definition set forth in the 1969 Coal Act, but whether coal preparation facilities, in the traditional sense (and not just the refuse pile), were subject to the Coal Act where they had no connection with any coal extractor. The Commission correctly found jurisdiction, citing the test set forth in Elam to the effect that the proper inquiry is not into whether the cited entity performs one or more of the listed functions but rather into the nature of the operation. 4 FMSHRC at 545. Accord Donovan v. Island Terminals, Inc., 3 MSHC BNA 1983 (S.D. Ind. March 28, 1985). In the case at hand, however, the majority only compares the processes undertaken by Westwood with some of those undertaken in Alexander Brothers and noting that, like Alexander Brothers, Westwood engages in crushing and sizing of material taken from the refuse pile, concludes that, because Westwood performs some of the specifically enumerated processes carried out by those who prepare coal and because this work is usually done by the operator of a coal mine, the operation comes within the ambit of section 3(i) of the Mine Act. At no point do they analyze and compare the nature of Westwood's operation (burning the culm as fuel for its generating plant) with that in Alexander Brothers (cleaning and processing material from a refuse pile for shipment, through a broker, into the chain of commerce). I believe that Westwood's operation is of an entirely different nature from the operation in Alexander Brothers and is not a "coal mine" in the sense contemplated by Congress when it enacted the Mine Act. Had Congress wanted to regulate not only mines but electric power generating plants, steel mills and other coal consumers, I think it would surely have given some indication of that intent.

The majority also briefly addresses Westwood's position that ultimate consumers of coal are exempt from Mine Act coverage, rejecting it on the basis that there is no per se exclusion from the Mine's Act jurisdiction and, thus, the inquiry need only address whether the activity in question can be found among those listed in section 3(i) and whether the work is usually performed by a coal mine operator. Slip. op. at 8. In Pennsylvania Electric Co., I noted that the Black Lung Benefits Act, 30 U.S.C. §901 et seq. (1982), also takes its definition of "coal mine" from section 3(h) of the Mine Act and I believe that the majority errs in dismissing those cases out of hand. The Black Lung Benefits Act cases have used the point where coal enters the stream of commerce or reached the ultimate consumer as the line of demarcation for determining whether an operation is a coal mine. 11 FMSHRC 1875 (October 1989), dissent at 1894.

I am also of the view that the majority's opinion is in conflict with itself. As identified by the judge, the primary issue in the case is "whether Westwood's facility is a mine within the meaning of that term in the Mine Act, and therefore subject to the jurisdiction of MSHA." 11 FMSHRC at 107, Slip. op. at 4. After examining the Mine Act's definition of the term "coal or other mine" set forth in section 3(h), 30 U.S.C. §802(h), the majority concludes that "... the culm bank literally falls within the statutory definition of 'mine' since 'it result[s] from the work of extracting ... minerals from their natural deposits'..." Slip. op. at 6. The majority further concludes that Westwood "literally engages in the 'work of preparing coal'" and that it "engage[s] in the enumerated processes, ... for the purpose of making the mined material suitable for a particular use; ... as a fuel to be consumed at an electric generating facility." Slip op. at 7, 8. Thus, they "conclude that Westwood's activities fall within the Mine Act's definitions and therefore that the Secretary of Labor possesses statutory authority to make mine safety standards applicable to the disputed area ." Slip. op. at 8. They remand the case for a determination of whether the Secretary has chosen to exercise that authority. Slip op. at 8.

If, in fact, the majority is correct in its conclusion that Westwood's operation falls clearly within the statutory definition of a mine, any determination other than that the Mine Act applies to Westwood's operation is, in my opinion, precluded. Section 4 of the Mine Act provides that "[E]ach coal ... mine ... shall be subject to the provisions of this Act." "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 N. 9 (1984). Thus, coverage would be mandated, not discretionary with the Secretary.

For the reasons set forth above, I would reverse the judge and dismiss the case against Westwood.

Joyce A. Doyle
Commissioner

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Administrative Law Judge James A. Broderick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 20, 1989

BEAVER CREEK COAL COMPANY	:	
	:	
v.	:	Docket No. WEST 88-145-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

The questions presented in this contest proceeding are whether Beaver Creek Coal Company ("Beaver Creek") is entitled to declaratory relief under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act"), and to attorney's fees and costs. Commission Administrative Law Judge John J. Morris concluded that Beaver Creek was not entitled to either declaratory or monetary relief, and he dismissed Beaver Creek's contest. 10 FMSHRC 758 (June 1988)(ALJ). For the reasons that follow, we affirm the judge's decision.

Beaver Creek's application for declaratory relief involves a dispute between Beaver Creek and the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding the revision of Beaver Creek's roof control plan at its Trail Mountain No. 9 Mine located in Emery County, Utah. 1/ The plan permitted 140 feet of penetration on

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1/ Pursuant to 30 U.S.C. § 862 and mandatory safety standard 30 C.F.R. § 75.200 (1987), an operator is required to adopt a roof control plan suitable to the conditions and mining system of the mine. The plan must be approved by the Secretary and must be reviewed at least every six months. Once adopted and approved, the provisions of the plan are enforceable as mandatory safety standards. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Jim Walter Resources, Inc.,

development mining without installation of permanent roof support. It also permitted continuous mining machines to make 10 foot cuts. By letter dated January 13, 1988, Beaver Creek requested that MSHA approve a modification of the roof control plan to allow remote controlled continuous mining machines to make cuts of 20 feet during development mining. By letter dated February 16, 1988, MSHA "tentatively" approved the modification subject to various conditions, one of which stated that "[t]he maximum depth of penetration is limited to 40 feet. If adverse conditions are encountered or anticipated, the cut depth shall be substantially reduced." Exhibit C. By letter mailed March 14, 1988, Beaver Creek objected to this and other conditions.

On March 17, 1988, MSHA inspector Dick Jones conducted an inspection at the mine. Jones found that a remote controlled continuous mining machine had exceeded the 40 foot penetration limit set forth in MSHA's letter. Jones therefore issued to Beaver Creek an order of withdrawal pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging a violation of section 75.200 for failure to comply with the approved roof control plan. Jones further found that the violation significantly and substantially contributed to a mine safety hazard and resulted from Beaver Creek's unwarrantable failure to comply with the standard.

Beaver Creek personnel informed Jones that Beaver Creek had not agreed to the 40 foot penetration condition stated in MSHA's letter. They showed Jones a copy of Beaver Creek's letter to MSHA in which it stated its objections to the condition MSHA sought to impose. Later that same morning, MSHA terminated the withdrawal order and mining was allowed to resume. MSHA, however, refused to vacate the withdrawal order issued by Jones.

On March 22, 1988, Beaver Creek initiated this proceeding before the Commission asserting that the order was improperly issued. Beaver Creek argued that, because it had not agreed to the condition, it had not violated section 75.200 by not complying with the condition. Beaver Creek also requested the Commission to order the Secretary to reimburse Beaver Creek for its attorney's fees and costs pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 11"), section 105(d) of the Mine Act, and the common law, asserting that MSHA's defense of the contested withdrawal order was frivolous and in bad faith. Notice of Contest 2-3. Beaver Creek also challenged the inspector's unwarrantable failure finding.

On March 25, 1988, MSHA vacated the withdrawal order and in a letter to Beaver Creek conceded that, because there had been no agreement between MSHA and Beaver Creek regarding the stipulation, penetration by the remote controlled continuous mining machine beyond 40 feet did not violate the mine's roof control plan or section 75.200.

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9 FMSHRC 903, 906-07 (May 1987). On March 28, 1988, the Secretary's revised mandatory safety standards for roof, face, rib support, and roof control plans became effective. The revised standards generally retain the adoption, approval, and review requirements of section 75.200 (1987). See e.g., 30 C.F.R. § 75.220(a); 30 C.F.R. § 75.223(d)(1988).

MSHA also advised Beaver Creek that the roof control plan in effect on January 13, 1988, would be enforced, commencing March 30, 1988, absent an agreement on the conditions proposed by MSHA.

On April 8, 1988, Beaver Creek filed an amended notice of contest, requesting declaratory relief and charging that the Secretary's practices and procedures for approving new and revised roof control plans were improper. Beaver Creek also renewed its request for attorney's fees and costs. On April 22, 1988, MSHA unconditionally approved the roof control modification requested by Beaver Creek, and moved to dismiss the notice of contest as amended. The Secretary essentially argued that Beaver Creek's request for declaratory relief was moot and that the principle of sovereign immunity barred Beaver Creek's claims for attorney's fees and costs.

The administrative law judge granted the Secretary's motion to dismiss. The judge concluded that, although the Commission had authority to grant declaratory relief, relief was not warranted because the issues were moot. 10 FMSHRC at 764. The judge specifically noted that the modification sought by Beaver Creek had been granted by the Secretary. Id. The judge also denied Beaver Creek's request for an award of attorney's fees and costs, concluding that Fed. R. Civ. P. 11 does not provide a basis for an award of fees and costs in Commission proceedings. 10 FMSHRC at 763. We granted Beaver Creek's petition for review.

Beaver Creek submits that the Commission should reverse the order of dismissal and reinstate its contest. Beaver Creek asserts that, despite MSHA's approval of Beaver Creek's proposed modification of the roof control plan at the Trail Mountain No. 9 Mine, the relief Beaver Creek seeks involves an interpretation of the proper procedures to be followed in the roof control plan approval process and, therefore, that the issues are not moot. PDR at 2, 16-19. Beaver Creek also argues that it should be awarded the monetary sanctions it seeks.

The Commission has previously recognized that it may grant declaratory relief in appropriate proceedings where jurisdiction otherwise exists. Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (10th Cir. 1983); Kaiser Coal Corp., 10 FMSHRC 1165, 1170-71 (September 1988); See also Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985)("Y&O"). The question is whether declaratory relief is appropriate.

The primary purpose of declaratory relief is "to save parties from unnecessarily acting upon their own view of the law." Climax Molybdenum Co., 2 FMSHRC at 2752. Beaver Creek instituted this case to challenge the validity of the withdrawal order and the inspector's finding of unwarrantable failure. Beaver Creek argued that MSHA had not approved, and Beaver Creek had not adopted, the provision of the plan for which it was cited and thus that it had not violated section 75.200. Shortly after Beaver Creek initiated this proceeding MSHA itself vacated the contested withdrawal order. MSHA admitted that the order had been improperly issued because the inspector mistakenly believed that a

limitation of 40 feet for the penetration of the remote controlled continuous mining machine had been adopted and approved. Thus, MSHA agreed with Beaver Creek that the company had not violated section 75.200.

In addition, MSHA approved without conditions and Beaver Creek adopted the modification of the roof control plan originally sought by Beaver Creek. The requirements of the roof control plan concerning the advancement of remote controlled continuous mining machines inby permanent roof supports during development mining are now clearly understood by both Beaver Creek and MSHA. Accordingly, denial of declaratory relief does not mean that Beaver Creek will have to act at its peril regarding the meaning of this previously disputed provision.

Further, there are no allegations by Beaver Creek that there is a present dispute between it and MSHA with respect to the approval or review of the mine's roof control plan or of any proposed revisions to it. See Tr. 15, 31-32. The prospect that the Secretary will take similar enforcement action in the future is purely conjectural and cannot be the basis for declaratory relief. See SEC v. Medical Committee on Human Rights, 404 U.S. 403, 406 (1972).

Beaver Creek also requests that we declare invalid certain of the practices and procedures used by MSHA in negotiating with operators with respect to approval or revision of roof control plans, and that we issue a declaratory ruling regarding the effect of the revised roof control regulations upon MSHA's authority to review a roof control plan. See Amended Notice of Contest 4; 53 Fed. Reg. 2354 (1988). The prospect of future allegations of violations resulting from the Secretary's practices and procedures for approval or revision of Beaver Creek's roof control plan is entirely speculative. Indeed, the Secretary acknowledges that MSHA's presently published roof control plan approval and review policies "are largely consistent with the positions taken by Beaver Creek and the declarations it seeks." See S. Br. 20-24. We further find it inappropriate to consider declaratory relief in the context of the revised roof control regulations. The revised regulations were not in effect at the time of the Secretary's enforcement action in this proceeding. It would be inadvisable, therefore, to express an opinion as to the propriety of the revised procedures, absent a factually grounded controversy arising under those procedures. Hence, we agree with the judge that, under the circumstances of this case, declaratory relief is not warranted.

We also agree with the judge that Beaver Creek is not entitled to attorney's fees and litigation expenses. Subsequent to granting review of this proceeding, we concluded that the provision of Fed. R. Civ. P. 11 providing for monetary sanctions does not apply to Commission proceedings. Rushton Mining Co., 11 FMSHRC 759 (May 1989). 2/ We held

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2/ Fed. R. Civ. P. 11 provides:

Signing of Pleadings, Motions, and Other Papers;

that, absent specific statutory authority, the Commission cannot award attorney's fees and costs against the Secretary. We noted that the barriers to such relief "include the silence of the Mine Act on the subject, the nature of the Federal Rules of Civil Procedure, the bar of sovereign immunity, and the Equal Access to Justice Act (Pub. L. No. 96-481, 94 Stat. 2325, reauthorized, Pub. L. 99-80, 99 Stat. 183)("EAJA")." 11 FMSHRC at 763. Beaver Creek raises no arguments causing us to reconsider our decision in Rushton. Therefore, for the reasons set forth in Rushton, we conclude that Beaver Creek is not entitled to attorney's fees and reimbursement for costs under Fed. R. Civ. P. 11.

Sanctions

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended April 28, 1983, effective August 1, 1983.) (Emphasis added.)

Beaver Creek also argues for an award of attorney's fees and costs under section 105(d) of the Mine Act and under general principles of American common law. It asserts that such fees and costs are warranted when the government engages in frivolous or bad faith litigation. However, as we observed in Rushton, the doctrine of sovereign immunity bars the award of attorney's fees and costs against an agency of the United States absent Congressional authorization. 11 FMSHRC at 765. As we explained in Rushton, the EAJA is "the exclusive remedy provided by Congress to prevailing litigants who seek reimbursement of their litigation expenses from the Secretary in Commission contest and civil penalty proceedings." 11 FMSHRC at 765. Because Beaver Creek makes no claim or showing of an entitlement to an award of fees and costs under the EAJA, its request must be denied.

On the foregoing basis, we conclude that the judge properly denied Beaver Creek's motion for declaratory relief and for monetary sanctions against the Secretary, and we affirm the judge's decision dismissing Beaver Creek's contest.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Laštowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 4 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 89-28
	:	A. C. No. 18-00621-03663
v.	:	
	:	Mettiki Mine
METTIKI COAL COMPANY, Respondent	:	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary;

Timothy M. Biddle, Esq., and Susan E. Chetlin, Esq., for the Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor for a civil penalty under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

After an evidentiary hearing on the citation and the filing of post-hearing briefs, the Secretary moved to vacate the citation. Respondent has requested that, if the motion is granted the order "note that the standard at issue . . . is § 75.512 . . . and . . . that standard must be among those" conceded by the Secretary to be "applicable only to electric-powered equipment and not diesel-powered equipment."

Rather than exploring further the parties' interpretation of § 75.512, this Decision is being issued on the merits of the issue that was originally tried and fully briefed. The Decision was written and completed before receiving the Secretary's motion to vacate.

Having considered the hearing evidence and the record 1/ as a whole, I find that a preponderance of the substantial,

1/ The transcript and exhibits are consolidated in Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.

reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

1. In January, 1989, the Mettiki Mine used diesel track-mounted locomotives underground to pull supply cars and mantrips.

2. The Nos. 2 and 3 diesel locomotives were diesel-powered and nonpermissible. 2/ Their lights, gauges and starters were operated off of a 12-volt electrical generator.

3. Company policy required that, at the start of each shift, each diesel locomotive operator examine, inter alia, the brakes, sanders and general condition of the locomotive according to a pre-operational checklist to be sure the locomotive was in safe operating condition. In addition, each week a mechanic was to make a thorough examination of each diesel locomotive "just to try to keep the equipment in tiptop shape," as Mettiki Safety Inspector Alan Rohrbaugh testified. Tr. 55,63.

4. Mettiki policy also required that a record of these weekly maintenance examinations of diesel locomotives be maintained; for convenience, the results of these examinations were kept in the book in which the results of the required examinations of electrical equipment were recorded.

5. On January 5, 1989, MSHA Inspector Robert Calvert began his regular quarterly inspection of the Mine by checking the examination books.

6. He noted that no examination of the Nos. 2 and 3 diesel locomotives had been recorded for the week of December 24, 1988. Based on this finding, he issued Citation 3110574, alleging a violation of 30 C.F.R. § 75.512.

DISCUSSION WITH FURTHER FINDINGS

The controlling issue is whether Locomotives Nos. 2 and 3 are "electrical equipment" within the meaning of 30 C.F.R. § 75.512. That regulation, which is a reprint of § 305(g) of the Act, provides in pertinent part:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions . . . . A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

2/ In an underground coal mine, "nonpermissible" equipment may not be used inby the last open crosscut in any working section.

Section 75.512 refers only to electrical equipment, not to diesel equipment or diesel equipment with electrical components. The plain meaning of the language of § 75.512, as well as its relationship to other regulations, does not indicate that a diesel locomotive is covered by the regulation. For example, § 75.512-1 and § 75.153 require that, to be a "qualified person" within the meaning of § 75.512, an individual must be a qualified mine electrician. Unless expressly provided in a regulation, one would not expect a mechanic to be additionally trained and certified as a mine electrician in order to make a safety inspection of a diesel locomotive. Also, § 75.512 is included in Subpart F, entitled, "Electrical Equipment." Subpart F is extremely detailed and imposes numerous requirements with respect to electrical devices, cables, wires and various types of electrical equipment. See, e.g., 30 C.F.R. Part 75, Subpart F, App. A. However, nowhere does Subpart F mention or require periodic inspections of "diesel equipment" or nonpermissible "electrical components on mobile diesel-powered transportation equipment." Similarly, "diesel equipment" or "electrical components on mobile diesel-powered transportation equipment" are not mentioned in the explanation of § 75.512 in MSHA's Policy Manual.

Moreover, the language in the Secretary's other regulations indicates that where it is intended to apply a standard to "mobile diesel-powered transportation equipment" or "electrical components on mobile diesel-powered transportation equipment," those words are stated. See, for example, 30 C.F.R. §§ 36.2(a), 36.3 - 36.6, 36.9, 36.28 - 36.31, 36.41 ("mobile diesel-powered transportation equipment"), and 30 C.F.R. § 36.32 ("electrical components on mobile diesel-powered equipment"). Where Congress, or an administrative agency, has included a term in one regulation and excluded it in another, it should not be implied where excluded. Marshall v. Western Union Telegraph Co., 621 F.2d 1246, 1251 (3d Cir. 1980). Thus, because the Secretary used terms relating to "diesel equipment" elsewhere in her regulations, such terms are not reasonably implied in § 75.512.

"'[I]n statutory construction the primary dispositive source of information is the wording of the statute itself." International Union, United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 840 F. 2d 77, 81 (D.C. Cir. 1988) (quoting Association of Bituminous Contractors v. Andrus), 581 F. 2d 853, 861 (D.C. Cir. 1978). See also Asarco, Inc.-Northwestern Mining Department v. Federal Mine Safety and Health Review Commission, 868 F.2d 1195 (10th Cir. 1989). In matters of statutory and regulatory construction, non-technical terms "'are to be given their usual, natural, plain, ordinary and commonly understood meaning.'" Western Fuels-Utah, Inc., 11 FMSHRC 278, 283 (1989) (quoting Old Colony R.R. v. Commissioner, 284 U.S. 552, 560 (1932)). Where the meaning of language in a

regulation is plain, "the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning." Western Fuels-Utah, supra (citing Old Colony R.R., 284 U.S. at 560). See also Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986). In coal mines, there are two basic kinds of mobile equipment -- equipment powered by electric engines and equipment powered by diesel engines. Although the words "electric equipment" in § 75.512 are not defined, their meaning is plain from the context of the regulation. Mobile "electric equipment" reasonably means equipment driven by an electric engine; 3/ those words do not reasonably imply equipment powered by a diesel engine.

Even if one looks beyond the plain language of the regulation, the Secretary has provided no indication that when she said "electric equipment" in § 75.512 she meant to include "diesel equipment." There is no reference to "diesel equipment" in § 75.512, or, indeed, anywhere in 30 C.F.R. Part 75. 4/ The Secretary has produced no legal authority, MSHA policy memoranda or MSHA training instruction to its inspectors indicating that electrical examinations required by § 75.512 must be performed on nonpermissible diesel equipment. The Secretary may not enforce a regulation based on what she intended to, but did not say. Gates & Fox, 790 F.2d at 156.

Finally, I note that on October 4, 1989, the Secretary issued proposed rules regarding, inter alia, the use of diesel equipment in underground coal mines. 54 Fed. Reg. 40950 (1989). These proposed rules are inconsistent with the position which the Secretary has taken in this case -- that 30 C.F.R. § 75.512 applies to diesel-powered equipment.

The proposed regulation requires that "all diesel-powered equipment [in underground coal mines] shall be examined and tested weekly . . . ." 54 Fed. Reg. at 40995 (proposed § 75.1914). By proposing such a regulation the Secretary has

3/ The legislative history of the 1969 Act confirms that Congress was concerned about the kind of equipment driven by electricity. It explained the purpose of Subpart F of the regulations: "New and improved standards have been provided to reflect the growing sophistication of electrical systems in underground coal mining and the higher voltages used on machines that become larger each year." Legislative History at 1126 (emphasis added).

4/ As noted, Part 36 of the regulations addresses the use of permissible diesel equipment, but only in gassy noncoal mines and tunnels. 30 C.F.R. § 36.1.

effectively conceded that no regulation currently exists to require the weekly inspection of diesel equipment. Indeed, in the preamble to these proposed rules, the Secretary states:

> The proposed rules would also seek to amend certain equipment safety standards in existing part 75 that are now applicable only to electric-powered equipment so that such standards would apply, where necessary, to diesel powered equipment as well.

Because the locomotives at issue were diesel-powered, the requirements of § 75.512 did not apply to them and no violation of that regulation occured. If the Secretary desires to include diesel-powered locomotives in § 75.512, she must use the rulemaking procedures in § 101 of the Act, not litigation.

CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.

2. Section 75.512 does not apply to the two diesel-powered locomotives cited in Citation 3110574.

3. The Secretary failed to prove a violation of 30 C.F.R. § 75.512.

ORDER

WHEREFORE IT IS ORDERED that Citation 3110574 is VACATED and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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DEC 5 1989

SECRETARY OF LABOR, on behalf of FRED BARTLEY, Petitioner	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-102-DM
v.	:	Jenkins Quarry
ADAMS STONE CORPORATION, Respondent	:	

CORRECTION TO SUPPLEMENTAL DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; David Adams, Esq., Vice-President, Adams Stone Corporation, Pikeville, Kentucky, for Respondent.

Before: Judge Broderick

On November 13, 1989, I issued a Supplemental Decision in this case ordering, inter alia, the payment of back wages and other benefits to Complainant Bartley. The order was based on my misunderstanding the Secretary's Statement of Back Wages dated October 16, 1989, and received by the Commission October 23, 1989.

Therefore, IT IS ORDERED that the Supplemental Decision of November 13, 1989, is SET ASIDE.

IT IS FURTHER ORDERED that the Secretary submit on or before December 22, 1989, a statement of back wages due Bartley pursuant to my Decision and order issued October 18, 1989.

IT IS FURTHER ORDERED that Respondent shall reply to the Secretary's statement on or before January 12, 1990. The decision is not final until a corrected supplemental decision is issued following receipt of the above submissions.

James A. Broderick
James A. Broderick
Administrative Law Judge

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DEC 5 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 89-13
	:	A.C. No. 03-00278-03502 J3E
v.	:	
	:	Sugarloaf Mine No. 1
KELLY TRUCKING COMPANY, Respondent	:	

DECISION

Appearances: Jerome T. Kearney, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Petitioner;
Curtis Kelly, Kelly Trucking Company, Hodgen, Oklahoma, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether the Kelly Trucking Company has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations or orders.

The case was heard in Little Rock, Arkansas on July 6, 1989. Both parties declined to file post-hearing proposed findings of fact and conclusions of law, however, I have considered their oral arguments made on the record during the course of the hearing in my adjudication of this case.

Section 104(g)(1) Withdrawal Order No. 2929232 was issued on July 5, 1988, and states as follows:

> Ronnie Bennett, observed performing duties on and around the dragline has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Bennett has been determined to be a new miner hired

by this Company on 07-04-88, and has received little or none of the required 24 hours of new miner training. In the absence of this training Ronnie Bennett dragline operator is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

Citation No. 2929233, issued in conjunction with the above Order and pursuant to section 104(d)(1) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 48.25(a) and charges as follows:

Ronnie Bennett, determined to be a new miner was observed performing duties around the Koehring dragline. A discussion with Mr. Bennett revealed that he had received none of the required 24 hours of new miner training. A later discussion with the foreman revealed Mr. Bennett had received no training as stipulated in the Company's approved training plan.

Section 104(g)(1) Withdrawal Order No. 2929236 was also issued on July 5, 1988, and states as follows:

Paul Wells (Contractor) was observed performing duties on and around the dragline has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Wells has been determined to be a new miner hired by the Company on 06-29-88, and has received none of the required 24 hours of new miner training. In the absence of this training, Paul Wells Contractor and foreman is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

Issued in conjunction with Order No. 2929236 was section 104(d)(1) Order No. 2929237, alleging another violation of the regulatory standard at 30 C.F.R. § 48.25(a) and charging as follows:

Paul Wells, determined to be a new miner was observed performing duties on and around the Koehring dragline. A discussion with Mr. Wells revealed that he had not received any of the required 24 hours of new miner training that is stipulated in the Company approved training plan.

Finally, section 104(a) Citation No. 2929235 was issued on July 5, 1988, alleging a violation of 30 C.F.R. § 77.1713(c) and charging as follows:

> The results of the daily examination were not being recorded.

There is no factual dispute whatsoever that the cited employees did not have the required training under the pertinent regulation or that the results of the daily examinations were not being recorded as charged. The respondent's "defense" is that he contacted Inspector Coleman prior to the July 5 inspection (on July 3 or 4) and told him that he wanted to take coal fines out of a pond or ponds at the Sugarloaf Mine near Midland, Arkansas. He explained to the inspector that he was unfamiliar with the coal mining regulations. He didn't know what he needed to do to be legal and he asked the inspector to meet with him or "one of his people" at the mine site to tell him or them what they needed to do in order to be legal. The inspector remembers the conversation but his recollection is that the respondent was concerned about making the dragline legal. He maintains that the subject of personnel training was never mentioned. In any event he testified that: "We cannot go and just give an inspection.... When I go to a mine, my supervisor sends me to a mine and whenever I see a violation, I have to issue a citation" (Tr. 25).

On July 5, 1988, when Inspector Coleman arrived at the mine site, there were two persons present, Paul Wells and Ronnie Bennett. They both stated they were working for Mr. Kelly. At the time, they were both performing maintenance on the dragline. When asked, Mr. Bennett stated that he had no miner's training and was unfamilar with the dragline he was working on. When the inspector asked Mr. Wells what he was doing, he replied that he was there fixing the dragline and that they were going to take some coal fines out. He also stated that he had no miner's training and had never been around a mine. He was, however, familiar with the equipment. He owned the dragline in question.

The inspector was and is of the opinion that the dragline had been there for several days and had taken out several hundred tons of coal fines already. Mr. Bennett also told the inspector that he had been there for three or four days, and there is no factual dispute that several tons of material (coal fines) had been taken out and laid up on the side. The question is who took them out.

During the inspector's conversation with Mr. Bennett, he also determined that no one was doing any kind of pre-shift inspections, checking the equipment out or anything. There was no one there that was certified to do pre-shift inspections and no records whatsoever were being kept at this mine.

Mr. Kelly testified to the effect that he didn't even know that Mr. Wells had Mr. Bennett at the mine site. It is Kelly's position that Bennett was just being tried out for a position as dragline operator and was not on the payroll of either Kelly Trucking or Mr. Wells at the time of the inspector's visit.

The arrangement between Kelly Trucking and Wells was that Wells was to furnish his dragline and an operator to Kelly Trucking for so much a ton of coal fines recovered. Kelly Trucking in turn had been hired by Earl Powers, who had the mine leased, to take out coal fines.

Mr. Kelly also takes the position that the 300 tons of coal fines out on the bank on July 5, 1988, were taken out by someone else, not him. So, the upshot of this testimony was that the pile of coal fines the inspector saw was taken out by the HHH Mining Company using a different dragline. The significance of this evidence being that neither the Kelly Trucking Company nor Messrs. Wells and Bennett were responsible for "mining" this material. I accept this evidence as credible and I do credit it. However, what Mr. Kelly describes as "experimenting" does amount to operating a mine in my opinion. He admits to being on the mine property on two previous occasions trying to take out some of these coal fines with small bulldozers. Additionally, Bennett told the inspector on July 5 1988, that he had already been on the mine property for three or four days working with this truck mounted dragline that belonged to Wells. The inspector further noted that the dragline was all set up. It had coal dirt all over it where it had been worked and Bennett told him he had been working it. Mr. Kelly even candidly allows that Bennett may have swung his bucket out there and taken out some piles of material, but not the 300 tons that the inspector assumed he did.

On the basis of the entire record herein, I find that the respondent was operating a "mine" on July 5, 1988, and that Wells and Bennett were "miners" within the meaning of the Act on that date. Accordingly, since they admittedly did not have the required training, the Secretary has proven the two training violations of 30 C.F.R. § 48.25(a) alleged herein. With regard to the alleged violation of 30 C.F.R. § 77.1713(c), the inspector's testimony stands unrebutted and therefore, I find that violation proven as well.

I do not find, however, on the facts of this case that the training violations were the result of the "unwarrantable failure" of Kelly Trucking to comply with the law. "Unwarrantable failure" means aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997 (1987).

In the Emery case the Commission compared ordinary negligence as being conduct that is "inadvertent", "thoughtless", or "inattentive" with conduct constituting an unwarrantable failure i.e. conduct that is "not justifiable" or "inexcusable".

In this case, I believe Mr. Kelly made a good faith attempt to comply with the regulations. His efforts just amounted to a case of too little, too late, to avoid being in a violative posture at the mine site. On his own, he contacted the MSHA inspector before the inspection and told him what he intended to do and that he wanted to operate the mine site in a legal manner. He specifically requested assistance from the inspector to achieve compliance. A fair reading of the record in this case shows that the inspector was not too helpful to Mr. Kelly in this regard.

Both the inspector and Mr. Kelly knew the inspector was coming to the mine site on the day in question, but each had a different purpose in mind. The difference is that the inspector was coming on a previously scheduled inspection and if he found violations he intended to write citations. Kelly, on the other hand, thought this visit was at his behest, "to get him legal", in his words.

Under the circumstances, I find Kelly's negligence to be ordinary negligence, attributable to his ignorance of the regulations and inattention to detail. Therefore, Citation No. 2929233 and Order No. 2929237 must be modified to citations issued under section 104(a) of the Act.

The Secretary also alleged that the violations were "significant and substantial". In order to find that a violation is "signficant and substantial" the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC 1 (1984).

According to the undisputed testimony of Inspector Coleman, the retaining ponds at this mine differ significantly. In some of them, the material is very consolidated and in some it is very liquified, and there is an elevated roadway that goes around these ponds that has water on one side. In the opinion of the inspector there could likely be a fatal accident if the operator turned a vehicle over into one of these ponds. The inspector also opined that just being on this property would be a very dangerous situation for an untrained person who was not familiar with that environment. Under these circumstances, I conclude and

find that the two individuals in question were exposed to the hazards inherent in such activities and that their lack of training presented a reasonable likelihood of an injury or accident of a reasonably serious nature. Within the framework of this evidence, I conclude that the training violations were "significant and substantial" and serious.

In assessing a civil penalty in this case, I have also considered the size of this operation, its history of violations (one other training violation two years prior), its good faith abatement of the violations found herein and the consequences payment of a penalty would have on the future of the company.

Counsel for petitioner was given 30 days subsequent to the hearing to put the computer printout of the respondent's violation history into the record. He has neglected to do so and therefore I assume there were no prior violations of the regulations by the Kelly Trucking Company within the 24 months preceding the violations found to exist herein. That is the gist of the operator's testimony and I accept it as being credible. By independent research of the Commission's records, I have determined that the respondent did pay a $100 civil penalty in 1987 for a training violation which arose in 1986.

Under the circumstances, I find that a civil penalty of $225 for each of the training violations found herein and a civil penalty of $20 for the recordkeeping violation are appropriate.

ORDER

1. In accordance with the foregoing findings and conclusions, including the rejection of the inspector's unwarrantable failure findings, section 104(d)(1) Citation No. 2929233 and Order No. 2929237 each citing a violation of 30 C.F.R. § 48.25(a) for the failure to provide training for the two cited individuals are modified to section 104(a) citations, with "S & S" findings, and affirmed as such.

2. Section 104(a) non-"S & S" Citation No. 2929235, citing a violation of 30 C.F.R. § 77.1713(c) for a recordkeeping violation is affirmed as issued.

3. The respondent is ordered to pay a civil penalty of $470 within 30 days of this decision and order.

Roy J. Maurer
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 6 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 89-95-M A.C. No. 38-00595-05506
v.	:	
	:	Yaupon Plantation Pit
ISLAND CONSTRUCTION CO., INC., Respondent	:	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor (Secretary);
John B. Bailey, President, Island Construction Co., Inc., Charleston, South Carolina, for Respondent, Island Construction Co., Inc. (Island).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for nine alleged violations of mandatory safety standards at Island's Yaupon Plantation Pit, all cited on January 18, 1989. Island denies that the operations at the Yaupon Plantation Pit are subject to the Mine Safety Act, and denies that its operation affects interstate commerce. It denies that the violations alleged took place, and contests the proposed penalties.

Pursuant to notice, the case was called for hearing in Charleston, South Carolina, on November 1, 1989. Merle Slaton and Kelly Fulz testified on behalf of the Secretary. The Secretary also called John Bailey as an adverse witness. Bailey testified on behalf of Island.

At the close of the hearing, the parties argued their positions on the record and waived their rights to file posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

I

Island's primary business is the grading of land for new residential subdivisions, for shopping centers and for roads and highways. The Yaupon Plantation Pit is apparently slated to become a residential subdivision at some future time. The annual gross receipts of Island are approximately 2 to 3 million dollars. Island also sells sand to customers--private contractors and governmental agencies. This part of its business brings in gross annual receipts of more than $100,000. In percentage terms about 5 to 10 percent of its gross annual income is received from the sale of sand to the general public. Such sales are made to trucking companies, construction companies, road building agencies, and water and sewer construction agencies. The sand is used for filling and grading. It is apparently not fit for making concrete or for use in construction activities, other than as a fill.

Island does not excavate or produce gravel. It removes the overburden, then removes the sand which is used in its grading operations and sold to the general public. Sand is of course nonliquid.

Sand is defined in A Dictionary of Mining, Mineral, and Related Terms, (U.S. Dept. of the Interior, 1968) as:

> a. Separate grains or particles of detrital rock material, easily distinguishable by the unaided eye, but not large enough to be called pebbles; also, a loose mass of such grains, forming an incoherent arenaceous sediment.
>
> * * * * * * *
>
> b. In geology, any loose or moderately consolidated bed consisting chiefly of sand; often used in the plural, even in the name of a single deposit.
>
> * * * * * * *

I find that in excavating sand, Island is extracting a mineral from the earth's surface.

In January 1989, the Yaupon Plantation Pit was composed of two separate facilities: the Mt. Pleasant Pit and the Johns Island Pit. The Mt. Pleasant facility is no longer producing sand. Island had 50 to 60 pieces of equipment, including trucks, loaders, graders, dozers and a pump. The equipment includes a

Caterpillar Motor Grader manufactured in Illinois, an Allis-Chalmers loader and an International dozer, both manufactured outside of South Carolina. Island also had a Mercedes-Benz fuel truck and a pump, both manufactured outside of South Carolina. Since 1984, MSHA has made 18 to 20 regular and follow-up inspections at Island's facilities.

II

On January 18, 1989, MSHA Metal/Nonmetal supervisory inspector Merle Slaton and inspector Kelly Fulz inspected the Yaupon Plantation Pit. Fulz at the time was in training. He became a designated representative of the Secretary on September 27, 1989. As a result of the inspection, 9 citations were issued.

> A. Inoperative Service Brakes. Citations 2856484 and 2856485 charged violations of 30 C.F.R. § 56.14101(a) because of inoperatiave services brakes on a Caterpillar motor grader and an Allis-Chalmers front end loader, both located at the Johns Island facility. The grader appeared to have been recently operated and the vehicle operator said it had been used that morning. When the inspector (Fulz) pushed the brake pedal with his hand, it offered no resistance but went all the way to the floor. The foreman said that there was a leak in the hydraulic system. The front end loader was in operation during the inspection. The inspector noticed that the loader operator stopped it by dropping his bucket. When he was questioned the vehicle operator said that the brakes on the machine were inoperative.
>
> 30 C.F.R. § 56.1410(a) provides in part:
>
> (a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.
>
> * * *
>
> (3) All braking systems installed on the equipment shall be maintained in functional condition.

Inspector Slaton issued the citations involved in this proceeding. I find as a fact that the braking systems on the Caterpillar Motor Grader and the Allis-Chalmers front end loader were not maintained in functional condition. I further find that the violations were serious and resulted from Island's negligence.

B. Inoperative Parking Brakes. Citations 2856487 and 2856504 were issued charging violations of 30 C.F.R. § 56.14101(a)(2) because of inadequate parking brakes on a Terex front end loader and a Mercedes-Benz fuel truck. The front end loader was being operated at the Mt. Pleasant facility, and the fuel truck at both locations.

30 C.F.R. § 56.14101(a)(2) provides:

(2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

I find as a fact that the parking brakes on the loader and the fuel truck were inoperative. The vehicles were used on level ground, and the violations were considered nonserious.

C. Seat Belt violations. Citation 2856483 was issued charging a violation of 30 C.F.R. § 56.14130(f)(2) because an International Dozer, equipped with roll over protection, did not have seat belts. Citations 2856486 and 2856506 charged violations of 30 C.F.R. § 56.14130(g) because operators of two different loaders were operating their vehicles and not using seat belts. 30 C.F.R. § 56.14130(a) requires ROPS and seat belts on crawler tractors (dozers).

30 C.F.R. § 56.14130(f)(2) provides:

(f) Exemptions.

* *

(2) Self-propelled mobile equipment manufactured prior to October 24, 1988, that is equipped with ROPS and seat belts that meet the installation and performance requirements of 30 C.F.R. § 56.9088 . . . shall be considered in compliance with paragraphs (b) and (c) of this section.

30 C.F.R. 14130(g) requires that seat belts be worn by equipment operators.

I find as a fact that the International dozer cited was not equipped with seat belts. I further find that the loader operators cited were not wearing seat belts. The violations were considered nonserious.

D. Back-up Alarm and Horn. Citation 2856503 charged a violation of 30 C.F.R. § 56.14132 because the audible signalling device (horn) and reverse signal alarm were inoperative. 30 C.F.R. § 56.14132(a) requires all self-propelled mobile equipment to have horns in functional condition. Section 14132(b) requires such equipment to have a functioning back-up alarm when the equipment operator has an obstructed view to the rear.

I find as a fact that the cited fuel truck did not have an operative horn or back-up alarm. I find that the operator of the truck had an obstructed view to the rear. Persons were in the area on foot. The absence of the alarms was a serious violation.

E. BERMS. Citation 2856505 charged a violation of 30 C.F.R. § 56.9300 because there was no berm at an open ditch by the roadway on the pit property. The length of the roadway was about 500 feet. The ditch was about 15 feet deep and the drop off was vertical. 30 C.F.R. § 56.9300 requires berms or guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

I find as a fact that no berm or guardrail was provided on the bank of the roadway cited. I find that a drop off existed of such grade and depth that a vehicle could overturn. I find that the violation was serious and was evident to visual observation.

ISSUES

1. Was Island subject to the jurisdiction of the Mine Act in the operation of the Yaupon Plantation Pit?

2. If so, did the violations charged in the citations involved herein occur?

3. If they did, what are the appropriate penalties?

CONCLUSIONS OF LAW

I. JURISDICTION

Section 3(h)(1) of the Mine Act defines a "coal or other mine" in part as "(A) an area of land from which minerals are extracted in nonliquid form . . ." I have found that sand is a mineral, and that Island extracts it from an area of land. I conclude, therefore, that Island operates a mine as that term is used in the Act.

In 1979, the Mine Safety and Health Administration and the Occupational Safety and Health Administration, both in the department of Labor, entered into an Interagency Agreement. 44 F.R. 22827, April 17, 1979, effective March 29, 1979. The purpose of the agreement was to guide the agencies and affected employers and employees of the general principle and procedures to be followed in determining the jurisdiction of the two statutes (Mine Act and OSHAct). The general principle is set out as follows: ". . . as to unsafe and unhealthful working conditions on mine sites . . . , the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder . . . " The agreement refers (B.5) to "Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act."

Paragraph B.7 refers to "borrow pits." It states that borrow pits are subject to OSHA jurisdiction except when located on mine property or related to mining. It defines a borrow pit as "an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material is extracted from the surface. Extraction occurs on a one-time only basis or intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted . . . the material is used by the extracting party more for its bulk than its extrinsic qualities on land which is relatively near the borrow pit."

Island's operation is located on mine property and is related to mining (the extraction of sand). The extraction is not on a one-time basis or intermittently. The extraction is used in the form in which it is extracted as fill material, but not exclusively by the extracting party, since some of the extracted material is sold to the general public.

I conclude that under the MSHA-OSHA Interagency Agreement, Island's facility is not made subject to OSHA jurisdiction.

Section 4 of the Act provides that each mine, the products of which enter commerce, or the operations or products of which affect commerce is subject to the Act. The evidence indicates that Island's sales of sand are made to customers within the State of South Carolina. This does not remove it from the Act's requirements. It used substantial amounts of equipment manufactured in other states or countries. Its products were sold intrastate but clearly affected interstate commerce. See Wickard v. Filburn, 317 U.S. 111 (1942); Marshall v. Bosack, 463 F.Supp. 800 (E.D. Pa. 1978); Marshall v. Kilgore, 478 F.Supp. 4 (E.D. Tenn. 1979); Secretary v. R&S Coal Company, 8 FMSHRC 1333

(1986 ALJ). I conclude that Island's operations and products affected interstate commerce.

II. VIOLATIONS

I conclude that each of the violations cited in this proceeding has been established by the preponderance of the evidence to have occurred. Mr. Bailey stated on the record: "Brought down to a direct yes or no, I would have to say that what I got a citation for more than likely did exist at the time the inspectors looked at it, but I think it's more to it than just the yes or no." (R. 151). He then discussed the specific citations more in terms of gravity than in terms of the existence of the violations. Island is a small mine operator and has a favorable history of prior violations. All the violations involved herein were abated promptly in good faith.

Citations 2856483, 2856486, 2856487, 2856504 and 2856506 were considered nonserious by the inspectors. I accept their determination as to these violations. Twenty dollars ($20) is an appropriate penalty for each of these violations.

Citation 2856484 charges a violation of 30 C.F.R. § 56.1410(a) because of the absence of brakes on a caterpillar motor grader; Citation 2856485 charges a violation of the same standard because of the absence of brakes on an Allis-Chalmers front end loader. These are very large machines. The absence of brakes is a serious safety hazard and therefore a serious violation. The inspector rates Island's negligence as moderate. The foreman told the inspector that with respect to the grader, he was aware of a hydraulic leak in the braking system. There is no factual evidence of negligence with respect to the front end loader. One hundred fifty dollars ($150) is an appropriate penalty for the violation cited in 2856484; $75 for that cited in 2856485.

Citation 2856503 charges a violation of 30 C.F.R. § 56.14132 because of the absence of a horn and a back-up alarm on a fuel truck. There were persons in the area on foot. The violation was serious and should have been obvious to Island. Seventy five dollars ($75) is an appropriate penalty.

Citation 2856505 charges a violation of 30 C.F.R. § 56.9300 because of the absence of a berm at an open ditch. The ditch was about 15 feet deep and the drop off was verticle. The violation was serious in that a vehicle could overturn which would result in serious injuries. The absence of the berm was evident and resulted from Island's negligence. One hundred fifty dollars ($150) is an appropriate penalty.

ORDER

Based on the above findings of fact and conclusions of law and considering the criteria in section 110(i) of the Act, IT IS ORDERED:

1. Citations 2856483, 2856484, 2856485, 2856486, 2856487, 2856503, 2856504, 2856505, and 2856506 are AFFIRMED.

2. Respondent Island Construction Co., Inc. shall within 30 days of the date of this decision pay the following penalties:

CITATION	PENALTY
2856483	$ 20.00
2856484	150.00
2856485	75.00
2856486	20.00
2856487	20.00
2856503	75.00
2856504	20.00
2856505	150.00
2856506	20.00
TOTAL	$ 550.00

James A. Broderick
Administrative Law Judge

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DEC 6 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-230 A.C. No. 05-00301-03548
v.	:	Docket No. WEST 88-231 A.C. No. 05-00301-03549
MID-CONTINENT RESOURCES, INC., Respondent	:	Dutch Creek No. 1 Mine

DECISION

Appearances: James H. Barkley, Esq., Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, For Petitioner; Edward Mulhall, Jr., Delaney & Balcomb, Glenwood Springs, Colorado, For Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charged respondent Mid-Continent Resources, Inc., (Mid-Continent), with violating various regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Glenwood Springs, Colorado.

Mid-Continent filed a post-trial brief.

Introduction

These cases involve the following alleged violations of 30 C.F.R., Part 75.

Docket No. WEST 88-231

104(d)(2) 1/ Order No.	Date	30 C.F.R. Regulation Section
3223449	1-20-88	§ 75.1110-3
2832627	1-26-88	§ 75.305

1/ All of the orders in these cases were issued under section 104(d)(2) of the Act. The parties further stipulated the orders were written while the (d) series was in effect.

Docket No. WEST 88-230

104(d)(2) Order No.	Date	30 C.F.R. Regulation Section
2832624	10-24-87	§ 75.305
2832625	10-24-87	§ 75.305
3076182	12-10-87	§ 75.316
3076185	12-11-87	§ 75.400
3076189	12-11-87	§ 75.316
3076190	12-11-87	§ 75.316
3076193	12-12-87	§ 75.1105
3076194	12-12-87	§ 75.1105
3076195	12-12-87	§ 75.1105
3223121	12-12-87	§ 75.200
3223122	12-12-87	§ 75.1704
3223124	12-13-87	§ 77.502
3223125	12-13-87	§ 75.400
3223159	12-28-87	§ 75.316
3223185	12-29-87	§ 75.316
3223207	1-12-88	§ 75.1100-3
3223220	1-15-88	§ 75.403
3223445	1-20-88	§ 75.400
3223446	1-20-88	§ 75.403
3223447	1-20-88	§ 75.316

Transcripts of Proceedings

The evidentiary hearings in the foregoing proceedings were conducted in separate hearings over periods of several days each.

The hearings in Docket No. WEST 88-231 were conducted on November 29 and December 1, 1988. These transcripts are in two volumes and consist of pages 1-205 and 206-288, respectively. For convenience of reference these two volumes are consolidated and they will be referred to as Volume I in the following manner; i.e., "(Tr. 1-266)." [Illustrative emphasis supplied.]

The hearings in Docket No. WEST 88-230 were conducted in two sets of hearings. The first of these was held November 30, December 1 and December 2, 1988. The transcripts in this first

evidentiary hearing are in three volumes and consist of pages 1-230 and 231-320 and 321-412 respectively. For convenience of reference these three volumes are consolidated and they will be referred to as Volume 2 in the following manner; i.e., "(Tr. 2-411)." [Illustrative emphasis supplied.]

The final hearings in Docket No. WEST 88-230 were conducted January 17, 18 and 19, 1989. The transcripts in the second evidentiary hearing are in three volumes and consist of pages 321-514, 515-733 and 734-778. For convenience of reference these three volumes are consolidated and they will be referred to as Volume 3 in the following manner; i.e., "(Tr. 3-758)." [Illustrative emphasis supplied.]

By these groupings of the transcripts into three consolidated volumes, according to hearing dates and docket numbers, the potential confusion resulting from duplicated pagination should be avoided.

Mid-Continent's Legal Position

Mid-Continent's legal position is straightforward. Except for three alleged violations (Order No. 3076189, Order No. 3223122 and Order No. 3223185) Mid-Continent does not deny the existence of the conditions described by the Secretary in the foregoing orders or that such conditions constituted violations of the applicable sections of 30 C.F.R. Part 75. Instead, Mid-Continent disputes the "unwarrantable failure" characterization, the alleged violation of section 104(d)(2), and the corresponding special penalty assessment for such violations. 2/

Structure of the Decision

Several of the alleged violations are related to type of circumstances or by date of occurrence. Accordingly, several of the individual orders have been grouped when logic indicates the grouping is warranted. The review of these orders in this decision is neither consecutive nor chronological.

2/ Post-trial Brief at 3.

Frozen Waterlines in Rock Tunnels Project North Adit During Winter Weather

Order No. 3223449
(Issued January 20, 1988)

This portion of the decision addresses two 104(d)(2) orders alleging violations of 30 C.F.R. § 75.1100-3. 3/

The narrative allegations of Order No. 3223449, alleging a violation of 30 C.F.R. § 75.1100-3, are as follows:

> The firefighting equipment (waterlines) along the No. 1 and the No. 2 belt conveyors in the Rock Tunnel Project were not being maintained in a usable and operative condition. The waterlines did not contain water.

Order No. 3223207
(Issued January 12, 1988)

The narrative allegations of Order No. 3223207, alleging a violation of 30 C.F.R. § 75.1100-3, are as follows:

> The waterlines and the firehose outlet (fire fighting equipment) installed along No. 1 belt conveyor (in the north adit) were not maintained in a usable and operative condition. The waterlines and the firehose outlets were frozen beginning at the portal and extending inby for 4 crosscuts, about 1,300 linear feet.

3/ The cited regulation provides as follows:

> § 75.1100-3 Conditions and examination of firefighting equipment.
>
> All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

The belt conveyor was in use when this condition was observed.

The air used in this belt entry is used to ventilate active working sections.

The Evidence

PHILLIP R. GIBSON, JR., a person experienced in mining, is a safety and health inspector at MSHA's Glenwood Springs, Colorado office.

Order No. 3223449

After completing an inspection on the longwall unit he went to the No. 1 mine intercept located at the No. 34 crosscut. At the intercept he entered the belt conveyor entry and began walking to the surface. At the intercept he saw a waterspray that was not emitting water as required by the operator's ventilation plan.

After issuing a citation for lack of a waterspray, he opened an inby water hydrant. The waterline runs the length of the conveyor but there was no water in it. The fire hydrant is the only means available for fighting fires in this area. A man was stationed at this transfer point so a preshift examination should have been done. Firefighting equipment is subject to a preshift examination.

The order was abated by turning on a high pressure pump 3000 feet above the hydrant. The inspector would have issued this order even if the line was frozen because MSHA regulations require, as a minimum, 60 psi and 50 gallons of water per minute. Fire hydrants are required at 300 feet intervals. As a result of this condition, about 1200 feet of the entry lacked fire-fighting protection. If a fire occurred it could extend into the working section. Also the smoke could migrate with the intake air into the entry. Several sources of ignition included coal on the conveyor belt, power cables, electrical control boxes and a transformer of 72,000 volts.

Inspector Gibson did not know the temperature on the date he issued the order. But he agreed the base elevation of the mine is about 10,000 feet. Water freezes at 32 degrees F.

On this particular day there were miners in the longwall section but the section was not operating.

The inspector discussed various choices available to the company. He indicated he would recommend that the operator apply for a modification. However, the inspector did not know if Mid-Continent had filed a modification in Docket No. M-86-226-C. Nor did he know if there was a modification order in affect when he wrote his 104(d) order.

Inspector Gibson didn't recall any other freezing problems in January [1988] but Order No. 3223207 involves frozen waterlines and it was written on January 12, 1988 [in Docket No. WEST 88-230].

Order No. 3223207

Inspector Gibson wrote Order No. 3223207 on January 12, 1988. The order refers to waterlines that are adjacent to the belt conveyor suspended from the mine roof.

On the date of this order the inspector saw several sections of dismantled waterlines. For a distance of about 1600 feet there was no source of water for firefighting.

This belt entry was located in the intake air; the entry contained ignition sources. The inspector did not observe anyone in the area nor anyone working on the waterlines. He considered the violation to be S&S because of the unavailability of firefighting capability.

In the two years before this order was written, Mid-Continent had been cited for some 36 citations and orders dealing with the maintenance of firefighting equipment. Because of its repetitive nature and seriousness, he believed the violation was unwarrantable. In addition, management necessarily had prior knowledge that the lines had been dismantled.

The inspector acknowledged that Mid-Continent had filed petitions for modification involving firefighting equipment (Ex. R-3 in Docket No. 88-231).

Further Findings

For the reasons hereafter discussed the judge declines to rule on several threshold issues that are raised by Mid-Continent's evidence. However, it is appropriate to review the evidence relating to these issues.

RICHARD REEVES, Assistant Superintendent for Mid-Continent, indicated the mine portals are located at an elevation of approximately 8500 feet. Coal Basin, near Redstone, Colorado, is probably one of the coldest places in the state. About 80,000 to 100,000 feet of air is ventilated through the north adit beltline entry. A 20 to 30 degree wind chill factor exists. Everything freezes and breaks in the beltline entries during the winter months. In January 1988 temperatures in the Coal Basin exceeded the freezing point eight times (Tr. 1-114 - 1-117, 3-439, 3-440, Ex. R-11).

In view of such "freeze and break" conditions it had been the practice at Mid-Continent to maintain empty or "dry waterlines" during the winter months. Such lines could have been quickly pressurized in the event water is needed [4/] (Tr. 1-242).

This practice was accepted until 1986 when MSHA indicated dry lines would no longer be acceptable (Tr. 1-242). After MSHA's change in policy Mid-Continent was required to formalize its dry waterline practice by filing a petition for modification under section 101(c) of the Act (Tr. 1-242, 1-243). The proposed decision and order ("PDO") or modification, Docket No. M-86-226-C was issued September 1. It allowed such dry waterlines in the slope section beltline entries of both the Dutch Creek No. 1 and No. 2 mines (Exhibit P-3, WEST 88-231).

The Rock Tunnel Project was driven as a "slope or shaft" under 30 C.F.R. § 77.1900 [through § 77.1919]. The latter portion, Subpart T, does not contain a counterpart provision like 30 C.F.R. 75.1100-2(a) requiring waterlines in beltline entries (Tr. 1-189, 1-190). Mid-Continent, according to its witness DAVID POWELL, withdrew its application because under Part 77 a waterline was not required. Accordingly, the company didn't believe the petition for modification was needed (Tr. 1-189, Ex. R-4).

MSHA interpreted Mid-Continent's dismissal request as also negating the modification's application to the Rock Tunnels Project upon its completion, when it intercepted the coal seams -- the entire purpose for which the RTP adits were being developed. This interpretation was formally communicated on February 9, 1988. On that date Mid-Continent received a

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4/ A valve, protected from freezing, was located near the pump that can put water into the system (Tr. 1-242).

memorandum drafted by MSHA District Manager John M. DeMichiei (Ex. R-6). According to Mr. DeMichiei, the maintenance of dry waterlines within the beltline entry of the Rock Tunnels Project would not be allowed unless procedures supplemental to those already incorporated by the MSHA Administrator for Coal Mine Safety and Health in the PDO were instituted.

Mid-Continent argues that it is difficult to understand MSHA's actions in this situation. The Rock Tunnels Project (RTP) was a multimillion dollar endeavor which took over 5 years to complete. The project, which links with the underground mining sections as well as an extensive overland surface conveyor system in advance of the coal preparation plant, was undertaken for the express purpose of providing a more efficient coal transportation system. The project also improves ventilation and worker transportation (Tr. 1-240).

Following its installation, the beltline in the north adit of the Rock Tunnels Project replaced the mainline belts in the slope sections as the only facility to transport coal out of the Dutch Creek No. 1 and No. 2 Mines. As with the slope sections, Mid-Continent would need an additional modification of 30 C.F.R. § 75.1100-2(a) to properly run a beltline through this adit.

Mr. DeMichiei, according to Mid-Continent, erroneously considered the PDO to be inadequate for the RTP beltline. As with the beltlines which preceded it, and to which the PDO in Modification No. M-86-226-C was unquestionably applicable, the north adit beltline is located in the intake air which is isolated from other intake air going into the working sections (Tr. 3-356). As with all beltlines at Mid-Continent, this beltline is constructed of a fire-resistant conveyor belt with metal supporting hardware (Tr. 3-451). In fact, the only difference of a substantial nature between these belts is that the RTP north-adit beltline is surrounded by solid rock and not coal (Tr. 1-37, 3-451).

Mid-Continent contends Mr. DeMichiei's treatment of the Rock Tunnels Project in this instance as an entity separate and distinct from that of the Dutch Creek No. 1 Mine is grossly inconsistent with MSHA's historical treatment of these entities. Since the inception of the Rock Tunnels Project, the north and south adits have been considered and treated by MSHA as a part of the Dutch Creek No. 1 Mine. Whenever a citation or order was issued for a violative condition in the Rock Tunnels Project, the Dutch Creek No. 1 Mine was the entity named in the citation and order. When the additional penalty point assessments were

determined for such violations under 30 C.F.R. § 100.3(b), MSHA used tonnage figures derived from the Dutch Creek No. 1 Mine's production. Effective July 1, 1988, the Dutch Creek No. 1 Mine, the Dutch Creek No. 2 Mine, and the Rock Tunnels Project were all consolidated into a single operating entity.

Under Mr. DeMichiei's view, it would appear that numerous citations and orders have been erroneously issued and numerous assessments erroneously calculated -- an error involving thousands of dollars which should be reimbursed if the Rock Tunnels Project is not inextricably tied to the Dutch Creek No. 1 Mine (Exhibit R-7).

Mid-Continent asserts there is nothing in either the 1977 Mine Act or the regulations that allow Mr. DeMichiei's unilateral, rule-making alteration of a PDO which has become final. Under 30 C.F.R. Part 40, the authority to issue a modification is a power vested exclusively in the Assistant Secretary and the Administrator. Once a proposed decision and order becomes final, any further amendments, corrections and revisions by anyone, including the Assistant Secretary or the Administrator, is ended. 5/ As such, Mid-Continent contends that Mr. DeMichiei's substantive addition to the Proposed Decision and Order, Docket No. M-86-226-C would appear to be entirely ultra vires and unenforceable. (See Ex. R-7 wherein Mid-Continent in a letter to Mr. DeMichiei protests MSHA's actions.)

As a result of this action by MSHA, Mid-Continent found itself, going into the winter months of 1987-88, in the anomalous position of apparently being without a dry waterline modification for the RTP north-adit beltline where it was needed but with an effective modification for 1-Mine and 2-Mine where there was a lesser need (Tr. 1-241). Despite its opinion that MSHA's position was incorrect, management at Mid-Continent was hesitant to implement the dry waterlines modification under PDO Modification No. M-86-226-C. 6/

5/ See section 101(c) of the 1977 Mine Act, and 30 C.F.R. § 44.13 which expressly states, "The proposed decision shall become final upon the 30th day after service thereof unless a request for hearing has been filed ...." [Emphasis added].

6/ Management felt that such an implementation would further agitate what was then already perceived as a hostile and adversary relationship with MSHA. (Tr. 1-247, 1-267).

Instead, management attempted unsuccessfully to comply with 30 C.F.R. § 75.1101-2(b) and maintain a charged or "wet" waterline in the RTP north adit beltline. 7/

Order No. 3223207 was issued during this time period of attempted compliance.

On the date the instant order was issued the Coal Basin was in the midst of a severe cold snap. While reaching a recorded low of -14 degrees Fahrenheit, temperatures in the basin never exceeded 16 degrees Fahrenheit (Exhibit R-11). Faced with the certainty that the waterline in the north adit beltline would freeze, and most likely be damaged, and perhaps rendered useless, management at Mid-Continent had no choice but to drain the water from the line. 8/

Care was taken to drain and maintain this waterline in a manner substantially in compliance with the petition incorporated in the PDO, Modification No. M-86-226-C (Tr. 1-133). At the time the order was issued, a heat-activated fire suppression system was in place and operational at the No. 2 belt-drive of the RTP. Additionally, a CO monitoring and early warning CO detection system was in place and operational along the entire length of the RTP beltline. Also, two workers trained and experienced in the operation of the beltline and the various fire detection and suppression systems and devices were assigned to and patrolled the beltline (Tr. 1-123, 1-162). Finally, as demonstrated during the abatement of this order, the waterline could be successfully charged in under five minutes (Tr. 1-119).

Mid-Continent argues the waterline was drained and maintained in the "dry" state under conditions which did not present

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7/ Various methods were attempted by management to achieve compliance with 30 C.F.R. § 75.1101-2(b). In this time period, the water in the line was left running. When that proved to be unsuccessful, an antifreeze solution was added to the running water. Although these measures helped, portions of the waterline still froze during the colder weather (Tr. 1-267, 1-268).

8/ Permitting the water to be left running works as long as there is an underground supply of water. After the water supply is exhausted there is a very pragmatic question of what do you do for water to put into the firefighting line and for respirable dust suppression on the mining machinery.

a danger to the miners. With the safety devices then in place the possibility of an ignition or a fire occurring, much less propagating to the point creating a danger was infinitesimal.

There is nothing in the RTP north adit which could support or facilitate combustion. The RTP north adit is one of two entries driven through sedimentary rock formations, shale and sandstone, to points of interception with the Dutch Creek No. 1 and No. 2 Mines (Tr. 1-107). Nothing exists in this adit other than a fire-resistant synthetic conveyor belt, its supporting steel hardware and incombustible rock (Tr. 3-451). Mid-Continent argues that Inspector Gibson's testimony indirectly reflected these conditions. When asked what condition or conditions existed in this area which presented a source for combustion, the inspector limited his answer to the coal being transported on the conveyor belt (Tr. 1-30).

Mid-Continent contends that Inspector Gibson's analysis of the hazard presented by this coal does not adequately take into account the incombustible nature of Coal Basin's coal. Coal Basin coal is a medium volatile metallurgical coal used to make coke which is used in the manufacture of steel. This coal is not, as contrasted with other types of coal, susceptible to spontaneous combustion. In fact, Coal Basin coal will not burn without encouragement (Tr. 1-114). In his years as a resident field inspector in the Glenwood Springs office, Mr. Gibson has neither experienced nor heard of an instance in which Coal Basin coal has been ignited underground.

Further, Mid-Continent states that even if this coal was susceptible to combustion there is nothing in the RTP which could ignite it. In his hazard assessment, Gibson identified the electrical system as presenting a probable source of ignition (Tr. 1-28, 1-29). 9/

Finally, in support of the proposition that no hazard existed, a carbon monoxide (CO) fire detection system was installed along the entire length of the beltline. Computer

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9/ This system consists of a power center (transformer) and belt-drive (electrical motor) located at crosscut No. 27. A high voltage cable extending from 1-Mine for an approximate distance of 2,000 feet supplies power to this electrical system (Tr. 1-111).

controlled, this system consisted of a series of CO sensors placed on approximated 2,000 foot intervals which monitor the ambient environment along the beltline on a continual basis (approximately 2 to 3 times per second). Upon measuring an ambient level of 18 parts per million carbon monoxide, an audible alarm sounds in the lamphouse located outside the line. Along with sounding an alarm, the system locates and informs lamphouse personnel of the area where the carbon monoxide was detected. Following this warning, lamphouse personnel notify the miners underground in the affected sections. They in turn take appropriate action (Tr. 1-163, 1-165).

Discussion

Several threshold issues are presented here: do the facts establish that Mid-Continent violated 30 C.F.R. § 75.1100-3 and what was the affect of Mid-Continent's petition for modification filed in M-86-226-C.

I decline to rule on these issues since Mid-Continent admits the conditions described by the Secretary constituted violations of the applicate sections of 30 C.F.R. Part 75 (See Mid-Continent brief at page 3). As to the second issue: the company voluntarily withdrew its petition for modification. In view of these factors these violations should be affirmed.

Accordingly, it is now appropriate to consider the unwarrantable failure characterization here.

The issue of whether Mid-Continent unwarrantably failed to comply with a cited regulation is raised throughout the orders involved in these cases. In view of the sometimes elusive nature of what facts constitute an unwarrantable failure it is appropriate to review some leading cases on this subject.

In the leading decision concerning the interpretation and application of the term the Commission has concluded that the term in the statute means "aggravated conduct, constituting more than ordinary negligence by a mine operator in relation to a violation of the Act."

The underlying facts in some leading cases are these: In Emery Mining Corporation, 9 FMSHRC 1997 (December 1987) four roof bolts had popped on a bearing plate. Further, this violation had existed for at least a week in an area where the operator's safety personnel should have known of the condition.

In viewing the factual situation the Commission stated that the popped bearing plate was a matter involving only ordinary negligence. As a result, in Emery the Commission vacated the finding of unwarrantable failure and modified the section 104(d)(1) order to a 104(a) citation.

In Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, issued the same day as Emery, the Commission upheld two unwarrantable failure findings. Specifically, the operator had been cited for a violation of its roof control plan (30 C.F.R. 75.200). Three days before the contested violation a similar order had been issued. Preshift examinations had been conducted but violative conditions had not been reported. The Commission concluded as follows: "Given the prior violation of section 75.200 in the same area ... only days before the violation at issue occurred and the extent of the violative condition, we find that Y & O's conduct in relation to the violation was more than ordinary negligence and ... resulted from Youghiogheny & Ohio's unwarrantable failure.

In Youghiogheny & Ohio the Commission further upheld an unwarrantable failure regarding a "hole through" violation. Specifically, the Commission observed that "even if the 'hole through' was accidental, the roof control plan clearly prohibits cutting through into areas of unsupported roof and the section foreman is responsible for compliance with the plan," 9 FMSHRC at 2011.

In Rushton Mining Company, 10 FMSHRC 249 (1988), the Commission reversed the judge's conclusion that the company's failure to detect the broken wires was due to its inadequate procedure for examining the rope. The procedures followed by the operator were extensive and they are recited in the decision. In short, the Commission found no aggravated conduct within the meaning of Emery.

In Quinland Coals, Inc., 10 FMSHRC 705 (1988), the Commission upheld an unwarrantable failure violation of a roof control plan. After reviewing the underlying facts the Commission concluded that "(g)iven the extensive and obvious nature of the condition, the history of similar roof conditions and [the operator's] admitted knowledge of the conditions, we find that [the operator's] failure to adequately support the roof was the result of more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from ... unwarrantable failure," 10 FMSHRC at 709.

In The Helen Mining Company, 10 FMSHRC 1672 (1988), the Commission determined the operator's failure to comply was not due to the operator's unwarrantable conduct. In finding a lack of such evidence the Commission relied on evidence involving the design and function of the operator's shield system. Other factors supporting the operator included a lack of previous MSHA citations relating to the forepole pads of the shields. Further, even after the roof control plan was revised forepole pads were not required by MSHA. Finally, the operator reasonably believed that if cribbing was installed the miners involved in the installation would be placed at considerable risk.

In the case at bar, on the issue of unwarrantable failure, I credit Mid-Continent's uncontroverted evidence. The operator was seriously hampered by the freezing weather but nevertheless, and by several means, attempted to comply with the regulation and furnish firefighting capability as well as water in the lines. In fact, in Order No. 3223207 the waterlines had been frozen for 1,300 feet.

The allegations of unwarrantable failure should be stricken and both violations should be affirmed under section 104(a) of the Act.

Additional facts also impinge on an evaluation of civil penalties. I find the negligence of the operator to be low since it was faced with a freeze and break situation. On the other hand, the gravity is high: I credit the inspector's testimony and conclude there were combustibles along the conveyor lines. A fire, if it occurred, could spread and affect miners in the area.

In the two years ending January 19, 1988, Mid-Continent was assessed and paid 13 citations asserting a violation of § 75.1100-3. In the period before January 20, 1986, Mid-Continent was assessed and paid 34 citations alleging a violation of the same standard (Ex. C-1 in WEST 88-231).

At the hearing Mid-Continent objected to any proof of history extending for a period greater than two years before any contested citation.

In other cases before the judge the Secretary has limited her proof of history to the two years before the citation or order in contest. However, the Act merely recites "prior history" shall be a criteria in assessing a penalty. Accordingly, any prior history is admissible. However, the Secretary has not articulated why Mid-Continent should be singled out from other operators and assessed for its history back to the enactment of the Act. In view of this factor, in assessing a

civil penalty the judge will only consider evidence of prior history within the two-year period before the order in contest.

The parties stipulated that the violations here are significant and substantial (S&S) if the violations are established. Since I have found the facts to be as stated by the inspector the allegations of S&S should be affirmed.

Weekly Examination of Seals

This portion of the decision addresses Order No. 2832627 issued on January 26, 1988.

The narrative portion of the order, which alleges a violation of 30 C.F.R. § 75.305, 10/ reads as follows:

> The weekly examination for hazardous conditions was not being conducted at the seals located on the No.'s 1 and 2 slopes of the mine. The last dates and initials placed at the Nos. 2, 3, 3½, 4, and 5 South seals were 01-15-88 G.B. The times ranged from 7:32 A.M. to 8:47 A.M. This is a time period greater than seven days. According to the recorded results of the weekly examinations this exam was completed on 01-22-88 which would be within the required time frame.

10/ The cited regulation provides as follows:

> § 75.305 Weekly examinations for hazardous conditions.
>
> [Statutory Provisions]
>
> In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas. Such weekly examinations

The Evidence

LEE SMITH, an MSHA supervisor, wrote Order No. 2832627 when he, in the company of Mid-Continent's David Powell, inspected sealed areas numbered 2, 3, 3½, 4 and 5 in the No. 1 and No. 2 slope at the Dutch Creek Mine (Exhibit R-1). The purpose of the wooden seals is to prohibit air from migrating out of the mined-out sections. Mid-Continent uses squeezed seals. As the seals are squeezed they become more efficient.

The inspector looked at every entry that contained a seal. This was approximately 19 seals. Every seal was inspected where it was safe to travel to it.

The regulation, 30 C.F.R. § 75.305, requires that the person doing the examination on behalf of the operator place the date, the time and his initials, (D,T&I), on the seals. The D,T&I can be located in several places. The examiner usually tries to do this in a sequential order and it is entered on a metal pan some 12 inches by 8 foot long, or on the face of the seal itself. Any suitable surface is satisfactory and they are placed so that they can be readily found. Normally, the dates are entered in a straight line, grouped in chronological order. A fire boss would normally inspect the seals and the length of the examination depends upon the size of the mine. A fire boss has other duties.

10/ Continued from previous page.

> need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

On January 26, the date of this inspection, the inspector found that the date of the last examination was 11 days prior to January 26. He did not find any notation within the seven days. The D,T&I in several locations have been in place for many years. The entries are usually made on a pan. When the pan is used the examiner returns to the top and starts over.

The inspector and the company's representatives in the inspection party looked and didn't see any timely D,T&I. This same condition existed at seals 3, 3½, 4 and 5.

In the inspector's opinion the violation was established because he could not find the DT&I. If they were found at a later time this would be a basis to vacate the citation. Based on the inspector's experience the DT&I would be in close proximity to the seals and grouped in about the same location.

The inspector examined seals in 19 entries. The initials on most of the seals were "GB."

The purpose of the weekly examination is to be sure that the seals are performing their intended purpose; that is, to separate the abandoned areas from the active air.

If the areas are not separated, gasses from the other areas could enter the active workings. The hazard is that some of these gasses can displace oxygen and severely injure a miner.

At Mid-Continent seals are routinely inspected. The order was abated when David Powell began to conduct examinations as required and he placed his D,T&I on the seals.

When the inspector observed the seal the last date on it was January 15, 1988. The initials he saw were GB, which is Gary Bellington, a Mid-Continent fire boss.

Inspector Smith agreed there was no evidence the return aircourse was migrating into the gob area. The inspector further rated the seals as in good to fair condition. They were performing their function.

JIM KISER, Mid-Continent's safety director, testified that following the issuance of the present order, Mid-Continent conducted an in-house investigation to determine whether the

fire boss responsible for the questioned examinations had been derelict in his duty (Tr. 1-140). 11/ The Mid-Continent safety director instructed a company safety inspector, Oviatt, to accompany mine examiner Billington on his subsequent examination of the permanent seals located at the 2, 3, 3½ 4 and 5 south sections. During this investigation, Oviatt went into the areas and Billington remained outby and described the locations in which he had placed his initials. During this investigation, all of the allegedly missing initials were found. According to Oviatt, the initials were located in random locations within the general area of the seals. 12/

Given the conditions and procedures then used at these locations in the Dutch Creek No. 1 Mine it was not unusual that Smith could not find Billington's initials. At the time this order was issued, the general areas surrounding these seals, had, over the years, accumulated literally hundreds of mine examiner's times, dates and initials. Powell, who assisted Smith in his inspection testified that dates were found which went back to 1981 (Tr. 1-273). Furthermore, Mid-Continent had not, at that time, implemented a program providing specified locations at which mine examiners could place their times, dates and initials at the 2, 3, 3½, 4 and 5 south seals (Tr. 1-148). Finally, as can be inferred from the above investigation, Billington was in the habit of scattering his times, dates and initials randomly around the area he was examining. 13/

Discussion

In connection with this order Mid-Continent has clearly articulated that it does not believe that a violation occurred. 14/

11/ Mid-Continent urges that this investigation was not, as it could appear, conducted in preparation for litigation. Instead, this investigation was conducted by the Mid-Continent Safety Department in performance of its duty to ensure compliance with the 1977 Mine Act. Had this investigation revealed that the required examinations had not in fact been made, the examiner, Billington, would have been discharged (Tr. 1-143).

12/ The results of this investigation were later telephoned to Smith by Mid-Continent Manager, David A. Powell (Tr. 1-88).

13/ While conducting the joint search with Smith, neither Powell nor Smith (neither of whom had a day-to-day familiarity with this mine area) could discern any regular pattern or sequence from Billington's prior examination times, dates and initials (Tr. 1-244).

14/ Mid-Continent's brief at 20.

The judge believes Mid-Continent's statement on page 3 of its post-trial brief addresses only the two orders involving the "freeze and break" of the waterlines. So, it is in order to proceed to the merits: Mid-Continent claims weekly examinations of the seals were in fact conducted and the mine examiner's (D,T&I) were placed in the general area in which this inspection was conducted. Mid-Continent further asserts that this examination was conducted properly and that Inspector Smith's inability to find these initials, standing alone, fails to constitute a violation of 30 C.F.R. § 75.305. Finally, Mid-Continent asserts that Smith's inability to locate these initials is neither unusual nor extraordinary.

The regulation, 30 C.F.R. § 75.305, in its relevant portion simply requires any seals examiner to place his D,T&I at the places examined.

There is no requirement that the DT&I be located in any specified location other than in the "area" examined. There are no limitations on the proximity of the "area."

I infer from the evidence here that company examiner Bellington marked his DT&I at the seals. I base this on the fact that at a number of seals the timely DT&I were observed by the inspector. Further, Bellington recorded his inspections in the operator's book.

The Secretary, by Inspector Smith, offered evidence that mine examiners generally group their DT&I in the general area of the examination and readily visible to a person following him.

I am not persuaded.

Mr. Smith's qualifications do not disclose that he possesses the requisite knowledge to properly describe an industry custom and practice. Inspector Smith, a supervisor, is a specialist in roof control (Tr. 1-52). On the other hand witness Kiser, a safety specialist for 15 years, has worked underground operations in Virginia, West Virginia and Colorado. It has not been his experience that mine examiners group their DT&I at all times in a chronological order at specified locations. In fact, he has found that the placement of DT&I varies from one mine examiner to another.

For the foregoing reasons Order No. 2832627 should be vacated.

Failure To Make Face-to-Face Examination of Inaccessible Seals

This portion of the decision considers two orders alleging violations of 30 C.F.R. § 75.305, supra, page 15.

The narrative portion of Order No. 2832624 reads as follows:

> The fourteen (14) seals (immediately inby the #7 slope entry), in the 3rd North section were not being examined. The seal in the east entry (up dip) was being examined as was other portions of 3rd North except the west entry along which the seals in question are located. This area was being evaluated rather then performing the required examinations of seals.

The narrative portion of Order No. 2832625 reads as follows:

> The 6 North upper and lower seals were not being adequately examined. Caprock had fallen and the area adjacent to the two seals had heaved, making little, if any, of each of the seals visible to perform an adequate examination of their integrity.

The Evidence

WILLIAM CROCCO, an MSHA inspector experienced in mining, inspected Mid-Continent's mine in October 1987.

Due to unsafe ground conditions it was not possible to inspect the seals in the 3rd north section. The roof was loose, hanging and broken; it was unsafe to travel the area. These conditions in No. 1 entry involved 14 seals for a distance of 1100 to 1200 feet.

Mr. Crocco inquired about how the seals were being examined. Company representative Bishop stated that due to impassibility of traveling they made an evaluation of the air at the mouth of the entry. In Mr. Crocco's view such an evaluation was not equivalent to a physical examination of each seal. In this situation the company could support the roof or put up new seals at the mouth of the entry. It would take three such installations to isolate the 3rd North in this fashion.

The inspector determined the violation was unwarrantable as well as S&S. The company knew of the requirements of the regulation as other seals are dated and signed weekly. The company also indicated some of the seals had not been inspected for a number of years.

Order No. 2832624 was issued for the described conditions.

Order No. 2832625

In the 6th North area (Order No. 2832625) the inspector could neither examine nor see three seals. The entries were blocked due to heaving and roof control problems.

Mid-Continent's representatives Bishop and Wright confirmed that the seals were being evaluated at the mouth of the entry. In the inspector's opinion this was insufficient to comply with the regulation.

The inspector considered the condition unwarrantable because the conditions existed for many years and the company knew the requirements of the regulation.

If Mid-Continent had wished to inspect the seals they could have removed the obstruction and graded out the area. However, the inspector agreed that grading the area can cause bumps or bounces to occur.

The mine has both concrete block and wooden squeeze-type seals. If the floor heaves, the wooden seals have the best chance of surviving. The seals examined by the inspector were outby the active workings.

The witness has seen petitions for modification concerning section § 75.305. The petitions are granted when there is no diminution of safety and when the alternative is safe. Modifications of inaccessible seals usually involve evaluation points.

Inspector Crocco felt there was a good possibility the seals had been breached and he thought they had detected a little leakage but he could not specifically identify any such leaking seals.

The operator installed wooden structures which were designed to address the rock burst and heaving [15] conditions which are endemic to the mine (Tr. 2-61).

DAVID POWELL, Mid-Continent's engineer, testified that under the company program it is possible from an engineering standpoint to perform outby examinations compared to nose-to-nose examinations. This is done at the outby point by evaluating the air that had passed the sealed area (Tr. 3-754, 3-755). [16]

The seals which isolate the old 3 North and 6 North mining sections are located in areas commonly termed barrier pillars. Such pillars separate a mined-out area from the active areas. They incur abatement pressures from the mine-out sections (Tr. 2-275).

The floor heave which prevented access to these seals is the natural result of the redistribution of overburden pressures as a mine area moves toward a re-stabilized configuration (Tr. 3-754). The grading described by Inspector Crocco would upset this re-stabilization. As the evidence indicates, workers have been injured by severe rock burst or outbursts in the past while performing such grading (Tr. 2-94, 3-753).

Discussion

The thrust of Mid-Continent's position is that the company may inspect its seals at an outby point. Such inspections were Mid-Continent's previous policy and MSHA has previously concurred in such procedures. In short, the issue is whether Mid-Continent may monitor the condition of its seals by testing the ventilating air.

15/ Floor "heave" or "heaving" is a mining term which refers to the convergence of the mine roof and floor. Rock and/or coal bursts are incidents of sudden and large scale convergence between the roof and floor as a result of overburden pressures on the mined seam. Heaving is normally incident to deep mines such as the Dutch Creek mines of Mid-Continent.

16/ In making an examination from a remote location the inspector can rely on a number of things. These include 1) the smell from the gob area, 2) whistling sounds, 3) line brattice flapping, 4) flame resistant devices, 5) rattling members, 6) floor heave possibly causing buckling in the seal, 7) methane methometer and flame detector.

Mid-Continent argues that nothing in the regulation mandates face-to-face examinations of seals.

The regulation, 30 C.F.R. § 75.305, in its relevant part provides that

> [E]xaminations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas .... [Emphasis added.]

The regulation simply requires examinations "at seals." I agree the words are not otherwise defined but the expression "at seals" is grouped with other words indicating specific locations in the mine.

I reject the concept urged by Mid-Continent. Compliance with § 75.305 does not permit an examination of seals from some remote outby location.

I further reject witness Powell's opinion that a sealed area can be tested by checking its ventilating air at a point not in close proximity to the seal itself. One of the stated purposes of the regulation is to test for methane. If methane leaked from a sealed area it could be easily diluted with other air before reaching the point where the air was being monitored.

Mid-Continent raises a legitimate concern that grading the entries to gain access to the seals will disturb a stable area. Such disturbances could result in dangerous bounces, heaves and outbursts.

In effect, Mid-Continent is seeking a modification under section 101(c) of the Act. However, the Commission lacks jurisdiction to grant relief under that section.

As Inspector Crocco suggested, Mid-Continent has the option of erecting new seals. In fact, he testified three seals would isolate the 3rd North section.

The inspector also considered these violations to be significant and substantial.

The Commission has indicated a "significant and substantial" violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

Further, in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained its interpretation of the term as follows:

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

In connection with these two orders the credible evidence establishes the seals were intact and not leaking. Such a finding precludes a finding under (3) and (4) of Mathis Coal. The S&S designation should be stricken.

The Secretary's evidence also fails to establish that the violation was a result of the operator's unwarrantable failure to comply. The evidence so often relied on by the Secretary is that the operator knew of the regulation and knew of the violative condition over a period of time. But more is required. In particular, the Secretary must show aggravated conduct, see Emery Mining Company, supra. Since the record fails to show aggravated conduct, it necessarily follows that the allegations of unwarrantability should be stricken from these two orders.

These orders should be affirmed as 104(a) citations.

In considering a civil penalty I conclude the negligence of the operator as moderate. Mid-Continent could have erected additional seals outby the inaccessible seals. Such outby seals could have effectively sealed off the areas in question. Since the credible evidence indicates the seals were intact and not leaking I consider the gravity of the violations to be low. Mid-Continent's prior history is favorable to the operator. It was assessed and paid for one violation of § 75.305 in the two years ending January 19, 1988. Before January 20, 1986, it was assessed and paid for seven violations of the same regulation.

Aluminum Overcasts, Sufficiency of Pyrochem Applications

This portion of the decision reviews Order No. 3076190 which alleges a violation of 30 C.F.R. § 75.316. 17/

The narrative portion of the order reads as follows:

> The operator failed to comply with his approved ventilation plan at the overcasts between 6 slope and crosscut No. 48, 5 slope and crosscut No. 48, 4 slope and crosscut 48 and 3 slope and crosscut 48 in that aluminum overcasts had been installed at the above locations which do not meet the requirements of substantial incombustible material [sic] testing has shown that in case of a fire, aluminum has been shown to fail rapidly. The operator was required to have the overcasts fireproofed by November 30, 1987.

17/ The cited regulation reads as follows:

> § 75.316 Ventilation system and methane and dust control plan.
>
> [Statutory Provisions]
>
> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The Evidence

DOUGLAS ELSWICK, an electrical specialist for MSHA, issued Order No. 2076190 because four aluminum overcasts had not been installed at certain locations in the Mid-Continent mine (Tr. 2-165, Ex. P-4). The aluminum overcasts were the subject of the order issued December 11, 1987. The company agreed the overcasts would be coated by November 30, 1987, (Tr. 2-174). The work was in progress on some of the overcasts at the time the order was issued (Tr. 2-175).

A brief review of certain historical facts is appropriate: Aluminum ventilation controls, including overcasts, have been used in the coal industry for more than 10 years. In western mines, aluminum overcasts, the type presently at issue, had been the standard for years (Tr. 2-345).

As a result of the Wilburg Mine fire disaster [18/] MSHA instituted a policy change concerning the acceptability of aluminum overcasts in mines (Tr. 2-349). Under the new policy all aluminum devices had to either be replaced with devices of incombustible construction or coated with a layer of incombustible material. Operators of mines possessing aluminum ventilation controls had to submit, under this new policy, detailed plans which included a timetable with specific completion dates showing how these devices would be either coated with a fire-proofing material or replaced (Exhibit P-4(a)).

On November 6, 1987, Mid-Continent submitted for final approval its plan for the coating of aluminum overcasts then present in the Dutch Creek No. 1 and No. 2 mines with a fire-proofing material termed Pyrochem (Exhibit P-4(e)).

On November 20, 1987, MSHA Inspector James B. Denning issued an order under the authority of section 103(k) of the 1977 Mine Act which took all diesel equipment in the Dutch Creek Mines out of service [19/] (Tr. 2-328, 329). Under the 103(k) order, no diesel equipment could be operated until thoroughly inspected

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18/ An underground coal mine fire that occurred on December 19, 1984, in Emery County, Utah. Investigation at Wilberg revealed the fire propagated due to the lower heat tolerance of aluminum ventilation controls as contrasted to other controls such as steel or block and mortar (Tr. 2-180).

19/ The diesel Eimco matter is discussed, infra, in connection with Order Nos. 3076185, 3223125 and 3223159.

by MSHA. During these subsequent inspections, Mid-Continent received a total of 19 orders and citations involving the Eimco fire (Exhibit R-16).

The aluminum overcasts, the subject matter of the present order, were located in older sections of the Dutch Creek No. 1 Mine commonly referred to as the slope section or slopes entries. With the completion of the Rock Tunnels Project this area of the mine, while not abandoned, was limited to minimal miner activity. At the time the present order was issued, there were no facilities in the area by which electrical equipment could be operated (Tr. 3-605). As a result, diesel-powered Eimcos were the only machines which could provide the required power for the sprayer unit to coat the overcasts.

Following the period of the Eimco fire inspection and abatement, Mid-Continent was left with approximately three days in which to finish the required spraying on its original schedule (Tr. 3-587).

Given the difficulties experienced during this application process, compliance with the MSHA timetable was simply not possible. MSHA, however, was not inclined to enlarge its timetable for the aluminum overcast coating although the policy target-date was another six months away. (See Exhibit R-24.)

Because there was no need to maintain roadways in the area, Mid-Continent had to grade significant amounts of roadway to reach the overcasts with its diesel machinery (Tr. 3-572). 20/

Upon reaching these overcasts, Mid-Continent's efforts for timely completion were further hindered by the spraying process itself. In order for the Pyrochem to properly adhere, only thin layers could be applied to the overcasts at one time (Tr. 3-561). According to foreman STARZEL, in order to reach the required one-inch thickness, more than five applications of Pyrochem had to be applied (Tr. 3-606).

20/ The grading of the roadway resulted in the issuance of Orders Nos. 3076185 and 3223125, infra.

Discussion

Mid-Continent contends that the company's conduct was not aggravated as defined in Emery (Brief at 29).

I agree. It is uncontroverted that Mid-Continent had started to treat the overcasts with fireproofing material when Order No. 3076190 was issued. The company's attempts to comply, complicated by the withdrawal of the diesel equipment, negate any finding of aggravated conduct as defined by the Commission.

For these reasons the allegations of unwarrantability should be stricken and the order should be affirmed as a 104(a) citation.

Based on the uncontroverted evidence and in assessing a civil penalty I conclude that Mid-Continent's negligence was low. The circumstances simply precluded the operator from completing the work.

On the other hand the gravity was moderate. Given these circumstances here a mine fire could adversely affect the safety of the miners.

The operator's prior history indicates it was assessed and paid for 79 violations of § 75.316 for the two-year period ending January 19, 1988. For the period before January 20, 1986, the operator was assessed and paid for 125 violations of that section. I consider this history to be moderately adverse especially when a ventilation plan can involve a myriad of agreed regulations.

Eimco Emergency Fuel Cut-Off Blocked in While Pyrocheming Slope Section Overcasts

This portion of the decision deals with Order No. 3076182. The order originally alleged a violation of 30 C.F.R. § 75.316, cited, supra. During the hearing the Secretary was granted leave to allege a violation of 30 C.F.R. § 75.1725(a), 21/ (Tr. 2-112).

21/ This standard reads as follows:

§ 75.1725 Machinery and equipment; operation and maintenance

(a) Mobile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The narrative portion of the order reads as follows:

> The operator failed to comply with his approved ventilation and dust control plan on the 915-0923 Eimco (no approval plate) between slopes 4 & 5 at crosscut 48 in that the fuel (emergency cut off) on the machine was blocked in with a paper rag. The temp. gage [sic] indicated about 215 degrees. The anti-freeze was boiling in the machine with machine running.

The Evidence

MSHA Inspector DOUGLAS ELSWICK, a person experienced in mining, observed a 915-0923 Eimco loader on December 10, 1989.

The loader has an emergency shut-down device if the machine overheats. A paper rag prevented the shut-down device from functioning. This defeated the low level water capabilities of the machine. The temperature gauge read between 210° F. and 215° F. The temperature should not exceed 185° F.

The exhaust of this diesel equipment at times emits red-hot particles. These particles are eliminated by passing them through water. By defeating the safety device the temperature of the Eimco could reach 800° to 1000° F.

The inspector considered this was a safety hazard. The condition could cause a mine fire with possible fatalities.

Inspector Elswick considered the violation was due to the unwarrantable failure of the operator. The rag was in plain view and Stargel, Mid-Continent's foreman, was ten feet from the machine.

JOHN REEVES, assistant superintendent at the Dutch Creek Mine, testified that when the order was issued the Eimco was being used as a power source to apply Pyrochem to the surfaces of an aluminum overcast (Tr. 2-126). During this application process, the Eimco's engine reached a temperature at which the Eimco engine would shutdown. A shut down of the engine automatically shuts off the sprayer.

LOUIS STARZEL, Mid-Continent's crew foreman, testified that during the application both the sprayer and approximately 75 feet of hoses contained Pyrochem. Had the Eimco been given the time required to cool off before being restarted, the Pyrochem would have solidified and this equipment would have been, for all intents and purposes, ruined. Once overheated, it takes approximately 1 to 1½ hours for a diesel Eimco of this type to cool to the point where it can be restarted (Tr. 3-602). To prevent ruining the machine and equipment, Starzel overrode the automatic fuel shut-off so the system could be purged with water (Tr. 3-563, 3-564).

Before restarting the Eimco, however, Starzel had rock dust and a fire extinguisher brought into the area where this machine was parked. During the time the Eimco was running in this blocked-in condition, it remained stationary. Starzel and members of his crew were present at all times with firefighting equipment (Tr. 3-564).

Discussion

Mid-Continent does not dispute the facts as alleged by MSHA Inspector Elswick in the narrative portion of Order No. 3076182. At the time this order was issued, the emergency fuel shutoff was blocked in or bypassed and the Eimco was running at a temperature above that allowed under manufacturer specifications for normal operations. 22/ However, Mid-Continent contends the present facts do not justify the aggravated conduct established by the Commission in Emery. In support of its position the operator relies on the action of the crew in obtaining firefighting equipment, the lack of combustibility of Coal Basin coal, and the likelihood that a shut-down of the Eimco would cause the Pyrochem to solidify and thereby ruin the equipment.

I am not persuaded by Mid-Continent's arguments. In the instant case the foreman's actions were neither justifiable nor excusable. In the course of his activities the foreman plugged a shut-off safety device with a rag. This permitted the equipment to operate at highly excessive temperatures. In fact, the antifreeze was boiling in the Eimco. The foreman's acts of bringing firefighting equipment into the area shows he recognized the possibility of a fire. In addition, he was within ten feet of the Eimco. The assertion the equipment could have been ruined if the Eimco was shut off indicates the Eimco itself was inadequate for the job.

22/ Brief at 30.

The issue of lack of combustibility of coal in the coal basin does not reduce the hazard. Other sources of combustibility were in this area of the mine. 23/

The acts of Mid-Continent's foreman were clearly aggravated. Starzel deliberately overrode the automatic fuel shutoff and the regulation, 30 C.F.R. § 75.1725, was violated. As foreman, he is responsible for complying with the regulation and he cannot ignore it by bringing in firefighting equipment.

I conclude the deliberate disregard of a safety regulation by a foreman constitutes aggravated conduct within the meaning of Emery. The facts here are akin to those in Youghiogheny & Ohio Coal Company, supra, 9 FMSHRC at 2011.

For the foregoing reasons the allegations of unwarrantable failure should be sustained.

On the issue of assessing a civil penalty: both the negligence and gravity of the operator are high. The high negligence was determined by the deliberate decision of a supervisor to disregard a safety regulation. The high gravity is apparent since an overheated machine can easily cause a mine fire.

Mid-Continent's prior history is quite favorable to the operator. There were no assessments in the two-year period ending January 19, 1988. In the period before January 20, 1986, there was only a single assessment for a violation of § 75.1725.

Accumulations, Roadway Compaction During Overcast Spraying Operations

This portion of the decision involves three orders. The first two orders allege violations of 30 C.F.R. § 75.400 24/

23/ See the orders re accumulations, this page, et seq.

24/ The cited standard reads:

§ 75.400 Accumulation of combustible materials

[Statutory Provision]

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

The narrative allegations of Order No. 3076185 are as follows:

> The operator allowed combustible material in the form of coal to accumulate in crosscut 47 between 5 and 4 slope. The accumulation of coal were [sic] about 30 feet long 10 feet wide and 4 feet deep. In addition to coal accumulations there was [sic] wooden pallets, plastic lids, rock dust bags and glue boxes in the crosscut.

Order No. 3223125 reads as follows:

> The operator allowed loose dry coal, paper, plastic and wood to accumulate in the #49 crosscut between 4 and 5 slope. The dry loose coal was about 20 feet long, 8 feet wide and four feet deep.

Order No. 3223159 alleges a violation of 30 C.F.R. § 75.316, cited supra, page 25.

Order No. 3223159 reads as follows:

> The operator's approved ventilation system and methane and dust control plan was not being followed in No. 5 slope, intake aircourse and haulage-way. The floor, from No. 55 crosscut to No. 62 crosscut - about 700 feet, in the haulageway was not maintained compacted with calcium chloride or water. The dust on the mine floor ranged from one inch to 4 inches in depth.

The Evidence

Order No. 3076185

On December 11, 1987, MSHA Inspector DOUGLAS ELSWICK observed loose coal at crosscut 47 between slopes 4 and 5. The coal was 30 feet by 10 feet and 4 feet deep. There were plastic lids and dust bags on top of the coal. Upon inquiry a company representative stated he didn't know why this was stored in the area.

The inspector did not observe any effort being made to clean up the area.

Unwarrantability, in the inspector's opinion, was the proper designation of this violation because a foreman was working 100 feet above this area. Also, the area must have been pre-shifted as miners were working on the overcasts. The fire boss and management should also have been aware of this condition. Inspector Elswick identified a letter dated December 1, 1987, which discusses the operator's clean-up plan.

If a mine fire occurred, injuries could be serious. In the inspector's opinion it was reasonably likely that a fire could occur.

Diesel equipment and power lines were within five to six feet of the accumulation.

Order No. 3223125

On December 13, 1987, MSHA Inspector Elswick inspected crosscut 49 between 4 and 5 slopes. At this point he observed a quite visible accumulation of loose coal and plastic material. The loose coal was 20 feet long by 8 feet wide and 4 feet deep. The inspector thought the accumulation had been there three or four days.

If the coal caught fire in this intake air entry the smoke would spread to the working area. This area was not normally pre-shifted.

The inspector expressed the view that this violation was due to the unwarrantable failure of the operator since equipment cannot move this amount of coal without a foreman knowing about it. Also, there was a foreman 100 feet away.

Order No. 3223159

PHILLIP R. GIBSON, JR., an MSHA inspector, considered the lack of calcium chloride and water on the roadway to be a violation of the ventilation plan.

The inspector considered the violation to be unwarrantable because the area had to be pre-shifted. It was also outby a working section. In addition, the operator had been cited a number of times for this condition.

The inspector agreed the diesel equipment was hauling in gear to be used in coating the overcasts.

GEORGE PREWITT, a member of Mid-Continent's safety department, testified that after the interception of the Rock Tunnels Project with the Dutch Creek No. 1 Mine (B-seam, or lower of the two coal seams, see Exhibit R-2), all material haulage, coal haulage and personnel transportation which had been conducted in the slope section were transferred to the twin adits of the Rock Tunnels Project. Since the RTP interception of the coal seams, worker activity in the slope entries has been reduced to a minimum (Tr. 3-618, 3-619). In fact, at the time these orders were issued, mine examiners (commonly called "fire bosses") were the only personnel regularly present in the slope-section of the mine (Tr. 3-566).

The accumulations which were the subject matter of two of Inspector Elswick's orders were a by-product of the aluminum overcast coating operation. Similarly, the roadway conditions which were the subject of Inspector Gibson's order were caused by equipment traveling in the area due to the overcast coating operation.

In order to reach the overcasts with the needed equipment, a significant amount of road grading had to be performed. When the grading was being done there were no facilities for the removal of the graded material (Tr. 3-572). The nearest beltline was approximately 1500 feet away from the area where the grading was being done. Because of recent inspections which had taken the majority of its diesel equipment out of service, Mid-Continent was in a position where it was extremely difficult to perform the required fire-proofing of overcasts within the schedule deadline mandated by MSHA (Tr. 3-573, 3-582). As such, Mid-Continent had neither the time nor the equipment required to haul all the graded material to a point where it could be taken out of the mine. Instead, this graded material had to be stored in inactive crosscuts. This was the focus of Inspector Elswick's Orders Nos. 3076185 and 3223125 (Tr. 3-572).

To reach these particular aluminum overcasts, all machinery travel had to be routed up-dip via the No. 5 entry (Tr. 3-421). Because of the soft nature of Mid-Continent coal and the coal floors, the Eimco equipment tore and ground up the No. 5 entry floor and formed the accumulations which are the subject matter of Order No. 3223159 (Tr. 3-620). Because of the winter's dryness of the mine air, Mid-Continent's attempts to control this problem with the application of calcium chloride were largely frustrated. 25/

25/ For a discussion of the effect of ambient humidity upon calcium chloride see the discussion concerning Orders Nos. 3223445, 3223446 and 3223447.

A conflict in the evidence exists as to whether the accumulations were located near or on a roadway well traveled by diesel machinery. In this conflict Mid-Continent's witness STARZEL (Tr. 3-574) would be in a better position than Inspector Elswick to know the extent of the travel on the roadway. In short, at the time these orders were issued, the only equipment which traveled on this road was the single Eimco used in the application of Pyrochem (Tr. 3-574). Under this operation, the Eimco was required to pass the ordered accumulations only twice -- upon entering the area at the start of shift and upon leaving that area at the end of the shift. In the interim, this machine would remain in a stationary position away from the accumulations (Tr. 3-574).

Inspector Elswick identified an ignition source as a 7200-volt cable which fed power to the section and which ran across the accumulations (Tr. 2-141). I credit Elswick's testimony over Starzel's contrary view (Tr. 3-574). A 7200-volt cable is a large and obvious object. Further, Starzel admits the Eimco used to spray the aluminum overcasts was a source of ignition (Tr. 3-574).

Discussion

Mid-Continent does not dispute the existence of the accumulations or the fact that the 5 slope roadway was dry and dusty. 26/ But Mid-Continent argues its conduct did not constitute an unwarrantable failure to comply with the regulation. Further, the operator was attempting to cope with a mandate created by MSHA. In short, Mid-Continent argues it should have been granted additional time to complete the coating of the aluminum overcasts and to complete the attendant housekeeping as well.

Emery, discussed supra, requires aggravated conduct more than ordinary negligence. The evidence fails to show such aggravated conduct in connection with these three orders. Accordingly, allegations of unwarrantable failure should be stricken.

The failure of MSHA to grant Mid-Continent additional time to abate these violative conditions could form a basis to vacate the violation. However, I am not persuaded by Mid-Continent's argument, particularly where a 104(d)(2) order is involved.

26/ Post-trial brief at 37.

In assessing civil penalties for the initial two violations I believe the operator was moderately negligent in permitting combustibles to accumulate. The pressure of other work does not excuse an operator from complying with mandatory standards. Concerning the lack of calcium chloride on the mine floor I consider the operator's negligence was low. A certain amount of coal dust on the mine floor can be anticipated. An accumulation of one to five inches appears to be minimal. Further, Mid-Continent's efforts to control the problem was, to a degree, frustrated by the winter's dry air.

As to all three orders I consider the gravity to be high. Accumulations of coal and coal dust can readily contribute to a coal mine fire. It is commonly acknowledged that an underground fire can easily lead to a mine disaster.

Mid-Continent's prior history appears to be moderate. In the two years ending January 19, 1988, the company was assessed and paid 48 violations of § 75.400. Prior to January 20, 1986, the company was assessed and paid 111 violations of the regulation.

As to § 75.316 (ventilation plan), in the two years ending January 19, 1988, the company was assessed and paid for 79 violations. Prior to January 20, 1986, the company was assessed and paid for 125 violations.

Eimco Examinations
Place of Maintaining Records

This portion of the decision addresses Order No. 3076189 alleging a violation of 30 C.F.R. § 75.316, supra, page 25.

Mid-Continent denies [27/] it violated its ventilation plan, and the related regulation.

The narrative portion of the order reads as follows:

> The operator failed to comply with his approved ventilation and dust control on the 935-0031 being operated at crosscut 47 between 4 and 5 slope in that the last date recorded was 11/3/87.

27/ Brief at 38.

Section 21.5 of the approved ventilation plan (Exhibit P-2) provides:

> A record of all diesel examinations will be kept in a book for that purpose, which will include the date and results of the examination.

Section 21.4 of the approved ventilation plan further provides:

> All diesel equipment used for coal haulage, or any other diesel equipment used in or inby the last open crosscut on a regular basis, will be examined at least once every twenty-four hours of service to insure the equipment is in proper operating condition. Other diesel equipment, such as supply and mantrip vehicles will be examined once every seven (7) days of operation to insure the equipment is in proper operating condition.

The Evidence

MSHA Inspector Douglas Elswick issued this order on December 11, 1987.

There was no notation "on board" the Eimco indicating the date of its last inspection. There had been previous problems as the inspection books were lost when the machines were washed. Generally, the books for weekly checks are now maintained on the surface.

In the inspector's opinion the ventilation plan requires that diesel equipment be examined every seven days.

Mid-Continent's bull gang supervisor STARZEL testified that due to the repeated destruction of these inspection records during the operation and cleaning of these machines, the storage location had been changed in the approved ventilation plan (Tr. 3-579).

At the time the present order was issued, the storage of all required diesel examination records had been moved to a location at the 1 Mine intercept in the outside lamphouse (Tr. 3-580). On the date of the present order, Starzel had conducted the required CO and NO 2 examinations and had entered the results in a record located in the lamphouse (Tr. 3-590, 3-591).

Discussion

It appears Inspector Elswick issued this order because the record book was not located on the diesel equipment. It is understandable how such an error could be made particularly in view of the previous custom of storing the books on the machines themselves. In view of the unrebutted testimony of STARZEL that the inspections were in fact made and entered elsewhere, I conclude Mid-Continent did not violate its ventilation plan. The plan itself does not require the inspection books to be maintained "on board" the diesel equipment.

Mid-Continent also argues that Inspector Elswick erroneously concluded that the examinations must be weekly regardless of the number of days the machine is in operation. 28/ Since the order is to be vacated it is not necessary to consider this secondary issue.

For the reasons stated herein, Order No. 3076189 should be vacated.

Powercenter Crosscut No. 27 RTP
Failure to Record Weekly Notations

This portion of the decision involves three related orders. The orders, all non-S&S and written on December 12, 1987, allege violations of 30 C.F.R. § 75.1105. 29/

28/ The Eimco 935 was not a machine operated inby the last open crosscut (Tr. 2-341).

29/ The cited regulation reads as follows:

> Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.
>
> [Statutory Provisions]
>
> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

The narrative portion of Order No. 3076193 reads as follows:

> The operator failed to comply with petition for modification Docket #M-86-182-C dated Sep. 1, 1987, stipulation #4 in that the last date recorded for the required examination of the fire suppression system was 11/28/87.

The narrative portion of Order No. 3076194 reads as follows:

> The operator failed to comply with petition for modification Docket # M-86-182-C dated Sep. 1, 1987, stipulation #7 in that the last date recorded in the book for required electrical examination was 11/28/87.

The narrative portion of Order No. 3076195 reads as follows:

> The operator failed to comply with petition for modification Docket # M-86-182-C dated Sept. 1, 1987, stipulation #8 in that there is no record of daily examinations as required.

The Evidence

Order No. 3076193

MSHA Inspector Douglas Elswick testified a petition for modification had been issued to Mid-Continent involving the ventilation of a power center (Ex. P-5). The company was required to inspect and record weekly notations of the inspections. In fact, 14 days had elapsed and no entry appeared in the books. After an examination and entry of that fact in the book, the books are countersigned by the chief electrician or maintenance foreman. Inspector Elswick didn't recall if the books had been countersigned.

The hazard presented here is that if the recording is not done then other persons are not aware of hazards that might be involved.

Inspector Elswick considered this violation to be unwarrantable because the examinations must be done by a certified person.

MSHA has issued 10 or 12 record-keeping citations against Mid-Continent.

The power center in crosscut 26 was between the intake entry and the beltline drive. It was identified in the surface book as "No. 2 drive or center."

Order No. 3076194

This order involved the power center in crosscut 26. There had been no record made for 14 days.

The petition for modification had been posted so everyone should have been aware of the recording requirements.

Inspector Elswick considered this violation was due to Mid-Continent's unwarrantable failure to comply because the operator knew it was required to record the inspection. In addition, the company had been cited for 10 or 12 record-keeping violations.

It is important to examine the power center to see if anything is wrong with the equipment. The high voltage transformer reduces incoming power of 4,160 volts to 480 volts. This equipment was located in a rock room off the beltline.

Order No. 3076195

This order was written because Mid-Continent failed to comply with stipulation 8 in M-86-182-C. The stipulation requires the equipment be examined daily and recorded in a record book. The power center is located in a cinder block structure. The equipment must be examined daily and the examination recorded in a book.

If a fire occurs in the power center the door automatically closes and the incoming power is deenergized.

The inspector asked for the records but the mine superintendent offered no excuses and he could not find the records. Under paragraph 8 an examination must be made daily. The inspector did not know when the last examination had taken place.

Such examinations are important because fire and smoke can enter the working face.

Inspector Elswick agreed that he was aware the required examination had indeed been made, but not recorded, when Orders Nos. 3076193 and 3076194 were issued (Tr. 2-350, 2-356).

The facility which is the subject matter of the present orders is located at crosscut 27 of the north-adit beltline entry of the Rock Tunnels Project. This facility is a part of the new RTP conveyor belt system which had replaced the former mainline coal haulage facilities located in the slope sections of the Dutch Creek No. 1 and No. 2 Mines.

Discussion

Mid-Continent does not deny the violations described by Inspector Elswick. 30/ Specifically, the recorded entries were not made but the inspections had been made at least as to Orders Nos. 3076193 and 3076194.

But Mid-Continent disputes the unwarrantable feature of the orders. In this situation Mid-Continent asserts its personnel were adjusting to the new facility and the examination procedures.

All of the examinations were not required under electrical regulations but were required under the Proposed Decision and Order in modification Docket No. M-86-182-C which became effective on November 19, 1987 (Ex. P-5).

These three orders merely show ordinary negligence and not aggravated conduct as required by Emery. Accordingly, the allegations that the violations were due to the unwarrantable failure of the operator to comply should be stricken. Otherwise the three orders should be affirmed under section 104(a) of the Act.

Concerning the assessment of civil penalties I consider the negligence in recording violations to be low since the PDO became effective less than a month before the orders were written.

Likewise, I consider the gravity to be low since these recording violations would not likely contribute to a serious injury. I note the examination in connection with Orders No. 3076193 and No. 3076194 had, in fact, been made but not recorded.

The record reflects a favorable prior history. In the two-year period ending January 19, 1988, Mid-Continent was assessed and paid 12 violations of § 75.1105. Prior to January 20, 1986, the company was assessed and paid 13 violations of the same regulation.

30/ Brief at 43.

103 Longwall Return Escapeway
Whether Passable

This portion of the decision reviews Order No. 3223122 alleging a violation of 30 C.F.R. § 75.1704. 31/

The narrative portion of the order reads as follows:

> The operator failed to maintain the return escapeway from the 103LW in safe condition in that a water hole about 75 feet outby the shields blocked the escapeway. The water hole was about 20 feet long, 12 feet wide and from 8 to 19 inches deep.

The Evidence

MSHA Inspector DOUGLAS ELSWICK issued this order. At a point 75 feet outby the shields he observed a water hole 20 feet long. Its depth, measured by a ruler, varied from 8 to 19 inches. A drop-off of 8 to 19 inches was hidden by the murky water. These conditions would hinder anyone evacuating any persons.

31/ The cited regulation provides as follows:

§ 75.1704 Escapeways

[Statutory Provisions]

> Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance to the underground area of the mine of surface fires, fumes, smoke and floodwater. Excape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

This particular escapeway was in return air; as such, one would expect it to become filled with smoke if a fire occurred. Any miner attempting to crawl out would get water in his self-rescuer which is worn on a miner's chest. The inspector felt a miner could die if his self-rescuer became inoperable.

Inspector Elswick considered this violation was due to the unwarrantable failure of the operator to comply. This escapeway was in a working section and the area must be examined every four hours.

On his way out of the area a company mine examiner stated a waterline had broken and drained into the area about a week before. The area must be pre-shifted; also, as an escapeway, the area must be inspected weekly.

Discussion

Mid-Continent does not deny prior knowledge of the described condition 32/ but the operator denies it violated the regulation.

In support of its motion to vacate this order, Mid-Continent contends § 75.1704 consists of three distinct and separate sentences. Each sentence deals with a separate aspect of mine escape. The first sentence deals with the maintenance of passageways, the second with the protection of mine entrances and the third with the approval and maintenance of escape facilities. Of these three portions, only the third sentence, which addresses "escape facilities," requires "quick escape." Under the regulation Mid-Continent states that passageways such as the 103 tailgate return are subject only to the requirements that they be properly marked and maintained, be in a condition which is safe and which will insure passage of all persons including disabled persons.

Mid-Continent also asserts that no evidence was presented indicating the 103 return air escapeway was improperly marked, impassible or unsafe. At no time in his inspection did Inspector Elswick conduct any test to determine the actual passability of this escapeway. Judging from the description of his inspection, it did not appear the inspector was prevented from safely traveling through this escapeway. Finally, Mid-Continent argues that, as developed from Inspector Elswick's description of the area, there was a three-foot walkway on the up-dip side of the water hole which would have allowed passage through the area by miners or miners carrying a stretcher, without coming into contact with the water hole (Tr. 2-290).

32/ Brief at 44, 45.

Mid-Continent further points out that on direct examination Inspector Elswick testified that, "An escapeway is designed for safe, quick exit of persons from the section in case of emergency ....", (Tr. 2-291). Later on cross-examination, he stated that he interpreted 30 C.F.R. § 75.1704 to require escapeways to be maintained in such condition as to facilitate quick escapes (Tr. 2-378). In describing the hazard presented by the allegedly violative condition, Mr. Elswick stated that the water present in the 103 return entry escapeway would hinder such a quick escape (Tr. 2-299). Contrary to this interpretation, however, nothing in the first sentence of this regulation section requires that an escapeway be maintained in a condition to facilitate a "quick" escape.

Mid-Continent's threshold arguments were considered and denied in Mid-Continent Resources, Inc., 11 FMSHRC 1015 (1989). I reaffirm that decision for the reasons stated therein: "[T]he plain words of § 75.1704 require that travelways be maintained to "insure" passage. "Insure," according to Webster, 33/ means "to make certain esp. by taking necessary measures and precautions," 11 FMSHRC at 1052.

The testimony of Inspector Elswick is unrebutted. Such unrebutted evidence establishes that the passageway was not maintained to "insure passage".

Mid-Continent states that miners or miners carrying a stretcher could pass through a three-foot walkway on the up-dip side of the water hole without coming into the contact with the water hole. I reject the operator's views: escapeways can often be filled with smoke and involve confused miners. And what of a miner crawling the escapeway. Is he to somehow find a three-foot walkway on the up-dip side?

On the issue of escapeways generally Mid-Continent is invited to read the recent Commission decision entitled Utah Power & Light Company, WEST 87-211-R (October 1989).

Mid-Continent further states that the violative condition was not due to its unwarrantable failure to comply.

33/ Webster's New Collegiate Dictionary at 595.

I agree. At best, the evidence indicates this condition existed for a week because of water seepage. Such evidence is similar to the situation found in Emery. In short, the record fails to disclose any aggravated conduct. In view of this conclusion the allegations of unwarrantable failure should be stricken and the violation affirmed under section 104(a) of the Act.

In considering a civil penalty for this violation I conclude the operator was moderately negligent in that it failed to remedy this condition after a week. However, the gravity is moderate since the described condition was for a distance of only 75 feet.

I consider Mid-Continent's prior history to be moderately adverse. In the two years ending January 19, 1988, the company was assessed and paid for 12 violations of § 75.1704. In the period before January 20, 1986, the operator was assessed and paid for 46 such violations.

Maintenance of Robert Shaw Valve on Diesel Eimco

This portion of the decision involves Order No. 3223185, which alleges a violation of 30 C.F.R. § 75.316, supra, page 25.

The narrative portion of the order reads as follows:

> The operators approved ventilation system and methane and dust control plan was not being followed for the 913-0368, approved machine, diesel-powered load-haul-scoop. The low water level float switch did not shut off the machine when the water was drained from the cooling box. Two loads of muck had been transported by this vehicle from the 103 longwall return entry on this dayshift. This machine was observed being operated in the return entry of the 103 long-wall section.

The Evidence

PHILLIP R. GIBSON, JR., an MSHA inspector, issued Order No. 3223185 on December 29, 1987.

On that occasion he observed a diesel-powered scoop in the return-air tailgate entry. The scoop, being used to pickup debris, was beyond the last open crosscut. In such a location it is a permissible type machine, equipped with a 2 percent methane monitor.

The exhaust gases from the scoop are quenched by passing them through a water reservoir. In his investigation Inspector Gibson discussed the low water float with the equipment operator. He also drained the water level to four or five inches. But the equipment did not automatically shut off as it is required to do. The valve was disassembled and repaired within the time allowed by the inspector.

If the water level is not functioning then the hot gasses can enter the atmosphere (See para. 21.1 of Ex. P-9).

This Eimco must be examined every 24 hours. The records indicated it had, in fact, been examined the previous day.

Inspector Gibson considered this an S&S violation because the switch would not shut off the power automatically. As a result a fire could occur outby the equipment.

Prior to issuing this citation and in the two prior years, Inspector Gibson had written citations to Mid-Continent concerning diesel equipment. Other inspectors had also written similar citations regarding the maintenance of diesel equipment.

Concerning violations relating to diesel equipment, the inspector had checked the records. There were some 35 violations for two years prior to the time this citation was issued.

Inspector Gibson believed the violation of this order was unwarrantable because of the repetitious nature of the violation.

GEORGE FAGUNDES, Mid-Continent's master mechanic of diesel machinery, explained that the Robert Shaw valve is part of a safety device fitted on diesel Eimcos, in this case, a 913 Eimco scoop serial number 0368. The purpose of the Robert Shaw valve is to assure that such machinery is not operated with an inadequate level of water in its scrubber tank. 34/ In performing its safety function, the Robert Shaw valve has absolutely no relationship to the actual operation of the scrubber tank (Tr. 3-531).

34/ A scrubber tank is a stainless steel water tank affixed to the machine. The engine exhaust of the machine is routed through this water tank to cool the exhaust fumes to the point where they will not present the hazard of a possible coal and/or methane ignition (Tr. 3-338).

Up to the time when Inspector Gibson halted work to test the Robert Shaw valve, the Eimco scoop was operating with water in the scrubber tank (Tr. 3-341). Also, this Eimco was equipped with an methanometer which shuts down power to the machine upon encountering a methane percentage of 2.0 percent or more (Tr. 3-433).

A brief description of the Robert Shaw valve is necessary: the valve operates much in the same manner as a float system in a bathroom commode. In the diesel system a metallic float is in a cylindrical metal tube which extends into the scrubber tank. This captive float rides up and down in its tube according to the water level in the scrubber tank. Upon reaching a set low water level, the float activates a magnetic shunt device which disconnects power to the machine (Tr. 3-532).

Mid-Continent, in accordance with schedule 31 requirements, has been required over the years to equip all diesel-powered equipment operated inby the last open crosscut with Robert Shaw valves. Diesel Superintendent Fagundes has, over the years, had the opportunity of working on hundreds of such valves. During the course of his experience, Fagundes has come to consider the Robert Shaw valve, "a big nuisance item" (Tr. 3-540).

The problem presented by this valve results from the operation of the float device within its confining cylinder on the steep slope conditions of the Dutch Creek Mines. According to Fagundes, the approximate 13 degree pitch of these coal seams causes the float valve to bind within its confining cylinder even when the machine is in a stationary position (Tr. 3-534, 3-535). Fagundes has found that this problem can usually be alleviated simply by moving the machine and this "unsticks" the float in its cylinder. In short, the movement or vibration of the machine while being moved is enough to overcome the binding effect on the float valve (Tr. 3-534, 3-535).

Discussion

Mid-Continent states its valves involve a common occurring problem: [35] when the machine was operating it had water in the

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35/ Brief at 49.

scrubber tank. After the water was drained the machine was not equipped to determine whether or not the float valve had temporarily bound up. Because of the nature of the safety device it is quite probable that the valve was in an operable condition when the required weekly examination had been performed the day before the order was issued by Inspector Gibson.

Mid-Continent's argument is misdirected. The violation exists here because the low level water float switch did not shut off the Eimco when the water was drained. Mid-Continent's evidence does not rebut that issue.

Concerning the issue of unwarrantable failure: The inspector's testimony of violations relating to diesel equipment and the issuance of similar citations is simply too broad to clearly establish unwarrantable failure by repetitious conduct. In short, in the absence of more specific and detailed evidence as to this equipment, I conclude Mid-Continent's conduct only constituted ordinary negligence and not aggravated conduct as required by Emery.

For the foregoing reasons, the allegations of unwarrantable failure should be stricken. Further, Order No. 3223185, as amended, should be affirmed under section 104(a).

In assessing a civil penalty I consider both the operator's negligence and the gravity of the violation to be low. Concerning negligence, it appears some water was in the reservoir. Further, the equipment had been checked the previous day. The presence of some water in the reservoir also essentially negates a probability of a fire. In view of this factor I also deem the gravity to be low.

Mid-Continent's prior history indicates the company was assessed and paid 79 violations of § 75.316 in the two years ending January 19, 1988. In the period before January 30, 1986, the company was assessed and paid 125 violations of the regulation. I consider the operator's prior history to be only moderately adverse inasmuch as ventilation plans can involve a myriad of circumstances.

Rock Dusting in 103 Longwall on Non-Producing Shift

This portion of the decision considers Order No. 3223220 alleging a violation of 30 C.F.R. § 75.403. 36/

The narrative of the order reads as follows:

> The rock dust applied to the lower rib and the floor of the lower tail gate entry of the active 103 longwall section was not maintained in such quantity that the combined mine dusts was at least 80 percent. The substandard rock dust began at survey station 7250 and extended outby (toward the face) for 40 feet. Water was not squeezed from a handful of the combined mine dusts. One spot mine dust sample was collected to substantiate this condition.

The Evidence

MSHA Inspector PHILLIP R. GIBSON, JR. issued this order in the return air entry of the longwall section on January 15, 1988. At the time there was a mining crew of eight to ten miners in the area.

The inspector observed float coal dust in the air, on the coal ribs as well as on the mine floor. The area he observed appeared to be dark. Generally operators use rock dust when working. There were small amounts of rock dust on the ribs and floor.

36/ The cited regulation, in its relevant part, provides as follows:

§ 75.403 Maintenance of incombustible content of rock dust.

[Statutory Provision]

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum ....

The purpose of rock dust is to render coal dust inert. The rock dust can be applied by hand or by using a high pressure hose and a water mix.

Upon entering the area, Inspector Gibson concluded that the activities being conducted in the longwall were preparatory to mining. The mining process itself generates coal dust (Tr. 3-367).

Inspector Gibson further agrees the cited location was directly inby the 103 longwall tailgate (Tr. 3-456). 37/ The inspector also indicated that the 40 foot area located in this entry was not maintained to an incombustible level of 80 percent. This condition presented a reasonably likely hazard in the event of a mine fire or explosion. According to the inspector, if incombustibility of coal is not maintained it can contribute to the propagation of a fire and/or explosion (Tr. 3-381).

GEORGE PREWITT, a member of Mid-Continent's safety department, testified that when the order was issued the company was conducting a stress-relief program on the 103 longwall face (Tr. 3-634, 3-635). By this program, areas of stress are identified by drilling holes into the face and in the tailgate area. Upon detection of such stress, the holes are loaded with permissible explosives and detonated. Because of the severity of past outbursts, no mining is performed in the 103 longwall section until all stress-relief operations are completed 38/ (Tr. 3-692, 3-695).

37/ The 103 mining section consists of an advancing longwall panel. Under this unique system of mining no room and pillar development is required. Instead, the mechanized machinery constituting the longwall equipment set advances directly into the virgin coal creating, by packwalls in the headgate and tailgate entries, ventilation, beltline and roadway entries as the panel advances into the virgin block of coal (Tr. 3-633).

Because the 103 longwall utilizes the former 102 longwall headgate as the 103 longwall tailgate, this "Zed" configuration, uniquely, has areas inby the working face. This inby area is a de-stress drilling area, and the stress-relief work caused the area complained of by the inspection (See, Ex. R-22).

38/ Because of the time requirements required in the stress-relief program, actual mining is conducted on only one shift. In the present case, this shift was the C-shift or graveyard shift (approximately 2300 to 0700 hours the next calendar day) (Tr. 3-692).

The 40 foot area described in Inspector Gibson's order as not properly maintained was the by-product of the approved stress-relief program. This area had been created as a result of coal detonated from the rib by the explosive de-stressing of the area on a preceding shift (Tr. 3-501).

Discussion

Mid-Continent states 39/ the Secretary interprets her regulation to mean that at no time can any area of a mine, no matter how small, be allowed to exceed the incombustibility requirements of the regulation.

This argument overstates the facts. The record shows only a three-foot area was without rock dust but a violation of 30 C.F.R. § 75.403 nevertheless existed.

I agree with Mid-Continent that the situations involved here do not support the finding of unwarrantable failure as defined by the Commission in Emery. The order was written between the stress-relief detonation and the next scheduled production shift. The allegation of unwarrantable failure should be stricken.

In assessing a civil penalty the operator's negligence is low since the small area lacking rock dust was the by-product of the stress-relief program. I consider the gravity to be moderate. Mid-Continent's evidence shows its coal is not readily combustible. However, float coal dust can clearly and quickly propagate a fire.

The operator's prior history is favorable. In the two years ending January 19, 1988, the company was assessed and paid 15 violations of § 75.403. In the period before January 20, 1986, the company was assessed and paid for 27 violations of the regulation.

Accumulations in and Compaction of
103 Longwall Headgate Roadway
During Non-Producing Shift

This portion of the decision considers three orders issued on January 20, 1988.

39/ Brief at 51.

Order No. 3223445 alleges a violation of 30 C.F.R. § 75.400 (accumulations, cited supra), page 31.

The narrative portion of the order reads as follows:

> Fine, dry coal dust was not cleaned up but allowed to accumulate on the floor of the intake roadway of the 103 longwall section. Beginning at the startline and extending inby for 57 feet, 10 feet in width, and ranging from 1 inch to .5 inches in depth [sic] the accumulation lay on the mine floor.

Order No. 3223446 alleges a violation of 30 C.F.R. § 75.403 (rock dust, cited supra, page 49.

The narrative portion of the order reads as follows:

> The rock dust applied to the mine floor of the intake roadway of 103 longwall section, beginning at the startline and extending inby for 57 feet, was not maintained in such quantity that the incombustible content of the combined dry mine dusts was [sic] at least 65 percent.
>
> One spot mine dust sample was collected to substantiate this condition.

Order No. 3223447 alleges a violation of 30 C.F.R. § 75.316, (ventilation plan), cited supra, page 25.

The narrative portion of the order reads as follows:

> The operator's approved ventilation system and methane and dust control plan was not being followed in the active intake roadway for 103 longwall section. Beginning at No. 7 slope and extending inby to the startline of 103 longwall, the roadway was not dampened with water or calcium chloride so as to promote compacting of the mine dusts.

The Evidence

Order No. 3223445

PHILLIP R. GIBSON, JR., an MSHA inspector, issued this order on January 20, 1988. As he stated in his order he observed dry, finely pulverized coal dust on the coal floor.

The readily visible dust was one to five inches deep, 57 feet long and 10 feet in width.

Rubber-tired diesel equipment had used the roadway. In addition, there was foot traffic from the six to twelve-man crew entering the 103 working section. There was dust in the air. The left rib had fallen to the mine floor.

The hazard here: accumulated coal dust could become airborne and enter the working section. If an explosion occurred at the face it would propagate as well as add fuel to the fire.

The inspector agreed that this violation involved the unwarrantable failure of the operator to comply because of the dryness, the fineness and the location of the coal dust. Also, the area was subject to a pre-shift examination. The pre-shift examiner stated no hazardous conditions were observed. The examiner should have seen the conditions and taken corrective action.

Mr. Gibson argued there was no mining in progress but there were jacketed power cables in the area. There was no other source that could have caused an explosion.

Exhibit R-16 shows all mine floor violations for 1987 involving accumulations. For the two-year period before Order No. 3223445 was issued the inspector found 104 violations of these orders, 33 related to this mine, so the remaining 77 must have related to the Dutch Creek Mine. Inspector Gibson interprets section 75.400 to the effect that there can never be an accumulation of coal on the mine floor.

Order No. 3223446

This order, a violation of § 75.403, involves a failure to apply rock dust. It encompasses the exact location of the previous order (No. 3223445).

The area in the intake air did not appear to be 65 percent rock dust. A sample was taken and sent to the lab at Mt. Hope, Virginia.

The purpose of the rock dust requirement is to inert combustibility of coal dust on the coal floor. The hazard: coal dust can help propagate a mine fire.

This particular roadway on an intake escapeway is used by diesel-powered equipment and miners traveling on foot.

Electrical power cables in the area could be a source of ignition. The area has 80,000 CFM moving across the face.

Order No. 3223447

This order constitutes a violation of the company's ventilation plan as contained in paragraph 3.10 on Exhibit P-14, involved an un-dampened roadway. The cited area involved 250 feet of roadway ending in the areas involved in the two previous orders.

On January 20, 1988, this area was dry, dusty and there was no calcium chloride on it. 40/ Calcium chloride causes dust particles to become compacted. When applied the mine dust is less likely to become airborne and that reduces the possibility of an explosion.

Cold weather inhibits the action of calcium chloride.

The inspector has issued previous citations concerning the lack of calcium chloride on the operator's roadways.

This area is subject to a pre-shift examination. But no violation had been noted by the pre-shifter.

RICHARD REEVES and GEORGE PREWITT testified for Mid-Continent and indicated the attempted removal of the accumulations with equipment resulted in further tearing up and deterioration of the mine floor. In order to abate the order to the satisfaction of the inspector, the accumulations had to be removed by hand (Tr. 3-640, 3-641).

To reduce any hazard Mid-Continent was in fact in the process of applying calcium chloride to the accumulations 41/ but they were having a difficult time getting it to compact (Tr. 3-707).

40/ Calcium chloride looks like large chunks of salt.

41/ Calcium chloride is a hydroscopic chemical which absorbs water from the surrounding mine atmosphere. When applied to the mine floor, this absorbed water bonds with the floor material creating a more compact surface which is less likely to generate dust which can become airborne in ventilating currents (Tr. 3-649).

Under the conditions at the Dutch Creek mines, treatment with calcium chloride is the only feasible course of action available to deal with accumulations such as these. At the time of this order there was, in the Rock Tunnels Project and the Dutch Creek No. 1 and No. 2 mines, approximately 33,000 feet of roadway (Tr. 3-719, 3-720). All of the roadways located in the Dutch Creek No. 1 Mine consist of a coal floor. 42/ In the course of transporting men and material through these entries with rubber-tired equipment, areas of the soft coal floor will be pulverized and accumulations will form (Tr. 3-620). 43/ To require Mid-Continent in addition to their regularly scheduled clean-up program, to remove all such accumulations by hand would, as testified by Reeves, require that all miners be continuously assigned to accumulation removal (Tr. 3-719).

At this time, however, the Coal Basin was experiencing a cold weather snap 44/ which further reduced the already low relative humidity of the mine air. With lower humidity, the low temperatures adversely affected the effectiveness of the calcium chloride by reducing the amount of moisture which the chemical will absorb and by increasing the evaporative effect the mine ventilation has on a roadway.

Under the activity schedule, material haulage is not usually performed on the same shift as the de-stress drilling (Tr. 3-483). At the time when these orders were issued there was no reason for diesel machinery to be traveling on the 103 intake entry roadway. During this time, the only diesel equipment observed by Gibson was the machines subsequently brought into the section to attempt to abate the orders (Tr. 3-644).

There were no power cables in the 103 intake. All electrical power cables entering the 103 longwall section were located in the lower, conveyor belt entry (Tr. 3-646).

42/ The Dutch Creek No. 1 Mine is located in a coal seam approximately 10 feet thick. Generally, entries in this mine are developed to a height of 8 feet. In order to take advantage of the predominately good roof conditions in this seam, the remaining coal is left on the floor rather than on the roof (Tr. 3-700).

43/ Contrary to the testimony of Inspector Gibson, Mid-Continent Coal Basin coal is not a hard coal. In fact, this coal is one of the softest in the world; under normal conditions, it is possible to crush Coal Basin with the human hand.

44/ On the date the present orders were issued, temperatures in the Coal Basin, while reaching a low of -14 degrees Fahrenheit, never exceeded a high of 16 degrees Fahrenheit (Exhibit R-11).

Discussion

Mid-Continent argues the inspector's first two orders were an unreasonable multiplication of charges.

It is clear from the record that the only aspect which can be seen as differentiating Order No. 3223445 from No. 3223446 is the regulatory sections under which they were written.

However, I reject Mid-Continent's position: the purpose of the Act is to provide for the safety of the miners. It would be contrary to the intent of the Act if an operator could avoid a citation on the basis that it violated a different mandatory standard.

The Commission has previously ruled that the Mine Act does not permit an operator to shield itself from liability because it violated a different, but related, mandatory standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981).

The company's view that the accumulations were de minimus is rejected. The inspector's testimony indicates such accumulations were, in fact, not minimal. The coal dust was one to five inches deep for 57 feet.

Inspector Gibson believed these accumulations presented a respirable dust hazard. Witness Prewitt, trained in respirable dust, expressed a contrary view (Tr. 3-652). It is clear no respirable dust tests were taken. Since Mid-Continent was not cited for violating the respirable dust regulation, it is unnecessary to explore this issue.

Concerning the allegations of unwarrantable failure: the evidence as to the initial two orders fails to indicate any aggravated conduct as required by Emery. As to the third order Mid-Continent was attempting to apply calcium chloride but the operator was largely frustrated by the cold temperature. All allegations of unwarrantable failure should be stricken since Mid-Continent's attempt to comply negates a finding of unwarrantability.

Mid-Continent's remaining views [45/] relate to assessing a civil penalty. In short, Mid-Continent claims there are no significant health or other hazards in these orders. But I reject Mid-Continent's position. The foregoing summary of the evidence indicate the violative conditions existed.

45/ Brief at 57.

The negligence involved in each order is low since relatively small areas of the violative condition existed. But I further consider the gravity high since the accumulations of dry coal dust can readily propagate a mine fire. It necessarily follows that I am not persuaded by Mid-Continent's evidence seeking to establish that its coal "needs help" to burn. This may be true of the coal itself but coal dust is certainly a more volatile product.

The operator's prior history as to violations of § 75.400, § 75.403 and § 75.316 have been previously discussed.

For the foregoing reasons Order Nos. 3223445, 3223446 and 3223447 should be affirmed under section 104(a) of the Act.

Exposed Electrical Wiring in Lamphouse

This portion of the decision addresses Order No. 3223124 alleging a violation of 30 C.F.R. § 77.502 46/

The narrative portion of the order reads as follows:

> The energized 110VAC [sic] circuits located in the wall about 4½ feet about the floor in hallway at old #1 mine lamp house was [sic] not properly maintained in that the recording gage had been removed creating an opening about 14 x 14 inches with the energized parts exposed.

46/ The cited regulation reads as follows:

> § 77.502 Electric equipment; examination, testing, and maintenance.
>
> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

The Evidence

On December 18, 1987, Douglas Elswick, an MSHA electrical specialist, inspected the old lamphouse. Someone had removed an amperage meter and left some of its energized parts exposed in the hallway. There were two bare wires 4½ feet off the ground. The hallway was in use and the wires had been exposed for three and one-half weeks.

The 110 volts are hazardous and can cause a fatality. The circuit should have been removed with the fixture.

The inspector concluded the violation was due to the unwarrantable failure of the operator to comply because of the location of the bare wires.

On cross-examination, the inspector agreed only a few miners would go into the area of the exposed wires (Tr. 2-369). The wires were in a hallway to the old maintenance and superintendent's office (Tr. 2-368). In addition, the Breeden 47/ House operator would have no reason to go in this hallway even though he used the shop which was a part of the overall, old 1 - Mine lamphouse (Tr. 2-368).

Discussion

Mid-Continent states 48/ this is an example of poor workmanship but the operator argues the severity was misjudged by the inspector. In particular, as the inspector stated, the energized 110-volt wiring was almost flush with the wall (Tr. 2-302).

I am not persuaded by Mid-Continent's argument. Whether the energized wires are "almost" flush or completely flush with a wall does not reduce the hazard.

Mid-Continent further states the inspector misjudged the Emery criteria relating to unwarrantable failure.

I agree. The record establishes only ordinarily negligence on the part of Mid-Continent. In the absence of aggravated conduct the allegations of unwarrantable failure should be stricken. The violation should be affirmed under section 104(a) of the Act.

47/ The Breeden House is part of the aggregate handling system which furnishes the cement material for the 103 longwall's packwalls.

48/ Brief at 58.

In assessing a civil penalty I consider the operator's negligence to be high. The operator removed part of a fixture but left exposed wires. This condition was permitted to exist for three and one-half weeks. Electrical wiring that is "almost" flush with the wall is still a potentially dangerous condition within the meaning of § 77.502.

I further consider the gravity of the violation to be high since energized wires of this type could cause a fatality or severe burns to a miner.

Mid-Continent's prior history is favorable. In the two years ending January 19, 1988, the company was assessed and paid for six violations of § 77.502. Before January 20, 1986, the company was assessed and paid for five such violations.

Distance Between 103 Longwall Face Shields and No. 2 Headgate Packwall

This portion of the decision addresses Order No. 3223121 alleging a violation of 30 C.F.R. § 75.200.

In its brief, Mid-Continent states [49/] this order was contested because of an erroneous belief that the inspector had incorrectly measured the distance between the packwall and the face shields. However, the evidence at the hearing established that the inspector correctly measured such distance. Accordingly, Mid-Continent has withdrawn its request for a hearing.

For good cause shown, Mid-Continent's motion should be granted. The order and proposed civil penalty should be affirmed.

Further Discussion of Civil Penalties

The criteria not heretofore discussed in connection with the assessment of civil penalties involve the size of Mid-Continent, the effect of penalties on the operator's ability to continue in business and whether the operator demonstrated good faith in attempting to achieve prompt abatement.

At the hearing the parties stipulated that Mid-Continent's size is evidenced by the production tons contained in the Secretary's proposed assessment (Exhibit A attached to petition).

49/ Brief at 60.

Based on the stipulation it appears the company is small since it produces 666,582 tons of coal; the mine involved here produces 277,194 tons.

The record here indicates Mid-Continent demonstrated statutory good faith by promptly abating the violative conditions.

Whether the penalties assessed here would affect the operator's ability to continue in business was an issue presented in the case. 50/

Mid-Continent's witness DAVID POWELL, financial planner and engineer, testified the company had incurred an eleven and one-half million dollar shortfall. As a result of this shortfall the company couldn't pay a $2500 penalty to MSHA but it could shift funds within its operating accounts. However, the company had no money in the bank (Tr. 17, 18, 37, In Camera, December 1, 1988), Witness Powell's limited testimony also indicated other indicia to the effect that the company was financially strapped.

Discussion

Mid-Continent's evidence does not persuade me that the penalties assessed herein would affect the company's ability to continue in business. As a threshold matter Powell's opinion is based on a financial business plan and various coal contracts (Tr. 4 - 8, In Camera (not sealed)).

I am not persuaded. As a threshold matter the financial plan itself and its underlying documents were not offered in evidence. In addition, more persuasive evidence of inability to continue in business would consist of such basic accounting documents as income tax returns and profit and loss statements.

In sum, Mid-Continent's proof failed on this issue.

50/ This issue arose in two In Camera Proceedings held respectively on December 1, 1988 and January 19, 1989. Due to the sensitive, proprietary and confidential evidence presented on December 1, 1988, the Presiding Judge sealed certain portions of the transcript (See order of March 22, 1989). Said evidence remains sealed subject to further order of the Presiding Judge or the Commission.

The In Camera aspect of the proceedings of January 19, 1989, was dissolved by order of the Presiding Judge on November 20, 1989.

The Secretary's proposed penalties for each of the violations range between a low of $1100 and a high of $1500.

In considering all of the statutory criteria herein I deem the penalties as assessed in the order of this decision are proper.

Brief

Mid-Continent has filed a detailed post-trial brief which has been most helpful in analyzing and defining the issues. I have reviewed and considered this excellent brief. However, to the extent it is inconsistent with this decision, it is rejected.

ORDER

Based on the findings of fact and conclusions of law as stated herein I enter the following order:

WEST 88-231

1. Order No. 3223449 (Frozen waterlines during winter): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $300 is assessed.

2. Order No. 2832627 (Weekly examination of seals and placing date, time and initials): this order and all proposed penalties therefor are vacated.

WEST 88-230

3. Order No. 2832624 (Failure to examine inaccessible seals): the allegations of S&S as well as unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $225 is assessed.

4. Order No. 2832625 (Failure to examine inaccessible seals): the allegations of S&S as well as unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $225 is assessed.

5. Order No. 3076182 (Eimco emergency full cut-off blocked with a paper rag): this order, as amended, is affirmed and a civil penalty of $1,500 is assessed.

6. Order No. 3076185 (Accumulations of coal in crosscut 47): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) of the Act and a civil penalty of $200 is assessed.

7. Order No. 3076189 (Eimco examinations, place of maintaining records): this order and all proposed penalties therefor are vacated.

8. Order No. 3076190 (Aluminum overcasts): the allegations of unwarrantable failure are stricken.

This order is affirmed under section 104(a) and a civil penalty of $175 is assessed.

9. Order No. 3076193: (Power-center, failure to record weekly notations): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $50 is assessed.

10. Order No. 3076194: (Power-center, failure to record weekly notations): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $50 is assessed.

11. Order No. 3076195: (Power-center failure to record weekly notations): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $75 is assessed.

12. Order No. 3223121 (Distance between longwall face shields and headgate packwall): respondent has withdrawn its request for a hearing.

This order is affirmed and the proposed civil penalty of $1,100 is affirmed.

13. Order No. 3223122 (Longwall return escapeway, whether passable): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $275 is assessed.

14. Order No. 3223124 (Exposed electrical wiring in lamp-house): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $250 is assessed.

15. Order No. 3223125 (Accumulations of loose dry coal in Crosscut 49): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $200 is assessed.

16. Order No. 3223159 (Lack of calcium chloride and water on mine floor): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a penalty of $150 is assessed.

17. Order No. 3223185 (Maintenance of Robert Shaw valve): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $125 is assessed.

18. Order No. 3223207 (Frozen waterlines during winter): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $125 is assessed.

19. Order No. 3223220 (Rock dusting in longwall on non-producing shift): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $150 is assessed.

20. Order No. 3223445 (Accumulations in and compaction of 103 longwall headgate roadway): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $275 is assessed.

21. Order No. 3223446 (Failure to apply rock dust on in-take roadway): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $275 is assessed.

22. Order No. 3223447 (Roadway not dampened with water or calcium chloride): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of $275 is assessed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 7 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-112 A.C. No. 46-05368-03501 A2L
v.	:	
	:	Prep Plant
APPALACHIAN BUILDERS CORPORATION, Respondent	:	

DECISION

Appearances: Glenn M. Loos, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for the Petitioner;
Charles S. Wickline, Appalachian Builders, Inc., Huntington, West Virginia, for the Respondent.

Before: Judge Maurer

The Secretary of Labor filed a petition for the assessment of civil penalties for four alleged violations of the mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977 (the "Act").

Pursuant to notice, this case was heard on July 27, 1989, at Morgantown, West Virginia. Inspector Miller testified for the government and Mr. Charles Wickline for the respondent.

At the hearing, prior to the taking of any testimony, the Secretary moved for the approval of an agreed upon settlement with respect to two citations, for the full amount of the proposed penalties, which is $50 per each. I thereafter approved the settlement concerning Citation No. 3132750 and 3135815. The remaining two citations to be considered, Citation Nos. 3135814 and 3135816 were tried before me and having considered the entire record herein and the contentions of the parties, I make the following decision.

Citation No. 3135814

This citation alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 77.208(d) and alleges as follows:

> The acetylene and oxygen bottles, on the ground floor of the Bird Dryer Building were not stored and secured in a safe manner, in that one oxygen bottle, and three acetylene bottles were not tied off and secured.

The inspector found and the respondent essentially admits that the gas bottles were standing unsecured at the time the inspector happened along and found them. The respondent goes on to state that these cylinders were empty and were being collected for moving to the storage area. They had been standing unsecured where the inspector found them for 10-30 minutes at that time and most likely would have been transported to the storage area and properly secured within the next half hour, according to the respondent's witness.

This is a violation of the cited standard. The next question is what reasonably could have been the consequences of this violative condition. The inspector feels it was an "S & S" violation in that the tanks could have been pushed over, ruptured by penetration and exploded. I find this to be an absolutely incredible allegation. To begin with, these are very substantial metal cylinders standing on a dirt-packed floor. They were spent, having little or no internal gas pressure and they were already capped. The worst case scenario that I can imagine is that one of these tanks would tip over and fall on someone's foot. This is not inconsequential, but I do not believe it will support an "S & S" finding. See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Accordingly, I find that Citation No. 3135814 was erroneously designated as an "S & S" violation.

Considering the criteria for a civil penalty in Section 110(i) of the Act, I find that a penalty of $20 is appropriate for this violation.

Citation No. 3135816

This citation alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 77.1104 and alleges as follows:

> Combustible materials such as oil and grease were present on the frame, motor and electrical components on the Le-Roi Air Compressor, located beside the prep plant.

The inspector testified that there was a fire hazard because of the accumulation of oil, grease and grime on the motor and electrical components of the cited air compressor. The inspector further opined that this "mess" was both combustible and flammable, and there was an ignition source present. The inspector believed this was an "S & S" violation because a fire, resulting in burns to somebody, or resulting in an explosion of the air compressor itself was reasonably likely to occur. If this fire and/or explosion did in fact occur, the inspector believed a serious injury was "possible".

Respondent's testimony regarding this citation concerned the type of grease and grime that was present. Mr. Wickline testified that this compressor uses both motor oil and pneumatic oil. He points out that motor oil is not highly flammable, but is combustible. Pneumatic oil, in his opinion, is either inflammable or "almost nonflammable", and a lot of the leaking on this air compressor is done by this pneumatic oil rather than the motor oil. Respondent also disagreed with the amount of "grease and grime" present. Mr. Wickline stated: "What I saw on the compressor was no more than you would if I opened the hood of my Blazer out there now, which was on a mine site yesterday" (Tr. 61).

Reduced to its essentials, respondent's argument is that there was not enough grease, oil, dirt and grime covering the compressor to create a hazard and secondly that the "mess" that was there was not proven to be combustible.

30 C.F.R. § 77.1104 states:

> Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

Based on this record, I believe the inspector can identify grease and lubricants when he sees them and I accept his opinion that these had accumulated on the cited air compressor to the point where they could create a fire hazard, and thus a violation is proven. However, in order to find that a violation is "significant and substantial" the Secretary also has the burden of proving a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., supra.

From the description the inspector gave of the violative condition, I believe it is somewhat of a stretch to find that this could create a fire hazard. To also find that a fire was a

reasonably likely outcome of the violative condition is an improbability in my opinion. Accordingly, I find that Citation No. 3135816 was erroneously designated as an "S & S" violation.

Considering the criteria for a civil penalty in Section 110(i) of the Act, I find that a penalty of $20 is appropriate for this violation as well.

ORDER

1. The designations of Citation Nos. 3135814 and 3135816 as significant and substantial violations are hereby stricken.

2. Citation Nos. 3135814 and 3135816 are affirmed as amended.

3. Citation Nos. 3132750 and 3135815 are affirmed as issued.

4. Respondent is ordered to pay the sum of $140 within 30 days of the date of this decision and order.

Roy J. Maurer
Administrative Law Judge

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DEC 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 89-108
	:	A.C. No. 36-00929-03650
v.	:	
	:	Docket No. PENN 89-109
TUNNELTON MINING COMPANY, Respondent	:	A.C. No. 36-00929-03652
	:	
	:	Docket No. PENN 89-131
	:	A.C. No. 36-00929-03654
	:	
	:	Marion Mine

DECISIONS

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of labor, Philadelphia, Pennsylvania, for the Petitioner; Joseph A. Yuhas, Esq., Tunnelton Mining Company, Ebensburg, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for seven alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers denying the violations, and the cases were heard in Indiana, Pennsylvania, with several other docketed cases during the hearing term October 31, and November 1, 1989.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations,

taking into account the statutory civil penalty criteria found in section 110(i) of the Act; and (3) whether the violations were "significant and substantial."

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

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

Stipulations

The parties presented stipulations in Docket No. PENN 89-109, and they agreed that these stipulations were equally applicable to all of the cases. The matters stipulated to are as follows:

1. Tunnelton Mining Company is a subsidiary of Pennsylvania Mines Corporation.

2. Tunnelton Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in these proceedings.

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The respondent demonstrated good faith in the abatement of the citations.

6. The assessment of civil penalties in these proceedings will not affect respondent's ability to continue in business.

7. The appropriateness of the penalties, if any, to the size of the respondent's business should be based on the fact that:

a. The Pennsylvania Mines Corporation annual production tonnage is 1,435,690;

b. The Tunnelton Mining Company's annual production tonnage is 733,668.

8. The respondent Tunnelton Mining Company was assessed 294 violations over 539 inspection days during the 24 months preceding the issuance of the subject citations.

9. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

Discussion

All of the contested citations in issue in these proceedings are section 104(a) citations, with "S&S" findings. During opening statements at the hearings, the parties confirmed that they agreed to settle all of the violations, and they presented arguments on the record in support of their proposed settlement disposition of the cases, including arguments in support of the civil penalty reductions for three of the citations. The respondent agreed to make full payment of the proposed civil penalty assessments for the remaining four citations.

With regard to Citation No. 2888721 (Docket No. PENN 89-109), the parties agreed that an injury was unlikely, and petitioner's counsel agreed to modify the gravity finding to non-S&S. In Docket No. PENN 89-108, the parties agreed that the cited battery charger in question was enclosed in a designated battery charging station, thereby reducing the likelihood of any hazard (Citation No. 2888733). With regard to Citation No. 2888734, concerning an inoperable warning device, the parties agreed that the cited machine was an inherently loud and slow-moving vehicle, thereby mitigating any potential hazard that it could not be heard or seen. In both instances, the inspector made "low negligence" findings, and the citations were abated within 10 and 25 minutes (Tr. 5-15).

Findings and Conclusions

After careful consideration of the pleadings and arguments made by the parties in support of the proposed settlement of the violations in question, including a review of all of the conditions and practices cited, and the civil penalty criteria found in section 110(i) of the Act, the proposed settlement dispositions were approved from the bench, and my decisions in this regard are herein reaffirmed. The violations, proposed civil penalty assessments, and the settlement amounts are as follows:

Docket No. PENN 89-108

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2888733	01/04/89	75.1107-1(a)(3)(ii)	$ 91	$ 68
2888734	01/06/89	75.1403	$ 74	$ 54

Docket No. PENN 89-109

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2888866	12/06/88	75.523-2(c)	$ 98	$ 98
2888721	12/06/88	75.400	$ 74	$ 37

Docket No. PENN 89-131

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2884557	02/08/89	75.202(a)	$ 85	$ 85
2884558	02/09/89	75.202(a)	$ 85	$ 85
2884559	02/09/89	75.202(a)	$112	$112

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of these decisions and order, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

DEC 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-150 A.C. No. 46-05976-03501 BCD
v.	:	
	:	Lobby No. 4 Mine
O'NEAL MACHINE & REPAIR, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $5,300 to $2,600 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $2,600 within 30 days of this order.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 14 1989

WINSTON MADDEN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-62-D
RONALD SUMMERS AND SUMCO, Respondents	:	BARB CD 88-46

SUPPLEMENTAL DECISION AND ORDER

Before: Judge Maurer

On October 18, 1989, I issued a default decision in this case. 11 FMSHRC 2027 (1989) (ALJ). Therein, I ordered the complainant to file a statement within twenty days requesting specific relief. The complainant did so on November 9, 1989, and no objection has been heard from the respondent.

Accordingly, respondents are ORDERED:

1. To pay to Complainant Madden within 30 days of the date of this order the sum of $9590.40, representing back wages from June 14, 1988, to December 10, 1988, plus $624.71 for reimbursible expenses for a total of $10,215.11, with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988).

2. To pay to Complainant Madden within 30 days of the date of this order, $4212.50 as reimbursement for attorney fees.

3. To pay to Complainant Madden within 30 days of the date of this order $75.24 as reimbursement for costs.

This order supplements the default decision issued by myself on October 18, 1989, and with that decision represents my final decision and order in this proceeding.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 14 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 89-109-M A.C. No. 09-00053-05522
v.	:	Clinchfield Mine
MEDUSA CEMENT COMPANY-DIV/ MEDUSA CORPORATION, Respondent	:	

DECISION

Appearances: Michael T. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Tom W. Daniel, Esq., Hulbert, Daniel & Lawson, Perry, Georgia, for the Respondent.

Before: Judge Maurer

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $126 for an alleged violation of the mandatory safety standard found at 30 C.F.R. § 56.14211(d).

Pursuant to notice, a hearing was held in Macon, Georgia on September 26, 1989, and post-hearing briefs with proposed findings have been filed by both parties, which I have considered along with the entire record in making this decision.

STIPULATIONS

The parties stipulated to the following, which I accepted at the hearing:

1. Medusa Corporation is the owner and operator of the subject mine, and subject to the Federal Mine Safety & Health Act of 1977; 30 U.S.C. §§801, et seq.

2. The Federal Mine Safety and Health Review Commission has jurisdiction in this case.

3. The inspector who issued the subject citation was a duly authorized representative of the Secretary and a true and correct copy of the subject citation was properly served on respondent.

4. Imposition of a penalty will not affect the operator's ability to continue in business.

5. The alleged violations were abated in good faith.

6. The operator's history of prior violations, as shown on the computer printout (Secretary's Exhibit 1) is correct; and the operator's size is large.

7. If a violation of the standard exists as cited, the proposed penalty of $126 is a reasonable penalty.

8. The Lorain mobile crane had a "mechanical pawl locking device" in good working order and hydraulic check valves in place on both hydraulic lifting cylinders at the time of the inspection.

DISCUSSION AND FINDINGS

Pursuant to a telephone safety complaint, MSHA Inspector Grabner conducted an inspection of the respondent's facility on February 15, 1989, and as a result issued three citations, only one of which is contested herein.

Citation No. 2857907, issued on February 15, 1989, alleges as follows:

> The Lorain Mobile Crane Model No. LRT-40 U, Serial No. 36706 was being used to raise, and lower men in a work platform which was attached to swivel hook load wire rope. No provision was provided to prevent free and uncontrolled descent of the work platform.

The citation charges a violation of 30 C.F.R. § 56.14211(d) which provides:

> Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

The inspector determined that there were adequate functional load-locking devices on the crane, but not on the work platform itself. He testified that there were no devices to prevent free and uncontrolled descent of the work

platform in certain foreseeable situations. He opined that the wire rope could snap if it were inadvertently drawn up to the top of the crane's extendable boom, in which event the ball and hook attached to the end of the wire rope would run into the shieve wheel on the end of the boom, and likely separate.

If that occurred, the work platform and everybody on it would plummet to earth. There would obviously be serious injuries likely to result if the work platform was more than 15-20 feet above ground level when and if this occurred.

As a matter of fact, a scenario very much like this did occur on February 10, 1989, when two of the respondent's employees were working approximately thirty feet up in the air with the work platform attached to the crane by the wire rope and swivel hook, in the pre-abatement configuration.

The two employees testified at the hearing. They related a harrowing tale that the crane's extendable boom started to go out on its own, apparently uncontrollable by the operator. They went from about 30 feet above the ground to approximately 60 feet up in the air before the boom stopped. Most importantly, as the boom extends out, the wire rope shortens up relative to the end of the boom. By the time they stopped, the ball and hook arrangement on the end of the wire rope was only a couple feet away from the end of the boom and the shieve wheel located there. Mr. Hair opined that the wire rope supporting the work platform would have snapped if the ball and hook had dead-headed against the shieve. Of course, had this happened the two employees would have fallen some sixty feet to the ground.

The work platform is the raised component of mobile equipment spoken to in the cited regulation, the crane being the mobile equipment. The work platform itself must be provided with a functional load-locking device or a device to prevent free and uncontrolled descent to comply with the standard. It was not, and therefore a violation exists. Furthermore, I find that it is a "significant and substantial" violation. Mathies Coal Co., 6 FMSHRC 1, 3, 4 (January 1984)

Based on the entire record, I further conclude that the violation was serious and was caused by a moderate degree of negligence. Additionally, under the criteria in section 110(i) of the Act, I find an appropriate penalty for the violation is $126, as originally proposed.

ORDER

Accordingly, it is ORDERED that Citation No. 2857907 IS AFFIRMED.

It is further ORDERED that the operator pay $126 within 30 days from the date of this decision as a civil penalty for the violation found herein.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 18 1989

ROCHESTER & PITTSBURGH COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 89-64-R
	:	Order No. 2890946; 12/22/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No PENN 89-78-R
	:	Order No. 2890947; 12/22/88
	:	Greenwich Collieries #2 Mine
	:	Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 89-132
	:	A. C. No. 36-02404-03749
v.	:	
	:	Greenwich Collieries #2 Mine
ROCHESTER & PITTSBURGH COAL COMPANY, Respondent	:	

DECISION

Appearances: Paul Inglesby, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Joseph Yuhas, Esq., Rochester & Pittsburgh Coal Company, Ebensburg, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. §§ 75.1722(c) and 75.303(a). The Respondent has contested the issuance of Order Nos. 2890946 and 2890947, and has filed an Answer, on May 5, 1989, with regard to the Petition for Assessment of Civil Penalty, which had been filed on April 27, 1989. Pursuant to notice, a hearing in this matter was held in Ebensburg, Pennsylvania, on September 26, 1989. At the hearing, Vincent James Jardina, Jr. testified for Petitioner, and Robert John Elick, William Loughran, and Michael S. Skarbek testified for Respondent. Proposed Findings of Fact and Briefs were filed by the Respondent and Petitioner on November 14 and 21, 1989, respectively.

Stipulations

At the hearing, the Parties indicated that the facts that they stipulated to, as set forth in Respondent's Response to the Prehearing Order filed June 7, 1989, are as follows:

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation and managed by Respondent, Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The Respondent demonstrated good faith in the abatement of the Orders.

6. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the facts that:

a. The Respondent company's annual production tonnage is 9,386,168;

b. And that the Greenwich Collieries No. 2 Mine's annual production tonnage is 1,411,039.

8. Greenwich No. 2 Mine was assessed 914 violations over 1,250 inspection days during the 24 months preceding the issuance of the subject Order.

9. The Parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

Findings of Fact and Discussion

Order No. 2890946

I.

On December 22, 1988, at approximately 8:30 in the morning, Vincent James Jardina, Jr., inspected Respondent's M-16 Section. He observed that the guarding for the No. 1 belt entry tail consisted of two pieces of mesh metal screen. The left side was standing "partially upright," but was bent and twisted a "little bit" (Tr. 17), and the right side was "smashed and flattened down almost to ground level" (Tr. 18). He indicated that with the use of a ruler, the distance between the guard and the pulley was measured at 11 to 18 inches, and the two pieces of the guard were "approximately" 15 inches apart (Tr. 19). William Laughran, a beltman employed by Respondent, testified that when Jardina wrote the Order in question, he (Laughran) was present and stood 2 to 3 feet or less from the guarding. He indicated that the left side did not have any damage, and the right side was just bent down. He did not take any measurements, but testified that the guarding was from 4 to 6 inches away from the tail, and the two pieces of the guarding were 2 to 4 inches apart. I place more weight on Jardina's testimony due to my observations of his demeanor, and also based upon the fact that his testimony finds corroboration in his detailed contemporaneous notes. Also, I find his testimony as to the measurement of various distances involved to be reliable, as he used a ruler in making the original measurements.

According to Jardina, the end of the guarding, where it contacted the tail, was leaning in an upright position, but none of the guarding was secure in any way. This testimony has not been rebutted by any of Respondent's witnesses or by any documentary evidence. Accordingly I find, that the guarding in question was not secured in place. Hence, I find that Respondent herein violated 30 C.F.R. § 75.1722(c), as cited by Jardina, which provides, as pertinent, that ". . . guards shall be securely in place while machinery is being operated."

II.

According to Jardina, he observed a miner walking across the No. 1 belt entry, and going in the direction of the No. 2 belt head. He indicated that this would be the shortest route between those two areas. He also observed two shovels in the area, one

being approximately 2 feet to the left of the tail. Two beltmen were in the area, and had the responsibility of cleaning the belt at least once a shift. According to Jardina, depending upon the amount of coal accumulation, shoveling to clean the belt could take up to an hour, and cause the miner shoveling the coal to get up to within a foot of the belt. Further, according to Jardina, a miner greasing the belt would be in proximity to the tail and the exposed fin portion. In this connection, he indicated that he did not observe any extension to the grease hose. I find more credible the testimony of Loughran, who actually performed the greasing. Loughran indicated that the hose to be greased extended out a foot, and that the bearings were guarded.

Jardina indicated that it would be easy to lean on the guarding and make contact with the moving tail conveyor, as there was nothing securing the guarding. He opined that due to the fact that the guard was not secured, and the area was "very wet and slippery" (Tr. 22), it was "very likely" (Tr. 23) that those working in the area could make contact with the belt conveyor tail.[1/] He subsequently testified that, if the tail is not adequately guarded, contact with the tail conveyor is "reasonably likely" (Tr. 29), "by passing by, slipping, shoveling, the pulley being able to pull their shovel in and their arm, there could be a loss of a hand or even an arm, it could even pull them into the pulley" (Tr. 29). He was asked, on cross-examination, how a hand or arm could get caught in the belt. He answered as follows: "In that situation, cleaning the belt which I've shown on --- as I said, on the side view. But let's look at another situation where hazard exists also" (Tr. 82) (sic).

He also testified that in cleaning the side part of the pulley, contact can be made with "the moving fin part of the pulley" (Tr.73). However, this item was not described by Jardina, nor did he testify as to its dimensions and specific location. He also indicated that a shovel could be pulled in the direction of the belt, but did not testify as to the speed of the belt, nor as to the likelihood and nature of any injuries as a consequence of this occurrence.

Jardina testified that he evaluated the violation as significant and substantial, because there was a violation of a mandatory safety standard and ". . . the conditions that prevailed at the time were evident that a serious injury could occur, . . . and the fact also that the belt was in operation at the time and the condition of the guarding" (Tr. 35) (sic).

1/ Although Jardina used the term "moving machine parts," (Tr. 23), he subsequently indicated that this term is meant to be "the No. 1 belt conveyor tail" (Tr. 34). Accordingly, I find that, as used by Jardina, these terms are synonymous.

In order for it to be found that the violation herein was significant and substantial, it must be established, in addition to an existence of a violation of a mandatory safety standard, that there was ". . . (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." (Mathies Coal Co., 6 FMSHRC 1, at 3-4 (1984)).

I do not place much weight on Jardina's testimony, as it does not set forth in sufficient detail the basis for his opinions and conclusions. Specifically, I find that Petitioner has failed to establish that there was a reasonable likelihood that, as a consequence of the violation herein, there was a hazard contributed to, with a reasonable likelihood of a resulting injury of a reasonably serious nature. Accordingly, I find that it has not been established that violation herein was significant and substantial. (See, Mathies Coal Company, supra.)

III.

The record is devoid of any evidence establishing, with any degree of specificity, the length of time the violation herein existed. According to Jardina, at about 8:30 a.m. on the morning of December 22, when he informed two beltmen who were in the area, that the guarding was not securely in place, one of them said, ". . . that wasn't like that yesterday" (Tr. 17). Robert John Elick, a supervisor for Respondent, indicated that he worked the 4:00 p.m. to midnight shift on December 21, 1988, and in the course of his duties examined the M-16 tail between 9:30 and 9:40 p.m., and that "to the best of my knowledge" the guarding was in place (Tr. 113). He also indicated that "to my knowledge," no work was performed at the tail after he made his examination (Tr. 114). He indicated, however, that on that shift, two mechanics had dragged a cable out of the section, and in so doing could possibly have hit the guarding with the cable. In this connection, Jardina indicated that he noted the area near the tail was "worn from crawling and dragging feet or equipment. . . " (Tr. 28).Loughran, who was on the section at approximately 7:15 a.m., did not see the guarding until Jardina cited the condition.

According to Jardina, when he observed the guarding, the belt was in operation, and no corrective action had been taken to secure it. He indicated that records he examined prior to going underground on December 22, 1988, indicated that a preshift examination of the M-16 belt tail track had been performed, and

it was noted that there were no hazardous or unsafe conditions. According to Jardina, the No. 1 belt entry tail was exposed, and was seen by him from a man trip as he approached the area.[2/]

Michael S. Skarbek testified that on December 22, 1988, between 5:00 and 6:15 a.m., he performed a preshift examination of the M-16 Section, including the belt entries. He said that he got off the man trip at the tail area, checked the head area, but did not specifically remember the guarding, and did not specifically remember looking at it. On cross-examination, he indicated that on a preshift examination he always checks the guarding, and does not recall it being down. He said that on the second shift, a cable had been pulled out of the section. He opined that it was possible that the cable could have caught the guarding and bent it. He indicated that when the belt started at the commencement of the third shift, it could have further caught the guarding.

I find, based upon Jardina's testimony, that the unsecured condition of the guarding was exposed. However, since the evidence does not establish the guarding in question was not secured at the time of the preshift examination, I can not find that Respondent was negligent in this regard to any significant degree. In the same fashion, as the record does not clearly establish when the violation herein occurred, and how long it had been in the condition observed by Jardina, I do not find that the violation herein was as the result of Respondent's "aggravated conduct." As such, I find it was not been established that the violation herein was as the result of Respondent's unwarrantable failure. (See, Emery Mining Co., 9 FMSHRC 1997 (1987)).

I find that, should a person come in contact with the moving belt, as a consequence of the guarding herein not having been secure, there could have been a serious injury. I further find, that Respondent was negligent to a nonsignificant degree concerning the violation herein. I have also taken into account the remaining statutory factors set forth in section 110(i) of the Act, as stipulated to by the Parties. Considering all of the above, I conclude that a penalty herein of $100 is appropriate for the violation found herein.

2/ In contrast, Loughran indicated that at 7:30 a.m., on December 22, 1988, he passed the area in question in an open man trip, and did not notice the guarding. He said that it is not possible to see the tail piece from the man trip. Based on observation of the witnesses' demeanor, I accept Jardina's testimony that when he traveled on the man trip, he was able to see the area in question.

Order No. 2890942

Jardina indicated that he also issued Order No. 2890942 alleging a violation of 30 C.F.R. § 75.303(a), in that the Operator failed to discover and correct the hazardous condition at the tail, i.e., the fact that the guard was not secure.

According to Skarbek, he did perform an inspection of the working section of M-16 3 hours prior to commencement of the second shift, but does not recall looking at the guarding. He also indicated that he did not specifically recall the guarding being apart or down. No indication was made in the examination book that any hazardous or unsafe conditions were discovered at the preshift examination.

Jardina testified that the date board, which indicated that an examination had been conducted in the belt tail area, was approximately 10 feet from the defective guard, and that the No. 1 tail was not hidden or concealed. Jardina conducted his inspection of this area at approximately 8:26 a.m., on December 22, 1988, less than 2 and 1/2 hours after Skarbek had been in the area. It was Jardina's opinion that it would have been impossible to miss the condition of the defective guard because it was neither concealed nor hidden, was in plain view, and could be seen from either a moving man trip or by walking up the track.

In essence, section 75.303(a), supra, requires a mine examiner to notify the Operator if he ". . . finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such an area. . . ." (emphasis added). Thus, in order for Petitioner to prevail, and establish a violation of section 75.303(a), supra, Petitioner must establish, by a preponderance of the evidence, that there was a hazardous condition that should have been noted. I conclude, for the reasons set forth, infra, II., that the record does not contain sufficient evidence to establish the length of time the violative condition existed. I thus conclude that Petitioner has failed to establish that, at the time of Skarbek's preshift examination, the guarding was not secured and was in the condition observed subsequently by Jardina. I therefor find that it has not been established that Respondent violated section 75.303(a), supra.

ORDER

It is ORDERED that Order No. 2890947 be DISMISSED. It is further ORDERED that Order No. 2980946 be AMENDED to a section 104(a) Citation to reflect the fact that the violation was not the result of Respondent's unwarrantable failure, and it

shall further be AMENDED to reflect the fact that the violation therein was not significant and substantial. It is further ORDERED that, within 30 days of this Decision, Respondent shall pay $100 as civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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ROBERT SIMPSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 83-155-D
KENTA ENERGY, INC. and ROY DAN JACKSON, Respondents	:	

PARTIAL DECISION ON REMAND
ORDER PERMITTING DISCOVERY

Before: Judge Broderick

On September 29, 1989, the Commission remanded this case to me "for resolution of whether the attorney's fees being sought for administrative and court appeal proceedings are properly awardable under the Mine Act and, if so, for all appropriate findings of fact relevant to determination of the amount to be awarded." The Commission further found "it appropriate also to determine at this time the amount of additional back pay due since December 17, 1984, with the amount of interest due thereon, calculated according to the procedures set forth at 54 Fed. Reg. 2226 (January 19, 1989)."

I interpret these instructions to mean that I should determine the amount of attorney's fees to be awarded if I conclude that they are "properly awardable," and that I should determine the additional back pay and interest due Complainant at this time.

On October 6, 1989, I issued an order directing Complainant to submit on or before November 13, 1989 (1) a legal memorandum on the question whether attorney fees for administrative and court appeal proceedings are properly awardable under the Mine Act; (2) a statement of attorneys fees claimed after December 17, 1984; and (3) a statement of back pay due Complainant since December 17, 1984, with interest calculated according to the procedures set forth in 54 Fed. Reg. 2226 (January 19, 1989). Respondent was ordered to reply to Complainant's submissions on or before December 1, 1989.

On November 16, 1989, Complainant filed a memorandum on the legal issue presented, a statement of attorney fees and expenses

for work performed from December 18, 1984 through November 15, 1989, and a motion for leave to take discovery on the question of the amount of back pay due Complainant since December 17, 1984. On December 4, 1989, counsel for Roy Dan Jackson replied that my order had been forwarded to Mr. Jackson requesting "his instruction regarding his position on this issue." Jackson did not reply and counsel states that he "is unable to state Mr. Jackson's position."

I. THE ACT

Section 105(c)(3) of the Mine Act provides in part:

> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

The legislative history of this provision makes it clear that it was intended to make the Complainant whole, to put him in the position, as nearly as possible, which he would have been in had the discriminatory action not have occurred. See S.Rep. No. 95-181 at 37 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

The language of the Act, supported by the Legislative history plainly requires the reimbursement of attorney fees reasonably incurred in appellate proceedings where such proceedings are necessary to "sustain Complainant's charges."

II. SOME CASES

Although not specifically included in the remand instructions, the question may be raised as to whether the trial judge is the proper tribunal to determine and award attorney fees for appellate proceedings. It can reasonably be argued that the appellate tribunal, Commission or Court, is in better position to determine whether services for which a fee is claimed are necessary, and the worth of those services. For example, in my award of fees following the trial of this case, I made a judgment concerning the necessity for two attorneys being employed to perform certain services. The claim for fees on appeal includes a claim for the services of two attorneys. I have no way, absent a full scale hearing, and probably not then since Respondent has not replied to the claim, to determine the necessity and propriety of two attorneys being utilized on appeal. In Craik v.

Minnesota State University Board, 738 F.2d 348 (8th Cir. 1984), the 8th Circuit Court of Appeals said, "Normally we decide the question of fees and costs on appeal ourselves. We are naturally more familiar than the District Court with the nature and quality of the services rendered on appeal; the case is relatively fresh on our minds; and our decision on the question can furnish guides for the District Court to follow when it decides the amount of fees and costs for services rendered before it." Id., at 348. This holding was based in part on an 8th Circuit Court Rule providing that the Court of appeals may either determine for itself an appropriate attorney fee award for appellate services or remand to the District Court for such a determination. There is no such court rule in the Court of Appeals for the District of Columbia Circuit.

In a private action under section 4 of the Clayton Act, the Supreme Court held that the Act authorized an award of counsel fees for legal services performed at the appellate level and that "the amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." Perkins v. Standard Oil Co. of California, 399 U.S. 222, 223 (1970). In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court affirmed a Court of Appeals decision which affirmed a District Court's finding that the conditions in a State prison system constituted cruel and unusual punishment in violation of the 8th and 14th Amendments. The District Court issued remedial orders including an award of attorney's fees. The Court of Appeals affirmed and itself assessed an additional attorney fee for services on appeal.

In Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), the Court of Appeals remanded the case to the District Court for redetermination of an attorney fee award and for determination of a reasonable fee for time spent "pursuing this appeal." See also Kingsville Independent School District v. Cooper, 611 F.2d 1109 (5th Cir. 1980). In Toussaint v. McCarthy, 826 F.2d 901 (9th Cir. 1981), and Yates v. Mobile County Personnel Board, 719 F.2d 1530 (11th Cir. 1983), the Court of Appeals determined the attorney fee for legal services on appeal.

Finally, the marathon proceeding of Glenn Munsey v. Smitty Baker, et al., may provide a clue as to the law of the Commission and the District of Columbia circuit on this issue. The case arose under section 110(b) of the Coal Mine Health and Safety Act of 1969 and was originally heard in the Department of the Interior. Section 110(b)(3) of the Coal Act provides that when an order is issued finding discrimination, "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) . . . reasonably incurred by the applicant for,

or in connection with the institution of such proceedings, shall be assessed . . ." This is almost identical to the language in section 105(c)(3) of the Mine Act. In 1978, the D.C. Circuit remanded the Munsey case to the Commission to determine what Munsey's remedy should be and who must provide it. Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978). The Commission remanded the case to the ALJ "for assessment of attorney's fees and other costs incurred by Munsey in this litigation." Munsey v. Smitty Baker, 2 FMSHRC 3463 (1980). The ALJ awarded back pay, attorney fees and legal expenses including fees and expenses in conection with proceedings before the Commission and the Court of Appeals but denied fees for services performed by Munsey's attorney while he was in the employ of Munsey's union as "inappropriate." 3 FMSHRC 2056 (1981). The case returned to the D.C. Circuit which reversed the determination of the ALJ that Munsey could not be awarded costs or attorney fees for the period during which he received free representation by staff counsel of the United Mine Workers, but otherwise affirmed the ALJ. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983). The Commission later remanded the case to an ALJ for further proceedings consistent with the Court's decision. 5 FMSHRC 991 (1983). On remand the ALJ awarded further legal fees for services including services before the Commission and the Court of Appeals. Thus both the D.C. Court of Appeals and the Commission upheld the award made by the Administrative Law Judge of attorney fees for services on appeal to the Commission and from the Commission to the Court of Appeals. Based on the history of the Smitty Baker case and on the Commission's remand of this case to me, I conclude that I can properly determine and award attorney fees for legal services on appeal.

III. FEES AND EXPENSES

Complainant seeks an award of attorney fees for 403.2 hours during the period December 18, 1984 through November 15, 1989. The services are billed at an hourly rate of $125. I have no reason to question this rate as the market rate for the services performed, and Respondent has not objected to it. I note that I approved an hourly rate of $75 for the work performed prior to December 1984. An increase in the rate seems justified on the following bases: (1) the attorneys are more experienced; (2) the work was more complex, involving appeal from an adverse Commission decision; and (3) inflation in attorney fees during the five year interim. Therefore, I find that $125 is an appropriate hourly rate for the services performed after December 17, 1984, and will approve it.

I have carefully reviewed the statement filed by Complainant's attorneys, Tony Oppegard and Stephen A. Sanders. Oppegard claims fees for 316.1 hours, Sanders for 87.1 hours.

There is nothing on the face of the statements which would cause me to doubt the validity of the number of hours expended or the necessity or propriety of the work described. I am not in a position to conclude that there was need for both attorneys to participate in brief preparation, oral argument before the Commission, and oral argument before the Court of Appeals. But neither can I conclude that it was not necessary. The factual and legal isues were complex. The attorney's employment was contingent. The result was very favorable to Complainant. In the absence of any reply to Complainant's statement, I find that Complainant's attorneys reasonably expended 403.2 hours on this case between December 17, 1984 and November 15, 1989.

Complainant claims $2,120.31 as other litigation expenses. The itemized expenses are reasonable and reimbursement is awarded.

ORDER

Respondents Kenta and Jackson are ORDERED to pay Complainant's attorneys the sum of $50,400, as attorney fees and $2,120.31 as litigation expenses. These amounts are in addition to the attorney fees and expenses which I ordered Respondents to pay in my decision issued February 26, 1985.

IT IS FURTHER ORDERED that Complainant's Motion for Leave to Take Discovery on the issue of back pay due Complainant since December 17, 1984, is GRANTED. Following the discovery, Complainant shall file his claim for back pay on or before March 19, 1990. Respondent shall file a reply to said claim on or before April 6, 1990.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

DEC 20 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-332 A.C. No. 05-03455-03561
v.	:	Southfield Mine
ENERGY FUELS COAL, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown and Tooley, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of penalties by the Secretary of Labor pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820 (1977) (herein the Act). At the outset of the formal hearing on the record on November 28, 1989, counsel reached an amicable resolution of all 10 enforcement documents (Citations) involved. Pursuant to the agreement of the parties, Section 104(a), Citations numbered 2875361 and 2874012 are to be vacated on the basis of insufficient evidence to support the same. As to 3 of the Section 104(a) Citations, numbered 2874013, 2874015 and 2874032, the "significant and substantial" designations are to be deleted and the initially-proposed assessments ($68, $74, and $74, respectively) are to be paid in full by Respondent. As to the remaining 5 enforcement documents, all likewise are Section 104(a) Citations which are to be affirmed without modification and the initially-proposed penalties therefor are to be paid in full by Respondent as follows:

Citation	Penalty
2874014	$98
2874017	20
2874020	98
2874029	68
2874030	68

The settlement of the parties is found appropriate and supported in the record, the approval thereof from the bench (T. 8) is here affirmed, and the penalties (totalling $568) agreed to by the parties are here assessed.

ORDER

Citations numbered 2875361 and 2874012 are VACATED.

Citations numbered 2874013, 2874015, and 2874032 are MODIFIED to delete the "Significant and Substantial" designations thereon, and are otherwise AFFIRMED.

Citations numbered 2874014, 2874017, 2874020, 2874029 and 2874030 are AFFIRMED.

Respondent, if it has not previously done so, shall pay to the Secretary of Labor within 30 days from the date of this written decision the total penalties hereinabove assessed of $568.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204

DEC 20 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 89-28 A.C. No. 05-03455-03562
v.	:	Southfield Mine
ENERGY FUELS COAL, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown and Tooley, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of penalties by the Secretary of Labor pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820 (1977) (herein the Act). At the commencement of hearing a settlement was consummated and announced by the parties resolving all three enforcement documents involved. Pursuant to the agreement reached, Section 104(a) Citation No. 2873988 is to be modified to delete the "significant and substantial" designation on the face thereof and Respondent is to pay in full the initially-assessed penalty of $68; Section 104(d)(1) Citation No. 2873989 is to be affirmed and Respondent is to pay in full the initially-assessed penalty of $700; and as to the third enforcement document, Section 104(d)(1) Order No. 2873990, such is to be modified to a Section 104(a) Citation and the penalty reduced from $800 to $400. The approval of the settlement from the bench (T. 5-6) is here affirmed, the settlement is found appropriate and supported in the record, and the penalties agreed to by the parties are here assessed.

ORDER

Citation No. 2873988 is modified to delete the "significant and substantial" designation thereon.

Order No. 2873990 is modified to change its nature and issuance authority from a Section 104(d)(1) Withdrawal Order to a Section 104(a) Citation.

Respondent, if it has not previously done so, shall pay to the Secretary of Labor within 30 days from the date of this written decision the total penalties herein assessed of $1168.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 26 1989

DAVID THOMAS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-13-D
v.	:	
	:	BARB CD 88-16
AMPAK MINING, INC., JOHNSON COAL COMPANY, INC., SOUTHERN HILLS MINING CO., INC: Respondents	:	Mine No. 1
GEORGE ISSACS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-14-D
v.	:	
	:	BARB CD 88-34
AMPAK MIING, INC., JOHNSON COAL COMPANY, INC., SOUTHERN HILLS MINING CO., INC: Respondents	:	Mine No. 1

DECISION

Appearances: Tony Oppegard, Esq., and Stephen A. Sanders, Esq. Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky for the Complainants;
Geary Burns, Vice President, Ampak Mining, Inc., Van Lear, Kentucky for Respondent Ampak Mining, Inc.,
G. Graham Martin, Esq., Martin Law Offices, P.S.C., Prestonsburg, Kentucky for Respondent Johnson Coal Company, Inc.

Before: Judge Melick

These cases are before me upon the Complaints of David Thomas and George Isaacs against Ampak Mining, Inc., (Ampak), Johnson Coal Company, Inc., (Johnson), and Southern Hills Mining Company, Inc., (Southern Hills), pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging separate acts

of discrimination in violation of Section 105(c)(1) of the Act.[1]/

Mr. Thomas argues that Ampak violated Section 105(c)(1) of the Act by demoting him on December 21, 1987, in retaliation for his refusal to perform unsafe work and for his refusal to sign a training certificate for training he had not received. Thomas also alleges that had he not been discriminatorily demoted in December 1987 he would not have been laid off by Ampak on February 15, 1988, and that, therefore, his lay off likewise violated Section 105(c)(1) of the Act.

Mr. Isaacs argues that he was laid off by Ampak on April 22, 1988, because of his many protected activities, including repeated safety complaints, refusal to perform unsafe work, and by giving deposition testimony in a separate 105(c) discrimination proceeding involving Ampak.

In their post-hearing briefs the Complainants withdrew their Complaints against Southern Hills on the grounds that it is purportedly no longer in business, has no assets and could not in any event provide any relief. Under the circumstances the Complaints in case Docket Nos. KENT 89-13-D and KENT 89-14-D against Southern Hills Mining Company, Inc., are dismissed.

Complaint of David Thomas - KENT 89-13-D

On October 17, 1987, Ampak assumed operations at the former Johnson Coal Company No. 11 mine, located in Knott County,

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[1]/ Section 105(c)(1) of the Act provides as follows: No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Kentucky, under contract with Johnson Coal. Before Ampak took over David Thomas had worked for Johnson Coal for almost a year as a continuous miner operator at the mine .

When Ampak took over, Thomas was assigned to the third shift as a continuous miner operator at a rate of $12.90 per hour. He continued to work on the third shift until mid-December, 1987, when Johnny Pittman, Ampak's general mine foreman, transferred him to the second shift. When Thomas reported for his first day of work on the second shift, the section foreman, Alger Jent, told him to replace George Isaacs on the continuous mining machine and to tell Isaacs to operate the roof bolting machine. When Isaacs balked at operating the bolting machine, Jent assigned Thomas to help James Sexton on the roof bolter.[2/]

Thomas worked as the roof bolting machine helper for about 3 1/2 hours until Sexton injured his back and had to leave the mine. The other roof bolting machine operator on the second shift, Dennis Rucker, was off work due to an injury so Ampak was left without either of its regular bolting machine operators. Jent therefore asked Thomas to operate the roof bolting machine as best he could. When Thomas told the foreman that he was not a certified bolter and was afraid to operate the machine, Jent told Thomas to just do the best he could for the remainder of the shift.[3/] Jent also assured Thomas that he would not have to operate the bolting machine again. Thomas then agreed.

Thomas operated the roof bolting machine for the remaining 2 hours of the shift. According to Thomas he bolted slowly because of his unfamiliarity with and fear of the bolting machine. He was not given any training before bolting and he received no supervision while operating the bolter. He

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[2/] Isaacs testified that he objected to operating the roof bolting machine because the machine's "dust motor", which vacuums up loose coal dust, was inoperative and its boom was defective, which made the roof bolter difficult to control. These defects were also reported by the bolting machine's regular operator, Dennis Rucker, and by Thomas.

[3/] Thomas testified that he had not operated a roof bolting machine or received any roof bolter training for about 3 years. 30 C.F.R. § 48.7 requires a mine operator to provide task training, prior to the performance of assigned work, to, among others, any roof control operator who has not performed the assigned task during the preceding 12 months. Thomas explained that he was afraid to operate the machine because he had never before used resin roof bolts and did not know how to properly install them, because the dust collector was not working, and because the defective head on the bolter posed a safety hazard.

maintains that he did not then know of his right to refuse an unsafe job assignment, including a task for which he had not been trained.

At the end of the shift, Thomas maintains that he told Section Foreman Jent that he would not operate the bolting machine again because he was not certified to do so and because he was afraid of the machine due to its poor operating condition. Jent repeated his earlier promise that Thomas would not have to operate the bolting machine again, and stated that the crew would have another bolting machine operator for the next working shift.

Before the start of the 2nd shift the following day, Thomas was standing with other crew members in the mine shop. According to Thomas, Jent approached Thomas and told him he would have to bolt again that day. Thomas refused, telling Jent that he was not certified to operate the roof bolting machine that he was afraid of the bolter, and that he would not bolt double (40 foot) cuts.

The roof control plan for the Ampak No. 1 mine provided that continuous miner cuts could be no more than 20 feet in length. However, the evidence shows that since the end of November, 1987, Alger Jent had been ordering the continuous miner operators on the 2nd shift to take 40 foot cuts (also called "double" or "deep" cuts). It is not disputed that this practice was extremely dangerous for the bolting machine operator because a 40 foot cut exposed him to twice the area of unsupported top. A deep cut also created greater instability in the mine roof which also increased the chances of a roof fall. Double cutting saves time however because the crew does not have to move the mining equipment as frequently and could theoretically increase production.

When Thomas initially refused Jent's work assignment, Jent left the shop and went to the mine office located across the parking lot from the shop. When Jent returned, he handed Thomas a training certificate that had been filled out to indicate that Thomas had received task training as a roof bolting machine operator. Jent told Thomas to sign the certificate, but Thomas refused because, as he told Jent, he had not received the training. According to Thomas, Jent then told him that if he wanted to stay at Ampak he would have to bolt 40 foot cuts.

Jent left the mine shop again and when he returned told Thomas that Johnny Pittman, the general mine foreman, wanted to see him. The evidence shows that after Thomas left the shop, Jent stated that he did not need men like Thomas on his section and that he would get rid of Thomas. When Thomas arrived at the mine office, Pittman asked him "what the problem was". It is not disputed that Thomas told Pittman that he was not certified to operate the bolting machine, that he was afraid of it, and

that he would not bolt double cuts. According to Thomas, Pittman replied that if he did not want to operate the bolting machine, "we don't need you".

Thomas testified that he was afraid he would be fired if he refused to operate the bolter, so he returned to the shop and told Jent that he would operate the bolting machine, but that he would not bolt double cuts.[4]/ Thomas was waiting to enter the mine when Pittman called him on the paging phone and told him to go home and to report back for work on the 3rd shift on his regular job.

Thomas did report for work that night on the third shift and resumed his regular job as continuous miner operator. However, Thomas maintains that after his refusals to bolt the double cuts and to sign the false training certificate Pittman's attitude towards him changed. For the next few days, Pittman would not talk to Thomas. In contrast, before the safety disputes, Pittman had always joked around with him. Then, about three days after Thomas' refusal to bolt the deep cuts and his refusal to sign the false training certificate, Pittman informed Thomas that his job classification was being changed from continuous miner operator to belt man (or head drive operator) and that his pay rate was being cut by $1.30 an hour. Pittman gave Thomas no reason for his demotion from a skilled to an unskilled job.

After Thomas' demotion, effective December 21, 1987, he worked at the head drive of the conveyor belt during the entire shift. Paul Hughes, who formerly had been the 3rd shift repairman, was assigned to operate the continuous miner. Hughes, had not previously run the miner on the 3rd shift and had to be trained by Thomas to operate it.

Shortly after Thomas was demoted, he called the Federal Mine safety and Health Administration (MSHA) and reported that Ampak was taking double cuts with the continuous miner on the 2nd shift. As a result of Thomas' call, MSHA Inspector Stanley "Bobo" Allen went to the Ampak No. 1 mine on December 22, 1987, to determine if double cuts were, in fact, being made. Although Allen did not issue any citations for illegal cuts, he did issue five citations to Ampak during this inspection - four for roof control violations, and one for Ampak's failure to provide a ventilation brattice at the working face.

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[4]/ Thomas maintains that he was still not aware of his right to refuse unsafe work. He stated that he learned of this right when he later called the MSHA field office in Hazard, Kentucky to report that Ampak was taking 40 foot cuts with the continuous miner and that he had been told to sign a training certificate for training he had not received.

The MSHA inspector also told Pittman that the December 22nd inspection was made in response to a complaint about double-cutting. Ampak's management was thus aware that one of its employees had complained. According to George Isaacs and Dennis Rucker, Alger Jent suspected (correctly) that Thomas was the informer. In fact, Jent told Isaacs that Thomas was "going to be a short-timer" at Ampak because he had notified the inspector about the double cuts.

On or about January 20, 1988, approximately one month after he was demoted from 3rd shift continuous miner operator to 3rd shift belt man, Thomas was transferred to Ampak's day shift as a belt man (head drive operator) with a further pay reduction of $.20 per hour. Thomas continued to work as a belt man on the day shift until he was laid off on February 15, 1988.

When Thomas was given his layoff notice on February 15th, Pittman told him that he had been chosen for layoff because, according to the Johnson Coal Company seniority list, Thomas was the least senior head drive operator at the mine. On March 1, 1988, Pittman likewise told the MSHA special investigator during MSHA's investigation of Thomas' discrimination complaint that "Thomas was selected for layoff because he was the youngest [least senior] head drive operator we [Ampak] had".

Ampak laid off a total of 14 miners on February 15, 1988. Of these 14 employees, 7 or 8 were belt men (head drive operators). None of the miners laid off on February 15th were continuous miner operators.

Evaluation of the Evidence

In order to establish a prima facie violation of Section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence that he engaged in protected activity and that the adverse action taken against him by the Respondent was motivated in any part by the protected activity. In order to rebut a prima facie case, the Respondent must show either that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., Inc., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). If the Respondent cannot rebut the prima facie case in this manner, it nevertheless can defend affirmatively by proving that it was also motivated by the miner's unprotected activities and it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to this affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982).

In the instant case, it is undisputed that Thomas engaged in protected activities in mid-December, 1987, when he (1) refused to bolt double cuts which were being made in violation of Ampak's roof control plan and (2) refused to sign a certificate of training which falsely indicated that he had been given task training by Ampak as a roof bolting machine operator. Moreover it is not disputed that Thomas' refusal to bolt the double cuts was made in the good faith and reasonable belief in its hazardous nature.

Respondents failed to call Alger Jent or any other witness to dispute Thomas' testimony that Jent ordered him to bolt the double cuts and to sign the fraudulent training certificate and that when Thomas refused these orders, Jent threatened him with the loss of his job. Thomas' testimony, on the other hand, was corroborated, in whole or in part, by George Isaacs, Robert Slone, Everett Watkins, and Jackie Littrell. Moreover, even General Mine Foreman Johnny Pittman admitted that when Thomas reported to his office in the midst of the dispute with Jent, Thomas told him that he was afraid to operate the bolting machine and that he would not bolt 40 foot cuts. Pittman also admitted that he reassigned Thomas to the 3rd shift that same day after Thomas' dispute with the company over the roof bolting of double cuts.

It is also uncontroverted that Pittman demoted Thomas from the skilled continuous miner operator's position to the unskilled belt man job and cut his pay from $12.90 to $11.60 an hour only a few days after Thomas' refusals to bolt the double cuts and sign the false training certificate. It is likewise uncontroverted that Pittman's relationship with Thomas changed for the worse following Thomas' refusal to accede to Ampak's unsafe and unlawful directives and that Pittman gave Thomas no explanation for his demotion and pay reduction. Indeed, Ampak offered no explanation even at trial for demoting Thomas on December 21, 1987.

Within this framework of evidence it is clear that Thomas was demoted from continuous miner operator to belt man (head drive operator) by Ampak on December 21, 1987, because of his refusals a few days earlier to bolt double cuts and his refusal to sign the false training certificate. Indeed Thomas was demoted by Pittman only a few days after these protected activities. When a company's adverse action against an employee closely follows the employee's protected activity, that fact itself is evidence of an illicit motive. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom., Donovan v. Phelps Dodge Corporation, 709 F.2d 86 (D.C. Cir. 1983). I find that to be the case herein.

The deterioration of the employee-employer relationship after Thomas' protected activity, is also strong evidence of a retaliatory motive. See Stafford supra. In the instant case the evidence shows that Pittman refused to talk to Thomas after his protected activities. Retaliatory intent is also shown in this case by Ampak's failure to explain the reason for its adverse action to Thomas. See Secretary of Labor on behalf of Brackner v. Jim Walter Resources, Inc., 9 FMSHRC 263, 268 (Judge Broderick, 1987), NLRB v. Senftner Volkswagen Corp., 681 F.2d 557 (8th Cir. 1982). Indeed Ampak gave Thomas no reason whatsoever for his abrupt demotion. It may reasonably be inferred from this evidence that Pittman was punishing Thomas for the assertion of his safety rights.

The operator has failed moreover to present any evidence to rebut Thomas' prima facie case. It has therefore failed to show that Thomas' demotion was not motivated by his protected activities. Ampak's demotion of Thomas' was therefore in clear violation of Section 105(c)(1) of the Act.

Following his discriminatory demotion December 21, 1987, Thomas remained in the belt man (head drive operator) position until his layoff on February 15, 1988. At the time of the layoff Mine Foreman Pittman told Thomas that he had been chosen for layoff based on seniority. Specifically, Pittman told Thomas that Ampak was following Johnson Coal Company's seniority list, and that Thomas was the least senior head drive operator at the mine.

Although Pittman testified at trial that he and Herb Wolford made the decision as to which employees to lay off and which to retain on February 15, 1988, based on who they thought "could operate the equipment the best and do the the best job", this proffered explanation clearly is not credible as it relates to Thomas.[5]/ Indeed, the reason given by Pittman at the time of the layoff (that Thomas was the least senior head drive operator) is precisely the reason that Pittman gave the MSHA special investigator who was investigating Thomas' discrimination complaint. In his sworn statement to MSHA on March 1, 1988, just 15 days after the layoff, Pittman stated that "Thomas was selected for layoff because he was the youngest head drive operator we had". Pittman also told the MSHA special investigator that "seniority based on the Johnson (Coal Company) hire list" was considered in choosing the miners for layoff.

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[5]/Pittman's trial testimony concerning the circumstances surrounding the April 22nd layoff at Ampak also differs markedly from the sworn statement he gave the MSHA special investigator in the George Isaacs case. For this additional reason I do not find him to be a credible witness.

Significantly another miner laid off on February 15th, Dennis Rucker, was also told that he was chosen for layoff based on his seniority status.6/

In determining whether or not Thomas would have been laid off on February 15th had he not been discriminatorily demoted on December 21st, it is necessary to review the status of the miners who were laid off on February 15, 1988, and the positions they held at the time of the layoff. It is undisputed that 14 miners were laid off on February 15th. The positions of 12 of these miners have been stipulated. With regard to the two miners, Slone and Bentley, whose positions could not be agreed upon, I find that the Complainant has nevertheless established their positions by credible testimony.

The miners laid off by Ampak on February 15, 1988, and their positions are therefore established as follows:

PETE BENTLEY - tractor, scoop, and shuttle car operator
DAVID BROWN - repairman
DARRELL ESTEP - repairman
KENNETH EVERAGE - belt man
ROY JOHNSON - belt man
ARCHIE KING - shuttle car operator or belt man
JEWITT MULLINS - inside laborer
BOBBY OWNES - shuttle car operator
ELLIOTT ROWE, JR. - belt man
DENNIS RUCKER - roof bolting machine operator
LUTHER SEXTON - belt man
DAVID THOMAS - head drive operator
ROBERT SLONE - head drive operator; scoop operator
CON BENTLEY - belt man

Among the miners laid off on February 15, 1988, were 7 or 8 belt men (head drive operators), 1 inside laborer, 2 repairmen, 3 shuttle car and/or scoop operators, and 1 roof bolting machine operator. No continuous miner operators were laid off however and indeed the evidence shows that Paul Hughes, the employee who took Thomas' place as 3rd shift continuous miner operator in December, was not laid off in February. It may reasonably be inferred therefore that had Thomas not been discriminatorily demoted from his continuous miner operator's position in December, he would not have been subject to layoff in February.

Ampak's discriminatory demotion of Thomas in December 1987, was thus "inextricably linked" to the company's decision to lay him off in February 1988. See Wiggins v. Eastern Associated

6/ The Complainant maintains in this case that he is not challenging Ampak's assertion that its layoff of miners on February 15th was necessary because the mine was losing money. Rather, he asserts that whether or not layoffs were economically necessary, Ampak's decision to choose him for layoff was inextricably linked to his earlier demotion and was, therefore, violative of the Act.

Coal Corp., 7 FMSHRC 1766 (1985). Since Ampak did not lay off any continuous miner operators in February and since it may be inferred that Thomas would still have been a continuous miner operator had he not been discriminatorily demoted, it is apparent that Thomas would not have been laid off but for Ampak's prior discriminatory action. Therefore, Ampak's layoff of Thomas was in violation of the Act.

Pittman's testimony concerning Ampak's alleged reason for Thomas' layoff i.e., that Thomas was not among the miners that Ampak believed could do the "best job", is, as previously noted, simply not credible. Ampak therefore could not prove that Thomas would have been laid off for other reasons alone. Moreover although Pittman testified as to alleged complaints about Thomas' work, he never contended that these supposed complaints were the basis for Thomas' layoff. Therefore, it is clear that Thomas would not have been laid off solely for any unprotected activities.

Complaint of George Isaacs - KENT 89-14-D

The record shows that George Issacs worked for Johnson Coal for about 10 years before Ampak took over the former Johnson No. 11 mine on October 17, 1987. Issacs had worked as a continuous miner operator for Johnson Coal since the latter part of 1985 and he continued in that position after Ampak took over. Isaacs worked on the 2nd shift (3:00 - 11:00 p.m.) on the 003 section of Ampak's No. 1 mine. He worked in tandem with Jackie Littrell alternating with him as continuous miner operator and miner helper.

When Ampak took over the mine, Robert Slone was the section foreman on the 003 section and Alger Jent, the 2nd shift mine foreman, was Slone's immediate boss. As previously noted in the factual recitation in the Thomas' case, beginning in the latter part of November 1987, Jent regularly ordered the continuous miner operators on the 2nd shift to take illegal 40 foot double cuts with the miner. Jent gave the orders over the objection of Slone, who instructed his operators not to cut more than 20 feet deep. Indeed Slone testified that "Jent asked me to [order the miner operators to take deep cuts], and I told him that it was against the law, and I never would give no orders to do that. Whenever there was a deep cut took, he [Jent] was the man that give the orders."

In early December 1987, Jent reportedly told Slone directly that his crew had "to run coal and take double cuts." Jent also reportedly told Slone that "Johnny [Pittman] knows what I'm a doin' and [he] don't care". In mid-December 1987, Slone was reassigned as a scoop operator, and Jent took his place as section foreman on the 003 section. Pursuant to Jent's orders, the continuous miner operators on the 2nd shift regularly took double cuts until March 14, 1988, when Jent was suspended. All

of the miners who testified (Jackie Littrell, Robert Slone, Dennis, Rucker, Gary Day, Everett, Watkins, and David Thomas) confirmed that double cuts were regularly made at Jent's direction.

Isaacs maintains that he complained to Jent nearly everyday about the taking of double cuts, but that Jent ignored him. Gary Day, a shuttle car driver also confirmed that Issacs told Jent it was unsafe to take 40 foot cuts. Littrell, the other continuous miner operator, likewise complained to Jent. Issacs also maintains that he complained to Johnny Pittman twice about the taking of double cuts. On the first occasion, on January 1988, Pittman ridiculed Isaacs for only taking "baby cuts" of 36-40 feet with the continuous miner and Pittman chided Isaacs that "he was going to have to get [another] miner man". On the second occasion, in February 1988, Isaacs told Pittman that they needed to start taking short cuts because of hazardous roof conditions. Pittman replied that "there's no way he could afford to take short cuts".

Isaacs maintains that he refused Jent's instructions to take double cuts on two occasions. The first refusal was immediately after the mine roof had fallen on his continuous miner while he was taking a deep cut. It took two hours to clean the rock off Isaacs' continuous miner and when he was then instructed to double cut the adjoining place, Isaacs told Jent that he would only cut 20 feet deep and that if Jent wanted it cut deeper, he would have to cut it himself. According to Isaacs Jent then became upset and did not talk to him for two or three days.

Isaacs maintains that he also refused to take double cuts during a shift on the 001 section because of unstable roof. This section was called the "bad section" or "scratchback" because of its bad top and low coal seam. When Isaacs refused Jent reportedly again "got upset and ... cussed a little bit ... and pouted" for a few days.

Isaacs maintains that during February and early March 1988, he also complained repeatedly to Ampak's management about the absence of lights on the continuous miner. Isaacs and Littrell both estimated that the miner had been without any lights for three weeks.

Issacs testified that to operate the miner without lights he would have to stick his head out of the operator's deck and use his cap light for illumination. Isaacs described this as "extremely dangerous". Littrell called it as "dangerous as a cocked pistol". Isaacs maintains that he complained to Jent and Pittman about this condition but to no avail. In fact, Pittman reportedly told Isaacs that in the event of an MSHA inspection he should pretend that he was repairing the lights, and then resume cutting the coal without lights when the inspector left.

Isaacs reportedly also complained to Jent and to Pittman in February and March 1988, about the inoperative water sprays on the continuous miner. Pittman purportedly responded "Don't worry about the water, just worry about running coal". Isaacs maintains that he also complained to Pittman about Ampak's failure to hang ventilation curtains and about Ampak's practice of having the continuous miner remove pillars.

On February 16, 1988, the day after he was laid off, David Thomas filed his complaint of discrimination with MSHA in which he alleged that Jent had ordered him to roof bolt a 40 foot cut. As a part of its investigation of Thomas' complaint, the MSHA special investigators interviewed Pittman, Jent, and Herb Wolford, Ampak's superintendent, on March 1, 1988, at the Ampak mine office. After his interview with the investigators, Jent proceeded to go underground. As he began to enter the mantrip, Jent accused James Sexton, a roof bolting machine operator, of telling MSHA about the illegal 40 foot cuts. Sexton denied it but Jent responded that "somebody had to tell 'em ... they knew too much what's going on." After telling Sexton that he did not know if the cuts had been 40 feet long because "you do not carry no forty foot tape measure", Jent warned the crew that they'd better watch what they said to MSHA or else they would be in trouble.

Two days after Jent accused James Sexton of telling the MSHA special investigators about the mining of double cuts, Jent approached Isaacs and Littrell while they were working at the mine face. Jent told them that he was not going to the "pen" for double-cutting. When Isaacs stated, in effect, that he and Littrell could also be in trouble for cutting the double cuts, Jent warned them to watch what they told the investigators. As he did so, Jent patted his pocket in which he carried a pistol. Isaacs considered this gesture to be a threat.

About a week later, on the morning of March 10, 1988, the entire Ampak No. 1 mine was shut down pursuant to a Section 104(d)(1) "unwarrantable failure" order issued by MSHA. The closure order was issued for Ampak's failure to comply with its ventilation plan. Ampak called Jackie Littrell's home that day to inform him not to report for work. When Littrell called back to the mine office to ask why they would not be working, Superintendent Wolford told Littrell that the mine had been shut down because of ventilation problems. Littrell then told Wolford that there were some problems at the mine that he needed to know about, and Wolford suggested that they meet at a gas station.

When Wolford and Littrell met, the superintendent asked Littrell if he know who had been calling the MSHA inspectors. Littrell then told Wolford that Jent had been ordering the miner operators to take double cuts, and that Jent had threatened he

and Isaacs. A day or so later, Wolford telephoned Isaacs and asked him if double cuts were being made on the 2nd shift. When Isaacs answered affirmatively Wolford asked who was ordering the double cuts to be taken. Isaacs reported it was Jent and Pittman. Isaacs also recounted to Wolford the incident in which Jent had threatened he and Littrell with a gun.

Wolford then notified Pittman that Littrell and Isaacs had complained about Jent ordering them to take double cuts and Wolford arranged a meeting at the Ampak mine office among Jent, Pittman, and himself. At that meeting, Wolford told Jent that Isaacs and Littrell had alleged that he was ordering them to take double cuts. As a result of the complaints made by Isaacs and Littrell, Jent was suspended for the work week of March 14-18, 1988. At the end of that week, Wolford and Pittman met with Jent again and told Jent that he was being reinstated. Jent was moved, however, to the 3rd shift (as section foreman) in order to separate him from Isaacs and Littrell, who remained on the 2nd shift.

In the midst of MSHA's investigation of David Thomas' discrimination complaint, MSHA's March 10th closure of the Ampak No. 1 mine, the complaints made by Littrell and Isaacs regarding double-cutting on the 2nd shift, and Jent's suspension of March 14-18, there also was another pending safety discrimination case - against Johnson Coal Company - which involved Johnny Pittman. On August 25, 1987, 5 former employees of Johnson Coal Company - Calvin Baker, Edsel Baker, Elliott Rowe, Agnel Amburgey and Everett Watkins - had filed complaints of discrimination against Johnson Coal, which alleged they had been laid off because they had made various safety complaints. All of the complaints named Pittman as one of the persons responsible for the discriminatory actions.

The Secretary of Labor filed a complaint on behalf of these 5 miners against Johnson Coal with the Federal Mine Safety & Health Review Commission. On April 21, 1988, at a Hazard, Kentucky law office, Isaacs gave his deposition on behalf of the 5 complaining miners. Pittman saw and spoke to Isaacs at the law office on April 21st and Pittman stated at trial that he assumed that Isaacs was testifying on behalf of the complaining miners. Significantly, Pittman also admitted that he assumed on April 21st that Isaacs was testifying about unsafe practices that he (Pittman) had taken part in.

On April 22, 1988, the day after Isaacs' deposition testimony, Isaacs was laid off (terminated) by Ampak. Pittman informed Isaacs of his layoff but gave him no reason for the action. Of the four full-time continuous miner operators employed by Ampak, the two employees who had complained to management about the taking of double cuts and had regularly voiced other safety complaints (i.e. George Isaacs and Jackie Littrell) were laid off. On the other hand, the evidence

shows that the two full-time miner operators who were retained, Danny Hall and Eli Jent, had never complained about unsafe working conditions at Ampak. It is also apparent that Pittman, who was fully aware of Isaacs' safety complaints, was solely responsible for choosing the miners for layoff on April 22nd.

Although Pittman knew that Alger Jent had consistently ordered his crew to perform unsafe practices on the 2nd shift, Pittman did not lay off Jent on April 22nd. Rather, Pittman retained Jent and returned him to his previous job as 2nd shift section foreman.

Evaluation of the Evidence

Isaacs, like Thomas, does not challenge Ampak's assertion that its layoff of miners on April 22, 1988, was necessary because the No. 1 mine was losing money. He argues that whether or not layoffs were economically necessary, Ampak's (Pittman's) decision to choose him for layoff (while retaining other continuous miner operators) was discriminatory. For the reasons set forth below I agree.

The evidence shows that of the 10 miners laid off at that time two full-time continuous miners operators, George Isaccs and Jackie Littrell, were laid off while two other full-time miner operators, Danny Hall and Eli Jent, were retained. Therefore, of the four Ampak employees classified solely as continuous miner operators, Isaacs was one of the two chosen for layoff.

As noted by Isaacs in his post hearing brief, there were four strong indicia of discriminatory motivation on the part of Johnny Pittman in choosing him for layoff: (1) Pittman had knowledge of Isaacs' many protected activities; (2) Pittman had previously demonstrated hostility toward safety complaints by demoting Thomas for refusing to bolt double cuts; (3) the proximity in time between Isaacs' deposition testimony (on behalf of the 5 former Johnson Coal Company miners) and his layoff; and (4) Pittman's personal motivation for getting rid of Isaacs because of Isaacs' complaints to Wolford and his deposition testimony in the related Johnson Coal Company case, both of which implicated Pittman in unsafe mining practices.

It is clear that Isaacs engaged in numerous protected activities in the 3 months prior to his April 22nd layoff (termination). These protected activities were as follows: (1) regular complaints to Jent about the taking of double cuts; (2) two complaints to Pittman - in January and February 1988 - about the practice of double-cutting on the 2nd shift; (3) two refusals to perform unsafe work (i.e., to take double cuts); (4) frequent complaints to Jent and to Pittman about the lack of lights on the continuous miner; (5) complaints to Jent and Pittman about the inadequate water sprays on the continuous

miner; (6) complaints to Jent and Pittman about Ampak's failure to provide or hang ventilation curtains; (7) complaints to Pittman about performing pillar removal work from the deck of the continuous miner (without remote control); (8) the complaint to Wolford in mid-March about the double-cutting on the 2nd shift; (9) two conversations with the MSHA special investigators in March 1988, concerning Thomas' allegations of double-cutting; and (10) his deposition testimony in the Johnson Coal Company case on April 21, 1988.

There is, moreover, no dispute concerning the good faith or reasonableness of the work refusals. It is also clear that Pittman knew directly of almost all of these protected activities, particularly those which occurred closest in proximity to Isaacs' layoff. Indeed, because of Pittman's position at the mine and his close personal relationship with Jent, it can reasonably be inferred that Pittman was also aware of the complaints that Isaacs made to Jent.

Pittman was also directly involved in some of Isaacs' protected activities, which gave him a personal reason to get rid of Isaacs. In addition to complaining personally to Pittman about the mining conditions on the 003 section, Isaacs had told Wolford, Pittman's immediate superior, about the illegal double-cutting on the 2nd shift and, moreover, he told Wolford that Pittman and Jent were responsible for the ordering of the illegal cuts.

Pittman, who was named as the person responsible for the discriminatory actions in the related Johnson Coal Company complaints also assumed that Isaacs' deposition testimony on April 21st was on behalf of the former Johnson Coal Company miners and that Isaacs had testified about Pittman's involvement in unsafe acts. Isaacs and Littrell had, in fact, also been responsible for Jent's 5 day suspension and subsequent transfer. It can reasonably be inferred form this evidence that Pittman was therefore antagonistic towards Isaacs (and Littrell) as a result.

The fact that adverse action closely follows an employee's protected activity is itself evidence of an unlawful motivation. Donovan v. Stafford Construction Co., supra. Although the April 22nd layoff in the instant case may have been economically necessary; the fact that Isaacs was chosen for layoff while other continuous miner operators were not, and on the day after his deposition testimony, is therefore strong evidence of Pittman's discriminatory intent.

Hostility towards protected activity is another circumstantial factor pointing to discriminatory motivation. Chacon, supra. Such hostility towards safety complaints by Pittman is also present in this case. Not only did Pittman ridicule Isaacs' concerns over the taking of deep cuts with the

miner, but as has been already determined, he discriminatorily retaliated against David Thomas after Thomas' refusal to bolt double cuts in December.

Although Jackie Littrell is not a party to this action, it is clear that Pittman selected both Isaacs and Littrell for layoff because they were the two continuous miner operators who objected to the unsafe practices required by Pittman and Jent. On the other hand, as Pittman admitted, the two continuous miner operators who were not laid off i.e. Danny Hall and Eli Jent, never made safety complaints.

Mr. Isaacs has therefore, within this framework of evidence, proven that his layoff was indeed motivated at least in part by his protected activities. The Respondents have failed to rebut this evidence and have failed to affirmatively defend.

Ampak's only apparent defense in this case was that it chose which miners to lay off by "look[ing] at the jobs we needed filled and the guys most capable of filling them". However, no evidence was presented as to the relative skills of George Isaacs vis-a-vis Ampak's other continuous miner operators. On the contrary, Pittman admitted that Isaccs had had no disciplinary problems while employed at Ampak and that when he chose Isaacs for layoff, he knew that Isaacs was a certified foreman and that he was capable of performing "quite a few jobs" in the mines.

Ampak's primary evidence in its defense was that the miners who were laid off on Friday, April 22nd, had actually been chosen for layoff on the preceding Wednesday night, April 20th. Pittman testified that J. L. Workman called he and Herb Wolford at the No. 1 mine on Wednesday afternoon, and told them to report to Ampak's "main office". when Pittman and Wolford reported to the office, Workman allegedly told them that Ampak was "losing money" and "needed to make some cuts". Therefore, Pittman and Wolford then allegedly compiled a list of the miners who would be laid off.

Pittman's testimony in this regard is, however, contradicted by his sworn statement to the MSHA special investigator on June 14, 1988, during the investigation of Isaacs' discrimination complaint. Pittman then stated that "I made the decision as to who would stay and who would be laid off". He also stated that "Herbert Wolford left this mine [Ampak No. 1] on April 15, 1988. He went to another operation of Ampak Mines, Inc., and I took over as superintendent". Thus Pittman had previously stated that Wolford had left the mine a week before the layoffs took place and that he (Pittman) was solely responsible for choosing which miners would be laid off. Pittman is therefore not a credible witness. In this regard his testimony of his lack of knowledge of the double-cutting at the

Ampak mine and his denial that Isaacs ever made safety complaints to him in light of the overwhelming evidence to the contrary, are also incredible.

In sum, since Isaacs has proved a prima facie case of discrimination herein and since the Respondents have failed to prove that Ampak's adverse action was also motivated by unprotected activities (and that it would have laid Isaacs off in any event for the unprotected activities alone), Ampak's layoff of Isaacs on April 22, 1988, violated Section 105(c)(1) of the Act.

Liability for Damages

Ampak has been found in these cases to have discriminated against both Complaintants Thomas and Isaacs in violation of Section 105(c)(1) of the Act. According to the Complaints Ampak is out of business, has no assets and can provide no relief. They concede however that Johnson Coal did not exercise "substantial control over the most significant aspects of the operation of the mine" so as to establish liability under the agency theory applied by the Commission in Bryant v. Dingess Mine Service, et al., 10 FMSHRC 1173, 1178 (1988). The Complainants therefore seek legal remedies, on a strict liability theory, against Johnson Coal the owner of the mine in this case and with which Ampak contracted to operate the mine.

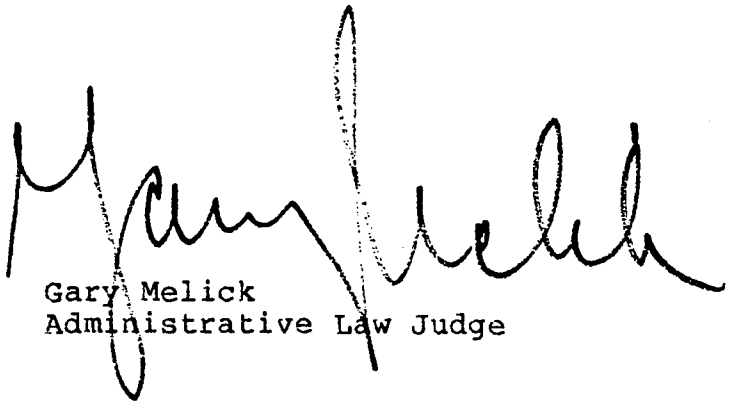
The cases cited in support of their argument are, however, inapposite. The cases essentially attach liability to mine owners for violations of the Act committed by their independent contractors based on the specific statutory liability of mine operators under Sections 3(d) and 111 of the Act.

Under the Act the Secretary of Labor could cite and propose a civil penalty against the mine operator, Johnson Coal, for the violations in this case of Section 105(c)(1). The question of strict liability by Johnson Coal to the individual miners is a different matter. Section 105(c)(1) limits liability to only those persons who discriminated against the Complainants. In addition, while the Commission has found in the Bryant case that liability may be extended to mine operators under agency theory, it has not extended responsibility under the principles of strict liability.

Absent evidence that would support liability under an agency theory such as in the Bryant case, there is no legal basis to find Johnson Coal liable in these cases. See also Bryant v. Dingess Mine Service et al., 9 FMSHRC 336 (Judge Broderick, 1987) and UMWA v. Algonquin Coal Co., 7 FMSHRC 906 (Judge Steffey, 1985).

ORDER

The Complaints of Discrimination herein are dismissed against Southern Hills Mining Co., and Johnson Coal Company, Inc. The Complaints against Ampak Mining Inc. are upheld and Ampak Mining, Inc. is liable for the acts of discrimination found herein. Accordingly the remaining parties are directed to confer regarding possible stipulations to establish costs and damages and to report the results thereof to the undersigned on or before January 5, 1990. In the event such stipulations cannot be reached, further proceedings will be held limited to the issue of costs and damages, at 9:00 a.m., on January 17, 1990, in Lexington, Kentucky. The assigned courtroom will be designated at a later date. This decision is not final and will not be final until such time as a decision establishing costs and damages is issued.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 26 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 89-194
CYPRUS EMERALD RESOURCES CORPORATION, Respondent	:	A.C. No. 36-05466-03687
	:	Emerald No. 1 Mine
CYPRUS EMERALD RESOURCES CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 89-45-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 3087308; 8/30/88
	:	Docket No. PENN 88-318-R
	:	Order No. 3087446; 8/31/88
	:	Docket No. PENN 88-325-R
	:	Order No. 3087309; 8/30/88
	:	Emerald No. 1 Mine
	:	Mine ID 36-05466

DECISIONS

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner/Respondent; R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the contestant (Cyprus) against MSHA pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of the captioned citation and orders. Docket No. PENN 89-194, concerns proposed

civil penalty assessments filed by MSHA against Cyprus seeking civil penalty assessments for five alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Cyprus filed timely answers denying the alleged violations, and three of the alleged violations were subsequently settled by the parties (section 104(a) Citation Nos. 3087305 and 3087444, and section 104(d)(2) Order No. 3087600).

Docket No. PENN 88-318-R, concerns a Notice of Contest challenging the legality of a section 104(d)(2) Order No. 3087446, with special "S&S" findings, issued on August 31, 1988, and citing an alleged violation of mandatory safety standard 30 C.F.R. § 77.205(b).

Docket No. PENN 89-45, concerns a Notice of Contest challenging the legality of a section 104(a) Citation No. 3087308, with special "S&S" findings, issued on August 30, 1988, and citing an alleged violation of 30 C.F.R. § 77.209. Docket No. PENN 88-325-R concerns a challenge to a section 107(a) Imminent Danger Order No. 3087309, issued on August 30, 1988, in conjunction with the section 104(a) Citation No. 3087308.

Hearings were held in Washington, Pennsylvania, and the parties filed posthearing briefs. I have considered their respective arguments in the course of my adjudication of these matters.

Issues

The issues presented in these proceedings include the following: (1) whether Cyprus violated the cited mandatory safety standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violation cited in the section 104(d)(2) order resulted from an unwarrantable failure by Cyprus to comply with the cited standard; and (4) whether the condition or practice cited in the contested imminent danger order was in fact an imminent danger. Assuming the violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of the adjudication of these cases.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

2. Sections 110(a), 110(i), 104(d), 105(d), and 107(a) of the Act.

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

Stipulations

1. The subject mine is owned and operated by Cyprus, and it is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction to hear and decide these cases.

3. The contested citation and orders were properly served on Cyprus by a duly authorized representative of the Secretary of Labor (MSHA).

4. The parties agreed to the authenticity of all documents received in evidence in these proceedings, but not to the truth of the matters asserted therein.

5. The history of prior violations for the subject mine is reflected in an MSHA computer print-out received in evidence in a prior civil penalty proceeding (Docket No. PENN 88-287).

6. The annual coal production for Cyprus during the relevant time period in question in these proceedings is 1.8 million tons, and Cyprus may be considered a large operator.

7. The proposed civil penalty assessments for the contested violations will not adversely affect the ability of Cyprus to continue in business.

8. All of the contested alleged violations were timely abated by Cyprus in good faith.

9. There were no intervening clean inspections between the issuance of the contested section 104(d)(2) order and a previously issued section 104(d)(2) order.

Settlements - Docket No. PENN 85-194

Section 104(a) "S&S" Citation No. 3087305, was issued on August 30, 1988, in conjunction with a section 107(a) imminent danger order, and the inspector cited a violation of 30 C.F.R. § 77.400, because a cyclone fence being used to prevent persons from entering an area under the counterweight for the No. 2 stacker belt conveyor was inadequate. MSHA proposed a civil penalty assessment of $800 for this alleged violation.

The parties filed a proposal to settle this alleged violation, and in support of the proposed settlement, MSHA stated that

the inspector was concerned that persons would walk over the coal stock pile and go underneath the counterweight and be struck by the counterweight. However, MSHA asserted that normal movement of the counterweight would not bring it in contact with persons below it, the belt and pulley structure were only 2 years old and in good condition, the counterweight was at least 30 feet above the level of the coal on the day the order was issued, and there was a sign posted that indicated that the area was restricted. Under the circumstances, MSHA vacated the imminent danger order, and the parties agreed to settle the alleged violation noted in the citation for a reduced civil penalty assessment of $400.

Section 104(d)(2) "S&S" Order No. 3087600, was issued on August 30, 1988, and the inspector cited a violation of 30 C.F.R. § 77.1607(bb), after finding an inoperable start up alarm for the No. 1 belt between the No. 1 stacker and the coal transfer building. MSHA proposed a civil penalty assessment of $850 for this alleged violation.

The parties filed a proposed settlement for this alleged violation, and in support of the settlement, MSHA stated that additional evidence established that the condition cited was caused by an "isolated output card" that had gone bad, and there is no evidence as to how long the bad output card had existed before the inspector found it. MSHA concluded that there was insufficient evidence of an unwarrantable failure by the respondent to comply with the cited standard, and the order was modified to a section 104(a) "S&S" citation. The parties agreed to settle this alleged violation for a reduced civil penalty assessment of $450.

Section 104(a) "S&S" Citation No. 3087444, was issued on August 31, 1988, in conjunction with a section 107(a) imminent danger order, and the inspector cited a violation of 30 C.F.R. § 77.404(a), after finding that an electrical junction box supplying power to a boiler heater located on the third floor of the preparation plant was not maintained in a safe operating condition in that openings in the box had allowed water and moisture to enter the box. MSHA proposed a civil penalty assessment of $650 for this violation.

The parties filed a proposed settlement for this alleged violation, and in support of the settlement MSHA stated that there was insufficient evidence that an accident would occur if normal mining operations had continued. MSHA stated further that although a person could be shocked if they came in contact with the box, it was mounted on a wall 10 to 12 feet off the ground, and the cables were protected by an adequate ground fault system. Under the circumstances, MSHA vacated the imminent danger order, and the parties agreed to settle the alleged violation noted in the citation for a reduced civil penalty assessment of $325.

In further support of the proposed settlement disposition of the aforementioned citations, MSHA submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. After careful and consideration of the arguments presented in support of the proposed settlement disposition of these violations, I conclude and find that the settlements are reasonable and in the public interest. Accordingly, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the settlements ARE APPROVED.

Docket No. PENN 88-318-R

This case concerns a contested section 104(d)(2) "S&S" Order No. 3087446, issued by MSHA Inspector Charles Pogue on August 31, 1988. The inspector cited an alleged violation of mandatory safety standard 30 C.F.R. § 77.205(b), and the condition or practice cited in the order states as follows: "Loose coal, two wash down hoses, 21 feet and 17 feet in length, 6 supply structure springs, and coal dust 24 inches in depth was permitted to accumulate in the walkways of the refuse belt and 300 ton bin building."

The cited standard, section 77.205(b), provides as follows: "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

The particular mine areas that are the subject of the order are the preparation plant building, a 300 ton refuse bin building, which is a separate building, and an inclined refuse belt conveyor which connected the two buildings (Exhibit G-6). Although there were actually two belts, one of them had been out of service for several years, and the cited belt area in question was used as a refuse belt. The belt was an enclosed structure, with an adjacent walkway of approximately 24 inches wide, and it was approximately 232 feet long, and was equipped with a handrail and lighting.

In support of the cited conditions, MSHA presented the testimony of Inspector Pogue, and the UMWA walkaround representative Keith Higginbotham, who accompanied the inspector during his inspection on August 31, 1988. Mr. Pogue and Mr. Higginbotham confirmed that they personally observed the conditions which prompted Mr. Pogue to issue the order.

In defense of the alleged violation, Cyprus presented the testimony of preparation plant foreman Ronald D. Kerr, and safety representative Jack B. Monas. Mr. Kerr confirmed that he did not accompany the inspector during his inspection, and that he did not observe the cited conditions (Tr. 126). Mr. Monas confirmed that he was involved in accompanying MSHA inspectors during the course of an MSHA inspection of the preparation plant which began

on August 26, 1988, and that he was at the plant when Inspector Pogue conducted his inspection on August 31, 1988. He further confirmed that he observed the accumulations of refuse materials at the lower part of the belt walkway "at the door as the walkway exited" the building, but he could not recall seeing any materials from the door back to the tail roller. He confirmed that he observed these materials after the order was issued, before any clean up operations were started, and observed a closure tag on the door. He believed that the conditions he observed were the same conditions observed by the inspector. Mr. Monas further confirmed that he could not see the cited hoses from the location of the accumulated materials, and that he did not walk up the belt or into the other areas cited by the inspector (Tr. 173-175).

Inspector Pogue testified that he observed loose coal refuse materials in the walkway in and around the walkway around the tail roller of the refuse belt. He stated that the materials were the size of golf balls and baseballs, and that he and Mr. Higginbotham had to walk through and over the accumulations as they walked up the inclined beltline. As he proceeded up the belt walkway, Mr. Pogue observed a wash down hose approximately one and one half inches in diameter, and 17 feet long, and it was connected to a water tap. Upon proceeding further up the walkway, Mr. Pogue observed another wash down hose approximately 21 feet long, and it too was connected to a water tap. He confirmed that both hoses were "scattered back and forth across the walkway" (Tr. 10-14). He also confirmed that they are usually hung on a hanger (Tr. 45).

Mr. Higginbotham confirmed that he also observed the accumulated coal refuse materials and hoses. He described the accumulations materials as "lump sized coal, probably the size of your fist down to a golf ball size," and stated that they were "scattered throughout the walkway going up the ramp," and that they extended for a distance of approximately 15 feet up the inclined walkway (Tr. 87). He stated that the hoses were "laid clear across the walkway in a very unorderly fashion," and "were snaked through," and that he had to walk on or over the hoses to pass (Tr. 88).

Mr. Pogue further testified that after observing the hoses, he proceeded inside the 300 ton refuse bin building to an "elevated walkway or platform" which was adjacent to the refuse belt roller. He gained access to this platform area by climbing up four to five steps similar to "step ladder rungs," and he described the platform as an area 10 feet by 10 feet, with an enclosed railing around it. He stated that there was a safety chain in place across the opening at the top of the platform, and that he had to unclip it to walk on the platform (Tr. 18, 21).

Mr. Pogue stated that he observed six spring mechanisms on the platform which were not stacked or set aside, and he described the springs as the approximate size of a basketball or volleyball (Tr. 19). Mr. Higginbotham confirmed that he also observed the springs, and he indicated that there was "grease and stuff all over the place" and that the springs were obstructing the walkway (Tr. 88).

Mr. Pogue stated that after leaving the platform area, he proceeded to the floor below, and entered through a door on the side of the building to a walkway next to the counterweight where he found an accumulation of fine refuse material approximately 24 inches deep and 24 inches in width in the walkway. He stated that "you had to kind of step over it in order to get on the back side of the top floor of this bin area" (Tr. 16). Mr. Higginbotham confirmed that he also observed the accumulations (Tr. 89).

Cyprus' counsel did not dispute the existence of the cited materials observed by the inspector and Mr. Higginbotham at the four locations in question (Tr. 118). Mr. Pogue confirmed that he cited a violation of section 77.205(b) because it requires that walkways be kept free of stumbling or slipping hazards where men are required to work or travel (Tr. 20). He believed that the accumulations of refuse materials adjacent to the belt tail assembly and the hoses in the walkway constituted a stumbling and slipping hazards because one had to walk through the accumulations and step over the hoses while walking along the walkway (Tr. 21). He further believed that the springs on the platform could cause a tripping hazard to someone on the elevated platform, and that if the safety chain were not put back in place someone could possibly fall through the platform opening (Tr. 21).

Although plant foreman Kerr's unrebutted credible testimony reflects that the top belt conveyor had been taken out of service in 1984, he confirmed that the bottom refuse belt is used continuously when the plant is in operation (Tr. 128). Mr. Kerr further confirmed that the hoses in question are used to wash down debris which collects under the belt, and that the belt is routinely washed down when the plant and belt are in operation (Tr. 139). Mr. Higginbotham, who testified that he had walked the belt on prior occasions, testified that the belt walkway is used by cleanup, maintenance, and inspection personnel, and Mr. Pogue agreed that this was the case (Tr. 16, 18, 93). Mr. Kerr conceded that cleaning and maintenance personnel used the belt walkway, and that he and other employees used it as an accessway to the bin building.

With regard to the cited walkway area in the bin building, Mr. Pogue and Mr. Higginbotham believed that the walkway was used by maintenance and inspection personnel, and Mr. Kerr confirmed

that the walkway provided an access way for maintenance personnel servicing the refuse belt, or for cleanup personnel washing down the area (Tr. 19, 94, 140-141).

Findings and Conclusions

Fact of Violation

I conclude and find that three of the cited areas, namely, the refuse belt walkway where the inspector found the accumulated coal refuse materials, the walkway areas where the inspector found the two hoses strewn across the walkway, and the walkway in the refuse bin building where the inspector found accumulated coal refuse, were all travelway areas which provided access to areas where persons were required to travel and work, and were therefore areas which fall within the scope of section 77.205(b). I further conclude and find that MSHA has established by a preponderance of the evidence that the cited materials which were found in these travelways constituted extraneous materials which presented stumbling or slipping hazards, and that the failure by Cyprus to keep the cited areas clear of these materials constitutes a violation of section 77.205(b). Accordingly, insofar as these cited locations are concerned, the inspector's finding that a violation occurred IS AFFIRMED.

With regard to the cited platform area in the refuse bin building, Cyprus argues that since the platform had not been in use since 1984, when the second belt was taken out of service, it does not fall within the purview of section 77.205(b), since no one is required to work on, or travel on, the platform (Tr. 124). With regard to the use of the platform, Mr. Higginbotham believed that it was probably used on a regular basis for maintenance and greasing of the belt, and for the servicing of a compressor located in the building (Tr. 94). Mr. Pogue believed that the platform would be used for routine examinations of equipment, and to provide a work platform for maintenance personnel (Tr. 19). However, Mr. Pogue could not recall the last time anyone may have been on the platform, and he confirmed that he made no inquiries of management as to where the springs came from, even though he knew that the plant foreman was in charge of the area and should have known where they came from, how long they were on the platform, and that a maintenance record may have given him such information (Tr. 65). When asked to explain why he made no further inquiries, Mr. Pogue stated that he relied on the presence of fine dust on the springs which he believed was "something that can give you that indication that it's been left to lay there" (Tr. 66). Mr. Pogue confirmed that the platform was equipped with a top railing, a middle railing, and a toe board, as well as a safety chain blocking off the platform access ladder (Tr. 55).

Mr. Kerr, whose testimony I find more credible than that of Mr. Pogue and Mr. Higginbotham, testified that the platform was once used for the head drive of the filter cake refuse belt which had been taken out of service in 1984, and that the springs had been used for a mechanical belt wiper. Mr. Kerr knew of no reason why anyone would have a need to be on the platform, and he confirmed that there is no compressor in the building, as claimed by Mr. Higginbotham (Tr. 53, 159). Although there was a hydraulic unit in the building, Mr. Kerr stated that it was located at the lower level of the bin building, and that it was located in a room at the bin bottom (Tr. 160). He speculated that someone may have stored the springs on the platform, and he had no personal knowledge where the springs came from. He reiterated that the platform was not used to service or maintain the belt which was in use (Tr. 164).

After careful review and consideration of all of the evidence, I conclude and find that MSHA has failed to establish that the cited platform area constituted a walkway or platform area where persons were required to work and travel. To the contrary, Cyprus' evidence, which I find credible and probative, establishes that the cited area, which had previously been used as a means of access to equipment associated with one of the belts, has not been used since the belt was taken out of service in 1984. Accordingly, I find that the platform in question does not fall within the purview of section 77.205(b), and that insofar as that particular location is concerned, a violation has not been established. That portion of the order which refers to this platform IS VACATED.

The Unwarrantable Failure Issue

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

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

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded

that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

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

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

The issue here is whether or not Cyprus' failure to address the cited conditions constituted aggravated conduct exceeding ordinary negligence. Inspector Pogue testified that he based his "high negligence" finding on his belief that Cyprus should have taken some corrective action to prevent at least one of the cited conditions from existing because the condition was readily observable from the preparation plant (Tr. 25). When asked to explain the basis for his unwarrantable failure finding, Mr. Pogue stated as follows at (Tr. 25):

> A. Well, previously, to make an inspection of this area, I had inspected other areas of the surface facility and I had found that there was four other locations throughout the surface facility that had obstructions in walkways that could result in slipping or stumbling hazards. When I got to this location in

the preparation plant and I could observe these accumulations adjacent to the belt and going up the belt conveyor system, it was just a condition that I felt that the operator should have been aware of, and that it's a highly traveled area and seemed to be that it was reasonable for a person that would be traveling through the area to observe the accumulations, at least in the preparation plant and then just be able to look up the conveyor and see the wash down hoses laying in the conveyor walkway.

In support of Inspector Pogue's unwarrantable failure finding, MSHA argues that the cited accumulations at the bottom of the belt were readily observable from inside the preparation plant, and that the cited hoses were visually obvious from the bottom of the belt in the preparation plant. MSHA further argues that the cited conditions had existed for some length of time, that some of the conditions had existed for a protracted period of time, and that given the amount of accumulated materials, and the number of locations involved where significant stumbling hazards existed for some length of time with no apparent attempts to clean them up, the violation was serious and extensive. MSHA also relies on the fact that the inspector had previously issued other violations of section 77.205(b) several days prior to the issuance of the contested order, and it concludes that these prior citations indicates indifference to general cleanup activities in travelways, or a serious lack of reasonable care, and consequently, aggravated conduct.

One critical factor in support of Inspector Pogue's unwarrantable failure finding, is his belief that some of the cited conditions were readily visible from the third floor of the preparation plant. The fact is that the only cited condition which may have conceivably been observable from Mr. Pogue's vantage point in the preparation plant itself was the accumulated refuse material at the lower end, or tail piece, of the conveyor belt (Tr. 38). Mr. Pogue conceded that the walkway location in the bin building where he observed the accumulated refuse were not observable from the preparation plant (Tr. 26). With regard to the two hoses which were scattered across the belt walkway, Mr. Pogue conceded that it was difficult to see the top of the conveyor belt walkway enclosure (Tr. 26). I find no credible evidence to support any conclusion that the second hose located at the upper inclined end of the belt walkway was observable from the preparation plant. With regard to the first hose located at the lower end of the walkway, Mr. Pogue believed that it would have been observable from the "general area of the tail roller" looking up the belt from the preparation plant floor (Tr. 53, 62).

Mr. Pogue's further conclusion that it was reasonable to expect anyone to readily observe the refuse accumulations at the

base of the conveyor belt, and the hoses located on the inclined portion of the belt walkway, was based on his opinion that these areas were "highly traveled." I find no credible evidence to support any such conclusion. Mr. Pogue made no apparent effort to speak to anyone concerning any work which may have taken place prior to the inspection, and he observed no one on the belt walkway, or in any of the other cited locations. Further, no testimony was forthcoming from the inspector with respect to any plant activities which may have been taking place during the inspection, and no testimony was forthcoming from the inspector to establish the presence of anyone on the third floor of the plant who may have observed the accumulations which Mr. Pogue said he saw from this location. Mr. Higginbotham, who was with Mr. Pogue, testified that while they were on the third floor of the plant, they stopped to rest, and while leaning on the hand-rail which was around the floor, they looked down and saw what Mr. Higginbotham characterized as "obvious spillage." Mr. Higginbotham conceded that had they not stopped to rest at that particular location, they would have had no reason to look over the rail, and that anyone simply walking by the area would not have seen the spillage "unless you actually looked down at it" (Tr. 90).

At page 12 of her posthearing brief, MSHA's counsel asserts that the plant area where the cited accumulations were found "was an active area." In support of this conclusion, counsel cites transcript pages 11, 25, 38, 87-90. I have carefully reviewed these transcript references, and I find no testimony to support counsel's conclusions that the preparation plant was "active." The fact that the inspector was in the plant conducting an inspection does not necessarily establish that any active plant processing work was taking place at the time of the inspection. I assume counsel made this argument to support an inference that since the plant was active, someone would reasonably be expected to notice the accumulations. I reject any such notion. One reasonable method for an inspector to determine whether anyone in the plant was in a position to observe the accumulations is to seek out witnesses and ask questions. Relying on a casual observation made during a rest period while leaning over a hand rail is hardly credible evidence that management indulged in aggravated conduct because it should have observe the condition and failed to do so.

The evidence in this case establishes that the plant and conveyor belt in question were shutdown at the time of the inspection, and that they had been shutdown for at least the week of August 26, 1988. Plant foreman Kerr and walkaround representative Higginbotham confirmed that this was the case, and Mr. Kerr testified that no one from his shift was assigned to the belt during the period of shutdown, and he confirmed that the only work that he was aware of was clean up work and work to abate several citations (Tr. 158-159, 165).

Walkaround representative Higginbotham confirmed that he saw no one on the belt walkway at the time of the inspection, and that on the three to five prior occasions he has used the walkway, he could recall seeing no one on the walkway other than an inspector or management personnel (Tr. 107). He was of the opinion that the hoses were left on the walkway since the last time it was washed down, but he had no knowledge as to when they may have been last used for this purpose (Tr. 107).

Mr. Pogue could not recall whether he had previously inspected the cited belt conveyor, and he confirmed that he saw no signs that anyone had been on the belt walkway recently, and that the belt was not running when he inspected it. Although he believed that he had checked to determine when the last monthly electrical inspections were performed, he did not do so "specifically for this area," and he could not recall when the last electrical inspection was conducted in the cited area (Tr. 47). Mr. Pogue confirmed that he observed no one using the belt walkway during his inspection and he saw no footprints in the accumulated refuse or dust.

Plant foreman Kerr's unrebutted and credible testimony reflects that when the plant is in operation, the conveyor belt is not totally unattended, and that someone is required to be there at some time over a 24-hour period (Tr. 152). Mr. Kerr conceded that cleanup and maintenance personnel are on the walkway, and that other employees, including himself, used the belt walkway occasionally as an access way to the plant or refuse bin building, and that he might use it once every 2 months. He denied that the walkway is heavily travelled, and indicated that it is only slightly used (Tr. 144, 147). Absent any evidence that Mr. Pogue had ever visited or inspected the belt in the past, and the fact that on the few occasions that Mr. Higginbotham was there and saw no one on the belt other than an inspector or management person, I give credence to Mr. Kerr's testimony and find little support for the inspector's belief that since the belt was heavily travelled, the conditions were readily observable and obvious, and therefore support a finding of aggravated conduct.

Mr. Pogue confirmed that no management representative was with him when he conducted his inspection and observed the conditions. He confirmed that when he issued the order, he found no "written record" or other evidence to establish that management had knowledge of the cited conditions prior to the issuance of the order (Tr. 61). Although I recognize the fact that such "hard evidence" may not be available, on the facts of this case, the inspector apparently made no effort to review any maintenance records, mine inspection reports, or to seek out any available plant personnel to determine when anyone may have been present

using the hoses, cleaning up around the belt tail piece, etc. etc.

After careful consideration of all of the testimony on this issue, I find no credible evidentiary support for MSHA's assertion that the cited accumulations at the belt tail piece, and the hoses on the walkway, were located in "heavily traveled" areas, and were "readily observable" by management. I further find and conclude that with respect to these factors, the evidence presented does not establish aggravated conduct by Cyprus. I take particular note of the following: When asked "what you're saying about the unwarrantable failure is that management should have known that it was there," Mr. Pogue responded "exactly" (Tr. 60). In my view, negligence based on "should have known" is something less than high negligence, and does not amount to inexcusable or aggravated conduct.

Mr. Pogue identified copies of four previous citations which he issued on August 26 and 29, 1988, during his inspection of the mine, and in each instance he cited violations of section 77.205(b) (exhibits G-2 through G-5; Tr. 29-35). He confirmed that he issued the citations for tripping hazards, but that the areas cited where at different locations and in different buildings from the areas which he cited in the contested order (Tr. 36).

Mr. Pogue confirmed that the prior citations on the slope belt occurred "a good distance away" from the preparation plant, and although he believed that Cyprus was responsible for them, he stated that Cyprus did not cause them, and that "there was contractors in there on some of them" performing work at the plant (Tr. 52).

Mr. Pogue was asked about his prior deposition in January, 1989, and his response to a question concerning the basis for his unwarrantable failure finding in this case. He confirmed that he stated that "I felt that because if the conditions on the walkway in relationship to the plant, that a foreman should have seen the condition being inside the plant" (Tr. 56). When asked whether he took into consideration the prior citations at the time he issued the order in this case, Mr. Pogue responded "to a degree, yes." However, he conceded that he did not mention these prior citations at the time he gave his deposition, and could not recall when he mentioned these citations to MSHA's counsel, but did not believe he mentioned them in preparation for the instant case (Tr. 57). Mr. Pogue confirmed that when he gave his deposition, he stated that the basis for the order was the fact that the cited condition could be observed by someone from management, "plus the amount of area that was covered" (Tr. 57).

When asked what role the prior citations played in his unwarrantable failure finding at the time he issued the order, Mr. Pogue responded as follows at (Tr. 67):

> THE WITNESS: Probably because of the fact that the management, there should be some effort on management to make a follow-up examination of the work area after a job is completed or in progress that gives workmen and even company officials a safe travel way in and around the surface area of the plant, and they know these areas that are under construction or maintenance is being performed in them.

Mr. Pogue stated that at the time he issued the order, he recognized that the operator had a problem with the general clean up of work sites during and after routine maintenance (Tr. 72). He conceded that some of these problems were caused by contractors, and although he confirmed that he has cited contractors in the past, he did not cite them for the prior violations in question because the contractor was not at the mine and had left the job, and the obligation for the violations was on the operator (Tr. 72).

Plant foreman Kerr confirmed that two of the prior citations were the result of a painting contractor's removal of certain materials from a building which was being sandblasted and painted, and that one of the citations concerned some material which was removed from an area where a counterweight was located so that access could be gained to the counterweight while maintenance was being performed (Tr. 142-143).

I take note of the fact that three of the tripping hazard violations previously issued by Inspector Pogue on August 26, 1988, were all section 104(a) citations. Three days later, on August 29, 1988, he issued another tripping hazard violation, and it too was a section 104(a) citation. In each instance, the inspector made a finding of "moderate" negligence. In the instant case, MSHA asserts that the fact that four other locations were cited in such a short period of time indicates a lack of indifference by Cyprus to general cleanup activities in travelways, and constitutes aggravated conduct.

In my view, if the basis for the inspector's unwarrantable finding with respect to the contested order was the fact that he had previously issued four citations for violations of the same standard shortly before the order was issued, then logic would dictate that he would follow the same procedure in connection with the issuance of the prior citations. The three section 104(a) citations were issued by Mr. Pogue on August 26, 1989, for violations of section 77.205(b). Three days later, on August 29, 1989, he found another violation of section 77.205(b), but instead of issuing an unwarrantable failure citation, he issued

another section 104(a) citation, with a finding of moderate negligence. I find this to be rather contradictory and inconsistent, and it raises doubts in my mind that the prior citations weighed heavily on the inspector when he made his unwarrantable failure finding in this case. In any event, I cannot conclude that the prior citations which were issued for different conditions, and at different locations far removed from the scene of the conditions which prevailed at the time of the inspection on August 31, 1988, may serve to support a finding of aggravated conduct. In my view, in order to support an unwarrantable failure order, which is a severe sanction, an inspector must make an informed judgment, on a case-by-case basis, with respect to the prevailing conditions which he believes justifies such an order. On the facts of the instant case, I reject MSHA's attempts to justify the order on the basis of prior violations issued for the same standard.

With regard to the time factor, Mr. Pogue was of the opinion that the cited conditions had existed for at least 5-work days prior to his inspection, and he based this on his observation of fine refuse dust deposited on the accumulated refuse materials along the belt walkway. The existence of this fine dust led him to conclude that the conveyor had been running and "this material had been left deposited in the walkway and on the platform for a period of time" (Tr. 28).

Mr. Higginbotham was of the opinion that the coal refuse accumulations at the belt tail had been there for "a lengthy period of time," "days," "roughly a week," because the area was dusty (Tr. 99). He conceded that refuse dust does accumulate on the belt, but indicated that the belt is required to be cleaned when it gets dirty and that accumulations are not permitted. Since the hoses were also covered with dust, he believed they were left in the walkway for "at least" or "probably a week to two weeks" (Tr. 101). With regard to the accumulations in the bin building, he stated that the belt is not used every day or regularly, but "probably weekly," but he did not know for certain (Tr. 103).

MSHA's assertion that the cited accumulations presented extensive and significant obstructions must be taken in context. The accumulations of refuse materials at the tail piece of the refuse belt extended a distance of approximately 10 to 15 feet along a belt line which was approximately 232 feet long, and the accumulations on the walkway in the bin building were described by Inspector Pogue as 24 inches deep and 24 inches wide. Mr. Higginbotham stated that they extended for a distance of 2-1/2 feet, 6 inches longer than Mr. Pogue's estimate. Since Mr. Pogue indicated that "you had to kind of step over it," I can only conclude that the pile was as described by the inspector, and that the accumulations did not extend along the entire length of the walkway.

With regard to the hoses, Mr. Higginbotham stated that he stepped on top of the hoses to pass through the area, and although he believed that a fall or slip were unavoidable, neither he or Mr. Pogue expressed any difficulty in passing through the area where the hoses were located. With regard to the accumulations at the belt tail, Mr. Pogue stated that he had to walk through the materials and over the larger coal and slate and Mr. Higginbotham indicated that the larger pieces were "scattered throughout the walkway."

After careful consideration of all of the evidence in this case, I find no credible evidence to establish that the cited accumulated materials in question had existed for any inordinate period of time. Inspector Pogue had never previously visited the belt area in question, and his reliance on the existence of dust on the accumulations in support of his conclusion that the materials had been present for at least a week is speculative at best. Had he made further inquiry, rather than relying on a rather cursory inspection of the belt areas, he may have found more probative evidence to support a conclusion of aggravated conduct. As for Mr. Higginbotham's testimony, I find it vague and lacking in probative weight. He believed the accumulations on the belt walkways were there "probably" or "roughly" for a "lengthy" period of "days" or "weeks" simply because they were dusty. As for the accumulations in the bin building, he had no idea as to how often the belt was used which would have caused these accumulations, and I find his testimony to be speculative and unsupported by any facts.

On the basis of the foregoing findings and conclusions, I conclude and find that the evidence advanced by MSHA in support of the inspector's unwarrantable failure finding does not establish that the failure by Cyprus to act was inexcusable or constituted aggravated conduct within the guidelines established by the Commission's line of cases with regard to this issue. Accordingly, the inspector's finding in this regard IS VACATED, and the contested order is modified to a section 104(a) citation.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Inspector Pogue believed that the accumulated coal refuse on the walkways, and the hoses scattered across the two walkway locations in question, constituted a significant and substantial violation because anyone walking through those areas would be exposed to a tripping or slipping hazard. In the event of such an incident, he believed that the individual would suffer bumps, bruises, a broken arm, or twisted back (Tr. 22). He further believed that it was reasonably likely to expect that mine personnel, such as a belt examiner or maintenance person, who may be walking along the walkways would slip or fall over the accumulated materials, and that the potential for an injury would increase if the individual were carrying equipment or tools (Tr. 23). He confirmed that at least one person, the examiner or maintenance person, would be exposed to the hazard (Tr. 38).

Mr. Higginbotham believed that the cited accumulated materials presented a tripping or falling hazard, particularly with respect to the belt walkway because it was inclined. He confirmed that he stepped on top of a portion of the hoses, and while he did not fall, he nonetheless believed that a fall was "highly likely" and "almost unavoidable." In the event of a slip

or fall, he believed that someone could "definitely break an arm," and his principal concern for anyone walking through the hoses and accumulated coal refuse materials on the inclined belt was "your feet going out from under you" (Tr. 91-92).

Cyprus argues that the accumulated materials did not present a significant and substantial hazard because the walkways were not highly travelled, and that any hazard exposure would be limited by the fact that the belt was not in operation and there was little or no likelihood of injury. Cyprus argues further that there is no testimony that the materials presented stumbling or slipping hazards, and that the hoses were easily compressed when stepped on, and that Mr. Monas testified that they presented no stumbling hazard unless they were in a pile. Cyprus argues further that there was adequate lighting and visibility along the refuse belt walkway, and that lacking any credible evidence as to how long the materials had existed, a significant and substantial finding is inappropriate.

Cyprus' assertion that there is no testimony of any stumbling or slipping hazards is not well taken. Inspector Pogue and Mr. Higginbotham personally observed the accumulated materials and gave credible testimony as to the existence of these hazards. The fact that they did not fall or slip while walking through and over the materials is irrelevant. They obviously took care while walking through the area, but the same may not be the case for anyone else casually walking along the cited travelways in question.

While it is true that the refuse belt and plant were down at the time of the inspection, plant foreman Kerr admitted that during the course of normal operations, the belt is never left unattended, and that someone is always present during any 24-hour period. Further, the evidence establishes that cleanup or maintenance personnel have occasion to walk the cited areas, and the fact that there was another access route to the bin building is immaterial. Mr. Kerr confirmed that the cited refuse belt walkway was used as an accessway to and from the plant and bin building, and that he used this route on occasion. The opinion by Mr. Monas that the hoses would present a tripping hazard only if they were piled up, rather than scattered, is rejected. In my view, if the hoses were piled neatly at one location on the walkway, they may pose less of a hazard since someone could simply walk around the pile. However, since they were scattered and "criss-crossed" on the walkway, I believe the hazard of slipping or falling over them was increased.

The fact that there was no immediate hazard because the belt was not in operation at the time of the inspection, and the fact that Mr. Pogue and Mr. Higginbotham did not slip or fall while

walking through and stepping over the cited material is irrelevant to any determination of a significant and substantial violation. See: Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1369, 1376 (May 1984); R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986); Mathies Coal Company, 6 FMSHRC 1 (January 1984). In Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986), the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

After careful consideration of all of the testimony and evidence adduced in this case, I agree with the inspector's significant and substantial finding. I conclude and find that the cited accumulated materials at all three of the cited locations in question posed a discrete stumbling or slipping hazard, and that the hazards contributed to by these conditions would likely result in an injury of a reasonably serious nature. Accordingly, the inspector's significant and substantial finding IS AFFIRMED.

After consideration of the six statutory criteria found in section 110(i) of the Act, I further conclude and find that the violation was serious, that it resulted from ordinary negligence, and that the conditions were subsequently abated in good faith by Cyprus.

Docket Nos. PENN 89-45-R and PENN 88-325-R

These proceedings concern a contested section 104(a) citation and section 107(a) imminent danger order issued on August 30, 1988, by MSHA Inspector Joseph Koscho during an inspection of Cyprus' surface coal preparation plant. The facts establish that after the coal is cleaned and processed through the preparation plant, it is transported by overhead belts for storage at the No. 1 and No. 2 stackers, which are tall cylindrical buildings surrounded by coal stockpiles. The transported coal is dropped into the top of the stackers, and when it reaches

a certain level it is deposited onto a stockpile through openings located on all sides of the stacker levels. Coal is removed from the stockpiles by a series of feeders, designated A through F, located under the stockpiles. In order to remove the coal by these feeders, coal must be above the feeders or within an area close enough to the feeders to permit gravity to bring it to the feeders. The stockpiled coal which is fed through the feeders drops onto a belt system in an underground tunnel below the stackers and feeders, and it is transported away to be loaded onto trains.

Cyprus utilizes bulldozers to push the stockpiled coal toward the feeders and to compact and arrange the stockpile. During the course of his inspection, Mr. Koscho, in the company of UMWA safety representative Greg Shuba, and preparation plant foreman Ronald Kerr, were walking on an overhead belt catwalk between the No. 1 and No. 2 stackers. Although there were no bulldozers operating on the stockpile at the time, the inspector looked down and observed bulldozer tracks in the coal pile in close proximity to the points that he believed would be directly over the B and E feeders. The inspector observed what he believed to be a depression in the coal where coal had been feeding into the B feeder, and he estimated that the bulldozer tracks were within 3 to 4 feet of the hole. The inspector also observed bulldozer tracks and blade marks in close proximity to the E feeder, and he concluded that these track and blade marks showed that a bulldozer had reached across with its blade and run backwards to smooth over the coal pile in front of the dozer. He estimated the blade marks of the dozer to be 7 feet on the other side of a depression over the E feeder, and he concluded that the dozer had to have been over top of the feeder to be able to reach this point.

After viewing the aforementioned tracks from the catwalk, Mr. Koscho and Mr. Shuba came off the catwalk and walked onto the coal pile to verify their observations. Mr. Kerr did not accompany them onto the pile, and left the area on another matter. After viewing the tracks from where he believed was a safe distance, Mr. Koscho concluded that the tracks were no more than 3 days old, and he was concerned that bulldozers were operating in too close proximity to the feeders during the stockpiling and reclaiming operations, and that the bulldozer operators were at risk of becoming entrapped in the holes or voids in the coal pile. Based on his observations of the track and blade marks in the coal pile, Mr. Koscho issued an "S&S" citation for an alleged violation of mandatory safety standard 20 C.F.R. § 77.209, and in conjunction with that citation, he also issued an imminent danger order citing Cyprus for operating bulldozers over feeders, or too close to feeders. The section 104(a) Citation No. 3087308, issued by Mr. Koscho states as follows:

From evidence of the visual observation in the area of the feeder, in the area of the No. 2 stacker, showed equipment is coming in too close of a proximity of the feeder. The evidence at the B feeder at the No. 2 stacker showed dozer tracks went over the feeder or too close to the feeder to be a safe distance back from the angle of repose at the feeder. At the No. 2 stacker E feeder a dozer reached across the reclaim area above the feeder for a distance of 7 feet and then set the dozer blade down to drag back the blade, making a smooth surface. In doing this he had to reach over the angle of repose at the E feeder.

The section 107(a) imminent danger Order No. 3087309, issued by Mr. Koscho states as follows:

> This is an order to prevent persons from exposing themselves to the type of dangers evident by visual observation in the area of the No. 2 stacker feeders. Equipment is being operated too close or over the feeders. Tracks over the B feeder shows that either the equipment runs over the feeder or comes too close to the feeder in that the tracks go into the angle of repose. On the E feeder of the No. 2 stacker the evidence shows that the push blade of a dozer was 7 feet to the opposite side of the feeder, set down on coal and was dragged back for a smooth surface. The equipment had to be on top of the feeder to be able to reach this point. The operator of equipment shall be instructed by management and a representative of MSHA to watch the operation before work is to be resumed at the No. 2 stacker. Cit. No. 3087309 was also issued.

MSHA's Testimony and Evidence

MSHA Inspector Joseph Koscho confirmed that he conducted an inspection at the mine on August 30, 1988, and that he issued section 104(a) Citation No. 2087308, and section 107(a) imminent danger Order No. 3087309, in conjunction with the citation (exhibits G-1 and G-2). Union Safety Representative Greg Shuba, and mine management representative Doug Kerr accompanied him during the inspection. Mr. Koscho stated that he walked up one of the belts above the coal stockpile, and looking out from a window which overlooks the west side of the stockpile he observed bulldozer tracks in close proximity to the feeders, particularly feeders No. B and E. He came down from the belt and walked up on the stockpile to look at the tracks which he had observed from the belt. He observed tracks "too close in the vicinity of the B feeder." The tracks were located within 3 to 4 feet from a depression where the coal had been feeding into the feeder, and the tracks were "right along side of it. Too close for safety" (Tr. 17-22).

Mr. Koscho stated that he also observed tracks near the E feeder where there was a depression approximately 3-1/2 to 4 feet in diameter and 2 feet deep where the dozer had reached across with its 7 to 8 foot long blade, and then backed up smoothing out the depression in the pile. He believed that the dozer had reached across the depression, and the dozer tracks were up to the depression. Mr. Koscho confirmed that the feeders were not in operation at the time of his inspection, and that no coal reclaiming work was taking place at the stockpile area (Tr. 23).

Mr. Koscho stated that he issued the order "because there is a very strong likelihood" that someone could fall into the depression and be covered by the coal even though he would be sitting in a dozer, and "that there could be imminent danger" (Tr. 24). He was concerned that someone could suffocate if he fell into a void or hole in the stockpile, and that the fact that he would be in the equipment cab would make no difference because the cab glass around the operator could be pushed in and the operator would be unable to get out of the cab because the coal would block the doors.

Mr. Koscho stated that a void can be created by the feeders feeding coal onto the belt, and that the resulting hole under the surface of the coal pile would not be observable because the surface of the coal would be intact above the area of the hole (Tr. 25).

Mr. Koscho stated that he had previously issued a section 104(a) citation on August 23, 1988, citing a violation of section 77.209. He explained that he investigated an incident where a bulldozer had slid into a void created by a feeder while it was reclaiming coal. The dozer was evidently operating too close to the edge of the feeder and it had to be pulled out, and the dozer operator used a radio which was in the cab to summon help (Tr. 26).

Mr. Koscho stated that there is no way for anyone to determine whether a void is present over the feeders that are feeding coal into the reclaim belt, and that a void may occur at any time. Since the coal on the stockpile is compacted, a crest could form over the feeders, and one would be unaware of any voids created between the feeders and the surface of the coal pile (Tr. 27).

Mr. Koscho estimated the height of the coal stockpile as approximately 60 feet, and he stated that a chain which is normally in place to indicate the height of the coal pile was not in place, and that the coal was half-way up the side of the stacker. He stated that the height of the coal pile would affect the

likelihood of an accident, and the higher the pile of coal present, the wider the hole would be (Tr. 29).

Mr. Koscho confirmed that he had no knowledge as to the number of dozers which may have been previously operating on the pile, and no one was on the pile at the time of the inspection. He also confirmed that he had no knowledge whether any dozers were operating on the pile while the feeders were in operation, but that this made no difference "because a void could exist at any time" and "when these bulldozers go up on this pile, that void could be there without them even knowing about it." He also believed that voids could be present even if the feeders are not operating because "they could have been pulled out previously" (Tr. 29-30).

Mr. Koscho confirmed that he had no knowledge when the tracks he observed were made, or when the dozers last operated on the pile, but he was of the opinion that the tracks were made "within the last two or three days" because they were "more pronounced and acute" (Tr. 34).

Mr. Koscho stated that dozers would be on the pile to level out and spread the coal so that more coal can be stocked on the pile after it feeds out of the stackers. He had no way of knowing whether the dozers were recovering coal through the feeder or just spreading it out (Tr. 35). He believed that the pile around the No. 2 stacker was used every week, but did not know how often during the week it was in operation (Tr. 36).

Mr. Koscho stated that he cited a violation of section 77.209, because "its the only thing we have to cover this." He explained that even though section 77.209, addresses people walking or standing on a reclaim pile, anyone in a piece of equipment "is just as open to that danger as a man standing on it" (Tr. 37). He confirmed that the "reclaiming area" includes the feeders, stockpile, and the area where the coal is being stocked and reclaimed (Tr. 39).

Mr. Koscho stated that the previous violation he issued was a section 104(a) citation rather than an imminent danger order because it was terminated within 5 minutes and he determined that management had instructed the dozer operator. However, when he observed the dozer tracks on August 30, he believed that the dozer operators were not following instructions and that mine management was responsible for seeing to it that the job was being done "to save their lives" (Tr. 46).

Mr. Koscho stated that he considered Citation No. 3087308 to be "S&S" because "its a serious proposition" (Tr. 47). He believed there was a danger of suffocation if the equipment operator fell into a void, and "it would be a lost life." He

believed this "could happen at any time, whenever the equipment would be put back on the stockpile" (Tr. 48).

On cross-examination, Mr. Koscho explained the modifications which were made with respect to Citation No. 3087308 (Tr. 48-52). He confirmed that the imminent danger order was terminated after a meeting was held with all of the equipment operators who were present and they were instructed to stay a "safe distance" from the feeders (Tr. 51, 54).

Mr. Koscho stated that while he was on the pile observing the area around the B feeder, he stayed a "safe distance" away from the feeder, and that he stood back further than 20 feet, but could not recall the exact distance. He could not recall how far away from the E feeder he was standing, but that it was "a safe distance." He confirmed that he did not measure the 7 or 8 foot distance over the cited feeder, but was close enough to estimate that distance (Tr. 53).

Mr. Koscho confirmed that when he walked on the stockpile, he did not notify anyone that he was there because a management supervisor was with him. He also confirmed that he did not have a self-rescuer with him, was not attached to a life line, and he could not determine whether any voids were present on the pile. He stated that "I was in an area where I felt there wouldn't be a void," and conceded that he did nothing to check whether any voids were present over the feeders because "there's no way for us to know if there was voids" (Tr. 56).

Mr. Koscho confirmed that the locations of the feeders are marked, and that if anyone was operating in the area and observed no changes in the surface of the coal, he would know there was a problem with a void over the feeder (Tr. 56). He confirmed that he observed small depressions over the B and E feeders and therefore knew where the feeders were located. The tracks he observed were in the vicinity of both feeders, and the tracks at the B feeder were within 2 feet of the void (Tr. 57). He confirmed that the prior citation concerned the dozer which was too close to the C feeder while pushing coal into the A feeder, and it slipped into the C feeder (Tr. 58). He confirmed that the prior citation was based on a condition which he did not observe, and that he based the citation on what someone told him, and a statement by the dozer operator that he had made a mistake which caused the problem (Tr. 60).

Mr. Koscho confirmed that when he issued the contested citation and order in this case he did not know when the feeders were last operated, or whether mine management had observed dozers operating on the cited stockpile (Tr. 60). He stated that he made no effort to determine who had operated on the pile in question (Tr. 62). He also confirmed that no one was in danger when he issued the order, that he cited what he perceived to be a

practice of pushing coal too close to the feeder, and that it was a "practice that seems to exist" (Tr. 62).

Mr. Koscho confirmed that he did not recall the prior citation at the time he gave his deposition on January 26, 1989, in this case "but it may have been in my mind at the time that I issued the order" (Tr. 63). He confirmed that when he gave his deposition he stated that he did not know whether the cited conditions in this case was an "isolated occurrence" because he did not remember his prior citation (Tr. 65). He believed that two occurrences or violations of section 77.209, "does become a practice" (Tr. 66). He explained further as follows at (Tr. 67-68):

> Q. So apparently, as you were testifying earlier, that instruction apparently didn't work, that somebody wasn't paying attention?
>
> A. Well, somebody hadn't paid attention.
>
> Q. You don't know --
>
> A. According to what I saw.
>
> Q. You don't know whether it was somebody in management or somebody in the hourly workers?
>
> A. There's no way for me to know.
>
> Q. I take it you don't know whether it's one particular individual who did it, or two or six. You just don't know?
>
> A. There was nobody working at the time. I wouldn't know.
>
> Q. So you really don't know whether it's some hourly employee who took it upon himself to do this and figured he could get away with it on this one time, or whether it was actually a practice?
>
> A. To answer you, from experience, it seems to me that it's management's responsibility to see that it is done properly, and that's the basis that I was using.
>
> Q. So you were -- regardless of whether or not it was somebody who was violating management's instructions, you said management is responsible so I'll issue the citation and the Imminent Danger Order?
>
> A. Yes.

Q. You didn't know whether it was somebody in management who was violating the instructions, someone in the hourly work force. You just didn't know that when you issued your order, isn't that correct?

A. I wouldn't know.

Mr. Koscho stated that during a meeting held after the order was issued and terminated, Cyprus' vice-president and general manager Lamar Samples told the assembled employees that "if he caught anyone doing this again he would fire them" (Tr. 71).

Mr. Koscho stated that a void hazard would exist all the time, regardless of whether the feeders were operating. He conceded that when the feeders are shut off the depressions can be filled up with the ongoing movement of the coal out of the pile and into the feeders and that a firm working coal surface would be established. However, he stated "that don't mean it would fill completely up," and that even though one would know that the coal was going down into the feeder, "it could block itself off by pushing coal down in there" (Tr. 72).

When asked whether he issued the order to get management's attention because of the previously cited condition a week earlier, Mr. Koscho replied "I wouldn't say yes, but it sounds good" (Tr. 72). He confirmed that when he issued the order the prior citation "wasn't even in my mind probably. Probably not" (Tr. 74).

Mr. Koscho stated that when he issued the order he did not check any dozers to determine whether they were equipped with self-rescuers or operative radios. Although the dozers are usually equipped with cabs and safety glass, he did not check them at the time he issued the order (Tr. 75).

Mr. Koscho stated that an equipment operator who fell into a void while in a dozer would have time to be rescued while using a self-rescuer, assuming that the cab is not crushed, but that anyone falling into the void while walking or standing on the pile would not have this option (Tr. 75-76).

Mr. Koscho stated that if someone were to be walking in the stockpile area where he walked, or if a dozer were operating there, it would be safe. He agreed that there was a "safe area" on the pile, and if a feeder were operating and the coal above it were to run down in a conical shape, there would be a need to get more coal around the feeder, and that this is normally done by pushing coal to the feeder. He confirmed that this method is not unique to the Emerald Mine and that other mines have similar coal feeder systems (Tr. 78).

Mr. Koscho conceded that the only information he had to support his belief that dozers were operating too close to the feeders is the tracks in the coal (Tr. 79). He confirmed that he had inspected the dozers in the past, and he identified them as D-9 caterpillars equipped with safety-glass cabs with no wire-mesh in the glass (Tr. 81). Although he was not aware of other surface mine facilities in his district that use a stacker feeder system, he was aware that this system is used at other mines (Tr. 82).

Greg T. Shuba, mobile equipment operator, and member of the mine safety committee, confirmed that he accompanied Inspector Koscho during his inspection of August 30, 1988. He confirmed that he observed the dozer tracks testified to by the inspector. With regard to the tracks at the B feeder, Mr. Shuba stated that part of the track impressions on the ground was broken away from the coal that had gone into the feeder, and that this indicated to him that someone was either directly over or too close to the feeder. He also agreed with the inspector's testimony concerning the dozer blade marks over the E feeder and he believed that the dozer had been over the feeder and "back-dragged" to smooth over the ground in front of the dozer (Tr. 89-92).

Mr. Shuba estimated the height of the coal stockpile as 70 feet. He confirmed that he has operated a dozer on the stock-pile "on and off" since February, 1989. He also confirmed that he operated a dozer on the pile prior to the time of the inspec-tion, but could not state when. He believed it would have been "months" before the inspection (Tr. 93).

Mr. Shuba stated that a dozer would be operating on the stockpile to reclaim coal or to stockpile it. Reclaiming con-sists of pushing the coal to the feeders to load the train, and this would be done when the feeders are operating. Stockpiling the coal, or pushing it on the pile or spreading out the pile, would be done while the feeders were not operating (Tr. 93-94).

Mr. Shuba stated that he has never crossed over a feeder while operating a dozer on the pile, but other operators have told him that "there were times" when they crossed the feeders, and that this would have been prior to August 30, 1988 (Tr. 94). Mr. Shuba stated that the stockpile reclaiming system is designed poorly, and that an operator can either get over a feeder or "literally destroy the machine" because of the restricted equip-ment turning area while attempting to push coal with the dozer blade. He stated that some operators may cross over feeders or operate over them because its easier to get behind the coal and push it in a straight line. He identified feeders C and D as the problem areas (Tr. 94-95). He stated that the problem with the cited B and E feeder areas was "the possibility of a void" (Tr. 96). He believed that the "probable" reason for operators to cross over the B and E feeders would be "to get from one side to

the other" (Tr. 96). He believed that the feeder system in question has been in effect for "a couple of years" (Tr. 97).

Mr. Shuba explained the operation of the feeder system, and he was of the opinion that "we are creating our own hazards by expanding the piles the way we are." He stated that there have been "a couple of close calls" where dozer operators have gone by areas where it has given in and that the front part of a dozer would start down in but they were able to get back out before anything materialized (Tr. 99).

Mr. Shuba confirmed that mine management has instructed equipment operators not to operate directly over feeders and that the instructions were also probably given prior to August 30, 1988. Mr. Shuba believed that management had reason to know that people were working over the feeders because the plant superintendent's office is directly below the piles, and the office has two windows where he can see out to the piles, and that "it doesn't take an expert to drive by in a pick-up truck and see which way a dozer is pushing" (Tr. 101).

Mr. Shuba confirmed that he has been instructed by management about the "safety zone" around the top of the feeders where one could safely operate, and he explained that a 65 degree angle of repose for the coal was the "safety zone." He also confirmed that a diagram explaining this safety zone was posted in each machine that operated on the pile, and he identified the diagram as exhibit G-4, (Tr. 103). He stated that for a 60 foot coal pile, the safety zone would be 32 feet away from the center of the feeder, or a radius of 64 four feet (Tr. 104). He confirmed that the stockpile at the number 2 stacker covered six feeders (Tr. 107).

On cross-examination, Mr. Shuba stated that the feeder operator has a radio to communicate with the equipment operators but conditions change momentarily and its difficult to maintain communications (Tr. 109-110). Mr. Shuba did not believe that he was in an unsafe position while on the pile with the inspector, and as long as he is not within the angle of repose he would not be in a hazardous area (Tr. 112).

Mr. Shuba stated that he had discussed the matter concerning the feeders with management as early as November 16, 1987, and that management's instructions that dozer operators were not to operate close to the feeders began at this time (Tr. 113). He confirmed that the angle of repose could change depending on the coal compaction, and that it was a guideline established by MSHA (Tr. 114).

Mr. Shuba confirmed that the biggest problem arises when coal is being stockpiled because the coal is stacked next to the stacker, and one has to get directly over the feeders to get

behind the coal to push it (Tr. 120, 122). He stated that while management has given instructions to equipment operators not to operate close to or over the feeders, it has been unable to tell the operators how to push the coal and stay within the law (Tr. 123).

Dr. Kelvin K. Wu, Chief, Mine Waste and Geo-Technical Division, MSHA, testified as to his background and experience, and he confirmed that he is a registered professional mining engineer, holds a PHD degree from the University of Wisconsin, and is an adjunct professor at the University of Pennsylvania (Tr. 127). Dr. Wu confirmed that he was familiar with the mine surface facility in question, and that in November, 1987, he was requested by MSHA's district office to make site visits and work with company personnel to try to come up with some safe operating procedures. He confirmed that he visited the site and observed the loading process. He identified exhibit G-5, as the field investigation report and recommendation he prepared. He stated that he made one site inspection on November 24, 1987, and believed he made a second visit, but was not sure (Tr. 129).

Dr. Wu explained his recommendations, including the establishment of a 65 degree angle of repose for the coal stockpile. The diagram used as a guide for the equipment operators was prepared by a company engineer, and it was based on his recommendations (Tr. 129-133).

Dr. Wu stated that he was concerned about voids that are not visually detectable from the surface (Tr. 134). He confirmed that his interpretation of the conditions cited in the citation and order describing the equipment tracks as being "too close" to the B feeder indicates to him that they were over and "right on top of the feeders." With regard to the E feeder, he agreed with the testimony that the dozer reached out over the feeder and then backing up to level out the coal (Tr. 137-138).

On cross-examination, Dr. Wu confirmed that the angle of repose was established in consultation with mine management who agreed that it was reasonable. He also confirmed that the coal was not tested because everyone observed the operation during his inspection, and he explained how the angle of repose was established (Tr. 140-142). He confirmed that the 65 degree angle of repose was based on a fatality which had occurred at the Loveridge Mine in 1985 where five individuals were fatally injured while walking on a coal stockpile. Although this accident involved people walking on a stockpile, there is no difference in the hazard simply because it concerns operators who are in a dozer (Tr. 143).

Dr. Wu confirmed that he was familiar with section 77.209, and notwithstanding the fact that it only refers to persons walking or standing on a stockpile, he believed that the intent

of the standard is to address the hazard exposure to a person on the pile, regardless of whether he is on foot or in a piece of equipment (Tr. 144-145). He also confirmed that the feeder system in use at the mine is not unique or unusual. If the feeders are not operating, one may need to fill any depressions over the feeders during the stockpiling process, but there is no guarantee that voids are not present. If there is any blockage while the feeders are closed, voids could develop (Tr. 145-149).

Dr. Wu agreed that it was necessary for a bulldozer to operate on top of a coal stockpile in order to push the coal into the feeders. When there is a 65 degree angle of repose and the coal is flowing freely into the feeder, any coal beyond the angle of repose would not feed into the feeder and the bulldozer must push the coal into the hole (Tr. 150). In this situation, there would be no need for anyone to be on the pile on foot. There is a need for bulldozers on the pile in order to spread or push the coal to the storage area and to maintain the volume of coal (Tr. 152). He confirmed that a standardized angle of repose cannot be applied "across the board" to all surface stacker feeder systems because of the variety of differences in the loading process, materials stockpiles, and the equipment used in the process (Tr. 153-154).

MSHA Supervisory Inspector Robert W. Newhouse, testified to his experience and training, and he confirmed that he is a certified mine foreman, and has an associate's degree in mining from Penn State University (Tr. 157). He confirmed that he is Mr. Koscho's supervisor and that he discussed the citation and order with him when they were issued. Mr. Newhouse also confirmed that in November, 1987, he visited the mine and observed the feeder operation after receiving information which raised questions about the feeder operating procedures and practices. He stated that he learned that dozers had been travelling over the feeders at some point through conversations with dozer operators, and plant superintendent Thurman Phillips. Mr. Newhouse confirmed that he never personally observed any dozers operating over the feeders (Tr. 158).

Mr. Newhouse was of the opinion that the condition described in the citation and order constitute violations of section 77.209, because the standard is designed to protect persons on stockpiles during reclaiming operations, and the standard states that it is "to protect people from being in an endangered area on those piles" (Tr. 159). He stated that MSHA made a determination that section 77.209 covers dozers operating over feeders in November, 1987, and the determination was made by MSHA's National office in Arlington, Virginia, and it was communicated verbally by him to plant superintendent Thurman Phillips. He also confirmed that this policy is current District 2 policy, which he confirmed through discussions with the district manager, Donald Huntley at various times prior to November, 1987 (Tr. 160).

Mr. Newhouse confirmed that he issued a citation regarding the operation of dozers over or near feeders at the same facility on June 10, 1988, and that he cited a violation of section 77.209 (Tr. 160, exhibit G-6). He stated that on this occasion, he observed dozer tracks directly over a feeder, and also observed a dozer working on an opposite pile, and made a determination that it was in "close proximity" to the feeder. He confirmed that he did not observe the dozer crossing over the feeders, but did observe it operating in "close proximity" to the feeder (Tr. 162). Mr. Newhouse stated that the dozer was working "on the side of the pile within the 65 degree," but he did not know how far it was from the center of the feeder, but that it was within the agreed upon safety zone (Tr. 162).

Mr. Newhouse confirmed that he did not issue an imminent danger in conjunction with his citation, but that in hindsight, he probably should have, and was probably mistaken for not doing so. However, the machine made a "momentary pass" in the feeder area, and as soon as he mentioned it to management, immediate corrective action was taken (Tr. 164). He explained that stockpiling takes place when the coal is spread out in all directions on the pile, and that reclaiming takes place when the feeder gates are opened and the coal is drawn into the belts under the feeders (Tr. 165).

Mr. Newhouse stated that he has received reports of accidents and fatalities which have occurred at other facilities by dozers operating on stockpiles, and he identified exhibit G-7 as an MSHA informational bulletin containing a synopsis of accidents which have occurred from 1979 to 1983 on certain storage piles (Tr. 167). He identified the fatal accidents which have occurred (Tr. 168-186, exhibits G-7, G-9).

Mr. Newhouse confirmed that he advised mine management of the application of section 77.209 to its feeder operation, and that the 65 degree angle of repose, "plus or minus five degrees," was an agreed upon prudent figure for the dozer operator to follow, and that this communication was made in November, 1987 (Tr. 186-188).

On cross-examination, Mr. Newhouse confirmed that the district policy in question was stated in a letter from Mr. Huntley to Safety Supervisor Dennis Dobish (exhibit O-4), and that prior to this time, the policy was verbally communicated to mine management (Tr. 189). He further confirmed that the current MSHA policy manual published in July, 1988, does not address section 77.209 (Tr. 190).

Mr. Newhouse confirmed that the citation which he issued in June, 1988, was abated after the equipment operators were

instructed not to operate over or too close to the feeders (Tr. 198). With regard to the alleged "common practice" engaged in by Cyprus, Mr. Newhouse stated as follows at (Tr. 199-200):

> Q. Now, you had the time you were cited and the equipment operators were instructed and then Mr. Koscho cited them at the end of August and they were instructed again. Do two times make it a common practice? Two times that they were cited?
>
> A. I'll tell you, I would say it's a common practice based on all the information collected over a year of fooling with that operation down there and the different questions and comments from operators.
>
> Q. I take it that during that year, as far back as November 1987, the company said they would instruct the employees who operate that equipment not to take dozers over the feeders or too close to the feeders?
>
> A. Yes. It started out to be a simple safety message to the operators not to run over feeders, and then it progressed into the threat of firing anybody that did take them over the feeders. Possibly if they had those control measures in the first place, we wouldn't have got the violations. I don't know.
>
> Q. Now, I take it that in November 1987 that there weren't any violations or Imminent Danger Orders issued?
>
> A. No.
>
> Q. And I take it that in January 1988 that when you were out there again you didn't issue any violations?
>
> A. Not that I recall.

Mr. Newhouse could not recall whether he issued any violations during his visit to the mine in January, 1988, when a section 103(g) inspection was conducted (Tr. 200). He identified exhibit O-5, as a finding made by Inspector Koscho that "no hazardous conditions existed and unsafe practices were not observed" (Tr. 201).

Cyprus' Testimony and Evidence

Donald D. Kerr, preparation plant foreman, testified as to his experience and duties, and he explained the coal loading process at the coal stockpile in question. He stated that the feeder loading operation is supervised by a foreman who is in radio contact with the bulldozer operators, and the foreman will

inform the operators as to which feeders are in operation (Tr. 227-231). He confirmed that he was with Inspector Koscho during his inspection, but did recall going onto the coal pile with him. He also confirmed that he observed the dozer tracks at the B and E feeders as testified to by Mr. Koscho, but could not recall observing any depressions in the pile (Tr. 232).

Mr. Kerr stated that he could observe the dozer operators operating on the pile from the catwalk and roadway which passes by the piles, but that he is rarely on the catwalk. The front of the pile can be observed from the roadway, but the back of the pile cannot be observed from the roadway, and one cannot determine whether the dozers are operating over the feeders from this vantage point (Tr. 234).

Mr. Kerr estimated that 600 tons of coal was loaded through the feeders during the period between August 21 and 30, 1988, and he believed that feeders C or D were in operation during this time, but that it was unlikely that the coal was loaded from the B or E feeders. With regard to the dozer tracks which the inspector observed on August 21, Mr. Kerr explained that after the completion of the loading and reclaiming operation, the dozer operators go back and push the coal into the voids created by the feeders in order to seal them to prevent any rain or inclement weather from washing the coal down into the reclaim tunnel, and that this procedure is a normal practice. Mr. Kerr was not certain if the tracks left at the B feeder were left there by the incident which occurred on August 21, but he believed they may have been left over tracks because "we hadn't operated the stacker system that much in that time" (Tr. 236).

On cross-examination, Mr. Kerr stated that the bulk of the 600 tons of coal in question came from the No. 2 stacker, and he confirmed that he did not check his loading records for the week prior to this time. He agreed that the B and E feeders are used on a regular basis, and he assumed that the August 21, incident occurred at the B feeder, and possibly the C feeder (Tr. 238). He believed that the tracks which were observed on August 30, were tracks which were left over by the dozer operating by the C feeder (Tr. 239). Since the feeders are close to each other, it was possible that the dozer operator strayed over near the B feeder while moving around to smooth out the pile. He confirmed that his records would not reflect when any particular dozer may have been operating on the coal pile (Tr. 240).

Mr. Kerr confirmed that he observed the dozer tracks and blade marks which were observed at the E feeder, and although he believed that the tracks at the B feeder were "left over" from the previous citation, he did not dispute the existence of the tracks at the E feeder (Tr. 243).

James Graznak, outside foreman, stated that part of his responsibilities include the supervision of dozer operators on the coal piles, and he confirmed that he was aware of the meetings held with respect to the issue of dozers operating in and around the feeders. He confirmed that the issue "came to a head" in November, 1987, and that MSHA was requested to bring some of its technical personnel to the site to address the problem. He identified a copy of an MSHA report, exhibit O-8, and confirmed that it reflects that he had "advised all operators not to cross over the feeders" (Tr. 255). He confirmed that these instructions would have been given 2 or 3-days prior to the November 19, date of the report, and that he also instructed that overhead markers and signs be placed over the piles to indicate the location of the feeders (Tr. 256).

Mr. Graznak confirmed that he was present at one of the meetings conducted by Dr. Wu, and that Cyprus agreed that "no man or equipment will be allowed directly over the feeders at any time, whether the feeders are operating or not" and that this instruction was communicated to the dozer operators (Tr. 258). Mr. Graznak had no knowledge of any discussions concerning the 65 degree angle of repose, but he confirmed that when he found out about this guideline, he found it difficult to follow because the angle of repose at which the coal was falling was steeper than 65 degrees, and that this was obvious by observation (Tr. 259). He confirmed that radios were installed in the dozers at the coal loadout for dependable communications between the dozers and the person in charge of the loading (Tr. 261).

In response to a question as to whether it is possible to reclaim coal without going too close to the feeders, Mr. Graznak stated that this would depend on "what is considered too close." He explained that although the contestant follows MSHA's recommended 65 degree angle of repose, it operates within that zone because it "has no choice" because it cannot get close enough to get the coal to the feeder otherwise. He confirmed that he was aware of the potential hazard by operating too close to the feeders, and he believes the dozer operators exercise judgment in determining how close they should push the coal (Tr. 263). He identified exhibit O-11, as copies of safety contacts made with employees as reminders of safe operating procedures while working on the coal piles (Tr. 263-265).

In response to a question as to whether or not the dozer operators made it a practice to operate over the feeders while reclaiming or stockpiling coal, Mr. Graznak responded as follows (Tr. 266-267):

> Q. Now, as far as you know, as of August 30, 1988, was there a practice of dozer operators running over the feeders when they were doing reclaiming or stockpiling?

A. There was not a practice of it, no.

Q. Now, was there a practice, as far as you know, of the dozer operators either doing reclaiming or stockpiling in August 1988 of going too close to the feeders?

A. I don't really know of any. You said during reclaiming?

Q. Reclaiming or stockpiling.

A. I really don't know of any problems with regard to reclaiming. For stockpiling, it's very difficult. Like we had some testimony earlier today, there are times when it is very difficult. Occasionally, but as far as, you know, was it a practice, no. That's the reason I kept reminding the people to try and stay on the dozer and be on the alert.

Q. You say it's very difficult. Is it possible to both reclaim and to stockpile without going over the feeders or too close to the feeders? Too close to the feeders being in a hazardous position.

A. It can be done, but it's tough.

Q. You have to work at it?

A. Well, we probably put up 500 tons per hour at that stacker, so it keeps the men busy. He has to stay on his toes.

Mr. Graznak stated that the contestant's stacker system is not unique and that it is common to other coal mines and power plants in the area, and that after the imminent danger order was issued he visited other mines in the area to check out their systems (Tr. 268). He stated that he was aware of four other operations where dozers were operating over the feeders during their stockpiling operations, and that in these instances, the reclaiming systems were locked out while the dozers travelled over the feeders while stockpiling coal (Tr. 269).

On cross-examination, Mr. Graznak confirmed that one of the operations he observed did not have coal stacking "tubes" similar to the contestant's No. 1 and No. 2 stackers, and that he did not discuss these other operations with MSHA, did not know whether these operators had approved MSHA plans, and had no information concerning the coal stacking capacities of these other operations (Tr. 271).

Mr. Graznak stated that during reclaiming operations, the dozers do not have to cross over the feeders, but during stockpiling, it is difficult to maneuver the equipment. He denied that dozers were crossing over feeders on a regular basis as of August 30, 1988, but that "occasionally someone would" (Tr. 276). Mr. Graznak could not recall the specifics concerning his safety contacts with the employees from November 30, 1987, to January 21, 1988, (exhibit O-11). He confirmed that these contacts may have been prompted by reports of someone observing dozer tracks, and that he sometimes makes them as "a blanket for the whole crew" after an indication that someone had crossed over or operated too close to a feeder. He also indicated that he issued these reports to insure that everyone was aware of the "gravity of the situation" (Tr. 278-280). Mr. Graznak could recall only one past incident where a bridged over cavity developed over one of the feeders (Tr. 284).

Mr. Graznak believed that with "certain limitations that we can live by," the dozers should be permitted to cross over the feeders during its stockpiling operation. He did not believe there was any reason for a dozer to cross over a feeder during the reclaiming operation because "we would move the material up to the edge of the draw hole and just let it go in by itself" (Tr. 285). With regard to dozers operating on top of the coal piles, Mr. Graznak stated that this was common to many coal mine operations for expanding the holding capacity of the stacking facilities (Tr. 286).

Dennis Dobish, safety supervisor, confirmed that he is a certified mine foreman, and that he is familiar with the feeder issue in this case. He confirmed that after the imminent danger order was issued, he sent a letter to Inspector Newhouse outlining the practice to be followed in the future, and to abate the order (Tr. 291). Since that time, he has worked to develop a plan which would permit the dozers to operate over the feeders, and he has met with various company, union, and MSHA officials in this regard, including a meeting with MSHA's sub-district manager Roger Uhazie on November 17, 1987 (exhibit O-6, Tr. 292). The plan was unacceptable to Mr. Uhazie, and a further meeting was held with former district manager Don Huntley, and a letter and the proposed plan was submitted to Mr. Huntley on December 1, 1988. The plan would permit the operation of dozers over the feeders during stockpiling operations after certain safety precautions were taken (Tr. 294).

Mr. Dobish stated that Mr. Huntley responded to the proposed plan by letter of January 4, 1989, exhibit O-4, and the letter does not state that dozers could not at anytime operate over the feeders. The letter stated in part "when reclaiming operations have been completed, however, a procedure may be developed to assure that there are no voids over the feeders. Compliance with such procedures would allow a dozer operation over the feeders at

that time." Mr. Dobish believed that this procedure would be in effect during the stockpiling operation (Tr. 295). He identified the proposed plan as exhibit O-3, and confirmed that it was a "consensus" plan developed from the mine experience, and after discussions with the equipment operators in the presence of the safety committee. He further confirmed that the operators agreed unanimously that they could safely operate under these procedures and they knew that adjustments to the procedure may be needed. He stated that he gave the proposed plan to Mr. Koscho, who passed it on to Mr. Newhouse, but that no reply or opinion has been received from MSHA (Tr. 296).

Mr. Dobish stated that prior to the issuance of the imminent danger order, he participated in meetings held with the dozer operators, and they were instructed not to run over feeders at anytime and to comply with the 65 degree angle of repose. He confirmed that he has visited other mines, and has observed the same type of feeder operation which is in use at the Emerald Mine in one mine outside of district 2, where dozers travel over the feeders during stockpiling while the feeders are shutdown (Tr. 298-299).

On cross-examination, Mr. Dobish identified the mine which he visited as the Cyprus Shoshone mine in Hanna, Wyoming, and he confirmed that it had a stacker system like the one at the Emerald Mine. He did not know the height of the stockpile at this other mine, and stated that the stacker was shorter than the one used at Emerald Mine (Tr. 300).

Findings and Conclusions

Fact of Violation

Cyprus is charged with an alleged violation of regulatory mandatory safety standard 30 C.F.R. § 77.209, which provides as follows: "No person shall be permitted to walk or stand immediately above a reclaiming area or in any other area at or near a surge or storage pile where the reclaiming operation may expose him to a hazard."

It is undisputed in this case that there is no evidence that anyone walked or stood on the coal pile in question, or in the vicinity of the areas affected by the operation of the feeders. The only persons who walked or stood on the pile, or in the area of the pile, were the inspector and the UMWA walkaround representative who accompanied him during the course of the inspection. They both testified that they walked on the pile to gain a closer look at the tracks which they had observed from a catwalk, and they both believed that they were in a "safe location" on the pile.

Cyprus takes the position that section 77.209, does not address or cover the operation of equipment on storage piles, and that the clear language found in section 77.209, with respect to the ordinary meaning of the terms "walk" or "stand" cannot properly be construed to mean "operating equipment" such as a bulldozer. Citing the dictionary definitions of the terms "stand" and "walk," the inspector's concession that these terms are not normally defined to include the operation of equipment, and the applicable case law dealing with statutory construction, Cyprus argues that the language of the standard simply does not prohibit the operation of equipment on a storage pile and that the citation must be vacated. Cyprus observes that while MSHA had the opportunity when the standard was promulgated to clearly include the operation of equipment as part of the standard, it did not do so.

In response to MSHA's argument that MSHA District 2 had previously interpreted section 77.209 to include the operation of equipment and that such an interpretation is reasonable and entitled to deference, Cyprus points out that the District 2 interpretation does not appear to have been accepted by other MSHA Districts. As an example, Cyprus makes reference to an MSHA Report of Investigation, issued by MSHA District 3, on April 25, 1983, where a fatality occurred when a bulldozer operating on a coal stockpile broke through material bridged over a feeder and fell into the bridge over cavity engulfing the bulldozer operator's compartment (exhibit G-8). Although MSHA's concluded that the accident occurred because the bulldozer was allowed to be operated on bridged material over top of the cavity in the coal stockpile, MSHA nonetheless made a finding that its "investigation did not reveal violations of the Coal Mine Safety and Health Act of 1977 of Title 30 Code of Federal Regulations" (pg. 7, report). Cyprus points out that no violation of section 77.209, was issued in this instance.

Cyprus also refers to an MSHA Regulatory Information Bulletin No. 83-4C, issued on August 3, 1983, by MSHA's Administrator for Coal Mine Safety and Health Joseph A. Lamonica, concerning "Fatalities Occurring at Surge or Storage Piles" (exhibit G-7). The bulletin discusses the hazards associated with equipment operators working on surge or storage piles where they are often required to maneuver in close proximity to "drawdown areas of feeders and hoppers," and it includes an attachment consisting of abstracts of eight fatal accidents mentioned in the bulletin, four of which involved persons walking over the feeder area or a void created by the reclaiming operation, and four of which involved bulldozers. Conceding that the bulletin does include a reference to section 77.209, in connection with bulldozers and front-end loaders operating in storage piles, Cyprus points out that it does not state that such operations are prohibited by section 77.209, and that Mr. Lamonica's reiteration of the language of the standard that "No person shall be permitted

to walk and stand immediately above a reclaiming areas or in any other area at or near a surge or storage pile where the reclaiming operation may expose him or her to a hazard," does not suggest that equipment was subject to the same prohibition found in the standard. To the contrary, Cyprus concludes that within the context of the bulletin, the absence of any indication that equipment was subject to the same prohibition suggests the absence of such a prohibition.

Citing the Commission's decision in Western Fuels-Utah, Inc., 11 FMSHRC 278, 284 (March 1989), Cyprus argues that deference to MSHA's interpretation of a standard is not required where it is clearly inconsistent with the language of the standard. In the Western Fuels-Utah, Inc., case, the Commission states in relevant part as follows at 11 FMSHRC 283-284, 287:

> It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." Old Colony R.R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932). When the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. Old Dominion R.R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932); see Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986).
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> * * * * * * *
>
> While the Secretary's interpretations of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulation. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)). Nor does it weigh in the Secretary's favor when the Secretary has not offered reasonable interpretations of the standards. See Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1145 (D.C. Cir. 1987). The Mine Act does not contemplate that the Commission merely "rubber-stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.
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> * * * * * * *

> Finally, a regulation subjecting an operator to enforcement action under the Mine Act must give fair notice to the operator of what is required or prohibited and "cannot be construed to mean what an agency intended but did not adequately express." Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982). * * *

MSHA takes the position that the cited locations where the dozer tracks were observed are either "immediately above a reclaiming area" or "in any other area at or near a surge or storage pile" as stated in section 77.209. MSHA argues that the coal storage or surge pile in question is part of the reclaiming operations, and that clean coal is stockpiled to create a reserve until it is reclaimed or loaded out for shipment to customers. MSHA asserts that bulldozers are used in the actual reclaiming operations when the coal is pushed toward the angle of repose above the feeders when the feeders are running and coal is being loaded, and that they are also used in stockpiling operations when coal is being sent through the stackers to be stored in the area until needed later and the dozers push the coal away from the stackers and spread it around to cover a larger area so that more coal can be put on top of the pile as it comes out of the stackers. MSHA maintains that dozer operators are exposed to hazards from the reclaiming operations, as well as the stockpiling operations, because a dozer can fall into the holes that occur over the feeders when the feeders are operating or they can fall into voids that may exist under the surface of the coal pile.

MSHA asserts that it is well recognized that holes or depressions normally occur over the feeders as coal is drawn down the angle or repose into the feeder, and that voids may occur in the pile where cavities occur and are bridged over with coal. Since voids are not observable from the surface, MSHA concludes that dozers operating too close to the holes or depressions run the risk of falling into the holes during reclaiming operations, and that dozers operating over or too close to the areas over the feeders are at risk of breaking through any bridged over material and falling into voids during either reclaiming or stockpiling operations.

MSHA strongly disagrees with Cyprus' contention that section 77.209 is directed only to persons walking or standing on coal piles, and not to persons on pieces of equipment which may be operating on these piles. MSHA argues that the narrow interpretation advanced by Cyprus is at odds with the purpose of section 77.209, which is to protect miners from the hazards of reclaiming operations around coal storage piles. Recognizing the fact that the standard contains the terms "walk or stand," MSHA takes the position that it applies to "persons" in general, and that persons in bulldozers or other pieces of equipment are

exposed to the same hazards as persons walking on foot on a coal pile. MSHA asserts that the hazard presented is the possibility of falling into voids or holes in the coal pile. Recognizing the fact that if a miner on a bulldozer fell into a hole or void, he may have a better chance of survival than if on foot because the dozer cabs are enclosed and there are self-contained self-rescuers in the cab, MSHA nonetheless believes that the hazard of falling into a void or hole is the same, if not greater, for a dozer because of its weight, and the pressure on the coal pile by a dozer would make it more likely to fall into holes or voids under the surface of the coal, and the chances of survival are not as good.

In support of its argument that section 77.209, applies to persons in general, regardless of whether they are walking, standing, or operating a piece of equipment on a coal pile, MSHA relies on the testimony of MSHA Supervisory Inspector Robert Newhouse who testified that the standard is designed to protect persons on coal piles, and that this interpretation is MSHA policy and practice, as well as the testimony of MSHA's other witnesses who agreed with Mr. Newhouse (Mr. Shuba and Dr. Wu). MSHA asserts that in order to effectuate the broad purposes of the standard and the Act, it must be concluded that section 77.209, applies to persons in general on a storage pile, and that limiting the application of the standard to persons on foot and excluding persons on equipment is too narrow and technical and would defeat the purpose of the standard to protect persons from falling into holes and voids. MSHA takes note of the fact that Cyprus was issued at least two previous violations of section 77.209 involving bulldozers and did not contest either citation (exhibits G-3, G-6). MSHA concludes that its evidence, consisting of the dozer tracks and marks, clearly indicates that dozers were operated over or too close to the feeders, and that a violation of section 77.209, has been established.

After careful consideration of all of the arguments advanced by the parties in these proceedings, I agree with the position taken by Cyprus that section 77.209, only applies to persons walking or standing on or near a coal surge or storage pile where the reclaiming operation may expose him to a hazard. I conclude and find that the plain wording of the standard is limited to persons on foot and does not apply to equipment being operated on or near such a pile while reclaiming or stockpiling operations are actively in progress. Under the circumstances, the contested citation IS VACATED.

With regard to MSHA's purported policy interpretation, and its asserted practice of expanding the application of section 77.209 to equipment being operated on coal piles, I find no credible evidence supporting any conclusion that MSHA has promulgated any such policy, or that it has been communicated to all coal mine operators. MSHA's primary support for the existence of

any such policy lies in the testimony of its District No. 2 Supervisory Inspector Robert Newhouse.

Mr. Newhouse conceded that MSHA's most current policy manual, published in July, 1988, does not address the application of section 77.209, and I find nothing there to suggest that it applies to equipment operating on coal piles. Mr. Newhouse's assertion that MSHA's National Office in Arlington, Virginia, made a policy determination in November, 1987, that section 77.209, applies to equipment operating on coal piles is unsupported, and no documentation of any such policy has been forthcoming from MSHA.

Mr. Newhouse also contended that the purported policy is current District 2 policy, and that he confirmed this through discussions which he had with MSHA's former district manager Donald Huntley at various times prior to November, 1987. Mr. Newhouse also asserted that this policy was communicated orally to respondent's safety supervisor Dennis Dobish and plant superintendent Thurman Phillips, and that the written embodiment of the policy is stated in an exchange of correspondence between Mr. Dobish and Mr. Huntley in December, 1988, and January, 1989.

The exchange of correspondence referred to by Mr. Newhouse is a letter dated December 1, 1988, from Mr. Dobish to Mr. Huntley, in which Mr. Dobish requested an interpretation of section 77.209, with regard to the following points (exhibits O-6):

> 1. Does the statement "No person shall be permitted to walk or stand . . ." apply to bulldozer operation?
>
> 2. Please clarify the statement "immediately above a reclaiming area or in any other area at or near a surge or storage pile where the reclaiming operation may expose him to a hazard." MSHA has stated their intention of enforcing a 65° angle of repose adjacent to each feeder. Due to weather conditions, compaction, and moisture, this figure is unrealistic and arbitrary.
>
> 3. If the feeders are not operating and locked out and no reclaiming operation is in progress, does 30 C.F.R. § 77.209 apply? If precautions have been taken to assure no void exists in the coal pile following reclaiming operations, and the feeders are locked out, the operation is no different from any other stockpile and 30 C.F.R. § 77.209 should not apply.

In his reply of January 4, 1989, to Mr. Dobish's letter, Mr. Huntley stated in pertinent part as follows (exhibit O-4):

> This is in reply to your letter dated December 1, 1988, in reference to 30 C.F.R. § 77.209. In reviewing this provision of law, it would appear to us that this regulation applies to persons immediately above a reclaiming area, whether on a bulldozer, walking, or standing. This provision was written to protect persons from falling into a void that occurred due to reclamation operations.
>
> Your plan is designed to allow a bulldozer to operate over feeders in an area susceptible to collapse. As stated above, this would not be in compliance with the regulations, therefore, bulldozers should not be operated in such areas when coal is being reclaimed from a stockpile. When reclaiming operations have been completed, however, a procedure may be developed to assure that there are no voids over the feeders. Compliance with such procedure should allow dozer operation over the feeders at that time.
>
> Since you raised the question about the use of 65 degrees, we will not specify any angle--the inspector will use his judgement to determine whether a person is "above" a reclaiming area or exposed to a hazard from the reclaiming operation. (Emphasis supplied).

I take note of the fact that Mr. Huntley's letter makes no reference to any National MSHA policy regarding the operation of equipment over feeders. In addition to his responses, Mr. Huntley furnished Mr. Dobish with an outdated MSHA Information Bulletin No. 83-4 C, August 8, 1983, concerning fatalities which have occurred at coal surge or storage piles (exhibit G-7). The bulletin includes a reference to section 77.209, as one of several standards found in Part 77, Code of Federal Regulations, which have been cited as contributing to one or more of the accidents discussed in the attachment to the bulletin. The bulletin also quotes the verbatim text of section 77.209, but I find nothing in the bulletin alluding to any MSHA policy prohibitions concerning equipment operating on coal piles. As a matter of fact, the safety procedures found on page two of the bulletin suggests that equipment may be permitted to operate on coal piles as long as the recommended safety procedures are followed, e.g., adequate communication, training, adequate means for identifying the location of feeders, the use of substantial screen guards over all windows of bulldozers and front-end loaders used around surge or storage piles, and the placement of self-contained self-rescuers in all dozers and front-end loaders.

I also take note of the fact that Mr. Huntley's letter suggests that dozers may be operated over the feeders when reclaiming is completed as long as certain safety precautions are

developed, and it contradicts MSHA's position that equipment operation on the coal pile is not permitted at any time, including reclaiming or stockpiling of the coal. This advice by Mr. Huntley also supports Cyprus' contention that it is permitted to operate its equipment on the coal pile during stockpiling operations as long as it follows certain safety precautions (exhibits O-3 and O-7). It also supports the unrebutted testimony of Mr. Dobish that other mine operators carrying on similar operations are permitted to operate equipment on their coal piles during stockpiling operations while the feeders are shutdown. Further, I find Mr. Huntley's apparent disregard for the 65-degree angle of repose as a yardstick safety precaution to be rather contradictory, particularly in light of MSHA's imposition of this requirement on Cyprus.

The Imminent Danger Order

The definition of an "imminent danger" is found in section 3(j) of the Act, and it is as follows: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition can be abated."

The validity of the contested imminent danger order in this case is not dependent on any finding of a violation of section 77.209. MSHA maintains that it has established that it was more than just an isolated occurrence that dozers crossed over the feeders during stockpiling operations and operated too close to the danger zone above the feeders during stockpiling and reclaiming. MSHA takes the position that there is substantial evidence supporting a conclusion that Cyprus engaged in a practice of crossing over and working in too close proximity to the feeders. The "substantial evidence" alluded by MSHA is (1) the physical evidence of equipment tracks observed by Inspector Koscho and Mr. Shuba during the inspection, (2) Mr. Shuba's testimony that other dozer operators told him that there "were times" when they crossed feeders, and his knowledge of "close calls" involving dozers over the feeders; (3) two prior citations because of dozers operating too close to the feeders; (4) "safety contacts" made by Cyprus with its dozer operators instructing them not to cross over feeders; and (5) the ongoing issue between MSHA, Cyprus, and the union since November 1987.

The thrust of MSHA's case is its contention that the alleged practice of dozer operators working above and/or in too close proximity to the feeders during reclaiming and stockpiling operations presented an imminent danger because of unknown voids or holes in the coal pile, and that an accident could have happened at any time if the practice of crossing over or in too close proximity of the feeders had continued. MSHA's position is that such a practice constitutes an imminent danger regardless of whether the feeders are operating.

The evidence establishes that no one was operating a bulldozer on or near the coal pile in question at the time it was observed by Inspector Koscho, the feeders were not in operation, no reclaiming or stockpiling operations were taking place, and no one was in any danger. I take particular note of the fact that the narrative description of the cited conditions does not include any assertion that Cyprus was engaging in any practice, and Inspector Koscho confirmed that in his pretrial deposition he admitted that at the time he issued the order he did not know if there was in fact a practice of operating equipment too close to the feeders. Further, although the order does not include any assertion that dozers were operating over or near nay voids or holes, Inspector Koscho testified that the tracks which he observed in the vicinity of the B feeder were within 3 to 4 feet of a "depression where the coal had been feeding into the feeder," and that the tracks near the E feeder led him to believe that the dozer blade, which was 7 to 8 feet long, had reached across a depression, and then backed up smoothing out the depression in the pile.

In order to prevail in this case, MSHA has the burden of establishing that in the context of its continued reclaiming and stockpiling operations, Cyprus was guilty of engaging in an imminently dangerous practice of operating its bulldozers over or in close proximity to feeders at all times, even when they were not operating. As recently noted by the Commission in Garden Creek Pocahontas Company, Docket Nos. VA 88-09, etc., November 21, 1989, slip op. at pg. 6, "[T]he litigation process requires the parties to obtain the evidence necessary to prove their allegations." With regard to the imminent danger order, the only evidence to support Inspector Koscho's belief that dozers were operating "to close" to the feeders were the equipment tracks which he observed. Although several inferences may be made with regard to these tracks in the coal pile, any such inferences must be reasonable and based on evidentiary facts, Mid-Continent Resources, 6 FMSHRC 1132 (May 1984).

In my view, in order to establish the existence of hazards such as operating over voids or holes in the coal pile, which could materialize at any time, although not necessarily immediately, MSHA must show the circumstances under which the tracks were made. In this case, although the inspector believed that the coal pile in question was in use every week, and believed that the tracks were no more than 2 or 3 days old because they were "more pronounced and acute," he conceded that he made no effort to determine who had operated on the pile, whether any dozers had actually operated on the pile while the feeders were in operation, when any dozers may have last worked on the pile, or when the feeders were last operated. Although the inspector agreed that dozers normally used by Cyprus are equipped with operator cabs and safety glass, and the evidence

establishes that self-rescuers and radios are provided for the dozer operators, the inspector conceded that he did not inspect any dozers which are used during the reclaiming and stockpiling operations. Further, the inspector made no effort to identify or speak with any of the dozer operators, nor did he review any mine production or work shift records which may have provided him with some factual information or answers to some of the aforementioned critical questions. I believe that it is incumbent on the inspector to at least attempt to develop and establish a factual basis to support his imminent danger order, particularly in a case of this kind where there is a contention that Cyprus has engaged in, and presumably still engages in, an imminently dangerous practice. On the facts of this case, it seems obvious to me that the "inspection" made in support of the order was cursory in nature, and I find nothing to suggest that the information and evidence which was not developed was not readily available to the inspector.

Mr. Shuba, the safety committeeman who accompanied the inspector during his inspection, testified that dozer operators have told him that there "were times" when they crossed the feeders, and he alluded to several "close calls" involving dozers operating over the feeders. However, none of these operators were identified or called to testify, and no further specific information was elicited from Mr. Shuba. Mr. Shuba, who confirmed that he operated a dozer on the pile intermittently since February, 1989, and for some unspecified "months" prior to the inspection, denied that he had ever crossed the feeders while operating a dozer on the pile. However, in its posthearing brief, MSHA asserts that several "safety contacts" made by mine management reflect that dozer operators were instructed not to cross over the feeders, and MSHA "assumes" that these contacts were made in response to instances of dozers crossing these feeders. If this assumption is correct, then Mr. Shuba has not been truthful since three of these "safety contacts" were issued to him (exhibit O-11). Under the circumstances, I have given no weight to Mr. Shuba's unreliable and uncorroborated hearsay testimony concerning what the other unidentified equipment operators may have told him.

With regard to the "safety contacts" (exhibit O-11), with the exception of Mr. Shuba, none of the individuals who were "contacted" testified in these proceedings, and the circumstances under which they were "contacted" are not known. Some of the contacts reflect that the foremen reviewed the safe operating procedures with the employees who presumably worked on the piles, and others caution employees to be careful while working on or near the piles. Foreman Graznak, who issued all of the contacts, prior to the issuance of the imminent danger order on August 30, 1988, could not recall the specifics of each of the contacts, but conceded that they may have been prompted by someone observing dozer tracks or other indications that someone had occasionally

crossed over the feeders or operated too close to them. However, he denied that dozers were crossing over feeders on a regular basis, and he could recall only one prior incident where a bridged over cavity developed over one of the feeders.

Mr. Graznak confirmed that the contacts were issued to alert the individuals of the hazards of working in and around the stockpiles, and Mr. Shuba, the safety committeeman, confirmed that mine management has instructed equipment operators not to work over the feeders, that he was instructed about the proper "safety zone" for safely working over the feeders, and that a diagram explaining the safety zone was posted in each machine that operated on the pile. Further, the evidence presented by Cyprus establishes that it has a communication system in effect with respect to the dozers operating in and round the coal pile, has marked the feeders, has equipped the dozers with cabs, safety glass, and self-rescuers, has consistently instructed the dozer operators as to the safety precautions to be taken while working in and around the pile, and has made it known that it will discharge any operator found running over feeders.

Mr. Shuba confirmed that due to the confined areas where the bulldozers must operate during stockpiling, it may be necessary for a dozer operator to position his dozer over the feeder in order to get behind the coal and push it towards the pile. Dr. Wu agreed that it was necessary for a dozer to operate on top of the pile in order to push the coal into the feeders, and he confirmed that if the feeders are not operating, there may be a need to fill any depressions over the feeders during the stockpiling process. Mr. Graznak confirmed that there is no need for a dozer to cross over a feeder during the reclaiming operation because the material which has been moved to the edge of the feeder draw hole will fall into the hole. Mr. Graznak also confirmed that it is difficult to maneuver the equipment and avoid crossing the feeder during stockpiling operations when the feeders are not operating. He also confirmed that he was aware of other mine operations where stockpiling activities permitted the travel of dozers over the feeders while they were locked out and not in operation. Safety supervisor Dobish corroborated that this was the case, and the letter of January 4, 1989, from MSHA District 2 Manager Huntley supports Mr. Dobish's belief that under certain conditions when the feeders are shutdown, dozers are permitted to operate over the feeders. Under all of these circumstances, MSHA's contention that a dozer operating over a feeder is <u>at all</u> times an imminent danger is not well-taken and contradictory.

With regard to the two prior citations issued to Cyprus for violations of section 77.209, one of them was issued by Inspector Koscho on August 23, 1988, a week before he issued the imminent danger order, and it is a section 104(a) citation with special "S&S" findings (exhibit G-3). Mr. Koscho stated that he issued

the citation after determining that a bulldozer had slid into a void created by a feeder while reclaiming coal, and although he did not personally observe the incident, someone told him about it, and the dozer operator admitted that he had made a "mistake." Mr. Koscho further explained that he issued a section 104(a) citation rather than an imminent danger order because the violation was abated within 5 minutes and mine management had previously instructed the dozer operator as to the proper operating procedure. Mr. Koscho also explained that at the time he issued the contested imminent danger order, he believed that the dozer operators were not following management's instructions. I fail to see the distinction since in both cases the dozer operators obviously were not following instruction. In addition, the condition cited in the prior citation was far more serious than that cited in the subsequently issued imminent danger order in that the dozer actually slid into a void and had to be assisted by another dozer to get out, and Mr. Koscho found that a fatality was highly likely. Even so, he did not believe this was an imminent danger, nor did he allege that the incident was the result of any practice.

The second citation for a violation of section 77.209, was issued by Inspector Newhouse on June 10, 1988, and it too is a section 104(a) citation with special "S&S" findings. The citation states that Mr. Newhouse observed a bulldozer operating on a coal pile at the No. 2 stacker over a reclaim chute that was in operation, and that he also observed dozer tracks indicating that bulldozers were working directly over reclaim chutes at the No. 1 stacker, and Mr. Newhouse made a finding that a fatality was highly likely. When asked why he did not issue an imminent danger order, particularly since he had personally observed the dozer over the reclaim chutes while they were in operation, Mr. Newhouse indicated that "in hindsight" he was "probably mistaken for not doing so," and he explained that the dozer he observed did not cross the feeders, and that it was only in "close proximity" to the feeders. This is contrary to the citation which specifically states that the dozers were operating directly over the reclaim chutes or feeders while they were in operation.

I find the explanations offered by Mr. Koscho and Mr. Newhouse as to why they did not consider the prior incidents to be imminently dangerous to be rather contradictory and self-serving. In those instances, the inspectors had reliable and probative evidence that dozers were in fact operating on the coal piles over the feeders during reclaiming operations while the feeders were in operation, and they both found that a fatality was highly likely. Yet, they concluded that no imminent dangers were presented. In the instant case, Mr. Koscho had no reliable and probative evidence that any dozers were operating over any feeders while they were in operation, and he based his imminent danger finding on speculative assumptions based on the equipment

tracks which he observed on the coal pile. I simply cannot reconcile these contradictory and inconsistent findings by the inspectors.

I find no credible or probative evidence in this case to support any conclusion that the tracks observed by Inspector Koscho and Mr. Shuba were made while dozers were operating on the coal pile during reclaiming operations while the feeders were in operation. Mr. Koscho conceded that he had no way of knowing whether or not the dozers were reclaiming coal or simply spreading it out on the pile when the tracks were made. The tracks at the E feeder were found at a location where the dozer had apparently reached across a depression with its 7 to 8 foot blade and then backed up to smooth out the depression in the pile. If this was done while the feeders were not in operation during the stockpiling operation, then I can only conclude that the dozer operator was following a normal practice of addressing depressions by smoothing them out, and this could not have been done if the feeder were operating. With regard to the tracks at the B feeder, there is no credible evidence that the dozer tracks extended over the feeder, and Inspector Koscho placed the tracks "in the vicinity" and to the side of the feeder approximately 3 to 4 feet from a depression which he believed resulted from the coal being fed into the feeder. I do not believe that these tracks could have been made and left intact if the feeder was operating.

Given the fact that the evidence and testimony in this case strongly suggests that the operations of dozers on a coal pile during stockpiling operations while the feeders are shutdown and not operating in order to fill the holes and voids left by the operation of the feeders is not specifically prohibited and seems to be an acknowledged method of operation, I believe it is just as reasonable as not for one to conclude that the tracks in question were made during the stockpiling operation while the feeders were not in operation, and that the dozer operators were not exposed to the danger of any voids or holes when the tracks were made.

In view of the foregoing findings, and conclusions, and after careful consideration of all of the evidence and testimony in this case, I cannot conclude that MSHA has established by a preponderance of the evidence that Cyprus has engaged in any imminently dangerous practice. Under the circumstances, the inspector's finding in this regard is rejected and the contested imminent danger order IS VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. PENN 89-45. Section 104(a) "S&S" Citation No. 3087308, August 30, 1988, citing a violation of 30 C.F.R. § 77.209, IS VACATED, and MSHA's proposed civil penalty assessment IS DENIED AND DISMISSED.

2. Docket No. PENN 88-325-R. Section 107(a) Imminent Danger Order No. 3087309, August 30, 1988, IS VACATED.

3. Docket No. PENN 88-318-R. Section 104(d)(2) Order No. 3087446, August 31, 1988, citing a violation of 30 C.F.R. § 77.205(b), IS MODIFIED to a section 104(a) "S&S" citation, and the violation IS AFFIRMED. Cyprus is assessed a civil penalty in the amount of $400 for the violation.

4. Docket No. PENN 89-194. Cyprus IS ORDERED to pay civil penalty assessments for the following section 104(a) "S&S" citations which have been affirmed and/or settled in these proceedings:

Citation No.	Date	30 C.F.R. Section	Assessment
3087305	08/30/88	77.400	$400
3087444	08/31/88	77.404(a)	$325
3087600	08/30/88	77.1607(bb)	$450
3087446	08/31/88	77.205(b)	$400

Payment of the civil penalty assessments shall be made by Cyprus to MSHA within thirty (30) days of the date of these decisions and order, and upon receipt by MSHA, the civil penalty proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
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DENVER, CO 80204

DEC 29 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-243-M A.C. No. 04-00036-05523
v.	:	Mojave Cement Plant
CALIFORNIA PORTLAND CEMENT COMPANY, Respondent	:	

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor, San Francisco, California, for Petitioner; Scott H. Dunham, Esq., O'Melveny & Myers, Los Angeles, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, California Portland Cement Company, with violating 30 C.F.R. § 56.9047, 1/ a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Los Angeles, California.

The parties filed post-trial briefs.

1/ The cited regulation reads as follows:

§ 56.9047 Securing parked railcars.

Parked railcars, unless held effectively by brakes, shall be blocked securely.

STIPULATION

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

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in this case.

4. The Federal Mine Safety and Health Administration ("MSHA") inspector who issued the subject citation was an authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject citation was properly served upon respondent.

6. A copy of the subject order or citation and narrative findings for a special assessment at issue are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. The imposition of the civil penalty in this case will not affect the respondent's ability to continue in business.

8. The alleged violation was abated in good faith.

9. The respondent's history of prior violations is described in the narrative findings for special assessment.

10. The respondent is a large operator.

11. Ronald Harrison, an employee of the respondent, was seriously injured when a train of seven Southern Pacific Company railroad cars rolled down a track and hit him.

12. The train of seven cars was parked on approximately a 4% grade approximately 164 feet beyond where the employee was welding on the track. The cars had been parked on the track for at least five hours prior to the time the accident occurred.

13. Before beginning work on the track, the employee visually inspected the first car and determined that the air brakes were engaged on that car and tightened the pull chain which provides an additional manual brake on the cars.

14. The cars of the train were not blocked in any way.

15. The employee began work on his shift at 3:00 p.m. on February 19, 1988. At approximately 8:00 p.m., the brakes which had been holding the cars of the train in place failed to the extent that the cars rolled from their parked spot on the track striking the employee.

16. An engineering analysis of the brakes on the railcars conducted by an independent laboratory following the accident revealed that the brakes on the four westernmost cars of the train were defective. (A copy of a preliminary analysis as well as a final analysis by Vollmer-Gray, Engineering Consultants, is attached hereto as Exhibit A.) The valve connecting the fourth and fifth cars was also frozen in a closed position. Thus, there was no air brake application affected on the easternmost three cars. The movement of the railcars was caused by air leakage from the air brake system of the four westernmost cars. This resulted in a pressure decay which eventually (over a period of approximately 6-1/2 hours) released the brakes on all the railcars.

ISSUES

On the undisputed facts the issues are whether a violation of 30 C.F.R. § 56.9047 occurred. If a violation occurred, then what penalty is appropriate.

THE EVIDENCE

EARL WAYNE McGARRAH, an MSHA inspector, is a person experienced in mining (Tr. 10, 11).

On February 22, 1988, he conducted an accident investigation at respondent's cement plant. During his inspection he learned that a string of seven parked and loaded railcars, had been moved from their parking spot and rolled over a welder's hand. At the time the welder was welding a frog 2/ on the track (Tr. 11, 12; Ex. P-1, P-2). Inspector McGarrah also observed the brake shoes on the railcars. On car number 3 there were three missing brake shoes (Tr. 15, 16; Ex. P-3). This condition was obvious and it was not necessary to crawl under the car to take pictures of the condition (Tr. 16).

2/ A frog is part of the switch that guides the cars onto another track (Tr. 12, 13).

The air valve on the fourth car was frozen in a closed position. It could not be opened by hand (Tr. 17; Ex. P-4). A valve in this position prevented the air from setting the brakes on the following three railcars. Since the parked cars were not blocked they rolled. The brakes did not hold them effectively.

A block under a wheel, on the downgrade side, will keep cars from rolling (Tr. 18).

After the accident the cars were blocked with a factory-type block (Tr. 19).

Inspector McGarrah learned the company had set the air brakes and one hand brake 3/ before the accident occurred.

REUBEN PAUL VOLLMER testified for respondent. Mr. Vollmer, a professional engineer, specializes in reconstructing accidents and failures involving train accidents (Tr. 27 - 30).

On February 22, 1988, he inspected the railcars involved in this accident (Tr. 32).

He found the brake linings were adequate on all the railcars with the exception of car No. 3 which had broken shoe material. On two of the brakes the shoe material was completely worn away (Tr. 33). The lack of brake lining would not affect a train at rest (Tr. 38, 46).

He also learned that each of the four cars had been charged with air prior to the accident. In addition, the angle valve on the brake pipe between cars 4 and 5 was closed. Due to the closed valve 4/ the air brakes would not be functioning on the easternmost three cars (Tr. 33).

Mr. Vollmer did a leakage test on the brakes. The charging system was set at 70 pounds per square inch. The test was made to determine if the brake locks tightened on the wheels of the cars when the brakes were applied (Tr. 34, 35). Mr. Vollmer's test established the brake system was functional and operating on the four cars (Tr. 35).

3/ The end hand brake looks like a wheel on the top of the westernmost car on the downgrade (Tr. 20, 25). The brake works like an emergency brake on an automobile (Tr. 25). It furnishes additional braking power (Tr. 26).

4/ This valve appears in Exhibit P-4 (Tr. 34).

Other tests by witness Vollmer included monitoring the air cylinders which operate the linkage to the brake locks of each wheel. It was found that cars 1, 2 and 4 bled down in approximately one and one-half hours. Car No. 3, the one with the least service, held for approximately six and one-half hours before it bled. In other words, the brakes on Car No. 3 were effective for six and one-half hours. If the brakes were set on one car of a seven-car train and there was no air leakage the brakes would effectively hold the train "forever" (Tr. 35, 36).

A test was also conducted by applying leak-detector solution to all the fittings visible on the railcars. This test indicated there were relatively significant leaks on Cars 1, 2 and 4. There was no indication of the air leaks unless a person got close to the fittings. In such a position you could audibly hear the air movement, similar to a sizzling sound (Tr. 36, 37, 42). The air leaks caused the cars to move. However, the cars had been held effectively braked for six and one-half hours (Tr. 44).

DISCUSSION

The regulation § 56.9047, simply provides that parked railcars "unless held effectively by brakes" shall be securely blocked. The regulation itself does not further define nor discuss the meaning of "effectively held by brakes." It is accordingly appropriate to consider the ordinary meaning of the words.

Webster's dictionary 5/ defines "effective," the adjective, as "producing a decided, decisive or desired effect." Effectively is listed as the adverb for "effective."

This definition, which is its primary meaning of the word, indicates the brakes here did not produce the desired nor decisive effect.

Respondent contends no violation occurred because the brakes held for at least five hours. (In fact, the evidence establishes the brakes held for six and one-half hours.) Respondent argues the Secretary's interpretation is improper because it would render the phrase "unless effectively blocked" meaningless. By phrasing the regulation in the terms it did, the Secretary intended that railcars could be parked without the use of blocks.

5/ Webster's New Collegiate Dictionary, 1973, at 359.

Respondent also argues that if the Secretary desires that railcars always be blocked, she could have explicitly so stated (Brief at 5). In short, respondent argues the Secretary's position emasculates the regulation and eliminates the portion providing "unless held effectively by brakes" (Tr. 9).

I disagree with respondent's contentions. Respondent's construction would rewrite the regulation to read that "railcars, unless held effectively for at least five hours, by brakes, shall be blocked securely." Such a regulation would not promote the safety of miners.

The Commission and the appellate courts have repeatedly stated that if there is a conflict between an interpretation that promotes safety and an interpretation that would serve another purpose as a possible compromise of safety the first should be preferred. District 6, United Mine Workers of America, v. United States Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (D.C. Cir. 1977). See also Pittsburg and Midway Coal Mining Company, 8 FMSHRC 4, 6 (1986).

Section 56.9047 reasonably addresses the various safety issues that may be present in any factual scenario. Whether parked railcars can be held effectively by brakes would no doubt depend on the number, weight and length of the railcars, the track grade and the condition of the braking systems (air and manual).

I have considered respondent's engineering analysis and the testimony of its expert witness. But I conclude Mr. Vollmer simply confirmed the railcars moved when air leakage caused a pressure decay in the air brake system (Tr. 46, 47). I further note that this air leakage could have been detected. In addition, the frozen closed valve on Car No. 4 was readily observable. The leakage of air and the closed valve reduced and eventually eliminated the braking capacity of the railcars.

For the foregoing reasons the citation herein should be affirmed.

CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is contained in Section 110(i) of the Act, now codified at 30 C.F.R. § 820(i).

Considering these factors I conclude that respondent is a large operator (Stipulation 10).

The imposition of a penalty will not affect respondent's ability to continue in business (Stipulation 7).

A favorable history appears in that respondent has been assessed for 23 violations in the preceding 24 months (Stipulation 9).

Respondent's negligence is moderate. The operator could have detected the leaking air in the brake system or observed the closed valve.

The gravity is high inasmuch as a workman's hand was severed.

Respondent abated the violative condition and is entitled to statutory good faith.

On balance I deem that a civil penalty of $600 is appropriate.

For the foregoing reasons I enter the following:

ORDER

Citation No. 3287171 is affirmed and a civil penalty of $600 is assessed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DEC 29 1989

JOSEPH G. DELISIO, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 89-8-D
v.	:	MSHA Case No. PITT CD 88-25
	:	
MATHIES COAL COMPANY, Respondent	:	Mathies Mine

DECISION
AND
FINAL ORDER

Appearances: Michael J. Healy, Esq., for the Complainant

Richard R. Riese, Esq., for the Respondent

Before: Judge Fauver

Following a decision on liability, November 24, 1989, the parties have filed a Stipulation of the amount of Complainant's back pay with interest and his litigation expenses including a reasonable attorney's fee.

WHEREFORE it is ORDERED that:

1. Respondent shall pay Complainant, within 30 days of this order, the following amounts:

1.	Backpay with accrued interest:	$ 99
2.	Litigation expenses, including a resonable attorney's fee:	$2,000
	TOTAL	$2,099

2. The decision on liability entered on November 24, 1989, is now a final decision effective this date.

William Fauver
Administrative Law Judge

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 17, 1989

BLUE DIAMOND COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 89-258-R
v.	:	Order No. 3370844; 8/16/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Scotia mine
	:	Mine ID 15-02055

ORDER DENYING MOTION TO DISMISS
ORDER DIRECTING SECRETARY TO ANSWER

The Secretary has filed a motion to dismiss the above captioned notice of contest on the ground that it was not filed within the 30 days allowed by section 105(d) of the Act. See also 29 C.F.R. § 2700.20. The operator has filed a motion in opposition.

The subject order was issued under section 104(d)(1) of the Act on August 16, 1989. The terms of the order were modified later that day. The operator's motion sets forth the facts of the matter as follows:

> "On August 18, 1989, two (2) days after the aforementioned Order was modified by the Inspector, the petitioner submitted a "Request for Health and Safety Conference" to an authorized representative of the Secretary of Labor, Ronald C. Wilder, 812 F.M. Stafford Avenue, Paintsville, Kentucky 41240 [MSHA sub-district manager, Paintsville, Kentucky]. Subsequent to this, the petitioner was notified that a revised form would have to be used for such contest. Accordingly, on August 30, 1989, the petitioner filed another Notice and Request, stating that the following issues needed to be resolved:
>
> > 'To establish whether or not a violation existed and if a violation did exist, if it was unwarrantable failure.'
>
> Attached hereto and incorporated herein by reference is a copy of the petitioner's "Request for Health & Safety Conference" dated August 30, 1989, and marked as petitioner's "Exhibit A".

> On September 19, 1989, a conference was conducted whereby representatives of the petitioner, the miners and MSHA were all present. Following this conference a conference worksheet was issued, a copy of which is attached hereto and incorporated herein by reference as petitioner's "Exhibit B".
>
> Following the issuance of the conference worksheet the petitioner was informed by authorized representatives of the Secretary of Labor that the next step to contest the Order and "special findings" would be to file a notice of contest. This was done on September 25, 1989. Attached hereto and incorporated herein by reference is a copy of the petitioner's September 25, 1989, notice.
>
> It is clear that before the petitioner retained counsel that not only was it confused as to the interrelationship of contest proceedings and civil penalty proceedings, but apparently duly authorized representatives of the Secretary of Labor were as well.

It is apparent from the foregoing that the operator was not dilatory in pursuing its challenge to the subject order. Its error was in not filing the notice of contest with the Commission while it was addressing the matter with MSHA. However, it is noted that MSHA entered into discussions with the operator but, until the conference was concluded did not advise that a notice of contest should be filed with the Commission. Moreover, the delay was only ten days after the expiration of the 30 day limit and immediately followed upon conclusion of the conference. Under the circumstances I conclude the operator's filing of the notice of contest should be allowed.

This conclusion is in accord with recent Commission precedent. In Rivco Dredging v. Secretary of Labor, 10 FMSHRC 624 (May 1988), the operator filed timely notices of contest immediately challenging citations and orders, but failed to notify the Secretary that it intended to contest the civil penalties subsequently proposed for the contested citations and orders. The operator mistakenly believed its initial notices of contest also put the penalties in issue. The Secretary moved to dismiss the contest proceeding because the penalties had not been challenged and the administrative law judge granted the motion. The Commission however, reversed the dismissal stating in pertinent part as follows:

> It appears that this operator, acting pro se, acted in good faith but misunderstood the need to object separately to the two different aspects of the same dispute. See 30 U.S.C. § 815(a) (contest of proposed civil penalties). Cf. Old Ben Coal Co., 7

> FMSHRC 205 (February 1985). This Commission has recognized that, in cases like this, innocent procedural missteps alone should not operate to deny a party the opportunity to present its objections to citations or orders. * * *

The Commission also has shown itself willing to accept late filings in a variety of circumstances so long as a justifiable excuse exists. See, M.M. Sundt Constr. Co., 8 FMSHRC 1269 (September 1986); Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981); Coal Junction Coal Company, 11 FMSHRC 502 (April 1989); Howard v. B & M Trucking, 11 FMSHRC 505 (April 1989); Westmoreland Coal Company, 11 FMSHRC 275 (March 1989); Amber Coal Company, 11 FMSHRC 131 (February 1989); Ten-A Coal Company, 10 FMSHRC 1132 (September 1988); Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

The circumstances of this case constitute justifiable and adequate cause for this late filing.

In light of the foregoing, the Secretary's motion to dismiss is DENIED.

It is ORDERED that the Secretary file an answer to the notice of contest within 20 days from the date of this order.

Paul Merlin
Chief Administrative Law Judge

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COLONNADE CENTER
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DENVER, CO 80204

December 19, 1989

RICK STEVENSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 89-130-D
v.	:	
	:	DENV CD 89-02
BEAVER CREEK COAL COMPANY, Respondent	:	Trail Mt. No. 9 Mine

INTERIM ORDER

This case involves a discrimination complaint filed by complainant on his own behalf pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

Now pending for a ruling is the motion of respondent Beaver Creek Coal Company, ("BCCC"), for a summary decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64.

Before considering the merits of the motion it is appropriate to consider the relevant procedural history of the case.

On March 6, 1989, complainant Stevenson, appearing pro se, filed his complaint pursuant to section 105(c) of the Act.

On April 7, 1989, BCCC filed its answer denying any discrimination. Further, BCCC raised several defenses. In part, BCCC asserts complainant signed a general release of all claims arising out of the termination of his employment.

On April 13, 1989, the case was set for a hearing on the merits.

On April 20, 1989, BCCC filed interrogatories, a request for documents and a request for admissions.

On May 15, 1989, BCCC moved for a rescheduling of the hearing.

On May 16, 1989, the hearing was rescheduled to August 8, 1989.

On May 22, 1989, after a conference call, complainant was ordered to answer BCCC's interrogatories and to appear for a deposition.

On June 6, 1989, complainant filed his answer to interrogatories.

On June 20, 1989, the hearing of August 8, 1989, was rescheduled to a full hearing on the merits.

On August 1, 1989, at the request of complainant, the hearing of August 8, 1989 was cancelled.

On August 14, 1989, BCCC filed a motion and brief for a summary decision.

On September 7, 1989, counsel entered his appearance for complainant.

On October 10, 1989, complainant filed his affidavit and brief in opposition to BCCC's motion.

On October 23, 1989, BCCC filed a reply memorandum.

Allegations

1. Complainant states that while he was a representative of miners he made numerous complaints to the Mine Safety and Health Administration ("MSHA"). These complaints resulted in MSHA inspections and in the issuance of numerous citations.

2. On September 26, 1988, complainant was laid off. He claims this was because of his safety and health activities.

3. It is uncontroverted that the day following his termination complainant executed and delivered to BCCC a general release. The agreement reads, in its pertinent part, as follows:

Part III

> Notice: Various State and Federal laws prohibit employment discrimination based on on age, sex, race, color, national origin, religion, handicap or veteran status. These laws are enforced through the Equal Employment Opportunity Commission (EEOC), Department of Labor and State Human Rights Agencies. If you feel that your election of the Atlantic Richfield Special Termination Plan was coerced and is discriminatory, you are encouraged to speak with your Employee Relations representative or follow the steps described in the Employee Problem Resolution procedure. You may also want to discuss the following release language with your lawyer. In any event, you should thoroughly review and understand the effect of the release before acting on it. Therefore, please take this Release home and consider it for at least (5) working days before you decide to sign it.

General Release:

In consideration for the Atlantic Richfield Special Termination Plan offered to me by the Company I release and discharge the Company, its successors, subsidiaries, employees, officers and directors (hereinafter referred to as "the Company") from all claims, liabilities, demands and causes of action known or unknown, fixed or contingent, which I may have or claim to have against the Company as a result of this termination and do hereby covenant not to file a lawsuit to assert such claims. This includes but is not limited to claims arising under federal, state, or local laws prohibiting employment discrimination or claims growing out of any legal restrictions on the Company's right to terminate its employees. This release does not have any effect on any claim I may have against the Company unrelated to this termination.

I have carefully read and fully understand all of the provisions of this Separation Agreement and General Release which sets forth the entire agreement between me and the Company and I acknowledge that I have not relied upon any representation or statement, written or oral, not set forth in this document.

4. In support of its position that complainant is bound by the release BCCC further cites portions of complainant's disposition (taken July 25, 1989). The relevant portions are as follows:

A. When delivering the general release to Beaver Creek Complainant Stevenson also delivered a handwritten statement which stated that Stevenson was signing the form with the "sole purpose of receiving any and all moneys (sic) owed me by Beaver Creek Coal. No other purpose is intended" (Tr. 119, 120, BC-19).

B. Beaver Creek refused to accept Stevenson's conditional note (BC-19) along with the BC-18 agreement, (Tr. 120, 121).

C. Stevenson received a letter dated October 4, 1988 from Beaver Creek which states in pertinent part: "... in order to get your severance pay you must sign the release given to you on September 27, 1988 without any conditions." The October 4, 1988 letter also noted that Stevenson had "already received all monies owed" to him. (Emphasis in original) (Tr. 121, BC-20).

D. Stevenson delivered to Beaver Creek a handwritten signed note dated October 10, 1988 which read, "Disregard previous note concerning severance pay and all related conditions." (Tr. 122, 123, BC-21)

E. Stevenson knew that the severance pay of nearly $8,000.00 was a company benefit given in exchange for the unconditional execution of the General Release (Tr. 116-123).

F. Stevenson knew that upon signing the release and receiving the severance pay he "could not pursue ... a Federal Mine Health and Safety Discrimination case." (Tr. 114, 122).

G. Stevenson testified that with respect to signing the release:

a) He thought about not signing it. (Tr. 114, 115).

b) He kept it a couple days before signing it. (Tr. 113, 114).

c) His wife witnessed his signature. (Tr. 114, 115, BC-18).

d) He was aware that by signing, he released Beaver Creek of liability. (Tr. 115).

e) He talked it over with his wife and also talked it over with a friend. (Tr. 115, 117).

f) Upon signing, he was unconditionally releasing Beaver Creek. (Tr. 123).

g) He had a right not to sign the release and not receive the severance pay. (Tr. 124).

h) He considered consulting a lawyer. (Tr. 125).

i) He was not forced to sign the release. (Tr. 126).

j) He "knew perfectly well what [I] was signing. (Tr. 122).

H. Stevenson has not refunded the nearly $8,000.00 in severance money to Beaver Creek. (Tr. 124).

I. Stevenson is a high school graduate (Tr. 5) with substantial mining experience and has had six years experience operating a video store which he owned. (Tr. 5-8).

Complainant, in opposition to BCCC's motion, asserts he is not bound by the release. In support of his position he states in an affidavit as follows:

1. His mailing address is Box 170, Star Route, East Carbon, Utah 84520.

2. He was employed at Trail Mountain Mine No. 9 on July 30, 1985 to September 26, 1988, for a period of over three years.

3. Respondent purchased the above mine on or about September 24, 1987, and agreed to honor, among other things, the existing severance pay benefit.

4. Upon becoming separated from BCCC, Stevenson was eligible for the severance pay benefit, which he earned as part of his compensation package during over three years of employment at said mine. The amount of his entitlement was based upon his length of service at said mine.

5. BCCC improperly required Stevenson to sign a document entitled "Special Termination Plan Documentation, Acknowledgment and Payment Schedule", which contained a "General Release" provision (refer to Deposition Exhibit BC-18 attached to Respondent's Brief), as a condition of obtaining his severance benefit money owed to him upon his separation for past service, notwithstanding the incorrect statement of Mr. J. F. Kasper, Employee Relations Manager of BCCC in his letter of October 4, 1988 to the contrary (refer to Deposition Exhibit BC-20, attached to Respondent's Brief).

6. BCCC did not offer him an Enhanced Retirement Program, which is described on the above acknowledgment form, so that he wasn't provided any opportunity to elect between a severance pay benefit and an Enhanced Retirement Program benefit. The above form indicates that he could decline to sign the release language and receive an Enhanced Retirement Program benefit instead of the severance pay benefit. He was not provided with this option to elect. He was simply told by BCCC that if he refused to sign the above document with the general release language, he would not receive any severance pay benefit or any other additional benefit.

7. BCCC never advised Stevenson, or any other coal miner to his knowledge prior to separation, that a general release would be required to receive the severance pay benefit, and no such requirement existed, to his knowledge, prior to the BCCC takeover. Moreover, he received nothing in return for giving to BCCC a general release, because he was owed the severance pay benefit anyway, whether he agreed to the release or not.

8. BCCC would not agree to his request to delete the effect of the general release language and required that said language be included for him to obtain his severance pay benefit. BCCC refused to negotiate or agree to any change.

9. Stevenson was forced to retract his attempt to delete the effect of the general release language, because of economic duress and coercion resulting from his child support obligation (over $900.00 per month for four children); the loss of his video business; his inability to qualify for Unemployment Insurance benefits because of the availability of a severance pay benefit, his lack of a job and lack of outside income and because of additional pressing economic obligations. (Refer to page 126 of his deposition of July 25, 1989.)

10. At the time that Stevenson submitted the signed document with the release language, he doubted that the release language was valid or enforceable. This was because it was obtained by coercion and duress ("blackmail") and because he was owed the severance pay money anyway, whether I signed the release or not.

11. At his deposition of July 25, 1989, Stevenson offered to pay back the severance pay money upon his reinstatement. (Page 124 of his deposition of July 25, 1989).

Discussion

As a threshold matter Complainant contends BCCC's motion was untimely.

Commission Rule 64 simply provides that a motion for summary decision may not be filed before the scheduling of a hearing on the merits. In this case the hearing on the merits then scheduled for August 8, 1989, was cancelled on August 1, 1989. BCCC filed its motion for summary decision on August 14, 1989 when there was no scheduled hearing. This factual scenario causes me to conclude that Commission Rule 64 is not applicable.

The writer believes the applicable case law governing the effect of a release as a valid waiver of rights is generally expressed in an ADEC 1/ case, Cirillo v. Arco Chemical Company, a Division of Atlantic Richfield Company and Ramey, 862 F.2d 448 (3rd. Cir. 1988).

Specifically, therein the Court adopted a "totality of the circumstances" approach, necessitating careful evaluation of the release form itself as well as the complete circumstances in which it was executed.

Relevant factors to be considered in the totality of the circumstances include, but are not limited to, the following considerations: (1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law. 862 F.2d at 451.

It is apparent on the facts presented herein that a genuine issue of fact exists under the totality of circumstances rule. In particular, the issue arises as to whether the consideration was adequate. Or as otherwise stated: was the consideration given for the waiver and accepted by Stevenson in excess of the benefits to which he was already entitled by contract or law.

Since a genuine issue of fact exists on this point it follows that BCCC's motion for a summary decision should be denied.

Accordingly, the following order is appropriate:

1/ Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 621, et seq.

ORDER

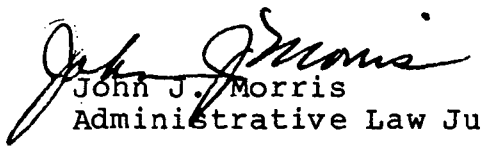
1. Respondent's motion for a summary decision is denied.

2. Complainant is granted 40 days to conduct discovery.

3. Counsel are directed to confer and within 10 days they are to suggest to the judge, in writing, an appropriate hearing site for this case.

4. If the parties cannot agree on an appropriate hearing site the judge will set the case for a hearing in Price, Utah in February 1990.

5. This is not an appealable order since it does not dispose of the alleged discrimination issues.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
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DENVER, CO 80204

December 27, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-275-M A.C. No. 04-01937-05505
v.	:	Docket No. WEST 89-71-M A.C. No. 04-01937-05506
SANGER ROCK & SAND, Respondent	:	Sanger Pit and Mill

ORDER

At the close of the evidence in the above cases on December 13, 1989, respondent requested leave to file interrogatories.

Petitioner objected to respondent's request.

Discussion

Commission Rule 55, 29 C.F.R. § 2700.55 encompasses discovery in general and Rule 56, 29 C.F.R. § 2700.55 addresses the use of interrogatories. These rules indicate discovery is to be initiated early in the proceedings. In fact, Rule 55 states discovery shall be initiated within 20 days after a notice of contest. Further, discovery is to be completed within 60 days after a notice of contest. For good cause shown, the judge may permit the time for discovery to be extended. However, the purpose of interrogatories is to assist a party to prepare and present its case at the evidentiary hearing.

In the instant case respondent requested leave to file interrogatories after the evidentiary hearing had been closed.

It is apparent respondent's motion for leave to file interrogatories addressed to the Secretary was not timely filed and it is denied.

John J. Morris
Administrative Law Judge

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