

DECEMBER 2003

COMMISSION ORDER

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DECEMBER 2003

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

Secretary of Labor, MSHA v. Colorado Lava, Inc., Docket No. EAJ 2001-2. (Judge Weisberger, November 10, 2003)

Secretary of Labor, MSHA v. McElroy Coal Company, WEVA 2004-18-R. (Judge Barbour, November 21, 2003, unpublished dismissal)

No cases were filed in which Review was denied during the month of December

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 23, 2003

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 2004-18-R
 :
McELROY COAL COMPANY :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER AND DIRECTION FOR REVIEW

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On November 21, 2003, Administrative Law Judge David Barbour dismissed the proceeding based on McElroy’s withdrawal of “its request for an expedited proceeding.” Order dated Nov. 21, 2003. On December 18, 2003, the Commission received a petition for discretionary review from McElroy Coal Company (“McElroy”) asserting that Judge Barbour’s dismissal of the proceeding was in error due to a misunderstanding. PDR at 1, 3-4. For the following reasons, we grant McElroy’s petition, vacate the judge’s order, and remand for further proceedings.

On November 4, 2003, MSHA issued Order No. 4705247 to McElroy pursuant to section 104(b) of the Mine Act alleging a violation of 30 C.F.R. § 62.130(a). On November 12, 2003, McElroy filed a notice of contest of Order No. 4705247 and sought expedited proceedings. A hearing was scheduled for November 20, 2003. On November 18, 2003, after receiving notice of a pending modification of the order, McElroy notified Judge Barbour that it was withdrawing its request for an expedited hearing, but reserving its right to renew its request.

In the dismissal order, Judge Barbour concluded that the “modification of the order, presumably to a section 104(a) citation, ha[d] eliminated the primary basis for McElroy’s contest of the order” and dismissed the contest without prejudice to the company. The judge noted that

“[t]he company retains the right to re-file a contest and to request an expedited proceeding should that be necessary.” *Id.*

In its PDR, McElroy contends that it intended to withdraw its request for an expedited proceeding, but not its contest of the underlying violation. PDR at 1. It asserts that contrary to the judge’s assumption, the order was not modified to a section 104(a) citation. *Id.* at 3; Ex. B. It explains that subsequent to the judge’s dismissal, it sent the judge a letter explaining that it still intended to pursue its contest of the order. *Id.* at 4; Ex. C. McElroy requests that the Commission grant review of its petition, grant relief from the judge’s dismissal order, and remand the proceeding to the judge for further proceedings. *Id.* at 5.

On December 19, 2003, the Secretary submitted a response to the Commission agreeing with the representations McElroy made in its PDR and agreeing that the Commission should grant review and remand the case to the judge for further proceedings. Letter from the Secretary of Labor dated Dec. 19, 2003.

The judge’s jurisdiction in this matter terminated when his order of dismissal was issued on November 21, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). McElroy’s petition for discretionary review was timely filed, and we grant it.

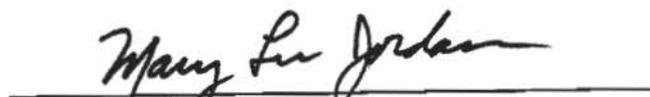
Based on the present record, it appears that the judge misconstrued McElroy's withdrawal of its request for an expedited proceeding. The Secretary does not oppose McElroy's petition or its request for relief. In the interest of justice, we vacate the judge's dismissal order and remand this matter to the judge for further proceedings as appropriate. See *REB Enter., Inc.*, 18 FMSHRC 311, 313 (Mar. 1996).



Michael F. Duffy, Chairman



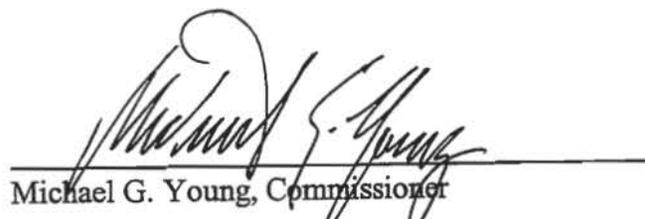
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboteski, Commissioner



Michael G. Young, Commissioner

Distribution

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

W. Christian Schumann, Esq.
Counsel, Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Administrative Law Judge David F. Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

December 1, 2003

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf of	:	
JUSTIN HANSEN,	:	Docket No. CENT 2004-39-DM
Complainant	:	RM MD 2003-14
v.	:	
	:	
MARTIN MARIETTA AGGREGATES,	:	Mine ID 25-00998
Respondent	:	Weeping Water Mine

ORDER GRANTING TEMPORARY REINSTATEMENT

This matter is before me upon an Application for Temporary Reinstatement, filed by the Secretary on November 13, 2003, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), for an order requiring Martin Marietta Aggregates ("Martin Marietta") to temporarily reinstate Justin Hansen to his former position as mechanic/welder at the Weeping Water mine or to a similar position at the same rate of pay. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their discrimination complaints. The Application is supported by Declaration of MSHA Special Investigator Andrew D. Lowe, and a copy of the Discrimination Complaint filed by Hansen on August 29, 2003. The Application alleges that Hansen was fired in retaliation for having reported to the Martin Marietta Ethics Hotline an unsafe practice committed by Maintenance Foreman Ray Fleshman and, because Hansen had obtained a District Court Protection Order as a result of a physical altercation between Fleshman and Hansen.

Martin Marietta filed a Response on November 24, 2003, opposing the Application and requesting a hearing. The parties then jointly moved on November 25, 2003, for an order granting temporary reinstatement, setting forth a proposal that resolves all issues in controversy respecting this proceeding. The essential provisions of the agreement are as follows:

1. Martin Marietta shall temporarily economically reinstate Hansen to his former position until the expiration of the agreement, as specified by the parties.
2. The effective date of the temporary economic reinstatement shall be on the date of this Order.
3. The Secretary, within her discretion, shall file any Discrimination Complaint on behalf of Hansen on or before December 15, 2003, and economic reinstatement

shall continue until final resolution of Hansen's claim, subject to action by the Commission or Court. The Secretary's failure to file a Discrimination Complaint on behalf of Hansen by December 15, 2003, shall render the agreement subject to immediate dissolution.

4. On any Discrimination Complaint filed on behalf of Hansen, the parties shall request that the hearing on the merits be held during February 2004, in Omaha, Nebraska.

WHEREFORE, the Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that Martin Marietta **ECONOMICALLY REINSTATE** Justin Hansen to the position of mechanic/welder, effective this date, in accordance with all terms set forth in the parties' November 25, 2003, settlement agreement.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (By Facsimile and Certified Mail)

Robert Cohen, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Laura Beverage, Esq., Jackson & Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Justin Hansen, P.O. Box 109, Weeping Water, NE 68463 (By Certified Mail only)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 3, 2003

PAUL LANDREVILLE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2003-55-DM
v.	:	NC MD 02-07
	:	
NORTHSHORE MINING COMPANY,	:	North Shore Mine
Respondent	:	Mine ID 21-00209

DECISION

Appearances: Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania,
for the Respondent.
Paul Landreville, Virginia, Minnesota, *pro se*.

Before: Judge Schroeder

This case is before me on a Petition under Section 105(c)(3) of the Mine Safety Act by a mine former employee alleging discrimination as a result of his exercise of rights under the Mine Safety Act. A hearing was held in Duluth, Minnesota on June 4-5, and continued on July 14-15, 2003.¹

INTRODUCTION

While a claim of discrimination under the Mine Safety Act is usually driven by the particular facts of the case, the legal pattern through which those facts are evaluated is important. In a case involving a claim of discrimination under the Mine Safety Act, the complainant bears the initial burden of showing (1) that he was employed as a miner, (2) that he exercised rights protected by the Mine Safety Act, and (3) that he suffered adverse action from his employer in circumstances in which it is reasonable to infer that the exercise of rights under the Mine Safety Act motivated in some substantial part the adverse action. When these three elements have been shown by competent evidence, the burden shifts to the respondent to show (1) that the complainant's evidence is defective, and/or (2) that any adverse action suffered by the complainant could reasonably have been motivated at least in part by reasons unrelated to the exercise of rights under the Mine Safety Act. When these two elements have been shown by

¹References to the Transcript of the Hearing will be indicated by "Tr" and a page number. References to record exhibits offered by the Complainant will be indicated by "PL" and a page number. References to record exhibits offered by the Respondent will be indicated by "N" and a page number.

competent evidence, the burden shifts back to the complainant to show that the motivation for the adverse action other than the exercise of rights protected by the Mine Safety Act was merely pretext. *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Sorenson v. Intermountain Mine Services*, 17 FMSHRC 145 (Feb. 1995).

In this case, many of the necessary factual elements are not in dispute. What is in dispute is the reason for the adverse action taken against Mr. Landreville by NorthShore Mining; Mr. Landreville contending his termination was triggered by his pattern of complaints on safety issues, while NorthShore contends he committed serious work-rule infractions and generally performed as an inadequate employee. I note at the outset that my consideration of Mr. Landreville's contentions represent the fourth opportunity he has had to argue these points. He has unsuccessfully appealed to an arbitrator under his union contract, to the Minnesota Unemployment Compensation Board, and to the Mine Safety and Health Administration.

Following the hearing, the parties were given an opportunity for oral and written argument. After careful study of the record and consideration of the arguments made concerning that record, I make the following findings and conclusions:

FINDINGS OF FACT

Paul Landreville was employed by Northshore Mining Company for the period June 1998 to June 2002. For much of that period he was an electrician that worked with a crew of electricians to construct and maintain electrical infrastructure to an open pit taconite mine. On June 5, 2002, his employment by Northshore Mining Company was terminated. During the course of his employment as a miner he raised safety issues (involving electrical and other crafts) with his immediate supervisors, with mine management and with personnel at the Mine Safety and Health Administration. He asserts his termination was the result of hostility toward him created by his attempts to raise safety issues.

Mr. Landreville was hired in June 1998 at the Silver Bay Processing Plant as a maintenance technician (Tr. 86; N-12, p.31). He had worked for United States Steel Company at its Minntac facility for two years as a millwright and electrician (Tr. 86: N-12, pp.4, 32). Minntac is a large taconite mine with an associated pellet processing facility similar to Northshore (Tr. 86). While at Minntac, he had experience with high voltage and high voltage switch gear (Tr. 87). While at Silver Bay, Mr. Landreville sought to transfer to the Babbitt facility (Tr. 64, 564). This required an interview with a group of hourly and management employees from Babbitt's electrical group (Tr. 782-3). At that time, the electrical group was supervised by Richard Judnick and the interviewers included hourly electricians Bob Toumela, Scott Eckman and Terry Sundahl (Tr. 784). Mr. Landreville did not receive the position at Babbitt because these hourly employees did not feel that Mr. Landreville was qualified to perform the job and had not been truthful in his interview (Tr. 782-3).

At a later date, Mr. Landreville was able to transfer to Babbitt as a production truck driver (Tr. 65, 87). In approximately the fall of 2001, Mr. Landreville was able to transfer into a position in the electrical group in the maintenance department (Tr. 65). Initially, he was

supervised by Brad Dahl because Mr. Judnick had been assigned to a special project (Tr. 750; see also Tr. 84). Mr. Judnick returned to his supervisory duties over the electrical group in October and November 2001 (Tr. 690).

In the beginning, Mr. Landreville's duties involved essentially "shadowing" another member of the electrical group (Tr. 248-9, 337). Those miners would perform their day-to-day tasks and show Mr. Landreville the procedures for performing the jobs safely and ask him if he had any questions (Tr. 248-9, 364-5, 477). He was not considered generally receptive to the training and he frequently commented that he had worked on more sophisticated systems at Silver Bay or that he "knew everything about that" (Tr. 184, 293, 334, 364-5, 478, 684; PL-1; N-7A, B, E). He also frequently commented that the procedures at Silver Bay and Minntac were different and better (Tr. 186, 364, 709-10; N-7 A through E).

In early October 2001, there was an incident that resulted in a counseling session for Mr. Landreville with Mr. Dahl (Tr. 683; N-13). Two hourly employees in the crusher brought it to Mr. Dahl's attention that Mr. Landreville had been unable to repair a problem another electrician was able to fix (Tr. 683, 686). During the incident, Mr. Landreville indicated an unwillingness to solve the problem. During the incident he had taken the time to eat his lunch and had, at one point, simply sat down without trying to solve the problem (Tr. 302; PL-1; N-13, pp.1-5). To a supervisor who observed him sitting down, leaning against a piece of equipment, he appeared to be sleeping, although Mr. Olson, who was the electrician involved, thought he was just sitting down (Tr. 302, 344; N-13, pp.1, 3). When Mr. Dahl met with Mr. Landreville, he indicated that he did not need training and said he was training Mr. Olson (Tr. 684; PL-1). Mr. Olson had, in fact, been the one who corrected the problems that Mr. Landreville did not (PL-1; N-13, pp.1-5). Mr. Dahl concluded that Mr. Landreville needed more training and he was assigned again to accompany other electricians for training (Tr. 336, 687; PL-13). He was not disciplined for these actions.

Mr. Landreville was also counseled by Mr. Judnick at various times about his excessive use of the telephone (Tr. 767-8; N-13, p.7). Other mine personnel observed this (Tr. 374; N-7E, p.3), and some complained to Mr. Judnick about Mr. Landreville's use of the telephone (Tr. 768). They also complained about difficulty in reaching him when he was on pit patrol and complained that he was slow in responding (Tr. 768, 827). He was also reported to tend to leave jobs for the next shift of electricians (Tr. 294, 372; N-7 A through E). He was not disciplined for these actions.

A safety work order system has been established by Northshore to permit employees to submit work orders related to safety issues (Tr. 99, 531). Mr. Landreville submitted two such orders between October 2001 and the end of May 2002 (Tr. 735-6; N-30). He was told on a number of occasions to use the system (Tr. 678, 725). Other employees used it far more frequently (Tr. 735-6; -30). The computer system automatically reminds management concerning outstanding safety work orders to ensure the work is done (Tr. 531-2, 690).

The program also involves the use of hourly safety coordinators to make safety inspections and report unsafe conditions to management (Tr. 529-30, 578-9). A portion of the Northshore Employee Handbook requires that "(e)ach employee must report to his/her immediate supervisor any unsafe condition, accident, injury, or property damage prior to the end of their working shift" (N-3A, p.5-1). The safety program also involves regular safety meetings and training (Tr. 528). It is portrayed as intended to instill in the workforce an attitude or culture that unsafe conditions are to be reported and corrected (Tr. 535-6). This goal is set out in its General Safety Rulebook on the first page:

NO JOB IS SO IMPORTANT OR CRITICAL THAT IT CANNOT BE DONE SAFELY. IF SAFETY WILL BE COMPROMISED, IT IS THE RESPONSIBILITY OF EACH EMPLOYEE TO STOP THE WORK UNTIL THE SITUATION CAN BE REMEDIED, i.e., SAFE PRODUCTION. (N-4B, p.1; see also Tr. 577)

Northshore's approach has achieved substantial results. The Babbitt Mine had not had a lost time injury for almost three years at the time of the hearing (Tr. 573). It had received recognition over the last several years by MSHA for its injury free record (Tr. 573-5).

Mr. Landreville has also shown difficulties in following instructions. On May 7, 2002, he asked for overtime and Mr. Judnick specifically assigned him the job of blowing out the control cabinets in the crusher building (Tr. 763-4; N-13, p.11). This was a job that needed to be done for reasons of safety (Tr. 764-5). Instead of performing the job he was assigned, he "air gapped" the 30" motors at the crusher (Tr. 764). He did this job despite the fact that other electricians told him it was unnecessary (Tr. 430-1,459, 764). He was not disciplined for this infraction.

On May 22, 2002, there was an incident that brought issues with respect to Mr. Landreville to a head. In the course of normal mine operations, an explosive blast had occurred that day. The blast damaged some power lines coming out of the west pit feeder in the pit (Tr. 54, 116, 268, 270; N-16). To enable mining operations to continue with powered equipment, it was necessary to reconfigure the power in the pit (Tr. 276-7). Prior to the blast, the power had been supplied from the west pit feeder substation located near the crusher building (Tr. 53-4; N-16).

Once the damage was discovered, Mr. Landreville locked out² the substation as part of his pit patrol duties; it had already been deenergized before the blast (Tr. 54, 273). In order to develop a plan of action concerning getting power to the pit equipment, two pit supervisors, Bernie Barich and Byran Rusco, came to the electricians' room to discuss what would be done (Tr. 277, 350-1, 462; PL-1). This kind of informal gathering of co-workers appears to be a

² A "lock out" is a process whereby a switch is rendered inoperable by placing a padlock on the switch arm. This process insures the system segment on the outbound side of the switch is not re-energized without the knowledge of the person placing the lock. It is possible to have multiple "lock outs" on the same switch at the same time.

regular part of how the electricians at Babbit did their work. Mr. Landreville was familiar with the practice.

A number of the electricians, including Mr. Landreville, participated in the discussion (Tr. 278, 350-1, 418). The weight of the evidence is that Mr. Landreville offered a suggestion that would have resulted in power going to one of the pieces of mining equipment that was affected (Tr. 118, 184, 513; N-5). Instead, it was decided to bring the power from the south mine substation so that both a drill and a shovel could be energized (Tr. 280, 350-1, 513-14). This would involve changing jumpers at the location where the lines for the west pit substation and the south mine substation met in order to permit power to flow from the south substation (Tr. 280, 351-2; N-16, pt. C). Mr. Landreville was present in the room as this option was discussed and the decision made (Tr. 277, 353, 390-1,462, 513-15, 517; -5). Mr. Landreville at one point denied being present and at another point contended he had been in and out of the room as the discussion proceeded. It appeared to others that he was present at the critical decision stage of the discussion and that he understood the discussion as it related to his work responsibilities as pit patrol. He had a work responsibility to understand the outcome of the discussion in order to be a safe and responsible member of the electrical team. After the discussion, the electricians left the room at the same time (Tr. 752).

Following the discussions, Todd Pontinen and Scott Eckman performed the pole work to accomplish the power rerouting task (Tr. 354). Two sets of cables ran from a three pole structure midway between the west pit feeder and a switch house for the Number 127 shovel (Tr. 351; N-16). Jumpers were moved, permitting power to flow from the south mine substation line to two taps, including the switch house for the 127 shovel and a second nearby switch house to which a drill cable were connected (Tr. 351,355; N-16). Mr. Pontinen locked out the west pit substation and the south mine substation before the work was performed (Tr. 354-5, 418). When Mr. Pontinen and Mr. Eckman switched the cables, they used a bucket truck to lift Mr. Pontinen up to the power cables (Tr. 354). While they were using it, it was parked jutting out into the mine road (Tr. 357, 419). It was a distinctive orange color and they put cones around it (Tr. 357). While they were performing the work, Mr. Landreville passed them in the pit patrol truck (Tr. 358, 414, 420). He could not help seeing the work in progress and was under a duty to inquire as to the significance of the work if he did not already understand the significance of the work.

Before the lock was taken off the south mine substation, Mr. Eckman contacted the electricians in the pit, including Mr. Landreville, to establish that they were clear of any danger before power was restored (Tr. 358-9, 402, 420-1). Mr. Landreville acknowledged the call and gave a response that he was in the clear (Tr. 359, 420-1, 438, 458). The call, at the very least, should have alerted Mr. Landreville that changes were occurring in the power distribution network. If he did not understand the significance of the changes, he was under some duty to inquire. He made no inquiry following the radio call.

Hugo Schulz, the mine's most experienced electrician, was also working in the pit that day (Tr. 461). He went to the switch house for the 127 shovel to change the rotation on the motors (Tr. 464). In order to do so, he had to "lock out" the switch house and remove what is

known as a "Kirk key" from the front of the switch house to open the back to check the rotation (Tr. 465). He performed this operation on both the drill and 127 shovel (Tr. 466). He restored the switch houses to the condition he found them, i.e., in a condition to provide power to the drill and shovel (Tr. 466). He then went to the 127 shovel to check the rotation on the electrical motor there once the power was restored (Tr. 466). When he was there, he noticed that the shovel did not appear to be energized, while the drill nearby appeared to be, because its lights were on (Tr. 467). Mr. Schulz inquired of one of the bull gang members who was nearby who told him Mr. Landreville had been working on the shovel (Tr. 468).³

Mr. Schulz investigated and discovered the cable for the shovel had been disconnected from the junction box near the shovel (Tr. 468). Mr. Schulz then called Mr. Landreville on the radio and Mr. Landreville apparently told him that he had the Kirk key for the switch house (Tr. 470). Mr. Schulz heard a response that was broken but sounded like "got key" (Tr. 470). At the time of this radio conversation, Mr. Olson, who was working in the crusher that day, observed Mr. Landreville driving near the crusher and saw him turn around and head in the direction of the switch house (Tr. 284-5; see also Tr. 471-2). Mr. Schulz drove from the shovel to the switch house (Tr. 470; N-16). As he passed the crusher, he saw Mr. Landreville come from the direction of the switch house (Tr. 471). Mr. Schulz would have had a longer drive to the switch house than Mr. Landreville (Tr. 470 - 75).⁴ When Mr. Schulz got to the switch house, it had been locked out (Tr. 471). This was the condition of the switch house that Mr. Landreville apparently described in the radio call with Mr. Scholtz.

Mr. Scholtz later learned from Mr. Olson about Mr. Landreville's reversal of direction at the time of the radio call and concluded that Mr. Landreville had lied about having the key and also concluded that the cable from the switch house to shovel was energized after it had been disconnected from the junction box (Tr. 472). He further concluded that Mr. Landreville did not tell the truth when he responded on the radio that he had the key (Tr. 473-4). Mr. Scholtz believed that the energized high voltage cable laying on the ground presented a significant safety hazard and was concerned about the nearby presence of the bull gang 100 feet away and the fact that a crew would be moving the shovel (Tr. 472).

It is standard operating procedure before working on a cable to lock power out at the

³ In testimony, Mr. Landreville admitted he did not follow standard procedure in working on the shovel in that he did not, according to him, lock out the switch house connection to the shovel until after he had finished his work on the shovel, apparently relying for his own safety on the remote lock out at the crusher placed earlier in connection with the blast damage.

⁴ Mr. Landreville spent the vast bulk of his post-hearing memorandum on the issue of time periods necessary for Mr. Scholtz and Mr. Landreville to make their respective trips after the radio call. Data on time and distance for these trips is not sufficiently precise in the record to make the kinds of comparisons attempted by Mr. Landreville. The actual issue is the credibility of the two witnesses. I find Mr. Scholtz to be a more consistent and credible witness.

source closest to it to minimize the risk of the cable being reenergized from any source (Tr. 285-6, 288, 375, 377, 425, 474). It is a procedure that Mr. Landreville had been trained on by the other electricians when he had accompanied them and it was a procedure he had performed (Tr. 288, 377, 425, 475, 502). Mr. Scholtz was concerned about the incident because of the hazard involved and discussed it with Mr. Judnick, his supervisor (Tr. 475). Mr. Judnick discussed the matter with Mr. Landreville that day, along with a number of other issues about Mr. Landreville's work performance (Tr. 756-61). Mr. Landreville admitted that he did not lock out the switch house (Tr. 758). Although Mr. Judnick did not direct Mr. Landreville to report the incident in the log book before he left for the day and did not tell him what to write (Tr. 758), Mr. Landreville made an entry in the logbook (PL-6). Mr. Landreville wrote:

Hookup to unit (I dropped power @ crusher west feeder put my safety lock on & opened up a box behind shovel with the switch house still in. This was wrong. I should have not relied only on the feeder being locked out but should have opened up switch house too.) The feeder can be energized from other sources by moving jumpers (PL-6).

On the morning of May 23, Mr. Dahl was contacted by several of the electricians who requested a meeting to discuss their concern with regard to the incident (Tr. 290, 360-1, 424-5, 672). Mr. Dahl contacted Carl Kerschen, Senior Area Manager for Human Resources, at his office in Silver Bay (Tr. 155, 673). Mr. Kerschen met with the electricians on the afternoon on May 23. Mr. Landreville was not working that day and did not attend the meeting (Tr. 159). He was not scheduled to return to work until May 28 (Tr. 159). In Mr. Kerschen's years of experience in human relations, for employees to request such a meeting was highly unusual (Tr. 157).

When Mr. Kerschen met with the electricians and heard their concerns for their safety and experiences with Mr. Landreville's work performance, he decided to have a complete investigation of the incident done by Kimball Alvey, Northshore's Area Manager for Safety and Loss Control (Tr. 158). Mr. Alvey had many years of experience working with MSHA and had been a special investigator for MSHA for several years and had conducted accident, Section 105(c), and Section 110© investigations (Tr. 158, 561). As part of the investigation, Mr. Alvey interviewed the electricians and Mr. Landreville. In addition, Mr. Kerschen reviewed Mr. Landreville's personnel file, which contained references to some of the previous incidents such as the one in the crusher in October 2001 (Tr. 162; N-12, p.166). He also asked for any other notes that Mr. Dahl and Mr. Judnick might have so he could get an accurate picture of Mr. Landreville as an employee (Tr. 168-9). Among other things, this indicated that on at least five separate occasions, going back to when Mr. Landreville was at Silver Bay, he had been counseled about his work performance (N-1; N-12, pp.14, 15, 23, 24, 25; N-13, p.7; PL-1).

Mr. Kerschen asked Mr. Judnick to contact Mr. Landreville to schedule a meeting on Tuesday, May 28, the day Mr. Landreville was scheduled to return to work in order to hear his side of the story (Tr. 159). Mr. Judnick advised him that he was suspended from work pending

completion of Northshore's investigation (Tr. 160). Mr. Landreville had two telephone conversations with Mr. Judnick before and after his meeting with Mr. Kerschen (Tr. 775-6; N-8). Mr. Judnick regarded some of Mr. Landreville's comments in their conversations as threats because Mr. Landreville said if he was fired he would not be the only one (Tr. 777). Mr. Judnick construed this as a threat because he thought Mr. Landreville might fabricate accusations against himself and others (Tr. 777). Mr. Judnick reported the conversations to Mr. Kerschen and to Mike Johnson, Mine Manager of Babbitt Mine (Tr. 161).

During various meetings during this time, with Mr. Judnick and Mr. Kerschen, Mr. Landreville raised safety concerns (Tr. 161). Although they were unrelated to the incident on May 22, Northshore tried to ascertain the nature of his concerns and correct them (Tr. 161). To that end, they met with him on June 3 and developed a list of safety issues in discussion with Mr. Landreville (Tr. 161, 568, 603, 606,675). They included the following:

1. Overfusing on a heater.
2. Wiring on a crane in the crusher.
3. Practice of holding the undervoltage relay in on the shovels and drills when they were started using a portable power unit.
4. A light switch in the women's dry.
5. Sodium lights on the shovels.
6. Panels for heaters in the truck shop with wrong color wire.
7. Jib crane at top of loading bins-wiring too small.

(Tr. 675; N-26, 27)

This list was given to Bryan Baird, Northshore's safety representative, and an electrician, Mr. Toumela, to investigate (Tr. 192-3, 568, 675). There had to be follow-up on the item related to the shovels (Tr. 569; PL-5). Two items did not need corrections; the others were determined to not be problems or could be remedied by simple corrective measures which could have been taken by Mr. Landreville in the course of his work, such as by the addition of a piece of colored tape (Tr. 194-5; PL-5).

After the meeting to gather information on the safety issues, there was a second meeting with Mr. Johnson, the Mine Manager (Tr. 221). Mr. Landreville's suspension was continued at that time to investigate the telephone conversations and to complete Mr. Alvey's investigation (Tr. 221-2).

Mr. Alvey reported his conclusions to Mr. Kerschen following his investigation of the May 22 incident by memorandum dated June 5, 2002 (Tr. 565; N-2). Mr. Alvey concluded that failing to lock out the switch house "is a serious safety infraction not only of company rule and procedures, which cannot be tolerated" (Tr. 568; N-2). Mr. Alvey also reported his conclusions

verbally to Mr. Kerschen before the report was finalized (Tr. 565).

The decision was made to terminate Mr. Landreville's employment (Tr. 162). Mr. Landreville was advised of this on June 5, 2002, by Mr. Kerschen (Tr. 164). The decision to discharge Mr. Landreville was based upon a review of Mr. Alvey's investigation, Mr. Landreville's personnel file, the documentation of Mr. Dahl, the notes concerning the incidents in the fall of 2001, the statements of the electricians, and the notes of Mr. Judnick concerning his conversations with Mr. Landreville (Tr. 164-79).

Mr. Kerschen based the decision to discharge Mr. Landreville on the seriousness of the incident on May 22, upon input from his co-workers relative to his work performance, the fact that Mr. Landreville had falsely told his supervisors that he had not been trained on the switch house lock-out procedure, that he had harassed his supervisor creating a hostile workplace in violation of Company policy, that he had been counseled several times since October 2001, and had not improved his work performance, and that he had failed to correct unsafe work conditions (Tr. 180-90; N-1). Mr. Kerschen felt Mr. Landreville was going to continue to be a safety risk (Tr. 180).

The NorthShore Employee Handbook includes a number of grounds for immediate termination including violation of commonly accepted safe working practices, falsifying testimony in an investigation, and sleeping on the job (N-3, p.3-4). A violation of a known safety practice is sufficient, in and of itself, for termination (Tr. 182). Such misconduct has resulted in discharges of other employees (Tr. 199). In addition, there was a pattern with Mr. Landreville of ongoing problems with no improvement (Tr. 188-9).

The Employee Handbook provides a number of remedies for employees when they are disciplined or terminated (N-3A, pp 2-8 to 2-12,3-3). Mr. Landreville had three options: he could appeal to the General Manager, to a Peer Review panel or to an arbitrator (N-3A, pp.2-10, 3-3). He selected arbitration (Tr. 128).

The arbitration was conducted under the national rules of the American Arbitration Association for the resolution of employment disputes (Tr. 200; N-19). An experienced arbitrator conducted the arbitration hearing, which lasted three days (Tr. 204; N-17, p.1; N-24). During the arbitration, Mr. Landreville was entitled to counsel, which Northshore should have partially paid for (Tr. 128; N-3A, p.3-3). He did not retain counsel (Tr. 128).

The arbitrator's decision was issued on April 4, 2003 (N-17). The arbitrator upheld the discharge and found there was just cause to terminate Mr. Landreville's employment (N-17, p.7). The arbitrator further held that there was "no basis to conclude that Respondent's action represented retaliation for Mr. Landreville's reporting of safety concerns at the mine or for any other reason" (N-17, p.7). The arbitrator found that Mr. Landreville testified inconsistently and attempted to divert attention from the facts of the case by raising other issues (N-17, p.8). She also held that he had lied (N-17, p.8). She held that work in the mine required a high level of

trust and good communication and that the absence of such trust and communication created a "clear and present danger of future safety concerns." (N-17, p.8). Finally she held that the incident which supported termination reflects Mr. Landreville's "blatant disregard for standard operating procedures which, clear to even a novice, could result in a fatality." (N-17, p.8).

By letter dated June 7, 2002, Mr. Landreville made a complaint to MSHA. That letter raised the following issues:

1. Practice of holding the undervoltage relay in when starting the shovel from a portable power unit
2. Cable splicing and the splice kit used for cable splices
3. An insulator on the cable testing machine. (PL-3).

Most of the issues were different from what was raised on June 3 by Mr. Landreville (PL-3: N-26, 27). An investigation was conducted by MSHA and included personnel from its technical support group as well as an electrical inspector (Tr. 568-71; PL-2). No citations were issued although a recommendation, which Northshore followed, was made concerning the undervoltage relay (Tr. 572; PL-2). In addition, the cable tester which is referenced in the complaint had been voluntarily red-tagged and taken out of service pending completion of repairs (Tr. 572; PL-2).

CONCLUSIONS

A complainant in a discrimination case has the burden of showing two essential facts; (1) that the complainant engaged in activity protected under the Mine Safety Act, and (2) that an adverse action against the complainant was motivated in some part by the protected activity. The showing of motivation can be inferential or circumstantial. There is no requirement for a showing of a "smoking gun." *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981). Once the miner has made an initial showing of the elements of a claim of discrimination, the respondent mine operator has the burden of showing either (1) that no actual protected activity occurred, or (2) that the protected activity did no in any way motivate the adverse action taken, or (3) that some unprotected action by the complainant was sufficient to justify the adverse action taken. *Haro v. Magma Copper Co.* 4 FMSHRC 1935 (November 1982). Unprotected activities which can be used as a defense to a claim of discrimination are activities such as insubordination, dishonesty, absenteeism, poor or unsafe work performance, and similar offenses. It is well settled that if an operator's business justification is reasonable it will be sufficient to sustain the defense. It is not my responsibility to determine whether I would have reached a different conclusion than that reached by the mine operator under the same circumstances. Unless the complainant is able to show that the mine operator's purported reasons are mere pretext, the merits, fairness, or wisdom of the adverse action taken is beyond my authority. To show that the mine operator's reasons are pretextual, a complainant must demonstrate that the reasons are implausible or incredible. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (November 1981). The mine

operator is not required to be **right** but only to have been **reasonable** on the record before me. One of the primary indications that the mine operator acted appropriately under the circumstances is a properly documented investigation into the facts prior to taking the contested adverse action.

In this case, the complainant was successful in presenting a *prima facie* case. It was not seriously disputed that Mr. Landreville engaged in activity arguably protected under the Mine Safety Act. Over an extended period, and with greater frequency near the time of his employment termination, Mr. Landreville pointed out to his supervisors and to his coworkers what he believed were safety concerns in the work place. He took advantage of the computerized safety work order system used by Northshore. He pointed out safety concerns, not only in areas in which he had work responsibilities, but also on other subjects he happened upon in the course of his work.

Further, the closeness in time between his increased number of safety complaints and his termination is a reasonable basis upon which it can be inferred that the complaints were related in some degree to his termination. He did not present anything remotely resembling a “smoking gun” on improper motivation of Northshore management in taking action against Mr. Landreville. But for the limited purpose of finding a *prima facie* case to shift the burden of proof to the mine operator, the time element would be sufficient. I should note here that the Northshore management officials that testified were completely credible in both style and content of their testimony.

The Respondent submitted evidence on the reasons given for the termination of Mr. Landreville. Northshore contended the termination was based on the following grounds that are not protected activity under the Mine Safety Act:

1. He committed a serious safety infraction on May 22, 2002, by failing to lock out power to the 127 shovel at the nearest power source, the switch house;
2. He engaged in a pattern of behavior in conflict with his employment responsibilities that he failed to correct even though counseled repeatedly;
3. He lost the trust of his fellow employees in the electrical team in circumstances in which trust is vital to the safe and effective completion of the work;
4. He lied about his training and experience;
5. He made hostile and threatening telephone calls about his immediate supervisor.

For two basic reasons, I conclude that Northshore has met its burden of showing that the termination of Mr. Landreville was not motivated by activity protected under the Mine Safety Act; first, because of process of termination used by Northshore included a fair and reasonable investigation of the facts relied upon by Northshore, including an opportunity for Mr. Landreville to present evidence and question the evidence presented against him, and second, the record created in this case indicates to me that it is more probable than not that Mr. Landreville committed a serious safety infraction on May 22, 2002, that would by itself be sufficient to

justify the termination of Mr. Landreville. Each of these reasons needs to be explained in some greater detail.

Business Justification

In asserting the affirmative defense of independent justification (i.e., showing business reasons independent of actions protected by the Mine Safety Act) the employer has the burden of demonstrating that its actions were motivated by information and analysis of facts which establish independent grounds for the action taken. A reasoned and documented business judgment, which is beyond the power of this Commission to second guess, forms the basis for a conclusion that the reasons for the adverse action were beyond the protection of the Mine Safety Act.⁵

In this case, the process of making a reasoned and documented business judgment began with the conversations of Mr. Landreville's coworkers, Hugo Scholtz and Carl Olson, concerning the cable Mr. Scholtz found on the ground. Rather than take those preliminary conclusions to immediate action against Mr. Landreville, the coworkers began talking with others about those conclusions. They accumulated evidence and issues to present to Human Resources. From Human Resources the conversation went to a trained investigator, Mr. Alvey, who gathered more information and opinions. This level of information was delivered to management, who went on to afford Mr. Landreville an opportunity to respond. Actions against Mr. Landreville were measured and proportionate to the seriousness of the charges. Written statements were taken within a short time after the events of concern and were preserved for future review. Even after a termination decision was made, well-established procedures afforded Mr. Landreville further opportunities for review.

In this instance, the arbitration decision is entitled to significant weight. First, the arbitration was conducted under the national rules of the American Arbitration Association resolution for employment disputes (Tr. 200, 219). The arbitrator was an experienced employment arbitrator. Mr. Landreville was entitled to counsel but did not exercise that right (Tr. 128). The hearing lasted three days and Mr. Landreville called a number of witnesses and was able to cross examine Northshore's witnesses (Tr. 217). The testimony was under oath (Tr. 205). The factual issues were very much the same (-17). Mr. Landreville has not presented any evidence to suggest the arbitration proceeding was anything but a fair and honest review of the facts of his case.

⁵ A careful reading of the decision in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2517 (November 1981) supports this position. The Commission in *Chacon* reverses on a substantial evidence basis the trial judges rejection of an affirmative defense by Phelps Dodge built on a careful documentation of a business case for termination.

Substantial Evidence

The evidentiary burden that rests on Mr. Landreville for him to succeed in this case is for him to show it is more probable than not that Northshore terminated his employment in substantial part because of his efforts to invoke his health and safety efforts protected by the Mine Safety Act. Rather than attempt to show that motivation directly from Northshore witnesses, Mr. Landreville attempted to show that the motivations articulated by Northshore in its termination action were incorrect and hence a pretext. I should note at this point that I do not consider it my responsibility or even within my jurisdiction to determine to a legal certainty whether Mr. Landreville either did or did not commit the work rule violations that he was accused of in the termination proceedings. My responsibility is to use the evidence concerning those alleged work rule violations to determine whether the respective burdens of proof have been met in this case, i.e., whether Mr. Landreville has shown by substantial evidence that Northshore was actually motivated to terminate him by reasons prohibited by the Mine Safety Act.

The Commission decision in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2517 (November 1981) makes it clear that the burden Mr. Landreville faces is a heavy one. In interpreting a prior Commission decision, the Commission in *Chacon*, supra, said the following:

Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." [Citations omitted] The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

3 FMSHRC 2516

Accepting Mr. Landreville's testimony at face value, he makes at most a plausible argument for error by Northshore management in evaluating the statements by co-workers on the hazards he created. I do not find in his allegations of error any evidence to support a conclusion that Northshore asserted the reasons for Mr. Landreville's discharge as a pretext for taking action against him that would otherwise be prohibited under the Mine Safety Act. However, there are a number of reasons to not accept Mr. Landreville's testimony at face value. Significant conflicts and contradictions are found on important points.

A typical example of this problem is the testimony concerning the delivery of a Northshore safety handbook to Mr. Landreville early in his employment. He first denied ever receiving a copy of the handbook. When confronted with a copy bearing his signature he was reluctant to agree that he had in fact received the document (Tr 106 - 111). Further, Mr. Landreville often claimed to be a very safe worker but admitted that on May 22, 2002, he violated a fundamental safety rule that required disconnection of electrical equipment at the disconnect point closest to the equipment. He admitted the violation but attempted to justify the lapse by other steps he had taken. Finally, he claimed to be not aware of the power rerouting plan developed at the electricians meeting on May 22, 2002. He conceded, however, that he was aware of the purpose of the meeting and that he planned to do other electrical work the rest of the day. Any safety conscious employee, particularly one with the assignment of "pit boss" would make it his business to learn the outcome of the meeting. Mr. Landreville's disclaimers of knowledge of the meeting and the outcome simply do not ring true.

ORDER

For all of the foregoing reason, the Petition filed by Mr. Landreville is **DISMISSED**.


Irwin Schroeder
Administrative Law Judge

Distribution:

Mr. Paul Landreville, 803 North 8th Street, Virginia, MN 55792 (Certified Mail)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 16, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2002-80
Petitioner	:	A.C. No. 36-07456-03532
	:	
v.	:	Docket No. PENN 2003-10
	:	A.C. No. 36-07456-03533
D & F DEEP MINE BUCK DRIFT,	:	
Respondent	:	Docket No. PENN 2003-38
	:	A.C. No.36-07456-03534
	:	
	:	Buck Drift Mine

DECISION

Appearances: Andrea J. Appel, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, on behalf of Petitioner;
Randy Rothermel, Sr., Klingerstown, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petitions allege that D & F Deep Mine Buck Drift ("D&F") is liable for four violations of the Act and mandatory safety and health standards applicable to underground coal mines. A hearing was held in Pottsville, Pennsylvania. The Secretary proposes civil penalties totaling \$2,628.00 for the violations. For the reasons set forth below, I find that D&F committed three of the alleged violations and impose civil penalties totaling \$1,560.00.

Findings of Fact - Conclusions of Law

Background

Respondent operated an underground anthracite coal mine, the D & F Deep Mine Buck Drift, in Schuylkill County, Pennsylvania. Four miners normally worked at the site. D&F's

mine is a “drift” mine,¹ the entrance to which consists of a nearly horizontal tunnel, 10-12 feet wide, leading into the Big Buck coal vein. At that level, the coal vein is approximately five feet thick and slopes at an angle of 35 degrees from horizontal. The main entry of an anthracite mine is referred to as a “gangway.” Entries called “chutes,” were developed upward in the coal seam from the gangway at 60-80 foot intervals. Other horizontal entries, approximately eight feet wide, were driven higher in the vein and parallel to the gangway, at 30-60 foot intervals. The first horizontal entry above the gangway is called the “monkey heading” and successive entries above that level are referred to as “miner headings.” A locomotive operated on tracks installed in the gangway from the mine entrance to the no. 16 chute, which was referred to as the “loadout point.” The locomotive towed haulage cars to transport supplies into and coal out of the mine.²

At the time of the inspections, D&F was in the process of removing pillars, those blocks of coal left between the headings and chutes. Specifically, D&F was removing the lower portions of the pillars between the gangway and monkey headings from chute no. 16 to chute no. 20.³ In the same area, D&F was also robbing, or removing, coal from the low-side rib of the gangway entry. This mining increased the width of the gangway by approximately 20 feet on the high rib side and by 10 feet on the low side. Roof support was provided by timbers placed on five-foot centers and roof bolts that were driven as indicated by conditions.

The Inspections

Section 103(a) of the Act requires that underground coal mines be inspected by the Secretary’s Mine Safety and Health Administration (“MSHA”) four times each year. Kenneth J. Chamberlain, an MSHA inspector with 12 years of experience and 15 years of experience as a miner, commenced an inspection of the mine on November 16, 2001. On Monday, November 19, 2001, he inspected the pillar removal work in the gangway and issued a citation to Respondent charging a violation of 30 C.F.R. § 75.203(a), i.e., that the gangway entry was being mined to an excessive width. Respondent was given until 8:00 a.m. the following day to abate

¹ A “drift” is “[a]n entry, generally on the slope of a hill, usually driven horizontally into a coal seam.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 169 (2nd ed. 1997).

² The slope of the Big Buck vein becomes more horizontal as it rises, changing approximately 3-5 degrees for each heading. At the monkey and gangway levels, coal would slide down the chutes by force of gravity alone. At the higher levels, however, coal would not slide and various methods were used to move the coal down the chutes.

³ Approximately 10-12 feet of coal on the high side of the pillars was left in place to preserve the lower rib of the monkey heading. D&F planned to use the monkey heading for removal of coal mined from the pillars further up the slope. The chutes were boarded-shut at the monkey heading, so that coal could be dragged to an open chute, where it could run down to the loadout point on the gangway.

the violation. On November 20, Chamberlain observed that the violation had not been abated and issued an order pursuant to section 104(b) of the Act, barring entry to the affected area. On November 21, 2001, Jack McGann, another MSHA inspector, accompanied by Dennis D. Herring, an inspector in training, attempted to conduct an inspection to determine whether the violation cited by Chamberlain had been abated.

They arrived at the mine about 9:00 a.m. and spoke to Cindy Rothermel,⁴ who was in an office on the surface. She was unable to contact Randy Rothermel, Sr., the superintendent, who was underground, because she could not locate the surface-to-underground intercom, which had been moved. McGann stated that he knew the layout of the mine and where work was being done, and indicated that he and Herring would enter the mine without an escort. Mrs. Rothermel told him that she was not comfortable with them entering the mine without the miners' knowledge. McGann and Herring then prepared to go underground and proceeded to walk down the gangway into the mine. When they reached the loadout point, the area of the no. 16 chute, they encountered Randy Rothermel, Jr., who had come down from the monkey heading to retrieve some tools. He sent another worker to inform his father of the inspectors' presence, stating that "he's not going to be happy." Tr. 158. Randy Rothermel, Sr. immediately came to the loadout point and was very angry that the inspectors had entered the mine without his knowledge. He ordered them to leave the mine immediately. McGann warned Rothermel that the denial of entry would result in a citation and order. Rothermel continued to insist that the inspectors leave mine property. Respondent stipulated that McGann and Herring were told to leave the mine because they entered the mine without Rothermel's knowledge and because there had been inspectors at the mine for the previous three days.

When he returned to the office, McGann issued Citation No. 7003551, charging Respondent with denying the inspectors entry to the mine, a violation of section 103(a) of the Act. The Secretary filed a civil action in the U.S. District Court for the Middle District of Pennsylvania against Randy Rothermel, Jr. and Cindy Rothermel, Respondent's principals, seeking temporary and permanent injunctive relief. On November 23, 2001, a preliminary injunction was issued barring the Rothermels from interfering with, hindering or delaying the Secretary of Labor from carrying out the provisions of the Act. McGann returned to the mine the following day and was allowed to perform the inspection. The denial of entry citation and the excessive width citation were terminated after a sign was hung forbidding passage on the gangway in by the no. 17 chute. McGann determined that mining in the gangway did not conform to the operator's approved roof control plan and issued a citation for that violation.

On January 30, 2002, Chamberlain visited the mine to conduct a respirable dust survey. Randy Rothermel, Sr. refused to allow him to carry dust pumps necessary for the survey into the mine, demanding to be shown, in writing, the Secretary's authority to conduct a dust survey not

⁴ Cindy Rothermel is married to Randy Rothermel, Sr., the mine's superintendent. Mrs. Rothermel and Randy Rothermel, Jr., are partners who own the D&F mine.

in conjunction with a regular inspection.⁵ When written authority satisfactory to Rothermel was not produced, he continued to refuse to allow Chamberlain to take the dust pumps into the mine. Chamberlain returned to the mine with the MSHA field office supervisor, Kenneth Hare, who again cited the Secretary's authority to conduct inspections under section 103(a) of the Act, and handed him a citation and an order when he continued to refuse to allow the inspection. Citation No. 7003958 charged Respondent with denying entry to an authorized representative of the Secretary in violation of section 103(a) of the Act. The Secretary again sued the Rothermels in federal court, seeking temporary and permanent injunctive relief. The Rothermels defended, challenging the Secretary's legal authority to conduct respirable dust surveys. The Secretary prevailed in that action. A permanent injunction was entered on April 25, 2002, enjoining the Rothermels from denying entry to authorized representatives of the Secretary attempting to conduct inspections. The Rothermels appealed that decision, which was affirmed. *Chao v. Rothermel*, 327 F.3d 223 (3rd Cir. 2003).

The four citations issued in the course of the above events are discussed below.

Citation Nos. 7003952 and 7003553

Citation No. 7003952, which was issued by Chamberlain on November 19, 2001, alleges a violation of 30 C.F.R. § 75.203(a), which requires that "The method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries, or faulty pillar recovery methods." The conditions noted on the citation were:

The method of mining used by the operator caused excessive width in the old conveyor gangway in the Big Buck Vein. The operator deviated in his pillar recovery sequence, in that the gangway is approximately 40 feet wide from no. 17 chute inby to the no. 20 chute. It should be noted the operator had spot bolted the area and placed appropriate timbers. The above method is not included in the operator's approved Roof Control Plan.

He concluded that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial, that four persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$281.00 is proposed.

Citation No. 7003553 was issued by McGann on November 24, 2001, and alleges a violation of 30 C.F.R. § 75.220(a)(1), which requires that "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." The conditions noted on

⁵ Beginning in April 2000, MSHA conducted bi-monthly respirable dust inspections at underground coal mines, four of which were done in conjunction with the regular inspections. Ex. P-11 (exhibits to the Secretary's Motion to Limit Trial Issues).

the citation were:

The operator deviated from the approved roof control plan in that the gangway pillars of the old conveyor gangway (Big Buck Vein), were being removed. The operator had removed the pillars on the high and low side of the coal ribs between chute nos. 17 through 20. The area mentioned is 40 feet in width. The above robbing method is not mentioned in the roof control plan.

He concluded that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial, that four persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$97.00 is proposed.

The Violations

The approved roof control plan in effect in November 2001 for Respondent's mine specified a maximum gangway entry width of 12 feet and did not contain any provisions for pillar removal. Tr. 103-05, 192-93; ex. P-6. Following issuance of these citations, Respondent submitted an addendum to its roof control plan, which included provisions for removal of gangway pillars and robbing of the low rib of the gangway. That proposal, as amended, was eventually approved by MSHA. Ex. P-7. The pillar removal provisions of the amended plan specify a procedure very similar to that employed by Respondent at the time the citations were issued. They allow the partial removal of the lower portions of the pillars between the gangway and monkey headings and robbing of the low-side gangway rib down to the water level, some 200 feet below. Required roof support consists of timbers installed on five-foot centers, and "cribs" or "cogs" installed on 50 foot centers. Foot or liner boards, at a minimum height of 12 inches, must be installed on the second row of timbers above the dragway-working surface. Ex. P-7. The plan also specifies a sequence for removal of blocks of coal from the low-side rib.

As to Citation No. 7003553, there is no question that the roof control plan in effect in November 2001 did not provide for pillar removal, and that Respondent was not following its approved roof control plan at the time the citation was written. Randy Rothermel, Sr. essentially conceded as much, although he maintained that his mining method exceeded the requirements of the plan. Tr. 68-69, 164-65, 189-96. I find that Respondent violated 30 C.F.R. § 75.220(a)(1), as alleged.

The alleged excessive width violation, Citation No. 7003952, presents more difficult issues. Respondent had expanded the width of the gangway entry to 40 feet, well in excess of the maximum width allowed in its approved roof control plan. The critical question is whether the conditions in that area were such that the 40-foot width presented a hazardous condition. For the reasons that follow, I find that the mining method employed by Respondent to rob the pillars and low-rib in the gangway complied, in all essential respects, with the later-approved amendment to its roof control plan and that no hazard was presented.

Chamberlain and Herring explained their assessments of the danger of conducting pillar removal as Respondent was doing it in November 2001. Increasing the width of the entry exposed more roof, forcing the remaining coal and roof supports to bear more weight. They felt that “sooner or later,” a large piece of coal or roof would fall and slide down the slope, possibly hitting a miner working on the gangway or low rib. Tr. 28-29, 106-09.

Chamberlain testified that the timbers and roof bolts Respondent had installed were not sufficient to compensate for the stresses caused by the increased width of the entry. In his judgment, cribs and foot boards should have been installed. The later-approved amendment to the roof control plan required that cribs be placed on 50-foot centers and that foot boards be installed on the second row of timbers above the working surface. Herring also testified that the timbers and bolts were not sufficient to compensate for the increased width. However, his conclusion was based upon an assessment that the timbers were spaced too far apart. Tr. 109, 134. He had not entered the mine past the no. 17 chute and did not take measurements, but estimated that the timbers may have been 6 feet apart. Tr. 134. Randy Rothermel, Sr., testified that the timbers were placed on 5-foot centers and that foot boards had been installed. Tr. 168. Chamberlain recalled that the timbers were spaced “pretty close” to the 5 foot centers required in the amended plan. Tr. 39-40.

I find that timbers had been placed on 5-foot centers and that roof bolts had been installed. Herring, who had not traveled the gangway beyond the no. 17 chute, testified that he did not recall foot boards being present. Tr. 110, 121. Chamberlain testified that foot boards were not present. Tr. 26, 30, 39, 80. However, he also indicated that he was relying on his recollection of observations made during the inspection in 2001. Tr. 45. I find it significant that neither the citation, nor the notes he made during the inspection, mention the absence of foot boards. Ex. P-1, P-9. McGann’s citation, likewise, does not note an absence of foot boards. Ex. P-3. I credit Rothermel’s unequivocal testimony on this issue, and find that foot boards had been placed on the timbers above the gangway entry.

Roof control plans must address the specific conditions of a particular mine, and may provide for protections in addition to those specified in the mandatory standards. *See, e.g., C.W. Mining Co.*, 18 FMSHRC 1740, 1745 (Oct. 1996); 30 C.F.R. §§ 75.220(a), 222(a) and 207. Approved roof control plans are, therefore, authoritative documents reflecting MSHA’s approval of roof control measures designed by the operator to avoid hazardous roof conditions in a particular mine. Anecdotal evidence of conditions or occurrences at other mines is of limited value in evaluating the adequacy of roof control measures in Respondent’s mine.

The later-approved amendment to the roof control plan for Respondent’s mine allowed a gangway width in excess of 200 feet and called for essentially the same amount of roof support that was provided when the citation was issued.⁶ While that plan also required that cribs be

⁶ The amended roof control plan also specified a procedure, or “sequence,” for removing the coal from the gangway’s low-side rib. Respondent had not been following that sequence in November 2001. However, there is no evidence that the procedure followed by Respondent was more hazardous than that specified in the amended plan.

installed on 50-foot centers, the gangway was no more than 40 feet wide at the time, such that cribs would not have been required. The mine roof was in good condition. The coal was very hard, and Chamberlain did not observe any areas where the roof or ribs were in bad condition or timbers were bearing any significant weight. Tr. 76-77. Even if foot boards were missing in some locations, the gangway, itself, constituted the substantial equivalent of a foot board. The higher side of the gangway floor had been “fired,” or blasted downward to level off the floor. That depression in the rock floor of the vein created a configuration that, in Herring’s opinion, would most likely have caught and stopped any sliding material, greatly minimizing the danger to miners working on the low-side rib. Tr. 124-25.

Based upon the foregoing, I find that the width of the gangway entry and the mining method used by Respondent to rob the gangway/monkey pillars and the low-rib of the gangway did not expose miners to a hazard, and that Respondent did not commit the violation alleged in Citation No. 7003952.⁷

Significant and Substantial

A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *See also U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985); *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I have found that the condition of the gangway entry in November 2001 did not present a hazard to miners. Consequently, the violation of 30 C.F.R. § 75.220(a)(1) was not significant and substantial.

Citation No. 7003551

Citation No. 7003551 was issued by McGann on November 21, 2001, and alleges a violation of section 103(a) of the Act, which provides that authorized representatives of the Secretary “shall have a right of entry to, upon, or through any coal or other mine” for the purpose

⁷ The Secretary argues that Respondent’s method of pillar removal, which left the higher side of the pillars in place, resulted in “compromised” pillars, in that the “dimension of the remaining coal at the bottom of the pillar [was] less than at the top,” whereas, leaving the lower side of the pillars in place would have provided a “stable” block of coal to support the roof. Sec’y Br. at pp. 3, 17. However, there is no evidence to suggest that the block of coal remaining at the top, or higher side, of the pillar would have had different dimensions or been less stable than a similar sized block of coal left at the bottom, or lower side. Chamberlain’s concern was the location of the pillar remnant, not its shape.

of conducting inspections authorized by the Act. He concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that four persons were affected and that the violation was due to the operator's reckless disregard of the Act. A specially assessed civil penalty of \$750.00 is proposed.

The Violation

There is no dispute that the inspectors were at the mine for a legitimate purpose, i.e., to determine whether the conditions noted in the citation issued by Chamberlain had been abated. There is also no dispute that Randy Rothermel, Sr. refused to allow them to remain in the mine because he was upset at the inspectors for entering the mine without his knowledge and he was frustrated by being subjected to another inspection when there had been inspections on the preceding three days. As he explained his concerns, anthracite coal is mined entirely through the use of explosives, an extremely hazardous mining method that requires a high degree of caution. As superintendent, he must know the precise location of everyone in the mine while blasting operations are occurring. On the day in question, since the previously issued citation and order prevented robbing of the pillars and rib in the gangway, he was driving a "rock hole," i.e., blasting a tunnel through rock to reach the Little Buck vein, approximately 20 feet above. The entrance to the tunnel was at the loadout point, no. 16 chute on the gangway, and pieces of rock blasted from the face of that tunnel would have been thrown forcefully out of the tunnel in the area of the loadout point. He ordered the inspectors out of the mine "for their own good," so that they wouldn't do it again. Tr. 163-64, 184. Randy Rothermel, Jr. testified that if the inspectors had entered the mine a half-hour later they "could have got fired up." Tr. 158. Herring has not entered a mine under such circumstances "before or since" and testified that he would have been very concerned if, when he and McGann reached the loadout point, he had seen twisted wires leading up the rock hole, indicating that a blast was about to occur. Tr. 115-16. He conceded that it could be very dangerous for an inspector to enter a mine under such circumstances. Tr. 116. Randy Rothermel, Sr. testified, without contradiction, that he has discussed the issue with the current MSHA District Manager and has been advised that MSHA's present policy is not to enter mines under such circumstances. Tr. 170.

Respondent argues that section 103(f) of the Act requires that a representative of the operator be given an opportunity to accompany the Secretary's authorized representative during an inspection, and that the only notification provided was to Cindy Rothermel who was not trained to go underground. However, as the Secretary notes, section 103(a) of the Act specifically provides that, except in certain circumstances, "no advance notice of an inspection shall be given," and in some situations, inspectors are not permitted to notify mine personnel underground before entering a mine. Tr. 96, 141-43. Section 103(f), upon which Respondent relies, also provides that "Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

McGann notified Respondent's principal of his presence and intention to enter the mine and conduct the inspection. He did not prevent Mrs. Rothermel from notifying the underground

miners. She was unable to do so because she could not find the mine intercom. Even if McGann's actions could be construed to be non-compliant with section 103(f), they would not compromise the Secretary's authority to conduct the inspection, and would provide no defense to the alleged violation. However inadvisable it was for the inspectors to have entered the mine without the underground miners' knowledge, once their presence was made known, they were not in danger and there was no justification for preventing them from conducting the inspection. The concerns raised by the manner of their entry could and should have been pursued at another time and place. Rothermel's refusal to allow them to conduct the inspection violated the right of entry provision of the Act. While Rothermel's actions were not legally defensible, I find that his concerns about the inspectors' safety and the safety of his mining activity were *bona fide* and, under the circumstances, understandable. I find the above considerations a mitigating factor on the degree of operator negligence and hold that the violation was the result of Respondent's high negligence.

Citation No. 7003958

Rothermel's refusal to allow Chamberlain to bring dust monitoring equipment into the mine on January 30, 2002, resulted in the issuance of Citation No. 7003958, alleging a denial of entry in violation of section 103(a) of the Act. Chamberlain concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that four persons were affected and that the violation was due to the operator's reckless disregard of the Act. A specially assessed civil penalty of \$1,500.00 is proposed.

By Order dated September 11, 2003, the Secretary's Motion to Limit Trial Issues was granted, in part. It was held that the preclusive effect of the federal court litigation conclusively established Respondent's violation of the Act, as alleged in this citation. That order provided, in relevant part, that "Respondent is precluded from relitigating the fact that it violated the Act as alleged in Citation No. 7003958. Respondent may, however, litigate the appropriateness of the gravity and negligence determinations, as well as the amount of the civil penalty."

The primary remaining issue, with respect to this citation, is whether Respondent's negligence was at the level of "reckless disregard." Randy Rothermel, Sr., explained that his refusal to allow the dust monitoring was based upon his recollection of a long-ago reading of a portion of the MSHA Program Policy Manual, and a recent change in inspection procedures. Tr. 180-81. He asked to be shown written authority for MSHA to conduct dust sampling when not done in conjunction with a regular inspection. He apparently was shown the Act's provisions regarding the Secretary's authority to enter mines for the purpose of conducting inspections, but was not provided with specific written authorization for the proposed dust inspection. He recognized the Secretary's authority to conduct spot inspections for respirable dust, but was resistant to the Secretary's program of conducting two dust samplings, in addition to those taken during the four regular inspections.

The Secretary characterizes Respondent's explanation for the denial of entry as

“unconvincing” for a number of reasons. Sec’y Br. at p. 32. However, the fact that Rothermel pursued his challenge to the Secretary’s authority through a final decision by the United States Court of Appeals for the Third Circuit is convincing evidence that he honestly believed that there was some question as to the Secretary’s authority. While the appellate court characterized some of the Rothermels’ arguments in less than charitable terms, it did engage in more extended treatment of the argument that MSHA’s change in dust sampling procedures required formal rulemaking. Again, I find Respondent’s *bona fide* belief in the legal merit of its position to be a mitigating factor. The Secretary’s authority to conduct inspections pursuant to section 103(a) of the Act is very broad, but is not unlimited or absolute. *Tracey & Partners, Randy Rothermel*, 11 FMSHRC 1457, 1461-62 (Aug. 1989). Randy Rothermel, Sr. had successfully challenged the Secretary’s claim of authority to conduct certain inspections. *Id.* An operator that believes there is a reasonable challenge to the Secretary’s authority to conduct inspections in a given manner has limited options with which to secure judicial review of the suspect practice, and must do so at its own “legal peril.” *Id.* n. 3 at 1462. I find that the violation was the result of Respondent’s high negligence, rather than reckless disregard of the Act.

The Appropriate Civil Penalties

The parties stipulated that, prior to its temporary abandonment of the Buck Drift Mine in March 2003, D&F produced approximately 8,000 tons of coal per year, making it a small mine and very small controlling entity. The computer-generated report of D&F’s history of violations for the period January 30, 2000, through January 29, 2002, reflects no violations other than those at issue in this case. Ex. P-5. The violations, gravity and negligence assessments, with respect to each alleged violation, are discussed above.

Respondent submitted copies of income tax returns for the years 2001 and 2002 filed by Cindy and Randy Rothermel, Sr., including returns related to the partnership operating the D&F Mine and RS&W Coal Co., Inc., a corporation. Ex. R-3. Respondent offered no testimony explaining the documents, and does not directly argue that imposition of the proposed penalties would threaten its ability to remain in business.⁸ Evidence of an operator’s financial condition is

⁸ Respondent’s economic argument is painted with a considerably broader brush. Pointing to productive time lost due to numerous inspections, the failed mail delivery of a request for expedited hearing, and the time required to secure approval of roof control plan amendments, it contends that maintaining economic viability in compliance with applicable regulations “is becoming an impossibility.” Resp’t. Br. at p. 9. Time required to attend to inspections can certainly adversely affect production in a small mine like Respondent’s. Within two months of opening the mine in September of 2000, some 21 inspectors visited. However, Respondent bears considerable responsibility for the disruption of the gangway pillar mining caused by the roof control citations. The Rothermels are highly experienced anthracite coal miners, and the primary planned mining activity when the D&F Buck Drift Mine was acquired was robbing of pillars. Yet, the roof control plan submitted by Respondent contained no provisions for the removal of pillars. If the later-approved amendments had been included in that plan, the subject citations

relevant to the ability to continue in business criterion. *Georges Colliers, Inc.*, 23 FMSHRC 822, 825 (Aug. 2001). However, in the absence of proof that the imposition of civil penalties would adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect would occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). The documents submitted by Respondent show modest, but positive, income for D&F and its principals. There is no evidence of indebtedness leading to tax liens or adverse judgments in favor of creditors. D&F has not been dissolved. It remains a viable business entity and could resume its temporarily abandoned operations. In the absence of evidence showing that imposition of the proposed penalties would affect its ability to resume operations and continue in business, consideration of this penalty criterion does not warrant a reduction in the amount of the proposed penalties. *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994).

Docket No. PENN 2002-80

Citation No. 7003553 was affirmed. However, the violation was not found to have been significant and substantial. Rather, the violation was found to be unlikely to result in a serious injury. Respondent took immediate steps to terminate the violation and submitted an amendment to its roof control plan that was eventually approved. A civil penalty of \$97.00 was proposed by the Secretary. I impose a penalty in the amount of \$60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Docket No. PENN 2003-10

Citation No. 7003551 was affirmed. However, it was found to have been the result of the operator's high negligence, rather than reckless disregard. The fact that Respondent did not attempt to abate the alleged violation is reflected in the negligence assessment and the proposed specially assessed penalty of \$750.00. Considering the reduction in the level of Respondent's negligence and the factors specified in section 110(i) of the Act, I impose a penalty of \$500.00.

Docket No. PENN 2003-38

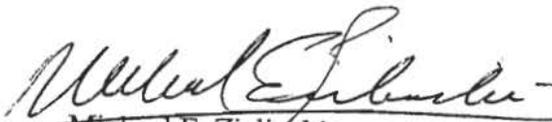
Citation No. 7003958 was affirmed. However, it was found to have been the result of the operator's high negligence, rather than reckless disregard. The fact that Respondent did not attempt to abate the alleged violation is reflected in the negligence assessment and the proposed specially assessed penalty of \$1,500.00. Considering the reduction in the level of Respondent's negligence and the factors specified in section 110(i) of the Act, I impose a penalty of \$1,000.00.

would not have been issued, and the disruption to mining activities most likely would have been avoided.

ORDER

Citation No. 7003952 is hereby **VACATED** and the petition as to that citation is hereby **DISMISSED**.

Citation Nos. 7003553, 7003958 and 7003551 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of \$1,560.00 within 45 days.⁹



Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

Andrea J. Appel, Esq., U.S. Dept. of Labor, Office of the Solicitor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Randy Rothermel, Sr., D & F Deep Mine Buck Drift., RD 1, Box 33A, Klingerstown, PA 17941

/mh

⁹ It should be noted that Respondent's principals are now subject to a permanent injunction issued by the U.S. District Court. Any further denial of entry could result in a charge of civil or criminal contempt and substantial penalties. The added deterrent effect of the injunction has not been taken into consideration in determining the amount of the penalties imposed herein.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

December 17, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-334-M
Petitioner	:	A.C. No. 16-00970-00000
	:	
v.	:	
	:	
MORTON INTERNATIONAL,	:	Weeks Island Mine & Mill
Respondent	:	Mine I.D.No. 16-00970

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

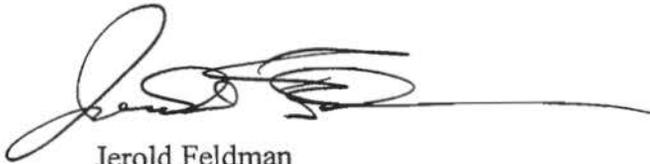
This civil penalty matter concerns a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (1994) (the "Act"), by Eddie Jeanlouis, Sr., against Morton International ("Morton"). Following an evidentiary hearing, it was determined that Morton's two week suspension of Jeanlouis violated section 105(c) of the Act. *Decision on Liability*, 25 FMSHRC 536 (Sept. 2003) (ALJ).

In the initial liability decision, the parties were directed to agree on the specific relief that should be awarded, or, alternatively, to file documentation in support of their separate proposals for relief. *Id.* at 548-49. After several telephone conferences, the parties advised that they had reached a settlement agreement. On November 13, 2003, Morton filed a Motion to Approve Settlement that was granted in a *Supplemental Decision and Final Order Approving Settlement* issued on November 17, 2003,. The parties agreed that the settlement terms would remain confidential. Consequently, the settlement agreement was placed under seal subject to review only by the Commission or other appellate body.

In accordance with the provisions of Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary was provided with a copy of the *Decision on Liability* so that she could initiate a civil penalty proceeding for the subject 105(c) violation. 25 FMSHRC at 549. As a consequence of Jeanlouis' case, on September 16, 2003, the Secretary filed a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act) that has been assigned as Docket No. CENT 2003-279-M. The Secretary's petition sought to impose a \$4,000 civil penalty.

On December 5, 2003, the Secretary filed a motion to approve a settlement agreement and to dismiss this case. A reduction in civil penalty from \$4,000 to \$1,500 is proposed. The settlement terms stipulate that nothing in the parties' agreement shall be construed as an admission by Morton that it violated section 105(c) of the Mine Act. *See Amax Lead Company of Missouri*, 4 FMSHRC 975, 980 (June 1982) (a violation is established for Mine Act purposes as a consequence of a settlement even though the respondent does not admit that a violation occurred).

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 Morton International pay a civil penalty of \$1,500 within 30 days of this Decision, and, upon receipt of timely payment, the civil penalty matter in Docket No. CENT 2003-334-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,
22nd Floor West, Arlington, VA 22209-2247

Willa B. Perlmutter, Esq., Patton Boggs, LLP, 2550 M Street, N.W., Washington, DC 20037

/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500

Washington, D. D. 20001-2021

Telephone No.: 202-434-9980

Fax No.: 202-434-9949

December 17, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2002-144
Petitioner	:	A. C. No. 01-01322-04240
	:	
v.	:	Docket No. SE 2002-145
	:	A. C. No. 01-01322-04256
	:	
JIM WALTER RESOURCES, INC.,	:	Docket No. SE 2002-148
Respondent.	:	A. C. No. 01-01322-04247
	:	
	:	Docket No. SE 2002-150
	:	A. C. No. 01-01322-04245
	:	
	:	Docket No. SE 2003-1
	:	A. C. No. 01-01322-04241
	:	
	:	Docket No. SE 2003-2
	:	A. C. No. 01-01322-04242
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	:	Docket No. SE 2003-3
	:	A. C. No. 01-01322-04243
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	:	Docket No. SE 2003-4
	:	A. C. No. 01-01322-04244
	:	
	:	Docket No. SE 2003-5
	:	A. C. No. 01-01322-04246
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	:	Docket No. SE 2003-6
	:	A. C. No. 01-01322-04248
	:	
	:	Docket No. SE 2003-7
	:	A. C. No. 01-01322-04249
	:	
	:	Docket No. SE 2003-8
	:	A. C. No. 01-01322-04250

: Docket No. SE 2003-9
: A. C. No. 01-01322-04251
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: Docket No. SE 2003-10
: A. C. No. 01-01322-04252
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: Docket No. SE 2003-11
: A. C. No. 01-01322-04253
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: Docket No. SE 2003-12
: A. C. No. 01-01322-04254
:
: Docket No. 2003-13
: A. C. No. 01-01322-04255
:
: No. 5 Mine

DECISION APPROVING SETTLEMENT

Appearances: Leslie John Rodriguez, Esq., Michael K. Hagan, Esq., U. S. Department of Labor, Atlanta, Georgia, on behalf of Petitioner;
David M. Smith, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, on behalf of Respondent;
Guy W. Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, on behalf of Respondent

Before: Judge Barbour

In these consolidated civil penalty cases, arising under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U. S. C. §§ 815, 820), the Secretary, on behalf of her Mine Safety and Health Administration (MSHA), seeks civil penalty assessments for 309 alleged violations of mandatory safety standards found in Parts 41, 48, 50, 75, and 77 of Title 30, Code of Federal Regulations, and for one alleged violation of Section 103(k) of the Act (30 U.S.C. § 813(k)). All of the citations were issued following September 23, 2001, the date when two explosions occurred at Jim Walter Resources, Inc.'s (JWR) No. 5 Mine. Although the explosions took the lives of 13 miners and seriously injured three others, none of the violations is alleged to have contributed to the cause of the accidents or to the resulting deaths and injuries (see Tr.12).

After the petitions were filed, I entered a prehearing order requiring the parties to confer and to discuss settlement. While in the process of conferring, but prior to engaging in substantive settlement discussions, the parties instituted discovery. In response to the Secretary's discovery efforts, JWR filed a motion for partial summary decision, arguing that, as a matter of

law, it was not responsible for many of the alleged violations because it did not control the mine at the time the citations were issued.¹ JWR also filed a motion to stay discovery, asserting a favorable ruling on its summary decision motion would obviate the need for discovery in many instances. I agreed, and granted JWR's latter motion. Subsequently, the Secretary filed a cross motion for partial summary decision, asserting that there was no basis for ruling in the company's favor, that JWR did not contest the factual allegations leading to the alleged violations and that the violations, therefore, existed as charged.

I denied the motions for summary decision. In so doing, I expressed my view regarding JWR's argument that the Secretary's imposition of a Section 104(k) order at the mine divested the company of its responsibility for many of the alleged violations. I stated in part, "Section 103(k) grants to the Secretary the extraordinary authority to take control of all or part of the mine away from the operator. Use of the authority can effectively place the Secretary in the shoes of the operator, and result in a disruption of the nexus between responsibility and control, a nexus that is a basis for the operator's liability" (Order Denying Cross Motions for Summary Decision 8-9). Therefore, I stated that in the forthcoming penalty proceedings I would "recognize an affirmative defense based upon the . . . imposition of the Section 103(k) order, provided the record establishe[d] in each instance that the . . . order as originally imposed or as subsequently modified and amended, deprived the company of its authority and control in the part of the mine where the cited condition existed, and that the condition would not have existed but for the presence of the order and its restrictions" (Id. 9). I also concluded the undisputed material facts did not establish that the specific conditions alleged in the citations would not have existed but for the restrictions imposed by the order and its modifications. I held that to make such determinations, I would need to hear the testimony of the inspectors regarding the scope of the order and its effect on the particular cited conditions (Id.). In addition, I also noted my disagreement with the Secretary's assertions that the material facts established JWR's liability for all of the alleged violations, and I again stated my belief that I needed to hear from the witnesses before I could resolve the many questions of liability (Order Denying Motions for Summary Decision 9-10).

Because of the large number of alleged violations, I instituted organizational requirements to facilitate resolution of the cases. In addition, I scheduled a prehearing conference of record at which the parties were directed, among other things, to identify the issues to be resolved at trial, to state an agreed upon discovery schedule, to state an agreed upon trial plan for the 17 consolidated dockets, and to announce the appointment of settlement representatives (Id. 10-13).

¹ On the same day the explosions occurred, the Secretary, pursuant to Section 103(k) of the Act, issued Order No. 7676787 at the mine. Section 103(k) provides that in the event of an accident, an inspector "may issue such orders as he [or she] deems appropriate to insure the safety of any person in the . . . mine, and the operator . . . shall obtain the approval of . . . [MSHA] . . . to recover any person in such mine or to recover the coal . . . or to return the affected areas of such mine to normal." A Section 103(k) order commonly is referred to as a "control order." Order No. 7676787 was terminated on June 11, 2002.

When the conference convened, counsel for the Secretary announced that the parties had reached an agreement to settle all of the cases. The settlement was in part “based upon . . . the language . . . of . . . [the] order denying [the] cross motions for summary judgement” (Tr. 10). Counsel for the Secretary and JWR described the broad outlines of the settlement agreement (Tr. 10-17) and stated that the agreement would be amplified and supported in a joint motion to approve the settlement.

Counsel now have filed that motion pursuant to Commission Rule 31 (29 C.F.R. § 2700.31). As they did at the conference, counsel note my recognition of “an affirmative defense based on the Secretary’s imposition of the section 103(k) order, provided the record establishes in each instance that the section 103(k) order deprived the company of its authority and control” (Joint Motion To Approve Settlement and Dismiss 14, *quoting* Order Denying Cross Motions for Summary Decision 9). Counsel also note that JWR maintains the affirmative defense to some extent applies to all 310 citations at issue. In addition, counsel state that the Secretary has agreed to vacate 22 citations, to reclassify five citations from significant and substantial (S&S) to non-S&S and to reclassify the negligence of one citation from “low” to “none.” Counsel also state that they have made additional compromises in view of “the vagaries of litigation” (*Id.* 14, 16-17). Moreover, in order to avoid the expense and inconvenience of litigation, JWR agrees to withdraw its contests to 222 single-penalty assessments listed in the dockets (*id.* 12). Finally, counsel have submitted general information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, including information regarding Respondent’s size, ability to continue in business and history of previous violations.

The proposed settlement is as follows:

SE 2002-144

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7675567	09/28/01	77.516	\$ 55.00	\$ 55.00
7675568	09/28/01	77.202	\$ 55.00	VACATE
7675569	09/28/01	77.400	\$ 55.00	\$ 55.00
7675570	09/28/01	77.502	\$ 55.00	\$ 55.00
7675571	09/28/01	77.1104	\$ 55.00	VACATE
7675572	09/28/01	77.1607cc	\$ 55.00	\$ 55.00
7677601	09/28/01	77.204	\$ 55.00	\$ 55.00
7677602	09/28/01	77.516	\$ 55.00	\$ 55.00
7677603	09/28/01	77.202	\$ 475.00	\$210.00
7677604	09/28/01	77.516	\$ 55.00	\$ 55.00
7677605	09/28/01	77.516	\$ 55.00	\$ 55.00
7677606	09/28/01	77.200	\$ 55.00	VACATE
7677607	09/28/01	77.516	\$ 55.00	\$ 55.00
TOTAL			\$1,135.00	\$705.00

SE 2002-145

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7670063	06/04/02	75.370(a)(1)	\$ 55.00	\$ 55.00
7670064	06/04/02	75.370(a)(1)	\$ 55.00	\$ 55.00
7678422	06/04/02	75.202(a)	\$ 161.00	\$ 80.00
7677873	06/05/02	75.364(b)(2)	\$ 55.00	\$ 55.00
7677464	06/06/02	75.400	\$ 317.00	\$ 125.00
7677465	06/06/02	75.362(b)	\$ 317.00	\$ 125.00
7677874	06/07/02	75.202(a)	\$ 224.00	\$ 105.00
7677875	06/07/02	75.202(a)	\$ 224.00	\$ 105.00
7678812	06/07/02	75.400	\$ 224.00	\$ 105.00
4864961	06/08/02	75.1403-5(g)	\$ 55.00	\$ 55.00
7677466	06/08/02	75.380(d)(1)	\$ 224.00	\$ 105.00
4864962	06/10/02	75.333(c)(1)	\$ 55.00	\$ 55.00
		TOTAL	\$1,966.00	\$1,025.00

SE 2002-148

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7678307	02/19/02	75.512	\$ 55.00	\$ 55.00
7676674	02/20/02	75.1403	\$ 55.00	\$ 55.00
7676675	02/20/02	75.1403	\$ 55.00	\$ 55.00
7676676	02/20/02	75.1910(j)	\$ 55.00	\$ 55.00
7678308	02/20/02	75.900	\$ 55.00	\$ 55.00
7678309	02/20/02	75.512	\$ 55.00	\$ 55.00
7678310	02/20/02	75.400	\$ 475.00	\$ 210.00
7678311	02/20/02	75.705(1)(b)	\$ 55.00	\$ 55.00
7676677	02/21/02	75.1403	\$ 475.00	\$ 210.00
7678312	02/21/02	75.1903(a)(2)	\$ 55.00	\$ 55.00
7678313	02/21/02	75.202(a)	\$ 55.00	\$ 55.00
7678314	02/21/02	75.202(a)	\$ 55.00	\$ 55.00
7678315	02/21/02	75.400	\$ 475.00	\$ 210.00
7678316	02/21/02	75.400	\$ 475.00	\$ 210.00
7678317	02/21/02	75.512	\$1,815.00	\$ 900.00
7677760	02/22/02	77.205(b)	\$ 55.00	\$ 55.00
7677761	02/22/02	77.200	\$ 55.00	\$ 55.00
7677762	02/22/02	77.400(c)	\$ 55.00	\$ 55.00
7677763	02/23/02	75.400	\$ 55.00	\$ 55.00
		TOTAL	\$4,485.00	\$2,510.00

SE 2002-150

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7677742	01/04/02	75.360(a)(1)	\$ 55.00	\$ 55.00
7677743	01/10/02	75.1722(b)	\$ 55.00	\$ 55.00
7677744	01/10/02	75.400	\$ 55.00	\$ 55.00
7677670	01/15/02	48.7(c)	\$2,279.00	\$1,100.00
7677671	01/15/02	48.6(b)	\$ 679.00	\$ 300.00
7677745	01/15/02	75.333(h)	\$ 55.00	\$ 55.00
7677746	01/18/02	75.333(h)	\$ 55.00	\$ 55.00
7669802	01/19/02	75.400	\$ 55.00	\$ 55.00
7669803	01/19/02	75.400	\$ 55.00	\$ 55.00
7669804	01/19/02	75.1910(f)	\$ 55.00	\$ 55.00
7669805	01/19/02	75.1909(b)(4)	\$ 55.00	\$ 55.00
7677747	01/23/02	75.1106-5(a)	\$ 55.00	\$ 55.00
7672662	01/24/02	75.380(d)(1)	\$ 55.00	\$ 55.00
7672663	01/24/02	75.1600	\$ 55.00	\$ 55.00
7677675	01/25/02	77.516	\$ 55.00	\$ 55.00
7677676	01/25/02	77.204	\$ 55.00	\$ 55.00
7677677	01/25/02	77.516	\$ 55.00	\$ 55.00
7677678	01/25/02	77.516	\$ 55.00	\$ 55.00
7677679	01/25/02	103(k)	\$ 55.00	\$ 55.00
		TOTAL	\$3,893.00	\$2,335.00

SE 2003-1

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7677608	09/28/01	77.516	\$ 55.00	\$ 55.00
7677609	09/28/01	77.516	\$ 55.00	\$ 55.00
7677610	09/28/01	77.516	\$ 55.00	\$ 55.00
3018484	12/05/01	77.507	\$ 475.00	\$ 210.00
7385798	12/06/01	75.400	\$ 55.00	VACATE
7386424	12/06/01	75.400	\$ 55.00	VACATE
7386425	12/06/01	75.807	\$ 55.00	VACATE
7509385	12/06/01	75.1100-3	\$ 55.00	VACATE
7530826	12/06/01	75.1909(b)(4)	\$ 55.00	VACATE
7530827	12/06/01	75.1403	\$ 475.00	\$ 210.00
7530828	12/06/01	75.1909(b)(4)	\$ 55.00	\$ 55.00
7530829	12/06/01	75.1909(a)(3)(x)	\$ 55.00	\$ 55.00
7644256	12/06/01	75.1914(a)	\$ 993.00	\$ 457.00
7644258	12/06/01	75.321(a)(2)	\$ 475.00	VACATE

7647056	12/06/01	75.1203	\$ 55.00	\$ 55.00
7647057	12/06/01	75.333(h)	\$ 55.00	VACATE
7385799	12/07/01	75.400	\$ 55.00	VACATE
7385800	12/07/01	75.333(b)(4)	\$ 55.00	VACATE
7385801	12/07/01	75.400	\$ 55.00	\$ 55.00
TOTAL			\$3,243.00	\$1,262.00

SE 2003-2

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7385802	12/07/01	75.1403-5(g)	\$ 55.00	VACATE
7509389	12/07/01	75.333(h)	\$ 277.00	\$115.00
7530830	12/07/01	75.400	\$ 55.00	VACATE
7647058	12/07/01	75.400	\$ 55.00	VACATE
7676569	12/07/01	77.202	\$ 475.00	\$210.00
7676570	12/07/01	77.200	\$ 55.00	\$ 55.00
7676571	12/07/01	77.200	\$ 55.00	\$ 55.00
7386426	12/08/01	75.400	\$ 475.00	\$ 55.00
7386427	12/08/01	75.333(h)	\$ 475.00	VACATE
7509390	12/08/01	75.333(h)	\$ 475.00	\$210.00
7509391	12/08/01	75.400	\$ 55.00	VACATE
7530831	12/08/01	75.340(a)(1)(i)	\$ 993.00	\$ 55.00
7644259	12/08/01	75.517	\$ 55.00	\$ 55.00
7647059	12/08/01	75.1914(a)	\$ 55.00	\$ 55.00
7647060	12/08/01	75.400	\$ 55.00	VACATE
7647081	12/08/01	75.1100-3	\$ 55.00	VACATE
7647082	12/08/01	75.1100-3	\$ 55.00	VACATE
7647085	12/08/01	75.503	\$ 55.00	\$ 55.00
7647086	12/08/01	75.400	\$ 55.00	\$ 55.00
TOTAL			\$3,885.00	\$975.00

SE 2003-3

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7509392	12/09/01	75.1714-1(c)	\$ 55.00	\$ 55.00
7647088	12/09/01	75.1914(e)	\$ 55.00	\$ 55.00
7647089	12/09/01	75.1713-7(b)	\$ 55.00	\$ 55.00
7509393	12/10/01	75.400	\$ 475.00	\$ 55.00
7509394	12/10/01	75.400	\$ 475.00	\$ 55.00
7509395	12/10/01	75.400	\$ 475.00	\$ 55.00
7647092	12/11/01	75.512	\$ 55.00	\$ 55.00

7647093	12/11/01	75.512	\$ 55.00	\$ 55.00
7647094	12/11/01	75.904	\$ 55.00	\$ 55.00
7647095	12/11/01	75.1914(a)	\$ 55.00	\$ 55.00
7647097	12/11/01	75.400	\$ 55.00	VACATE
7647098	12/11/01	75.512	\$ 55.00	\$ 55.00
7509396	12/12/01	75.333(h)	\$ 55.00	VACATE
7509397	12/12/01	75.202(a)	\$ 277.00	\$ 115.00
7676572	12/12/01	77.202	\$ 475.00	\$ 210.00
7676573	12/12/01	77.1110	\$ 55.00	\$ 210.00
7676574	12/12/01	77.205(e)	\$ 55.00	\$ 55.00
7676575	12/12/01	77.205(e)	\$ 475.00	\$ 210.00
7676576	12/12/01	77.202	\$ 55.00	\$ 55.00
		TOTAL	\$3,787.00	\$1,460.00

SE 2003-4

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7677733	12/12/01	75.202(a)	\$ 475.00	\$ 210.00
7530833	12/13/01	75.400	\$ 475.00	\$ 210.00
7676578	12/13/01	50.20(a)	\$ 55.00	\$ 55.00
7677734	12/13/01	75.333(h)	\$ 55.00	\$ 55.00
7669961	12/15/01	77.200	\$ 475.00	\$ 210.00
7669975	12/15/01	77.205(e)	\$ 55.00	\$ 55.00
7669976	12/15/01	77.200	\$ 475.00	\$ 210.00
7669977	12/15/01	77.200	\$ 475.00	\$ 210.00
7669978	12/15/01	77.200	\$ 55.00	\$ 55.00
7669979	12/15/01	77.200	\$ 55.00	\$ 55.00
7669980	12/15/01	77.1110	\$ 55.00	\$ 55.00
3018485	12/17/01	50.20(a)	\$ 55.00	\$ 55.00
3018486	12/17/01	75.400	\$ 475.00	\$ 210.00
7669635	01/03/02	75.202(b)	\$ 760.00	\$ 350.00
7677737	01/03/02	75.400	\$ 55.00	\$ 55.00
7677738	01/04/02	75.333(d)(3)	\$ 55.00	\$ 55.00
7677739	01/04/02	75.1722(b)	\$ 55.00	\$ 55.00
7677740	01/04/02	75.333(h)	\$ 55.00	\$ 55.00
7677741	01/04/02	75.333(c)(3)	\$ 55.00	\$ 55.00
		TOTAL	\$4,270.00	\$2,270.00

SE 2003-5

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7677749	01/26/02	75.202(a)	\$ 475.00	\$ 210.00
7677750	01/28/02	75.360(a)(1)	\$ 55.00	\$ 55.00
7678120	02/02/02	75.1403	\$ 55.00	\$ 55.00
7678121	02/02/02	75.1911(a)(4)	\$ 55.00	\$ 55.00
7678122	02/02/02	75.400	\$ 55.00	\$ 55.00
7678123	02/02/02	75.1910(j)	\$ 55.00	\$ 55.00
7677751	02/06/02	75.333(h)	\$ 55.00	\$ 55.00
7677752	02/07/02	75.400	\$ 55.00	\$ 55.00
7677753	02/08/02	75.1911(a)(4)	\$ 55.00	\$ 55.00
7677754	02/09/02	75.400	\$ 475.00	\$ 210.00
7677755	02/09/02	75.1910(j)	\$ 55.00	\$ 55.00
7677756	02/11/02	77.1104	\$ 55.00	\$ 55.00
7677757	02/12/02	77.1104	\$ 475.00	\$ 210.00
7677758	02/12/02	77.208(a)	\$ 475.00	\$ 210.00
7677759	02/12/02	77.404(a)	\$ 55.00	\$ 55.00
7678008	02/15/02	75.807	\$ 55.00	\$ 55.00
7678304	02/19/02	75.601-1	\$ 55.00	\$ 55.00
7678305	02/19/02	75.512	\$ 475.00	\$ 210.00
7678306	02/19/02	75.512	\$ 55.00	\$ 55.00
		TOTAL	\$3,145.00	\$1,820.00

SE 2003-6

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7677764	02/23/02	75.1403	\$ 55.00	\$ 55.00
7677765	02/25/02	77.512	\$ 55.00	\$ 55.00
7677766	02/25/02	77.205(b)	\$ 55.00	\$ 55.00
7677767	02/26/02	75.202(a)	\$ 475.00	\$ 210.00
7677768	02/27/02	77.1104	\$ 55.00	\$ 55.00
7677769	02/28/02	75.333(c)	\$ 55.00	\$ 55.00
7677770	03/01/02	75.400	\$ 55.00	\$ 55.00
7678319	03/01/02	75.807	\$ 55.00	\$ 55.00
7678320	03/01/02	75.512	\$ 55.00	\$ 55.00
7678321	03/01/02	75.1702	\$ 55.00	\$ 55.00
7678009	03/04/02	75.807	\$ 55.00	\$ 55.00
7678810	03/04/02	77.505	\$ 55.00	\$ 55.00
7678811	03/04/02	77.507	\$ 55.00	\$ 55.00

7678812	03/04/02	77.512	\$ 55.00	\$ 55.00
7678814	03/04/02	77.516	\$ 55.00	\$ 55.00
7678015	03/04/02	77.502	\$ 55.00	\$ 55.00
3018490	03/06/02	75.360(f)	\$ 55.00	\$ 55.00
7677772	03/07/02	75.1703	\$ 55.00	\$ 55.00
7677773	03/07/02	75.1703	\$ 55.00	\$ 55.00
		TOTAL	\$1,465.00	\$1,200.00

SE 2003-7

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7677774	03/08/02	77.502	\$ 55.00	\$ 55.00
7669812	03/09/02	75.1403	\$ 55.00	\$ 55.00
7669813	03/09/02	75.807	\$ 475.00	\$ 210.00
7677776	03/12/02	75.400	\$ 55.00	\$ 55.00
7678501	03/13/02	50.10	\$ 55.00	\$ 55.00
7678502	03/13/02	50.12	\$ 55.00	\$ 55.00
7678504	03/13/02	75.1702	\$ 475.00	\$ 210.00
7676680	03/15/02	75.400	\$ 55.00	\$ 55.00
7677777	03/15/02	75.400	\$ 55.00	\$ 55.00
7677778	03/15/02	75.333(h)	\$ 55.00	\$ 55.00
7677968	03/15/02	75.400	\$ 55.00	\$ 55.00
7678505	03/15/02	75.1405	\$ 55.00	\$ 55.00
7678506	03/15/02	75.603	\$ 475.00	\$ 210.00
7678507	03/15/02	75.809	\$ 55.00	\$ 55.00
7677779	03/16/02	75.220(a)	\$ 475.00	\$ 210.00
7677780	03/16/02	75.333(h)	\$ 55.00	\$ 55.00
7677969	03/16/02	75.400	\$ 55.00	\$ 55.00
7677970	03/16/02	75.400	\$ 55.00	\$ 55.00
7677836	03/18/02	75.400	\$ 475.00	\$ 210.00
		TOTAL	\$3,145.00	\$1,820.00

SE 2003-8

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7669814	03/19/02	75.203(e)(2)	\$ 55.00	\$ 55.00
7676681	03/19/02	75.400	\$ 55.00	\$ 55.00
7676682	03/19/02	75.400	\$ 475.00	\$ 210.00
7676683	03/21/02	75.1106-5(a)	\$ 475.00	\$ 210.00
7677781	03/21/02	75.400	\$ 55.00	\$ 55.00

7677782	03/21/02	75.503	\$ 55.00	\$ 55.00
7677784	03/23/02	75.1911(a)(4)	\$ 55.00	\$ 55.00
7677785	03/23/02	75.400	\$ 55.00	\$ 55.00
7677786	03/23/02	75.1911(a)(4)	\$ 55.00	\$ 55.00
7677981	03/23/02	75.333(h)	\$ 55.00	\$ 55.00
7678171	03/23/02	75.400	\$ 475.00	\$ 210.00
4871231	03/25/02	75.1914(a)	\$ 55.00	\$ 55.00
7678509	03/25/02	75.202(a)	\$ 760.00	\$ 350.00
3018491	03/26/02	75.1403-10(e)	\$ 55.00	\$ 55.00
3018492	03/27/02	75.400	\$ 55.00	\$ 55.00
3018493	03/27/02	75.333(b)(4)	\$ 55.00	\$ 55.00
4871232	03/27/02	75.400	\$ 55.00	\$ 55.00
7676684	03/28/02	75.400	\$ 55.00	\$ 55.00
7677685	03/29/02	75.400	\$ 55.00	\$ 55.00
		TOTAL	\$3,010.00	\$1,805.00

SE 2003-9

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7678176	03/30/02	75.1100-3	\$ 55.00	\$ 55.00
7677845	04/02/02	75.333(h)	\$ 55.00	\$ 55.00
7677846	04/02/02	75.1403-8(e)	\$ 55.00	\$ 55.00
7677443	04/03/02	75.1100-2(f)	\$ 55.00	\$ 55.00
7677444	04/03/02	75.220(a)(1)	\$ 55.00	\$ 55.00
7677445	04/03/02	41.20	\$ 55.00	\$ 55.00
7677446	04/04/02	75.220(a)(1)	\$ 55.00	\$ 55.00
7677847	04/04/02	75.606	\$ 557.00	\$ 250.00
7677992	04/05/02	75.517	\$ 55.00	\$ 55.00
7677993	04/06/02	75.604(b)	\$ 340.00	\$ 140.00
7677447	04/08/02	75.1100-1(f)	\$ 55.00	\$ 55.00
7677448	04/08/02	75.360(b)(8)	\$ 55.00	\$ 55.00
7677848	04/08/02	75.1100-3	\$ 55.00	\$ 55.00
7677849	04/09/02	75.400	\$ 55.00	\$ 55.00
7669365	04/10/02	75.400	\$ 55.00	\$ 55.00
7677850	04/10/02	75.1100-3	\$ 55.00	\$ 55.00
7677851	04/10/02	75.400	\$ 55.00	\$ 55.00
7677852	04/10/02	75.503	\$ 55.00	\$ 55.00
7678019	04/10/02	75.900	\$ 340.00	\$ 140.00
		TOTAL	\$2,117.00	\$1,410.00

SE 2003-10

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7678020	04/10/02	75.340(a)(2)(i)	\$ 55.00	\$ 55.00
7678021	04/10/02	75.1403	\$ 55.00	\$ 55.00
7678022	04/10/02	75.807	\$ 55.00	\$ 55.00
7678023	04/10/02	75.202(a)	\$ 340.00	\$ 140.00
7677449	04/11/02	75.360(e)	\$ 55.00	\$ 55.00
7677450	04/11/02	75.202(a)	\$ 55.00	\$ 55.00
7677853	04/12/02	75.400	\$ 55.00	\$ 55.00
7677854	04/12/02	75.400	\$ 55.00	\$ 55.00
7677855	04/13/02	75.202(a)	\$ 340.00	\$ 140.00
7677994	04/13/02	75.1403	\$ 55.00	\$ 55.00
7677995	04/15/02	75.400	\$ 55.00	\$ 55.00
7678359	04/15/02	75.900-4	\$ 55.00	\$ 55.00
4870868	04/16/02	75.1403	\$ 340.00	\$ 140.00
7677856	04/16/02	75.202(a)	\$ 55.00	\$ 55.00
7677857	04/16/02	75.1106-3(a)(2)	\$ 55.00	\$ 55.00
7677996	04/16/02	75.1906(i)	\$ 55.00	\$ 55.00
7677997	04/16/02	75.400	\$ 55.00	\$ 55.00
7670056	04/17/02	75.1100-3	\$ 55.00	\$ 55.00
7670057	04/17/02	75.400	\$ 340.00	\$ 140.00
		TOTAL	\$2,185.00	\$1,385.00

SE 2003-11

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7678361	04/18/02	75.601-1	\$ 55.00	\$ 55.00
7678362	04/18/02	75.902	\$ 340.00	\$ 140.00
7678183	04/19/02	75.512	\$ 55.00	\$ 55.00
7677998	04/23/02	75.1403	\$ 55.00	\$ 55.00
7677999	04/24/02	75.1106-3(a)(2)	\$ 55.00	\$ 55.00
7678000	04/24/02	75.340(a)(2)(i)	\$ 55.00	\$ 55.00
7677452	04/25/02	75.1403-8(b)	\$ 55.00	\$ 55.00
7677858	04/25/02	75.202(a)	\$ 340.00	\$ 140.00
7678366	04/25/02	75.512	\$ 340.00	\$ 140.00

7678601	04/25/02	75.1403	\$ 55.00	\$ 55.00
7672693	04/27/02	75.1914(a)	\$ 340.00	\$ 140.00
7677859	04/29/02	75.904	\$ 55.00	\$ 55.00
7669372	05/01/02	75.333(h)	\$ 760.00	\$ 350.00
7669373	05/01/02	75.400	\$ 55.00	\$ 55.00
7677860	05/03/02	77.502	\$ 55.00	\$ 55.00
7678194	05/03/02	75.807	\$ 55.00	\$ 55.00
7677861	05/04/02	75.1100-3	\$ 55.00	\$ 55.00
7677862	05/04/02	75.1100-2(f)	\$ 55.00	\$ 55.00
7669650	05/07/02	75.370(a)(1)	\$ 55.00	\$ 55.00
		TOTAL	\$2,890.00	\$1,680.00

SE 2003-12

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7669651	05/07/02	75.1202-1(b)(3)	\$ 55.00	\$ 55.00
7672696	05/07/02	77.206(c)	\$ 55.00	\$ 55.00
7672697	05/07/02	77.206(c)	\$ 55.00	\$ 55.00
7672700	05/07/02	77.206(c)	\$ 55.00	\$ 55.00
7672801	05/07/02	77.1104	\$ 55.00	\$ 55.00
7678704	05/07/02	77.202	\$ 55.00	\$ 55.00
7678705	05/07/02	77.202	\$ 259.00	\$ 100.00
7677863	05/08/02	77.1301(c)(11)	\$ 55.00	\$ 55.00
7677864	05/09/02	75.606	\$ 259.00	\$ 100.00
7672803	05/10/02	75.1722(b)	\$ 259.00	\$ 100.00
7672804	05/10/02	75.333(h)	\$ 55.00	\$ 55.00
7678706	05/13/02	75.202(a)	\$ 259.00	\$ 100.00
7677865	05/14/02	75.400	\$ 55.00	\$ 55.00
7677866	05/15/02	75.1714-2(c)	\$ 55.00	\$ 55.00
7677867	05/15/02	77.1101-7(b)	\$ 55.00	\$ 55.00
7672805	05/16/02	75.202(a)	\$ 55.00	\$ 55.00
7672806	05/16/02	75.202(a)	\$ 55.00	\$ 55.00
7672807	05/16/02	75.807	\$ 55.00	\$ 55.00
7672808	05/16/02	75.807	\$ 55.00	\$ 55.00
		TOTAL	\$1,861.00	\$1,225.00

SE 2003-13

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7672809	05/18/02	75.202(a)	\$ 55.00	\$ 55.00
7672822	05/18/02	75.1403-7(j)	\$ 259.00	\$ 100.00
7678418	05/18/02	75.220(a)(1)	\$ 55.00	\$ 55.00
7672810	05/20/02	75.1403	\$ 55.00	\$ 55.00
7678707	05/22/02	75.202(a)	\$ 259.00	\$ 100.00
7678708	05/23/02	75.1403	\$ 55.00	\$ 55.00
7678924	05/24/02	75.701	\$ 55.00	\$ 55.00
7672812	05/28/02	75.202(a)	\$ 55.00	\$ 55.00
7672813	05/29/02	75.202(a)	\$ 55.00	\$ 55.00
7677869	05/29/02	75.202(a)	\$ 55.00	\$ 55.00
4871105	05/30/02	75.403	\$ 277.00	\$ 115.00
7672815	05/30/02	75.1101-10	\$ 55.00	\$ 55.00
7677870	05/30/02	75.380(d)(1)	\$ 55.00	\$ 55.00
7677871	05/30/02	75.1100-2(f)	\$ 55.00	\$ 55.00
4871106	05/31/02	75.1403	\$ 55.00	\$ 55.00
7677461	05/31/02	75.202(a)	\$ 55.00	\$ 55.00
7677872	06/01/02	75.1100-1(a)	\$ 55.00	\$ 55.00
4871107	06/03/02	75.1403-8(b)	\$ 55.00	\$ 55.00
4871108	06/03/02	75.1403-8(b)	\$ 55.00	\$ 55.00
TOTAL			\$1,675.00	\$1,195.00

After review and consideration of the pleadings, arguments and submissions in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

Respondent is **ORDERED** to pay a total civil penalty of \$26,082.00 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. Also, within the same 30 days, the Secretary is **ORDERED** to delete the S&S findings on the five subject citations and to reclassify negligence from "low" to "none" on the specified citation. Upon receipt of full payment and modification of the citations, these proceedings are **DISMISSED**.


 David F. Barbour
 Administrative Law Judge

Distribution: (Certified Mail)

Leslie John Rodriguez, Esq., Michael K. Hagan, Esq., U. S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

David M. Smith, Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue N., 2400 AmSouth-Harbert Plaza, Birmingham, AL 35203

Guy W. Hensley, Esq., Jim Walter Resources, Inc., P. O. Box 133, Brookwood, AL 35444

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-207
Petitioner	:	A.C. No. 42-02113-03574
	:	
v.	:	Docket No. WEST 2002-278
	:	A.C. No. 42-02113-03575
PLATEAU MINING CORPORATION,	:	
Respondent	:	Willow Creek Mine

DECISION

Appearances: Kristi L. Floyd, Esq. and Lydia Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor; R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Plateau Mining Corporation.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Plateau Mining Corporation (“Plateau”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve three citations issued by the Secretary under section 104(a) of the Mine Act following a fatal accident at the Willow Creek Mine.¹ The Secretary seeks a total penalty of \$45,340. An evidentiary hearing was held in the Commission’s courtroom in Denver, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND

The Willow Creek Mine was an underground coal mine in Carbon County, Utah, operated by Plateau, a subsidiary of RAG American Coal, Inc. The mine was developed in 1996 and it was closed in 2000 after the accident at issue in this case. At the time of the accident, the mine had three operating sections: the D-3 longwall panel and two continuous miner sections. This longwall panel was the third longwall panel that had been developed at the mine.

¹ Docket No. WEST 2002-278 initially included two additional citations but, in an order dated October 4, 2002, I approved the parties’ proposed settlement of those citations.

The D-3 longwall panel (the "panel") started retreat mining on July 17, 2000, 15 days prior to the accident. The face was 815 feet wide and the panel was projected to be about 4200 feet long. At the time of the accident the face had been mined about 250 feet. MSHA had granted Plateau the right to use a two-entry system of mining on this panel and on the two other panels that had been previously mined. This D-3 panel immediately abutted the D-2 panel, which had been sealed off.

The panel was ventilated by a flow-through bleeder system that included multiple bleeder entries. The ventilation plan in use at the time of the accident was reviewed and approved by the MSHA District 9 manager on March 25, 1999. An amendment to the ventilation plan addressing retreat mining in the panel was approved by MSHA on July 7, 2000. The mine liberates substantial quantities of methane. In addition, the extraction of coal results in the release of liquid hydrocarbons. An analysis of these hydrocarbons noted that the composition of this liquid was roughly equivalent to a mixture of 15% gasoline, 35% kerosene, and 50% light lubricating oil. Vapors from the liquid hydrocarbons were present in the mine and the ventilation system was designed to remove these vapors along with the methane.

Two miners were killed and eight miners were injured on the night of July 31, 2000 - August 1, 2000, as a result of a series of events that occurred on the panel. The events that transpired that night are at issue in this case. Each party presented extensive testimony and documentary evidence to support its position.

A. Secretary of Labor's Interpretation of the Events.

The Secretary believes that at about 10:14 p.m. on July 31, 2000, a sudden release of methane in the face area caused the longwall shearer to de-energize as it approached the tailgate on its third clean-up pass. Using various methods, the crew was able to re-energize the longwall shearer 42 minutes later at 10:56 p.m. The shearer operator completed the cutout at the headgate side and the clean-up pass along the first eight shields. About 12 miners were on the panel at that time.

At 11:48 p.m., a relatively small roof fall occurred on the headgate side of the gob, between the longwall face and the setup rooms. The fall ignited a small pocket of methane and other gaseous hydrocarbons. The flame traveled inby to a small methane accumulation in the back of the gob near the longwall setup rooms, which resulted in the first explosion (the "first event"). The miners on the panel assumed that the forces that they felt were a result of the first major cave in the gob. The miners remained on the panel to extinguish a fire at the base of the shields on the headgate side of the longwall face. This first event disrupted longwall ventilation on the panel, which prevented methane from being removed from the gob through the bleeder entries. As liquid hydrocarbons started to burn, two subsequent explosions occurred at 11:55 p.m. and 11:56 p.m. The Secretary believes that one miner was killed during the second explosion when he was thrown to Shield No. 4 and was asphyxiated by carbon monoxide. Miners near the headgate side of the longwall shearer were signaled to evacuate. Moments later,

at about 11:56 p.m., a third explosion occurred. The forces of this explosion likely killed the second miner. At about 12:17 a.m., August 1, 2000, a fourth explosion occurred.

Following its investigation of the accident, MSHA concluded that Plateau's bleeder system did not adequately control the air passing through the worked-out area of the panel. The ventilation system did not dilute and render harmless concentrations of methane and other gaseous hydrocarbons in the worked-out area where potential ignition sources existed. In addition, the investigation revealed that Plateau failed to comply with the approved ventilation plan. Finally, MSHA concluded that, in the week preceding the accident, Plateau failed to adequately ensure that its bleeder system was functioning properly.

B. Plateau's Interpretation of the Events.

On the evening of July 31, 2000, the ventilation system was functioning properly to move air away from the active areas through the gob and into the bleeder entries. Airflow at the face exceeded the requirements of the approved ventilation plan. At about 11:48 p.m., the shearer was stopped on the headgate side of the face while Shield No. 1 was advanced. The roof in the gob had not yet experienced its first large cave. At that time there was an event in the gob that was described by everyone on the face of the panel as a large roof fall in the gob. Plateau believes that this roof fall was the first event. This event was a significant cave and it was accompanied by an air blast coming out of the gob area which threw at least one miner working on the face and knocked down another miner. The miners felt no heat in this blast of air. This cave was accompanied by a fire on the mine floor between some of the longwall shields. The miners on the face tried to fight the fire with extinguishers.

When it became clear that the miners were not going to be able to extinguish the fire, the shift supervisor ordered an immediate evacuation. Before the miners were able to evacuate, three explosions occurred. Plateau believes that the first event, which was the large cave, likely damaged ventilation controls in by the longwall face resulting in a disruption of ventilation in the panel. This disruption in the ventilation permitted methane in the gob to come in contact with an ignition source, which was the hydrocarbon fire and, in all likelihood, caused the explosions which occurred after this first event.

C. Description of the Willow Creek Mine.

Plateau was mining in accordance with a ventilation plan approved by MSHA. The plan for the D-3 panel had been developed during a series of meetings between MSHA and Plateau during 2000. The review and approval of the plan was given particular attention by MSHA because the mining conditions at the mine were difficult and because there had been a fire on the mine's first longwall panel in November 1998.

Mining at Willow Creek presented a number of challenges because of the amount of methane liberation, the depth of the cover over the coal seam, and the resulting roof conditions,

including roof and rib bounces. The D-3 panel was going to be the first panel at the mine that would not be separated from the previous panel by a solid barrier of coal. Finally, as discussed above, liquid hydrocarbons were also present in the coal seam. The mine was operating under a petition for modification which allowed it to use a two-entry longwall mining system to minimize the hazards created by the roof conditions.

At the time of the accident, the panel had been mined about 250 feet on retreat. The gob was immediately behind the shields for the longwall. Behind the rubble zone of the gob two entries had been developed that ran the width of the panel from the headgate to the tailgate.² These entries were about 80 feet apart when they were developed and were called the “setup rooms” because the area was used to set up the longwall machinery when the panel was first mined. There were connecting crosscuts between the two setup rooms. Once longwall mining commenced, the setup room closest to the longwall shields (No. 2 setup room) became part of the rubble zone. Immediately behind the setup rooms were two short L-shaped crosscuts, one on the headgate and one on the tailgate that were called “doglegs.” The dogleg on the headgate side connected the No. 1 headgate entry with the No. 1 setup room. Behind the doglegs and setup rooms was a large block of coal. Behind this block of coal were three bleeder entries, which ran perpendicular to the panel. The No. 1 bleeder entry was used to bring intake air to a sump pump at the back of the bleeders. The other two bleeder entries were return entries. Plateau established a number of Measuring Point Locations (“MPLs”) throughout the panel and the bleeders to monitor carbon monoxide, oxygen, methane, and air flow, as discussed below. A map of the face, gob, and bleeder entries at the panel is attached to this decision to illustrate the configuration of the panel.³

Plateau’s ventilation plan was reviewed by high level MSHA personnel prior to the accident. The ventilation was evaluated by MSHA District 9 personnel, MSHA’s technical support group, including John Urosek, Chief of the Ventilation Division, and personnel from MSHA’s national headquarters. MSHA gave its approval for the ventilation plan for the D-3 longwall panel on July 7, 2000. The ventilation plan includes three alternative methods of ventilating the panel. The approved ventilation system being used on July 31, 2000, ventilated the panel by forcing air across the longwall face from the headgate to the tailgate. Intake air was brought to the longwall face through the last open crosscut from the No. 2 entry of the headgate. The vast majority of air was directed along the longwall face. After the air ventilated the face, it was coursed back through the tailgate inby toward bleeder entries and passed through MPLs 7

² The parties used the terms “gob,” “mined-out area,” and “pillared area” interchangeably at the hearing. In this decision, I use the term “gob” to describe the area between the longwall shields and the bleeder entries including the setup rooms and the headgate and tailgate entries inby the shields. I use the term “rubble zone” to refer to that area of the gob that had been mined by the longwall system.

³ The attached map is a portion of Appendix I of Ex. G-31 with a few additional labels for clarification.

and 8 as it entered the bleeders. A small portion of the intake air entering the last open crosscut from the No. 2 entry of the headgate was directed out the belt entry, which was the No. 1 headgate entry. As discussed below, a portion of the intake air entering the last open crosscut from the No. 2 entry of the headgate traveled through the gob into the bleeder entries. Intake air also traveled up the No. 2 headgate entry directly into the bleeders at MPLs 5 and 6.

Intake air also traveled up the No. 2 entry of the tailgate through MPLs 7 and 8. Use of the tailgate to bring intake air into the longwall helped maintain ventilation pressure on the tailgate corner of the gob to prevent methane from coming back into the face. The elevations on the panel dipped down from the tailgate to the headgate and down to the inby headgate corner of the gob. As a consequence, the corner of the gob closest to the face at the tailgate had the highest elevation while the corner of the gob on the headgate side closest to the bleeder entries had the lowest elevation. Methane would tend to migrate to the tailgate side of the gob because methane is significantly lighter than air.

Intake air traveled through the unsupported area of the gob where the roof was expected to fall. The path of the air moving through the rubble zone would be impossible to predict or determine, especially during the first few weeks of longwall mining. Air flowed out of the rubble zone into the setup rooms. From there, the air traveled to the tailgate side and into the bleeders at MPLs 7 and 8. Intake air also entered the No. 1 setup room from the headgate through a regulator between the Nos. 1 and 2 entries of the headgate at MPL No. 4. Finally, some intake air traveled up the No. 1 headgate entry inby the longwall shields through a hole in an undercast constructed at the intersection of this entry and the No. 1 setup room and then into the bleeders at MPLs 7 and 8. These two air courses were designed to help dilute methane as it came out of the rubble zone into the setup entries. The ventilation pathways are illustrated in Exhibit G-3.

Seals were constructed in the crosscuts between the Nos. 1 and 2 entries of the headgate as the longwall progressed outby each crosscut. The ventilation system was not designed to course air from the headgate entries through the gob and then back out the headgate entries to the bleeders because this portion of the gob was at the lowest elevation in the gob. The sump pump in the back corner of the bleeders was present to keep water from accumulating in the bleeders and backing up into the headgate entries inby the setup rooms.

After the longwall retreated about 500 feet, it was expected that Plateau would change the ventilation system. This change was included in the ventilation plan approved by MSHA. Under this plan, which was never implemented because the longwall had only retreated about 250 feet at the time of the accident, intake air would ventilate the longwall face from the tailgate to the headgate. In addition, gob vent boreholes had been drilled from the surface to supplement the ventilation system. These gob vent boreholes could remove methane from the face and gob as the longwall retreated beyond them. None of these gob vent boreholes had been intersected by the longwall at the time of the accident so they had not been used.

The MSHA-approved plan also included the use of a computerized atmospheric monitoring system ("AMS"). This system was designed to present instantaneous information to mine personnel about the functioning of the ventilation system on the panel. The information monitored included air velocities, as well as methane, oxygen and carbon monoxide levels at the MPLs discussed above.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 7143395, Section 75.334(b)(1)

Citation No. 7143395, issued on July 16, 2001, by Chad A. Weaver and Gary J. Wirth⁴ under section 104(a) of the Mine Act, alleges a violation of the 30 C.F.R. § 75.334(b)(1) as follows:

During pillar recovery of the D-3 longwall panel, the bleeder system being used did not control and distribute air passing through the worked-out area in a manner which continuously diluted and moved methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

The following factors impaired the bleeder system's effectiveness at controlling and diluting the air passing through the worked-out area: a limited mine ventilating potential; the configuration and distribution of airflow in the bleeder system and worked-out area; and temporary controls installed within the worked-out area which restricted airflow through the pillared area. As production increased and pillared area expanded, methane liberation increased and airflow paths changed within the worked-out area. These changing conditions resulted in reduced airflow and elevated methane concentrations within the worked-out area at locations containing potential ignition sources and within close proximity to the active longwall face.

On July 31, 2000, an explosive concentration of methane-air mixtures and/or other gases, dusts, and fumes had accumulated in the worked-out area, within 250 feet of the working D-3 longwall face. At approximately 11:48 p.m., a portion of the atmosphere in

⁴ At the time the citation was issued, Mr. Wirth was a supervisory mining engineer with MSHA's Coal District 11. He is now an Assistant District Manager for that district.

the worked-out area was ignited, resulting in an explosion which injured a miner working on the D-3 longwall section. The initial explosion created conditions which resulted in additional explosions within or near the worked-out area. The subsequent explosions resulted in fatal injuries to two miners on the D-3 longwall section.

The inspectors determined that the violation was serious, of a significant and substantial nature, and was the result of Plateau's moderate negligence. The Secretary proposes a penalty of \$25,000 for the violation. The cited safety standard provides: "During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine."

1. Arguments of the Parties

The parties introduced extensive evidence on this citation and presented wide-ranging arguments in their briefs. I only summarize the evidence and argument in this decision to emphasize the elements upon which I base my decision. Any evidence or argument not discussed herein that is inconsistent with my findings and conclusions is hereby rejected. I have not discussed all of the testimony and exhibits that were admitted into evidence.⁵

The Secretary maintains that the standard required the operator to establish a bleeder system that directs air through the gob and which controls that airflow to distribute it properly. The airflow must continuously dilute all contaminants in the worked-out area away from the active mining areas and out of the mine. A mine operator violates the safety standard when "airflow is not controlled or properly distributed to continuously dilute the methane and/or other gases or fumes within the worked-out area." Tr. 56. Thus, the Secretary argues that the standard is designed to address the hazards associated with methane entering the active mining areas and also to prevent methane from accumulating within the gob.

The Secretary contends that to comply with the standard, the ventilation system must control and distribute the airflow so as to continuously dilute and render harmless methane and other gases in the worked-out area. This requirement "means that hazardous concentrations of methane must not be allowed to 'accumulate' in a manner that would then allow an ignition source to explode or ignite the accumulation of gases within the gob when and if an ignition source comes into existence." (S. Br. 6). The Secretary acknowledges that not every accumulation of methane in the worked-out area comprises a violation because methane occurs naturally in worked-out areas of a coal mine. Methane and other gases must nevertheless be "coursed continuously out of the mine through the bleeder system." *Id.*

⁵ Included in this decision are frequent references to the transcript and exhibits. These references are illustrative only and are not the only support for my findings in the record.

The Secretary maintains that the mine's ventilation system failed to comply with section 75.334(b)(1) in several respects. The primary airflow paths were not fully established within the worked-out area, the mine had a limited "ventilating potential," and temporary controls installed in the worked-out area restricted airflow through the gob. *Id.* at 7. Additional factors that contributed to the violation included reduced air velocities on the panel due to the increased resistance in the worked-out area, especially on the headgate side, combined with increased liberation of methane in the gob. The Secretary believes that the bleeder system was over-extended so that it could not handle the levels of methane that were being liberated.

Plateau maintains that the Secretary did not meet her burden of proof with respect to this citation. Plateau agrees that the goal of a bleeder system is to minimize the hazard from the methane that is present in mined-out areas by moving it away from the active workings through the gob, into the return airway, and out of the mine. The goal is accomplished, in part, by keeping methane away from the most likely sources of ignition, including miners and equipment. As Clete Stephan testified, this goal is also accomplished by keeping the "explosive pocket of [methane in the gob] very small, very thin." (Tr. 532). The presence of explosive levels of methane in the gob does not establish a violation of the Mine Act or the Secretary's safety standards. The only limit in the safety standards is that methane cannot exceed 2% in the return air just before it joins another split of air. 30 C.F.R. § 75.323(e).

Plateau contends that the bleeder system at the mine fully met the requirements of section 75.334(b)(1). Plateau developed a ventilation plan which MSHA determined met the requirements of the standard. The interrelationship between section 75.370 and 75.334 compels a finding that development of an approved ventilation plan satisfies the requirements of section 75.334. Plateau argues that the evidence establishes that Plateau controlled the air in and around the longwall and the gob. It diluted the methane coming out of the rubble as evidenced by the methane levels at MPLs 7 and 8.

2. Analysis of the Issues

Section 75.334(b)(1) applied to the D-3 longwall panel because longwall mining is retreat mining. For purposes of the safety standard, Plateau was engaged in "pillar recovery" at all pertinent times. Under this standard, Plateau was required to use its bleeder system "to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases . . . from the worked-out area away from active workings and into a return air course . . ." The issue is whether the Secretary established that Plateau failed to comply with this requirement. The fact that there was a series of explosions or ignitions in the gob does not establish a violation. *Consolidation Coal Co.*, 20 FMSHRC 227, 240 (March 2000). The cause of the tragic events of July 31, 2000, relates to the question whether Plateau violated section 75.334(b)(1), but establishing the cause does not necessarily establish the violation.

I find that the Secretary established a violation of section 75.334(b)(1). I reach this conclusion after a careful examination of the facts presented by the parties. As discussed below,

I find that the Secretary established that the bleeder system was over-extended so that it could not, on July 31, 2000, control the air passing through the area so as to continuously dilute and move methane-air mixtures and other gases from the gob into the bleeders.

I agree with the Secretary that a mine's approved ventilation plan represents the minimum specifications for ventilating the mine. A mine operator may violate section 75.334(b)(1) even though it is fully complying with the approved ventilation plan. First, the mine operator has better knowledge of the conditions that will be encountered when mining commences. More importantly, because an underground coal mine is a dynamic environment, a mine operator must be constantly vigilant when monitoring the conditions underground and it must make changes to its ventilation system as conditions warrant. I agree with the Secretary that Plateau should have been on notice that its bleeder system was not functioning properly on July 31, 2000.

a. Increase in Methane Levels

There is no dispute that methane liberation levels generally increased on the panel as longwall mining progressed. As the rubble zone increased in size, the amount of methane liberated in the gob naturally increased. In addition, as production increased, the amount of methane liberated at the face increased. The increase in methane liberation from these two sources is demonstrated by the amount of methane measured by the mine's AMS at MPLs 7 and 8, as illustrated in Figures 3 and 4 of Exhibit G-31. These MPLs were located at the point where air leaving the gob entered the No. 3 bleeder entry. Longwall mining commenced on the panel on July 17, 2000. On the third day of mining, methane was measured at between 0.5% and 1.0% at MPLs 7 and 8. On July 24, 2000, it reached 3% at one point, but it averaged around 1.5% between July 25 and July 30. On July 31, it averaged between 2.5% and 3.0%. Although the general trend was upward, it spiked up most noticeably at those times that production was high, including above 3.5% on the morning of July 31. (Ex. G-31, Fig. 4). Plateau's "action level" for methane at that location was 4%. (Ex. P-15). If the AMS sensors detect methane at 4% at MPLs 7 or 8, all production is stopped on the panel. At 4.5% methane, the mine is evacuated and MSHA is notified.

The methane level at the measuring point for the bleeder entries established by the Secretary at section 75.323(e) also increased over this same period of time. On July 21, 2000, methane readings averaged between 1.0% and 1.5% at MPL B1.⁶ Starting on the evening shift of July 29, the methane concentration at this point began to range between 1.5% and 2.0%. (Ex. G-31, Fig. 3). Early on July 31, the methane concentration went above 2.0% on one occasion. Plateau's action level at this MPL is 1.9% and the safety standard requires that methane concentrations not exceed 2%. If the concentration of methane reaches 2.5%, Plateau evacuates the mine and notifies MSHA. Plateau halted production on the panel several times on July 31 because of high methane levels at the face.

⁶ Bleeder air joined another split of air just outby MPLs B1, B2, and B3. (Ex. G-31, Appendix I). The readings obtained at MPL B1 are used for comparative purposes.

The increase in methane liberation was quite significant. Methane liberation, as measured in the bleeder system at MPLs B1, B2, and B3, was 2.5 million cubic feet per day on July 18 and 19, 2000. (Ex. G-31 p. 27). By July 25, the methane liberation had increased to 6.3 million cubic feet per day. *Id.* On July 31, it was over 7 million cubic feet per day. The airflow at the tailgate bleeder connectors decreased during this same period of time. Although this condition is common during longwall startup, adjustments should be made to the bleeder system to increase ventilating pressure in order to control the methane in the gob. Plateau did not make any changes in its ventilation system to better control, dilute, and move methane as a result of these increases in methane liberation during this period.

Plateau states that it expected methane levels to increase and that its ventilation system was designed to handle the increase. (Tr. 1055-57). As the tailgate side of the gob became restricted by roof falls, Plateau was going to change its ventilation system so that intake air from the tailgate entries would ventilate the longwall face. Until that time, the air velocity on the face would slowly decrease. Plateau denied that its ventilation system was beyond its capacity on July 31. More air than was required under the plan was being coursed into the panel. In addition, the mine was experiencing less downtime for methane than had been experienced on other panels. This mine is subject to coal bursts and other sudden releases of methane at the face. When that occurs, all mining stops until the methane clears. Finally, Plateau maintains that the longwall would have reached the first gob vent borehole within a few days which would have provided an additional means of removing methane from the panel.

b. Control, Dilute, and Move

Under the safety standard, a mine operator must “control” and “dilute” methane-air mixtures in the gob and “move” these mixtures into the bleeder system at the earliest practical point. The purpose is to render these mixtures harmless and carry them away from the active workings. It is impossible for a mine operator to ensure that explosive concentrations of methane never occur in the gob. Methane is explosive at concentrations between 5% and 15%. Because methane is liberated 100%, there will be some zones where explosive levels will exist on a temporary basis. Nevertheless, if the bleeder system is operating correctly, methane-air mixtures will be continuously diluted and swept away into the bleeder entries. Methane must not be allowed to accumulate in the gob because explosive concentrations are likely to develop that could be ignited if the accumulation comes in contact with an ignition source.

The key element in diluting and moving methane-air mixtures from the gob is to ensure that there is a sufficient quantity of air sweeping the gob. On July 31, 2000, the fan ventilating the mine was operating at or near its capacity. In order to properly ventilate the gob, there must be a sufficient pressure drop between the last open crosscut in the headgate entries and the connection between the gob and the bleeder entries. The regulators at MPLs 7 and 8 were open all the way. Although the frame for the regulators provided some resistance, for all practical purposes the entries were wide open. As the methane levels increased, the amount of intake air

sweeping the gob actually decreased because of increased resistance to air movement in the gob. Plateau did not make any changes to its ventilation system during this period.

c. Sweetened Air at the §75.323(e) Measuring Point

Under section 75.323(e), the “concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air . . . shall not exceed 2.0 percent.” Monitoring the methane levels at this location is one of the key ways that a mine operator can determine whether it is meeting the requirements of section 75.334(b)(1). This measuring point, MPL B1 in Plateau’s AMS, is critical to evaluating the effectiveness of the bleeder system. (Tr. 1370). The evidence in this case establishes that as longwall mining progressed, the level of methane at this location increased significantly. (Ex G-31 Fig. 3). Indeed, on July 31, 2000, methane levels at this location went above 1.9% methane on at least two occasions for a total of 50 minutes and above 2% at least once. These measurements show that the mine’s bleeder system had “max’ed out.” (Tr. 595). At the same time, the methane levels at MPLs 7 and 8 increased to above 3% while the levels at MPLs 5 and 6 were consistently below 0.5%. Thus, air ventilating the sump pump in the No. 1 bleeder entry and air entering the No. 3 bleeder entry at MPLs 5 and 6 from the headgate entries were mixing with the 2.5% to 3.5% methane concentration entering the bleeders at MPLs 7 and 8.

John Urosek estimates that there was a concentration of 2.3% to 2.6% methane in the bleeders at the point where this mixing occurred near MPLs 7 and 8. (Tr. 599-601). He testified that ordinarily this concentration would have manifested itself at the section 75.323(e) measuring point, MPL B1. Urosek concluded that the methane readings at MPL B1 would have been much higher than was actually recorded by the mine’s AMS but for the fact that there was a significant amount of leakage between the No. 1 bleeder entry, which brought intake air to the sump pump and other electrical installations, and the No. 2 bleeder entry which carried air from the gob through MPL B1. *Id.* Gary Wirth estimated that this leakage amounted to about 50,000 cfm of air. (Tr. 100-01). Thus, a significant amount of “sweet” intake air was entering the bleeders between the gob and the section 75.323(e) measuring point which had the effect of artificially lowering the methane concentrations at that location. This sweetening of air in the bleeders is not typical in longwall mining.⁷ (Tr. 603-04). If this sweetening had not occurred, the methane levels at the section 75.323(e) measuring point would have been above 2% on a fairly regular basis since at least the afternoon of July 30, 2000. These readings would have revealed that the bleeder system was not working to control, dilute, and move methane away from the panel. I credit the testimony of Urosek in this regard.

⁷ The leakage between the intake bleeder entry and the return bleeder entries was due to the high pressure differential between them. (Tr. 600-01). If the regulator for the intake bleeder had been installed at the mouth of bleeder rather than at the sump pump, this pressure differential would have been reduced. (Tr. 659).

As Mr. Urosek testified, if a mine operator detects a concentration of methane at the section 75.323(e) measuring point that is greater than 2%, the ventilation system needs to be changed in some way to bring more airflow through the gob. (Tr. 1370-71). By bringing in a significant amount of intake air into the bleeder system at a considerable distance outby the gob, the readings at this measuring point become meaningless. As Urosek pointed out, it is as if a split of air containing 40,000 to 50,000 cfm was entering the bleeder entries just inby the section 75.323(e) measuring point. (Tr. 1371 - 73; Exs. G-41 & G-42). It is important to understand that the bleeder entries were about 9,000 feet long, and the point where ventilation from the gob entered the bleeder entries was at least 8,000 feet from the section 75.323(e) measuring point. (Tr. 1258). Although some leakage of intake air into the bleeders is to be expected along this distance, Plateau failed to recognize the effect of the leakage when it established its action level for MPL B1. At the 1.9% level, the true methane concentrations were already well above 2%.

Plateau argues that the safety standard does not require a mine operator to fully dilute methane in the gob before the methane-air mixtures enter the bleeder entries. It argues that, under section 75.334(b)(1), it is appropriate to use the bleeder entries to reduce the concentrations of methane below 2%. I agree that the safety standard does not require that the 2% limit be met as the air from the gob enters the bleeders but, if the mixing occurs thousands of feet outby as a result of air leaking into the bleeders from an intake air course, a mine operator has no means of determining whether it is properly "controlling" the air passing through the gob to "continuously dilute" and "move methane-air mixtures" from the gob away from active workings. In this case, the readings at MPL B1 gave a false impression that Plateau's bleeder system was functioning properly when it actually was not. When methane concentrations in the bleeder entries at the section 75.323(e) measuring point are at or above 2%, the bleeder system can no longer dilute additional methane from the gob down to the 2% level. In this situation, a mine operator is no longer able to "continuously dilute and move" methane from the gob. As a result, there is a high risk that an explosive methane-air mixture will accumulate in the gob. Such an accumulation developed at Willow Creek on July 31, 2000.

Plateau contends that, because the methane readings taken by the AMS at MPLs 7 and 8 were higher than readings taken by bottle samples, the AMS readings are inaccurate. As a consequence, it argues that the Secretary's supposition that the methane readings were higher than Plateau believed is without factual foundation. (P. Br. 28). The Secretary contends that because Plateau's argument is based on one example, it should not be given any credence. She argues that many factors come into play when taking hand-held methane samples, including the location at which each sample is taken. Thus, "claiming that the AMS was reading high is not a reasonable assertion, especially given the fact that the AMS was routinely calibrated." (S. Reply Br. 6). I find that Plateau's argument is not well taken.

The data from the AMS showed that the methane levels were steadily increasing at MPLs 7 and 8 and at MPL B1 as longwall mining progressed. Starting on the evening of July 29, 2000, methane levels increased rapidly at MPLs 7 and 8. (Ex. G-31, Fig. 3). Prior to that time methane was about one-quarter of a percentage point greater at MPL 8 than at MPL B1. By the

middle of July 31, the spread was about three-quarters of a percentage point. Methane was accumulating in the gob as measured at MPLs 7 and 8, but this increase was not as perceptible at the section 75.323(e) measuring point because of the 40,000 cfm of intake air that was getting into the bleeder entries well outby the gob. The increasing difference between methane concentrations at the tailgate bleeder connections and those at MPL B1 indicates that gob airflow was becoming a smaller percentage of the total airflow at MPL B1. (Ex. G-31 p. 27, S. Br. 12-13). Quite simply, methane was accumulating in the gob more rapidly than the ventilation system was able to dilute and move it into the bleeders.

d. Distribution of Intake Air Through the Gob

The parties dispute whether Plateau was properly directing the air through the gob so as to sweep out methane from all areas of the gob. Plateau argues that it is impossible to direct air to a particular place within the gob and that the regulation does not contemplate that it do so. As the roof falls within the gob, the area will become more restricted. Air will always flow through those areas within the gob that offer the least resistance. The Secretary contends that Plateau should have configured its ventilation system to direct more air through the headgate side of the gob. She argues that this could have been accomplished through a number of means including having a more direct opening to the bleeder entries from the headgate side. She also contends that the curtains in the setup rooms, the undercast at No. 1 headgate entry, and the check curtain in the dogleg inhibited airflow through the headgate side of the gob.

The “configuration and distribution of airflow in the bleeder system” were established in the mine’s ventilation plan. As stated above, MSHA approved the amendment relating to the D-3 on July 7, 2000, under section 75.370(a), which included the approval of the bleeder system. This approval was forthcoming only after several meetings with local and national MSHA officials, including Mr. Urosek. (Ex. J-1). Consequently, the Secretary knew how Plateau intended to configure its bleeder system and she approved the design. Lincoln Derrick, a safety manager for Twentymile Coal Company, another RAG American Coal subsidiary, testified that several issues were addressed in the configuration of the airflow through the gob. One concern was the fact that the coal seam dipped down about 10 to 12 degrees. Since methane is lighter than air, it will migrate to the up-dip side of the gob. In the case of the D-3 panel, the up-dip area was the corner of the tailgate side of the gob closest to the longwall. Plateau wanted to make sure that sufficient air was ventilating the inby tailgate entries to control, dilute, and move the methane-air mixtures in that area into the bleeder entries. (Tr. 1144-46, 1151, 1254). Plateau also knew that this objective presented problems because the tailgate side of the gob would tend to cave more tightly than the headgate side. (Tr. 1022, 1078, 1124-25). Plateau’s witnesses testified that because the inby tailgate entries were immediately adjacent to the sealed D-2 panel and because there was no barrier of coal between them, keeping these entries open to ventilation was going to be difficult.

The Secretary believes that the first explosion which set off the subsequent explosions occurred on the headgate side of the gob inby toward the back. Because of the drop in elevation

in this area, it was the lowest part of the rubble zone. Thus, it was an area in which one would not expect to produce conditions that would initiate an explosion. Methane would not tend to accumulate there unless there was an anomaly in the roof, the area was blocked by a roof fall, or the entire gob was not being effectively ventilated. As a consequence, it was not an area that Plateau would be expected to be overly concerned about in its ventilation plan. When Chuck Burggraf, the general manager at Willow Creek, examined the longwall section on July 21, 2000, he learned that the tailgate side of the gob had caved while the headgate side was open. (Tr. 1022). Indeed, he testified that he believed that he could see into the crosscut between the setup rooms that was closest to the headgate entries. (Tr. 1023). The Secretary, on the other hand, contends that the headgate side of the rubble zone was more restrictive to airflow than the tailgate side on July 31, 2000. It is impossible to know exactly what conditions existed in the gob at the time of the accident, how intake air flowed through the gob at the time of the accident, or whether changes in the distribution of the air within the gob would have diluted and moved more methane out of the gob. Nevertheless, I credit the testimony of Derrick and Burggraf that the headgate side of the gob was at least as open, if not more open, to the passage of air than the tailgate side of the gob. Urosek testified that, as a general matter, the middle of a rubble zone in a gob is usually the most resistant to airflow. (Tr. 663).

Based on the foregoing, I find that the Secretary did not establish that the lack of a direct connection between the headgate side of the gob and the bleeder entries contributed to the violation of section 75.334(b)(1). MSHA approved the configuration of the connections between the gob and the bleeder entries when it approved the mine plan for the panel on July 7, 2000. The preponderance of the evidence establishes that the configuration of the ventilation system through the panel was designed to sweep air through the gob, paying particular attention to the up-dip areas that presented the greatest potential for methane accumulations. The evidence shows that the violation occurred because the ventilation system could not handle the increasing levels of methane liberation, not because of the improper distribution of air through the gob. Nevertheless, it is possible that Plateau could have made adjustments to its ventilation system in response to the increased levels of methane that would have included changing the distribution of air through the gob.

e. Temporary Ventilation Controls

In issuing this citation, the Secretary also referenced three “temporary controls within the worked-out area which restricted airflow through the pillared area.” These controls were check curtains in the crosscuts between the setup rooms, an undercast at the intersection of the No. 1 headgate entry and the No. 1 (inby) setup room, and a curtain in the dogleg at the No. 1 headgate entry. I discuss each control separately.

Plateau installed check curtains in the crosscuts between the setup rooms. These check curtains were necessary during the startup of the D-3 longwall panel to keep intake air along the longwall face. When the longwall first starts operating, there is nothing behind the longwall shields to keep intake air from flowing directly through the shields into the bleeder entries.

These check curtains blocked the crosscuts between the setup rooms thereby directing air along the working face. The check curtains were constructed of fabric attached on the inby side to a wooden frame. MSHA Inspector Gene Ray inspected the setup rooms on July 16, 2000, and required that one of the curtains be repaired. (Tr. 714). The approved ventilation plan did not require anyone to inspect the setup entries. Moreover, Inspector Ray advised Mr. Burggraf that if he were to see any footprints in the setup rooms, he would issue an unwarrantable failure citation. (Tr. 1019). In response to this instruction, Plateau constructed a chain-link fence at the entrance to this setup room to keep everyone out. (Tr. 494). Although the Secretary does not dispute that the check curtains were necessary at that time, she argues that Plateau should have removed them once the longwall advanced so that air could ventilate all areas of the gob. She contends that these check curtains contributed to the accumulation of methane in the gob.

I find that the Secretary failed to establish that these check curtains were present on July 31, 2000, and, even if they were, that they contributed to the violation of section 75.334(b)(1). On July 17, 2000, before longwall mining commenced, Kerry Hales, the mine manager at Willow Creek, entered the setup rooms and pulled down the corner of each check curtain. (Tr. 735). In addition, the evidence establishes that once longwall mining commenced, the forces generated by roof falls would have knocked out the check curtains. When Burggraf inspected the panel on July 19, 2000, he did not see a check curtain in the crosscut closest to the headgate entries. (Tr. 1023). Consequently, I find that most if not all of the check curtains had been knocked down before July 31, 2000. Moreover, MSHA performed several ventilation simulations during its investigation of the accident. There was no significant difference in the results between the simulation that assumed that check curtains were present in the setup rooms and the simulation that assumed that the check curtains were not present. (Tr. 638, 690-91; Exs. G-28, G-29). Thus, I find that the check curtains in the setup rooms did not restrict airflow through the gob in such a way as to violate section 75.334(b)(1).

Plateau had installed a curtain in the dogleg where it joined the No. 1 headgate entry. As a result of its investigation, MSHA believed that this curtain was a check curtain installed across the dogleg. I credit the evidence of Plateau's witnesses that this curtain was actually a wing curtain that was installed to ensure that intake air ventilated the seal that was across the No. 1 headgate entry just outby MPL 6. (Tr. 738-39, 1026, 1044, 1091). This wing curtain may well have been knocked down before July 31, 2000. In any event, I reject the Secretary's contention that this curtain inhibited airflow through the dogleg. As a consequence, this wing curtain, if it existed at all, did not contribute to the violation of section 75.334(b)(1).

The final ventilation control that the Secretary contends contributed to the violation is an undercast constructed at the intersection of the No. 1 headgate entry and the No. 1 setup room, inby the longwall face.⁸ This undercast was necessary during development and setup of the panel. Plateau contends that it could not remove this undercast because it needed the structure present in order to construct a regulator under it. As a consequence, Plateau knocked a three-by-

⁸ At the hearing, this undercast was often referred to as an overcast.

four foot hole in the undercast. Its witnesses contend that this opening effectively eliminated the undercast. If it had totally removed the undercast, the mine roof would have been about 18 feet above the floor, making the construction of the regulator very difficult. This regulator was part of the MSHA-approved ventilation plan.

Intake air from the No. 2 headgate entry traveled under the undercast through a regulator into the No. 1 setup room. (Ex. P-3B). Air from the gob traveled up the No. 1 headgate entry, over the undercast to the seal, around the wing curtain, and through the dogleg into the No. 1 setup room. *Id.* Some of the air traveling up the No. 1 headgate entry traveled directly through the opening in the undercast into the No. 1 setup room. *Id.* Although I do not agree with Plateau that the three-by-four foot hole negated the undercast, the hole effectively turned the undercast into a regulator. The hole functioned as a regulator and, as stated above, Plateau constructed another regulator under the undercast.

The panel was inspected by MSHA Inspector Ray on July 26, 2000. He was accompanied by Sid Hanson, an MSHA ventilation specialist. Ray observed the hole in the undercast. (Tr. 493). Inspector Ray noted that air was moving through the hole from the longwall gob, but he did not take an air measurement. (Tr. 494). He characterized the air movement as more than perceptible. Ray did take an air quality measurement and, although he could not remember the results at the hearing, he testified that the air quality was acceptable. He also testified that the undercast was no longer functioning as an undercast because of the hole. (Tr. 496). Water was flowing through the hole toward the sump pump and he could see hydrocarbons in the water. *Id.* I find that the Secretary failed to establish that the presence of the structure at the intersection of the No. 1 headgate entry and the No. 1 setup room contributed to the violation of section 75.334(b)(1). Although the structure was still present, it was no longer completely separating two air courses.

f. Cause of the Accident

I also conclude that the Secretary's evidence concerning the cause of the events of July 31 helps establish a violation of the safety standard. As described above, the Secretary contends that the first event was a methane explosion that was set off by the ignition of a small pocket of an explosive methane-air mixture that accumulated on the headgate side of the rubble zone. She relies on a number of factors in reaching this conclusion. First, she contends that the forces generated by the first event could have only been caused by an explosion. The Secretary argues that the nature and strength of these forces could not have been created by a roof fall. She maintains that, if the first event had been a large enough roof fall to compromise ventilation controls at the back of the headgate entries, then the forces that hit the miners at the face and in the No. 2 headgate would have been much greater. (S. Br. 17; Tr. 445). She also contends that the explosion forces in the first event propagated toward the back of the gob because the explosion pressure wave fed on itself as it traveled through the available fuel. These forces opened up ventilation controls between the headgate entries and the bleeder entries which, because of lower resistance, caused most of the intake air to travel directly into the bleeder

entries, bypassing the gob. These same forces then traveled down the No. 2 headgate entry in an outby direction and into the working section. The Secretary relies on the testimony of Mr. Stephan in arguing that the events that transpired on the night of July 31, 2000, can only be explained if the first event was an explosion. (Tr. 399-458)

Plateau presented evidence and argument that the first event was a large roof fall which not only damaged ventilation controls but also ignited hydrocarbons as a result of a piezoelectric spark created as the fall occurred. It believes that this hydrocarbon fire ignited methane that accumulated as a result of the damaged ventilation controls which, in turn, set off the subsequent explosions. It relies to a great extent on the description of the events given by the miners who were on the panel that night. The miners believed that the first event was a roof fall and that the forces they felt came from directly behind the shields. Although I find that it is not possible to completely resolve the issue on this evidence alone, the Secretary's evidence and argument is more convincing. Very few miners, including the miners on the panel that night, have ever experienced a mine explosion. Because miners are familiar with roof falls, it is natural that they would interpret the first event as a major roof fall, especially since they did not feel any heat. I credit the testimony and evidence presented by Stephan on this issue.

The most convincing evidence to support the Secretary's explosion theory is the carbon monoxide ("CO") readings obtained by Plateau's AMS the night of July 31. CO is released slowly and begins to build when there is a fire. (Tr. 416-19; Ex. G-14). If there is an explosion, however, CO is produced in high quantities very quickly. *Id.* Plateau's theory that a roof fall ignited hydrocarbons is not supported by the CO readings obtained after the first event. The CO sensors on the panel show that CO levels peaked immediately following the first event. Because the CO sensors recorded a sudden, immediate increase in the amount of CO following the first event, it more than likely was an explosion. I credit the testimony of Mr. Urosek on this issue. (Tr. 580-93; Exs. G-26 & G-27). Particularly telling are the CO sensors on the headgate entries outby the longwall face. The force of the explosion pushed CO "from the explosion area out into the intake entry." (Tr. 589). Although this entry was an intake air course, the airflow was reversed by the force of the explosion for a short time. Urosek concluded that "CO had to be pushed in front of this [first] event, which means the CO had to . . . come from the explosion for this to occur." (Tr. 590). Thus, the CO sensors indicate that there was a large amount of CO generated by the first event, which points to an explosion rather than a fire caused by a roof fall.

The Secretary also relies on the pressure data from the mine fan to support her theory that the first event was an explosion. (Ex. G-24 & G-25). Willow Creek was ventilated by a blowing main mine fan. The operating pressure of this fan was recorded on two separate systems: a standard Bristol pressure recording chart, and a computer-based Allen-Bradley system. The Bristol pressure chart provides a more visual presentation of the events that night. It showed a pressure spike at the time of the first event. (Ex. G-24). The graph of the Allen-Bradley system is similar. (Ex. G-31, Fig. 2). These charts indicate that ventilation controls were damaged as a result of the first event. The Secretary contends that such damage could only be caused by an explosion, but Plateau argues that a large roof fall can also severely damage ventilation controls.

I conclude that, taken by themselves, the fan pressure charts do not establish whether the first event was an explosion.

Another factor that supports the Secretary's theory is the low likelihood that a roof fall would have ignited hydrocarbons. Hydrocarbons of the type found at Willow Creek do not give off ignitable vapors at the temperatures found at the mine. (Tr. 1335-36; Ex. G-39 p. 8). While there may have been some vapors present, it is highly unlikely that they could have been ignited by a roof fall.⁹ Methane, on the other hand, if present in the explosive 5% to 15% range can be ignited by a roof fall. Roof falls in a gob are not the most common ignition sources for a methane explosion. Roof falls have been known to ignite methane at some mines as evidenced by the methane ignition in the D-1 panel at Willow Creek on November 25, 1998. I find that it is unlikely that the ignition of hydrocarbons was the initial event at the mine.

Finally, the Secretary relies on the testimony of Dr. Peter Swanson, a research geophysicist with the National Institute of Occupational Safety and Health (NIOSH). Dr. Swanson had set up a seismic array at the mine, at the invitation of Plateau, to help understand the roof pressures on the longwall system at the mine. NIOSH was interested in trying to understand the fracture and deformation processes that are associated with longwall deformation in longwall sequences "with an eye toward reducing the hazards associated with coal bumps." (Tr. 257-58). The geophones used by NIOSH are similar to those used to monitor seismic activity. They were connected to a computer network. Mr. Swanson tried to analyze the waves received by the NIOSH array to determine the nature of the first event. (Tr.385; Ex. G-16). His analysis was not part of MSHA's investigation and MSHA did not rely on his analysis in issuing the citations.

Plateau strenuously objected to his testimony and to the introduction of his research paper.¹⁰ Specifically, Plateau objected to his conclusion that a tracing from the geophones indicated that an explosion occurred at the mine at 11:46:39 p.m. on July 31, 2000. Plateau maintains that Swanson's testimony and evidence "lacked scientific basis and should be stricken because it lacks sufficient reliability and is not probative." (P. Br. 48). Prior to the hearing, Plateau sought to have Dr. Swanson's testimony excluded on the basis of the principles established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); and *General Electric Co. v Joiner*, 522 U.S. 136 (1997). In those cases, the Supreme Court held that, under

⁹ In arguing that a roof fall started a hydrocarbon fire, Plateau relies on two MSHA incident reports involving the Kaiser Sunnyside Mine. (Tr. 1154-57, 1174-79; Exs. P-34 & 35). I do not give much weight to these reports because it is clear that these incidents were not thoroughly investigated by MSHA. I also find that it is unlikely that spontaneous combustion initiated the first event.

¹⁰ His paper, entitled "Analysis of Seismicity Recorded at an Underground Coal Mine During a Fire and Explosion Sequence," was presented at the December 2002 meeting of the American Geophysical Union. (Tr. 280-83; Ex. G-16). Each page of the report contains the following at the top: "Draft Document under construction – Not for General Distribution."

the Federal Rules of Evidence, a judge has a duty to act as a gatekeeper to ensure that proffered expert scientific or engineering testimony rests on a reliable foundation. Although I permitted Dr. Swanson to testify, I have not based my decision on his testimony because it does not offer reliable evidence upon which I can make findings of fact.

Dr. Swanson testified that he believes that the tracing from the underground geophones indicate that an explosion took place at 11:46:39 p.m. on July 31, 2000. He bases his opinion on his own conclusion that the tracing is not typical for a “conventional seismic event.” (Tr. 285, 299-300, 328). His seismic equipment did not record any of the three explosions that were known to have occurred, including the largest explosion. (Tr. 341-42, 361, 390). Dr. Swanson could not identify the location of the event that created the disputed tracing. (Tr. 390). His surface array of geophones was not functioning on July 31, due to an electrical storm, so he could not locate the event vertically. (Tr. 272-73). The methodology Dr. Swanson used to reach his opinion has not been tested and it has not been reviewed through NIOSH’s peer review process. It is also important to take into consideration what Dr. Swanson did not say. He did not testify that he had seen a seismic tracing from an explosion in an underground mine to compare to the tracing he believes represents an underground explosion in this case. In addition, he did not testify that there is existing research to establish what seismic tracings of an underground explosion should look like. He opined that the disputed tracing looked different from the tracings of conventional seismic events and that he believes it represents an explosion. (Tr. 285, 325; Ex. G-16). As a consequence, although I do not grant Plateau’s motion to strike Dr. Swanson’s testimony and his research paper from the record, I have not relied upon his testimony or his paper in rendering my decision in this case because it is too speculative for use in a court of law. By not considering Dr. Swanson’s testimony and opinion evidence I do not mean to suggest that he should not have undertaken his study or that his study represents “junk science.” His research appears to be a professional attempt to analyze the available data produced by the geophones. Nevertheless, I conclude that his study is too tentative and unproven to be considered by a court of law. Because I have not relied upon Dr. Swanson’s testimony or exhibits, I have also not considered the testimony and exhibits of Dr. John Blott, the witness Plateau called in opposition.

g. Summary of Findings and Conclusions Regarding Violation

Based on the above, I conclude that the Secretary established by a preponderance of the evidence that the first event was an explosion. I also conclude that the Secretary established that, on the day of the accident, Plateau was not controlling the air passing through the gob to continuously dilute and move methane-air mixtures and other gases liberated on the panel away from active workings and into a return air course. Unlike her case in *Consolidation Coal*, the evidence presented was not based on speculative “post-ignition investigative assumptions, theories, and conclusions.” 20 FMSHRC at 241. As the methane levels increased, the amount of intake air coursing through the gob decreased as a result of higher resistance. The ventilation system became overwhelmed by the increasing amount of methane being liberated with the result that explosive levels of methane accumulated in the gob. Plateau was confident that once the

longwall reached the first gob vent borehole its ventilation system would be better able to control methane. The weakness in its ventilation system was the fact that until it reached that gob vent borehole, it could not handle the high volume of methane being produced. In order to comply with the standard, Plateau should have reacted to the increased methane levels and reduced ventilation through the gob by making changes to its ventilation system before the first gob vent borehole was reached. These changes would have ensured that the high levels of methane would be controlled, diluted and moved away from active workings. It is possible that Plateau could have also achieved compliance by decreasing the rate of production, thereby lowering methane liberation, until it reached the first gob vent borehole.

h. Penalty Criteria

I find that the violation was of a significant and substantial nature because, given the facts surrounding this violation, there was a reasonable likelihood that hazard contributed to by the violation would result in a fatality or an injury of a reasonably serious nature. (Tr. 95). I find that the violation was serious. Plateau's negligence was moderate for the reasons given by the Secretary. (Tr. 96).

B. Citation No. 7143396, Section 75.370(a)(1)

Citation No. 7143396, issued on July 16, 2001, by Chad A. Weaver and Gary J. Wirth under section 104(a) of the Mine Act, alleges a violation of the 30 C.F.R. § 75.370(a)(1) as follows:

The approved mine ventilation plan was not being complied with, in that the ventilation devices used to control air movement through the D-3 worked-out area were left intact after retreat mining commenced at locations not shown on the supplement to the mine ventilation plan titled, "D-3 Longwall Start-Up Head to Tail and Bleeder Ventilation with Tailgate Intake," approved July 7, 2000. Information obtained during the investigation of a fatal mine fire and explosion accident which occurred on July 31, 2000, established that the mine operator installed framed curtains across four of the six bleeder connectors at the inby end of the D-3 Longwall pillared area. Also, an overcast and check curtain were installed in the bleeder connector nearest the headgate side of the worked-out area, leaving one unobstructed bleeder connector which was located on the tailgate side of the worked-out area. However, the approved plan supplement did not show controls at these locations. These controls inhibited airflow on the headgate side of the worked-out area where the initial explosion and subsequent fire occurred on July 31, 2000.

The inspectors determined that the violation was serious, of a significant and substantial nature, and was the result of Plateau's moderate negligence. The Secretary proposes a penalty of \$20,000 for the violation. The cited safety standard provides, in part: "The operator shall develop and follow a ventilation plan approved by the [MSHA] district manager."

1. Arguments of the Parties

The Secretary contends that Plateau failed to comply with this safety standard by failing to remove the three temporary ventilation devices discussed above: curtains in the setup rooms, curtain in the dogleg, and undercast in No. 1 headgate entry. She maintains that these temporary ventilation devices are not shown on the plan for the D-3 panel that was approved on July 7, 2000, at page A-18. As a consequence, Plateau violated the ventilation plan when it did not remove these devices or seek to have them included in the plan when the plan was approved by MSHA. The Secretary contends that this violation contributed to the accident. Plateau argues that none of the three ventilation controls existed at the time of the accident and that they did not violate the ventilation plan in any event.

2. Analysis of the Issues

I entered findings of fact about the condition of the cited temporary ventilation devices when discussing the previous citation, which I do not repeat in detail here. With respect to the curtains in the setup rooms, I found that it was unlikely that these devices existed on July 31, 2000. They would have been knocked down or severely compromised by the forces generated by roof falls in the rubble zone. The corners of the setup curtains were torn down by the mine manager and Inspector Ray prohibited anyone from entering the setup rooms for any purpose. When Mr. Burggraf looked into the headgate side of the gob from the No. 1 shield of the longwall on July 21, he could not see any curtains in the setup room on the headgate side. MSHA knew that these curtains would be present during startup of the longwall as evidenced by page A-1E of the ventilation plan approved on May 31, 2000. (Ex. J-3). Although Plateau did not physically remove the curtains, they would not have existed by the time longwall mining progressed to the point shown on page A-18 of the July 7, 2000, plan. That page of the plan, which the Secretary relied upon in issuing this citation, shows the longwall after it had retreated about 500 feet. For the forgoing reasons, I find that the conditions in the setup rooms did not violate section 75.370(a)(1).

Based on statements made to Mr. Wirth, MSHA concluded that there was a check curtain across the dogleg. (Tr. 112). Mine Manager Hales testified that when he was in the area of the dogleg on July 17, 2000, there was no check curtain present, but there was a line curtain to ventilate the area adjacent to the seal. (Tr. 738-39; Ex. G-3). This curtain was loosely hung, it was not attached to the floor, and it did not prevent air from coursing through the dogleg. *Id.* It is not clear that this curtain was present on July 31, 2000. It is also not clear how long the curtain remained in place after the start of retreat mining. I find that the Secretary did not establish that

this temporary curtain violated the ventilation plan. If it had been present, it would not have significantly inhibited the flow of air through the dogleg.

There is no question that there was an undercast at the intersection of the No. 1 headgate entry and the No. 1 setup room. The undercast was breached because Plateau knocked a hole in the bottom to allow water and air to travel through. Plateau contends that the Secretary failed to establish that the undercast violated the ventilation plan because it no longer functioned to separate the air. Plateau points to the fact that MSHA Inspector Ray directly observed the structure on July 26, 2000. Inspector Ray stood at the hole and did not comment that the structure violated the mine's ventilation plan or that the quality or quantity of air was unacceptable. The Secretary contends that "the three-by-four foot hole in the [undercast] would not have significantly affected the overcast's function to inhibit airflow on the headgate side of the worked out area." (S. Br. 30; Tr. 112-13).

To be an effective ventilation control, an undercast must be intact to separate two different streams of air. (Tr. 1142). Mr. Burggraf testified that if this undercast had been depicted on the ventilation plan, it would have constituted a violation of the plan because it no longer separated the two air courses. (Tr. 1142-43). Inspector Ray testified that the structure was no longer functioning as an undercast because of the hole in it. (Tr. 496). Plateau kept the undercast in place so that it could install a regulator that was included in the ventilation plan under the structure. As stated above, the hole punched into the undercast joined the two air streams, but it regulated the flow of air. As a consequence, this hole functioned as a three-by-four foot regulator. This regulator was not shown on the ventilation plan and Plateau did not attempt to notify MSHA that it was altering the plan to keep the undercast in place. Consequently, although I agree with Plateau that the undercast was no longer separating the air, it was inhibiting the flow of air up the No. 1 headgate entry into the No. 1 setup room. MSHA's ventilation staff believed that this area would be completely open, so it was incumbent on Plateau to seek to change the plan accordingly. I find that the undercast violated the ventilation plan because Plateau failed to seek modification of the plan to keep the undercast in place with the hole in it. As a consequence, the Secretary established a violation of section 75.370(a)(1).¹¹ I find that Plateau's negligence was low because it was reasonable for it to rely on Inspector Ray's tacit approval of the structure.

As I discussed above, I find that the Secretary failed to establish that the presence of the undercast contributed to the violation of section 75.334(b)(1). As a consequence, I find that the Secretary did not establish that the violation of section 75.370(a)(1) was of a significant and substantial nature ("S&S"). An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the

¹¹ For the reasons discussed in this decision, I reject Plateau's argument that Citation Nos. 7143395 and 7143396 duplicate one another.

hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established the first and second elements. The Secretary did not prove the third element, however. The evidence establishes that air was moving through the hole and that the quality of this air was acceptable to Inspector Ray on July 26. It has not been shown that it is reasonably likely that the hazard contributed to by the violation would have resulted in an injury. Although there was a fatal methane explosion in this case, the Secretary did not establish that Plateau’s failure to completely remove the undercast contributed to that explosion. The amount of air that was traveling through the hole into setup room No. 1 at the time of the accident is unknown. In addition, the air that did not travel through this hole, traveled over the undercast, through the dogleg and into the same setup room. Thus, the presence of the undercast may not have had any significant effect on the ventilation of the gob in this instance. Consequently, I find that the violation was not S&S. I find that the violation was moderately serious because unauthorized changes in a ventilation plan can have unintended effects on ventilation.

C. Citation No. 7143400, Section 75.364(a)(2)

Citation No. 7143400, issued on July 16, 2001, by Chad A. Weaver and Gary J. Wirth under section 104(a) of the Mine Act, alleges a violation of the 30 C.F.R. § 75.364(a)(2) as follows:

Evaluations were not completed to determine the effectiveness of the bleeder system used to control air flow through the D-3 worked-out area during the weekly examination period ending July 26, 2000. Records of examination for this period indicated that the quantity of air flow was not determined at the approved location for MPL 2 and that the incorrect methane concentrations were recorded for MPLs 7 and 8. In addition, inconsistent readings were obtained for MPLs 3, 4, 5, and 6. The officials responsible for countersigning and reviewing records did not adequately review for completion the weekly records of examination nor did they

adequately use the results of the examinations to identify changes developing within the D-3 worked-out area. Proper evaluation of the bleeder system requires a thorough review of the obtained measurements to assess the effectiveness and performance of the system.

The inspectors determined that the violation was serious, of a significant and substantial nature, and was the result of Plateau's moderate negligence. The Secretary proposes a penalty of \$340 for the violation. That portion of the safety standard relied upon by the Secretary provides: "At least every 7 days, a certified person shall evaluate the effectiveness of the bleeder systems required by section 75.334 as follows: (iii) At least one entry of each set of bleeder entries used as part of a bleeder system . . . shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities . . . shall be made at the measuring point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder systems."

1. Arguments of the Parties

The Secretary contends that Plateau violated the safety standard in three different ways. Plateau (1) failed to determine and record the air quantity reading at MPL 2 on two separate occasions; (2) recorded incorrect methane concentrations for MPLs 7 and 8; (3) and obtained inconsistent readings for MPLs 3, 4, 5, and 6. Wirth discovered these violations upon reviewing Plateau's weekly examination book.

Plateau argues that, at best, the Secretary "demonstrated that there are questions about the record keeping concerning the weekly examinations because she relies entirely on the records." (P. Br. 63). Plateau observes that the Secretary did not offer any testimony from miners who performed these examinations. Plateau maintains that without more evidence of what the examiners did, the Secretary did not meet her burden of proof.

2. Analysis of the Issues

This safety standard is designed to make sure that a mine operator takes certain key air measurements on at least a weekly basis and uses that information to monitor the bleeder system to "assure that no hazardous conditions are developing within the bleeder system." (Tr. 122). The first allegation is that an air quantity measurement was not taken at the approved location for MPL 2. (Tr. 124-26; Ex. G-8). The weekly examination book for July 19, 2000, has no entry under "CFM" for MPL 2. (Ex. G-8). The examination page is countersigned by Kerry Hales and John Pesarsick, the foreman. Wirth testified that he was told during the accident investigation that an air quantity reading was not taken at that location. (Tr. 126-28). Another page of the weekly examination book shows that no air quantity reading was taken at that same location on July 26, 2000. (Ex. G-7). Kerry Hales admitted that no air quantity measurement was recorded for those two dates. (Tr. 757-58). I find that the Secretary established this part of the violation.

In addition, the Secretary established that there were incorrect methane concentrations reported at MPLs 7 and 8. The weekly examination sheet with data for those MPLs dated July 25, 2000, shows concentrations of methane at MPLs 7 and 8 at 0.2%. (Ex. G-7). The methane readings from the AMS for that date ranged between 1.27% and 2.57%. (Tr. 129-30; Ex. G-32 and 33). Hales could not explain the discrepancy between the AMS data and the readings obtained during the weekly examinations. (Tr. 765-66). He stated that he did not put enough emphasis on determining what information was reliable. *Id.*

The final factor that the Secretary relied upon is the inconsistent air quantity readings for MPLs 3, 4, 5, and 6. MPL 3 was in the No. 2 headgate entry near the longwall face. The Secretary asserts that all of the airflow at MPL 3 should be reflected at MPLs 4, 5, and 6. For example, on July 18, the airflow at MPL 3 was 113,950 cfm while the total airflow at MPLs 4, 5, and 6 was recorded as 32,299 cfm. (Ex. G-8; Tr. 132-33). The same inconsistencies occurred the week of July 26. (Ex. G-7; Tr. 133). During the accident investigation, Wirth was advised that the readings at MPL 3 were probably not accurate. (Tr. 133). Wirth believes that it is impossible for a mine operator to perform an adequate evaluation of the bleeder system if it obtains inconsistent readings. Although these weekly examinations were countersigned by mine management, it is apparent that nobody was reviewing the data to evaluate the bleeder system. These inconsistencies, as well as the inconsistent methane readings at MPLs 7 and 8, were never discovered by mine management. One can only conclude that Hales and Pesarsick were blindly signing the weekly examination book without looking at the results.

For the reasons discussed above, I find that the Secretary established a violation of the safety standard in all three instances. Accurate measurements of air methane concentrations and air quantities were not made and recorded as alleged in the citation.

Plateau alternatively argues that this violation is not S&S. It argues that the Secretary did not prove that its failure to perform the weekly examinations was reasonably likely to result in an injury. Plateau states that it relied on its AMS to evaluate the effectiveness of the bleeder system. The AMS provided data at virtually the same locations on a far more frequent basis. (Tr. 156, 160, Ex. J-1, Ex. G-31 pp. 20-21). The AMS provided real-time information that was available at the communications center in the mine office and was also available by phone. (Tr. 750-52). This system was much more extensive than is typical at underground mines and management regularly monitored the results obtained. (Tr. 242, 752, 776, 1050, 1096). In addition, a foreman inspected the bleeders everyday and reported the results to Mine Manager Hales. (Tr. 746-47).

I agree that the Secretary did not establish the S&S nature of the violation. Given the extensive computer-based atmospheric monitoring system that was in place in the mine, the results of the weekly examinations were not particularly critical. It was not reasonably likely that the hazard contributed to by the violation would have resulted in an injury. Plateau's failure to make adjustments to its flow-through bleeder ventilation system in the face of increasing liberation of methane was not related to its failure to accurately take and record the results of its weekly examinations. The information that should have alerted Plateau that it needed to make

changes in its ventilation system was the data available through the AMS. I conclude that the violation was not S&S.¹²

III. APPROPRIATE CIVIL PENALTIES

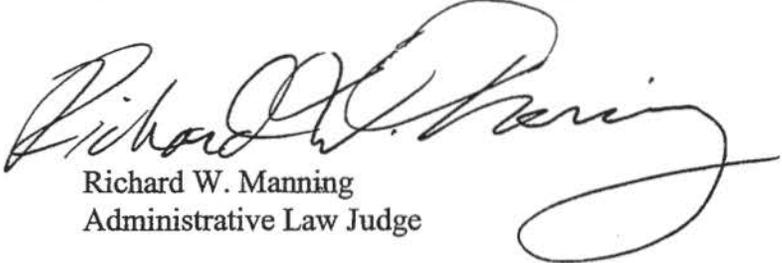
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The record shows that Plateau had a history of 256 MSHA enforcement actions at Willow Creek during the prior year. (Ex. G-31 p. 6). Plateau is a large coal mine operator; the mine produced 1.3 million tons of bituminous coal between January 1, 2000, and July 31, 2000. RAG American Coal produced 61.6 million tons of coal in the year 2000. All of the violations were abated in good faith. Plateau's negligence and the gravity of the violations are discussed above. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7143395	75.334(b)(1)	\$25,000.00
7143396	75.370(a)(1)	1,000.00
7143400	75.364(a)(2)	200.00
	TOTAL PENALTY	\$26,200.00

For the reasons set forth above, the three citations at issue in these cases are **AFFIRMED**, as set forth above. The significant and substantial designations in Citation Nos. 7143396 and 7143400 are **VACATED**. Plateau Mining Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of \$26,200.00 within 40 days of the date of this decision.


Richard W. Manning
Administrative Law Judge

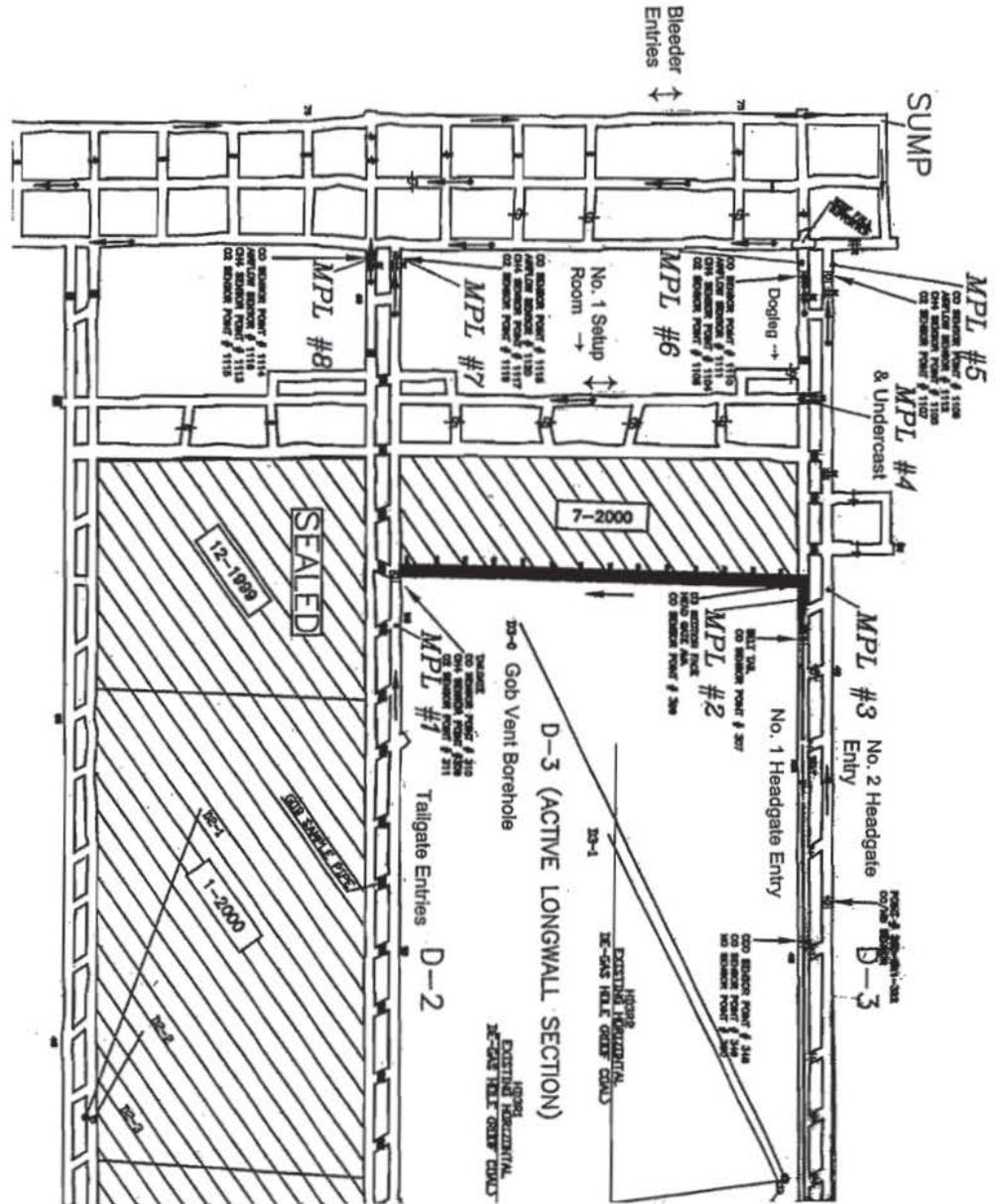
¹² Plateau filed a proposed list of corrections to the hearing transcript. I have reviewed these corrections and grant its request to amend the transcript.

Distribution:

Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

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

RWM



Portion of Appendix I, Exhibit G-31
Map of D-3 Panel, July 31, 2000
Willow Creek Mine, Plateau Mining Corp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

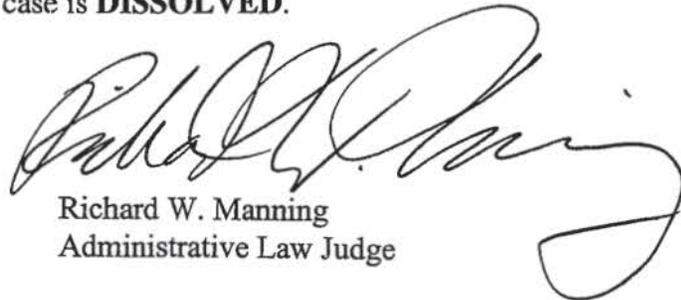
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

December 22, 2003

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of JOSEPH M. ONDREAKO,	:	Docket No. WEST 2003-403-DM
Applicant	:	MSHA No. RM MD 03-11
	:	
v.	:	Bingham Canyon Mine
	:	
KENNECOTT UTAH COPPER CORP.,	:	Mine I.D. 42-00149
Respondent	:	

ORDER DISSOLVING ORDER OF TEMPORARY REINSTATEMENT

On October 9, 2003, I ordered Kennecott Utah Copper Corporation to temporarily reinstate Joseph M. Ondreako pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) and 29 C.F.R. § 2700.45(e). 25 FMSHRC 612 (Oct. 2003), *aff'd* 25 FMSHRC 585 (Oct. 2003). Counsel for the Secretary of Labor notified me that the Secretary "has determined that the facts disclosed during the investigation do not constitute a violation of section 105(c)." (December 17, 2003, letter of Carolyn T. James, Technical Compliance and Investigation Office, Mine Safety and Health Administration). As a consequence, counsel for the Secretary states that the Secretary will not file a complaint of discrimination on behalf of Mr. Ondreako. Therefore, pursuant to 29 C.F.R. § 2700.45(g), the order of temporary reinstatement in this case is **DISSOLVED**.



Richard W. Manning
Administrative Law Judge

Distribution:

John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Fax 303-844-1753 and First Class Mail)

James M. Elegante, Esq., Kennecott Utah Copper Corp., P.O. Box 6001, Magna, UT 84044-6001 (Fax 801-569-6807 and First Class Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

December 23, 2003

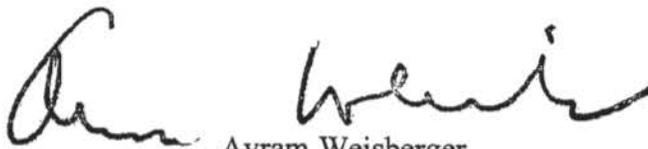
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-133
Petitioner	:	A.C. No. 15-18030-03507
v.	:	
	:	Docket No. KENT 2000-277
	:	A.C. No. 15-18030-03508 A
COUGAR COAL COMPANY, INC.,	:	
Respondent.	:	Mine: No. 8

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

These cases are before me based on a decision by the Commission, 25 FMSHRC 513 (Sept. 2003), which, inter alia, reversed my initial decision, 24 FMSHRC 176 (Feb. 2002), that Respondent did not violate 30 C.F.R. §§ 50.10 and 50.12, and remanded these proceedings for assessment of penalties for violating these standards. Subsequent to protracted negotiations, the parties entered into a settlement agreement. I have read the agreement, and find that, based on the record of these proceedings, its terms are consistent with the Federal Mine Safety and Health Act of 1977.

It is **ORDERED** that the parties abide by all terms of their agreement. It is **further ORDERED** that, within 30 days of this Decision, Respondent pay a total civil penalty of **\$5,000.00** for violating Sections 50.10 and 50.12, supra.



Avram Weisberger
Administrative Law Judge

Distribution List:

Philip J. Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Michael J. Schmitt, Esq., Porter, Schmitt, Jones & Banks, P.O. Drawer 1767, Paintsville, KY 41240-1767

/sc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

December 23, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-100-R
	:	Citation No. 7679500; 03/19/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

SUMMARY DECISION

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Drummond Company, Inc. (Drummond) challenging the validity of the issuance of Citation No. 7979500 which alleges a violation of 30 C.F.R. Section 75.321(a)(1). Subsequent to the filing of an Answer by the Secretary of Labor, Drummond filed a motion for summary decision. On September 23, 2003, the Secretary filed a statement in opposition to Drummond's motion and a cross motion for summary decision. On September 30, 2003, Drummond filed a reply brief in opposition to the Secretary's cross motion for summary decision. On October 20, 2003, pursuant to a telephone conference call with the undersigned, the parties filed statements setting forth their position regarding the precedential status of decisions of the Interior Board of Mine Operations and Appeals (IBMA). In addition, on October 20, 2003, the Secretary filed a further statement clarifying its legal position on the factual basis of the violation at issue. On October 27, 2003, Drummond filed its response to this statement. On October 27, 2003, the Secretary filed a reply to Drummond's opposition to the Secretary's cross motion for summary decision.

Material Facts Not in Dispute

On March 19, 2003, at 9:00 a.m., a roof support crew, consisting of three contract employees and four hourly Drummond miners, arrived at the No. 32 crosscut in the headgate of the G-2 longwall section. While moving roof support materials in the No. 1 face area, one of the contract employees of the roof support crew told his fellow crew members that he felt light-headed.

In response to the crew's concerns about a possible methane problem, Wayne Cox, a certified pumper, performed a methane check in the area where the roof support crew was working. Cox detected 2.0% to 2.8% methane in the face of the No. 2 entry. Minutes later he detected more than 5.0% methane in the No. 1 entry. Steve Duncan, an hourly employee, also took a methane reading and he detected 6.4% methane approximately 12 inches from the roof in the No. 1 entry in by the last open crosscut. Cox instructed the crew to leave the entry area, which they did.

Immediately upon discovery of the high methane readings, Marty Benson and David Whitworth, both hourly miners, dropped a curtain that had been rolled and chained up across part of Entry No.1 where it joined the last open crosscut.¹ They lowered the curtain most of the way down, waited a few minutes and then took a methane reading. Benson and Whitworth then dropped the curtain all the way to the bottom, and took additional readings. At 12:10 p.m., the methane levels were down to a safe level.

In the meantime, upon learning of the high methane readings, Jerry Brown, a company safety inspector, informed Dickie Estep, the safety director, and Jay Vilseck, the mine manager, of the presence of methane. They then instructed the communications clerk to call Norwood Brown, the longwall coordinator, to shut down production on the G-2 longwall, and go to the bleeder area to address the problem.

At 1:30 P.M., Norwood Brown arrived at the G-2 bleeder area and checked for methane in the faces of all three entries. The highest level of methane he detected in Entry Nos. 1, 2, and 3 was 1.4%. Brown then checked ventilation controls in the area that could improve ventilation in the face areas. At the number 40 crosscut, he found a drop-curtain that was a third of the way down, and tacked it back up. He also instructed the crew to remove a curtain from the Entry No. 3 between crosscuts 39 and 40, and to hang it at Entry No. 2, between crosscuts 40 and 41.

On March 19, 2003, MSHA Inspector John Terpo, who was above ground at the subject mine, learned of the existence of high methane, and in addition to issuing an imminent danger order² also issued Citation No. 7679500 alleging an unwarrantable failure violation of 30 C.F.R. § 75.333(h), because he thought required stoppings were missing or damaged. Terpo modified this Citation on May 28, 2003, to instead allege a violation of 30 C.F.R. § 75.321(a)(1).³

¹The roof support crew stated that this wing curtain had been rolled up the entire time they had been working in the area - approximately 10 days.

²Drummond filed a notice of contest challenging the validity of this order. Subsequent to an evidentiary hearing, a decision was issued sustaining the notice of contest and dismissing the imminent danger order. Drummond v. Secretary, 25 FMSHRC 621(October 14, 2003).

³30 C.F.R. § 321(a)(1) provides, as pertinent, as follows: "... the air in areas where persons work or travel, except as specified in paragraph (a)(2) of this section ... shall be sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes"

The Parties' Positions

In essence, the Secretary seeks summary decision based upon the undisputed fact that 6.4 % methane was measured in Entry No. 1 of the G-2 longwall panel. The Secretary argues that based on this undisputed fact "it can reasonably be inferred that the ventilation to the face of Entry No. 1 was not 'sufficient to dilute, render harmless, and carry away, ... explosive, ... gases, ...' ". Drummond, in contrast, in its motion for summary decision and in its opposition to the Secretary's cross motion for summary decision, argues, in essence, relying on Mid-Continent Coal and Coke Company, (Mid-Continent II), 8 IBMA, 204, 212 (1997), that methane levels in excess of 5% do not constitute a per se violation of Section 75.321(a)(1), supra.

For the reasons set forth below, I am constrained to find, based on legal precedent established by the Commission's predecessor, the Interior Board of Mine Operations Appeals (IBMA), that the uncontested facts herein do not establish a violation of Section 75.321(a)(1), supra. (Section 303(b) of the Federal Mine Safety and Health Act of 1977 (the Mine Act)). Accordingly, Drummond's Motion for Summary Decision is granted, and the Secretary's Cross-Motion for Summary Decision is denied.

Discussion

In Mid-Continent II, supra, relied on by Drummond, the operator was served with a notice of violation alleging that methane in excess of 5% had been detected and that 30 C.F.R. § 75.301, had been violated.⁴ In an initial decision, the Administrative Law Judge vacated the Notice of Violation. On appeal to the IBMA, the Secretary argued, in essence, that in order to sustain a violation of former Section 75.301, supra, it is only necessary to show a harmful accumulation of noxious or poisonous gases and that the notice of violation was issued "... solely because of a 5% methane at the face." IBMA, supra, at 213. In affirming the decision of the Judge, and in considering the position of the operator that "methane accumulation is not per se a violation of the act" 8 IBMA, supra, at 211, the Board found as follows: "... we find that the instant case is controlled by the Board's earlier decision in Mid-Continent Coal and Coke Company, 1 IBMA 250, 79 I.D. 736 (1972) (Mid-Continent I), in which we stated: 'Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation.'" 8 IBMA, supra, at 211.

I take cognizance of the Secretary's argument that Mid-Continent II, supra, does not have precedential value due to its flawed reasoning and misplaced reliance on an earlier Board decision, Mid-Continent I, supra, involved three notices issued under Section 303(h)(2) of the Federal Coal Mine Health and Safety Act of 1969 (the Coal Act). As correctly pointed out by the Secretary, Section 303(h)(2) of the Coal Act, which is identical to Section 303(h)(2) of the Mine Act, requires certain actions to be taken by an operator once it is found that methane exists at

⁴The wording of Section 75.301, supra, is now set forth in Section 75.321(a)(1), supra, at issue in the case at bar.

more than 1%, and other actions to be taken once it is found that the air contains more than 1.5% of methane. In contrast, Section 303(b)⁵ of the 1969 Coal Act, at issue in Mid-Continent II, supra, does not contain any provision setting forth actions to be taken by the operator once excessive levels of methane have been found. Section 303(b), supra, only requires a sufficient volume and velocity of air to “... dilute, render harmless, and to carry away ... harmful gases, ... and explosive fumes.” Thus, the Secretary argues, with persuasion, that under Section 303(b), supra, it appears that it would not have been necessary for the Secretary to establish the operator’s failure to act upon becoming aware of the presence of excessive methane to support a violation under Section 303(b), supra. However, Mid-Continent II, supra, held, referring, with approval to Mid-Continent I, supra, that it is the operator’s failure to act that constitutes the violation and not the excess, as such. 8 IBMA, supra, at 212. Thus, I recognize merit in the Secretary’s position that because Mid-Continent II’s, supra, reliance on Mid-Continent I, supra, appears to be misplaced, its decision is flawed, and should not have any precedential value regarding the case at bar, where Section 303(b), supra, not 303(h)(2), supra, is at issue. Additionally, the Secretary’s arguments appear to be supported by the clear language of Section 321(a)(1), supra, which does not require any specific action to be taken by the operator once excessive methane has been found. Section 321(a)(1), supra, states only that the lack of sufficient volume and velocity of air to ventilate harmful gases constitutes a violation. However, the decision of the Board in Mid-Continent II, supra, i.e., that the presence of explosive methane alone does not establish a violation of Section 303(b) of the Mine Act, whose language has been repeated in Section 75.321(a)(1), supra, remains in effect as precedent unless it has been superceded or overruled by the Commission. (Section 301(c)(2) of the Mine Act). Although the flaws in the decision as argued by the Secretary might dilute its value as a precedent, it would not be proper for a Commission Judge to usurp the function of the Commission, and rule on the precedential value of a decision of the Commission’s predecessor. To do so would violate the principle of *stare decisis*. Hence, I am constrained to follow the ruling in Mid-Continent II, supra, unless it has been superceded or overruled by the Commission. I take cognizance of the fact that, to date, the Commission has not expressly overruled Mid-Continent II, supra.

The Secretary cites Monterey Coal Co., 7 FMSHRC 996 (July 1985), and Consolidation Coal, 22 FMSHRC 340 (March 2000), both issued subsequent to the Board’s decision in Mid-Continent II, supra, as demonstrations that Mid-Continent II, supra, no longer has precedential value for the interpretation of Section 75.321(a)(1), supra. In Monterey Coal Co., supra, the issue was an alleged violation of 30 C.F.R. § 75.316. In discussing hazards contributed to by the violation of Section 75.316, supra, the Commission quoted from Section 303(b) of the Act, the statutory parallel to Section 75.321(a)(1), supra, and concluded that a basic reason for this mandatory requirement “... is the grave danger that, if there is not adequate ventilation, ignitions or explosions can result from concentrations of explosive gases like methane, ... liberated during

⁵Section 303(b) of the Coal Act, contains the same language as 30 C.F.R. § 75.301, which was the regulatory standard at issue in Mid-Continent II, supra and contains the same language as Section 303(b) of the Mine Act, which is repeated in Section 75.321(a)(1), supra, formerly numbered Section 75.301, supra.

mining operations.” 7 FMSHRC 1000-101. However, although these comments might indicate the Commission’s approach in 1985, to Section 75.321(a)(1), supra, they are clearly dicta. Since the Commission did not expressly overrule Mid-Continent II, supra, it still must be followed in the case at bar as precedent. Similarly, in Consolidation Coal, supra, a case involving 30 C.F.R. § 75.301, which contains the same language as Section 75.321(a)(1), supra, the Commission found that the operator had violated Section 75.301 based on “... largely undisputed evidence” of insufficient ventilation to render methane harmless. (22 FMSHRC, supra, at 350). Specifically, the Commission noted the conclusion of the Secretary’s expert and the Operator’s expert that air flow in the area in question had been reduced, and that it was insufficient to render methane harmless. Since the Commission, in Consolidation Coal, supra, did not deal with the issue of whether an accumulation of explosive methane is per se a violation of Section 75.321(a)(1), supra, which was the issue in Mid-Continent II, supra, and did not mention Mid-Continent II, supra, it certainly does not supercede precedent established by Mid-Continent II, supra.

The Secretary, lastly⁶, predicates Drummond’s liability under Section 75.321(a)(1), supra, upon Drummond being at fault when it failed to ventilate the entries in question causing the accumulation of methane. The Secretary here cites undisputed facts that in the entries in question curtains had been rolled up for at least 10 days causing 6.4% methane in the explosive range to accumulate in the face of Entry No. 1. However, regarding the operator’s “failure to act” as a predicate for establishing a violation under Section 75.321(a)(1), supra, the Board in Mid-Continent II, supra, held as follows: “It is the failure to act upon becoming aware of the presence of an excessive methane accumulation that constitutes the violation, and not the excess, as such.” 8 IBMA, supra, at 212. (Emphasis added). Hence, liability is based upon the presence of excessive methane, and the operator’s failure to act “upon becoming aware” of the methane. In this connection, Drummond’s actions prior to its becoming aware of the presence of methane appear to be not relevant. In contrast, the undisputed facts indicate that upon becoming aware of the presence of methane in an explosive range, Drummond made various ventilation changes including the dropping of the curtain and the hanging of two additional curtains. Methane readings taken after these actions indicated the presence of methane in amounts below the explosive range.⁷ It thus appears that a predicate for establishing a violation under Section 75.321(a)(1), supra, is missing.

Therefore, for all the above reasons, Drummond’s Motion for Summary Decision is granted and the Secretary’s Cross Motion for Summary Decision is denied.

⁶The Secretary also argues that its interpretation of 30 C.F.R. § 75.321(a)(1) is entitled to deference. As a Commission Judge, as set forth above, I must find that any deference to be accorded the Secretary’s interpretation of her regulation, and the statutory provision, is outweighed by the essential principle of stare decisis and my obligation to follow Commission precedent, i.e., Mid-Continent, supra.

⁷For a timeline of the finding of excessive methane and the specific actions taken by Drummond see Drummond v. Secretary, 25 FMSHRC 621 (October 14, 2003), and Drummond v. Secretary, 25 FMSHRC _ November 18, 2003, which both deal with the alleged violative conditions in the same area, time, and date as the case at bar.

Order

It is **Ordered** that the Notice of Contest herein be **Sustained** and Citation No. 7679500 be **Dismissed**.



Avram Weisberger
Administrative Law Judge

Distribution: Certified Mail

Timothy M. Biddle, Esq., Bridget E. Littlefield, Esq., Crowell & Moring, LLP, 1001
Pennsylvania Ave., N.W., Washington, DC 20004

Thomas A Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones
Rd., Suite B-201, Nashville, TN 37215

/sc

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 1, 2003

SHERWIN ALUMINA COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. CENT 2002-313-RM
	:	Citation No. 6223229; 8/16/2002
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2003-24-RM
ADMINISTRATION, (MSHA),	:	Citation No. 6223250; 9/13/2002
Respondent	:	
	:	Docket No. CENT 2003-25-RM
	:	Citation No. 6223251; 9/13/2002
	:	
	:	Sherwin Alumina Plant
	:	Mine ID 41-00906
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-226-M
Petitioner	:	A. C. No. 41-00906-05653
	:	
v.	:	Docket No. CENT 2003-325-M
	:	A. C. No. 41-00906-04829
SHERWIN ALUMINA COMPANY,	:	
Respondent	:	Sherwin Alumina Company

AMENDED STAY ORDER

Counsel for the parties request that, due to the need for additional preparation, trial of these cases be scheduled for the week of May 17, 2004. This request for such an extraordinary delay is contrary to the Commission's Strategic Plan adopted pursuant to the Government Performance and Requests Act of 1993, and therefore cannot be accommodated. Some of these cases have already been docketed for more than one year. Accordingly the parties are directed to hold the dates February 17, 2004 to February 19, 2004, open for trial of these cases. The Stay Order issued November 19, 2003, will remain in effect.


Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Facsimile and Certified Mail)

Matthew P. Sallusti, Esq., Office of the Solicitor, U.S. Dept. of Labor, 525 Griffin Street, Ste. 501, Dallas, TX 75202

Michael D. Hudlow, Jr., Esq., Chaves, Gonzales & Hoblit, LLP, 802 North Carancahua, Suite 2000, Corpus Christi, TX 78470

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 12, 2003

LARRY E. MULLINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. VA 2003-129-D
	:	NORT CD 2002-06
	:	
JEWELL SMOKELESS COAL CORP.,	:	
	:	Heavy Equipment Shop
Respondent	:	Mine ID 44-07058

**ORDER RESCINDING ORDER GRANTING MOTION TO DISMISS /
NOTICE OF RESCHEDULED HEARING**

At hearings on December 10, 2003, an order was issued granting the Respondent's Motion to Dismiss. That motion was based upon the argument that the Complainant failed to file his complaint of discrimination with the Secretary in compliance with Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. The bench decision granting the motion was based upon a finding of a lack of justifiable circumstances for the late filing. See *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 1 (January 1984). Upon further analysis of the relevant caselaw I conclude that even where justifiable circumstances are not found that is not necessarily the end of the analysis. The Commission stated in this regard in *Herman v. Imco Services*, 4 FMSHRC 2135 (December 1982) as follows:

The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:

. . . preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Burnett v. N.Y. Central R.R. Co., 380 U.S. 424, 428 (1965), quoting *R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

The Commission concluded therein that "[t]o be balanced against this policy of repose, however, are considerations of whether 'the interests of justice require vindication of the Plaintiff's rights' in a particular case. *Burnett*, supra, 380 U.S. at 428."

In the case at bar, the delay beyond the 60-day time limit was not significant (44 days) and the Respondent failed to produce any evidence of prejudice from the delay. More recent Commission decisions, *e.g.*, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (December 1999) also seem to suggest that the failure to meet the time limits in Section 105(c)(2) should not, in any event, result in dismissal absent a showing of "material legal prejudice."

Under the circumstances the December 10, 2003, Order Granting Respondent's Motion to Dismiss is hereby rescinded and this case is rescheduled for hearings on the merits at **9:00 a.m., on Tuesday, January 27, 2004, in Abingdon, Virginia.** The assigned courtroom will be designated at a later date.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (By Facsimile and Certified Mail)

Larry Mullins, P.O. Box 325, Richlands, VA 24641

S. T. Mullins, Esq., Street Law Firm, LLP, 339 West Main Street, P.O. Box 2100, Grundy, VA 24614

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 17, 2003

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of BOBBY D. SMITH,	:	Docket No. CENT 2003-247-D :
Complainant	:	
	:	Sebastian County Coal Mine
	:	
v.	:	Mine I.D. 03-01736
	:	
	:	
MID-AMERICA MINING AND	:	
DEVELOPMENT, INC., and its Successors,	:	DISCRIMINATION PROCEEDING
Respondent	:	
	:	Docket No. CENT 2003-308-D
	:	
	:	Sebastian County Coal Mine
	:	
	:	Mine I.D. 03-01736

ORDER REOPENING TEMPORARY REINSTATEMENT PROCEEDING

The Secretary of Labor filed an application for temporary reinstatement on behalf of Bobby D. Smith against Mid-America Mining and Development, Inc., and its successors, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Act"). The parties filed an Agreed Order of Temporary Reinstatement that disposed of all issues in the temporary reinstatement case. On July 1, 2003, I issued a decision approving the parties' proposed settlement, which included the economic reinstatement of Mr. Smith.

On August 18, 2003, the Secretary filed her complaint of discrimination on behalf of Smith against Respondent under section 105(c)(2) of the Act. This discrimination case has been set for hearing and the parties are conducting discovery.

On October 27, 2003, Respondent filed a "Motion to Amend Order Concerning Temporary Reinstatement Benefits and Motion to Expedite Proceedings on the Motion." In the motion, Respondent states that it closed its mine, laid off most of its personnel including Smith's supervisor, and retained only five hourly employees to answer the phones, provide security, and operate underground pumps. Respondent states that, had Smith been working at the mine, he would have been laid off. As a consequence, Respondent seeks to have my order of temporary reinstatement amended and asks that Smith's economic reinstatement be terminated.

Complainant opposes Respondent's motion because I do not have jurisdiction to dissolve the order of temporary reinstatement, Respondent should be required to abide by its settlement of the temporary reinstatement case, and Smith would have continued his employment with Respondent following the September layoff if he had not filed the discrimination complaint.

Respondent operates an underground coal mine in Sebastian County, Arkansas. Smith was employed by Respondent as the general mine manager until he was separated from his employment in May 2003. Complainant alleges that he was terminated for engaging in protected activities. Respondent denies this allegation. Before the September 2003 layoff, the mine employed about 11 people. Respondent alleges that only five people are working at the mine at the present time, all of whom are hourly employees who are paid at a rate of \$19 an hour. Prior to his termination, Smith was earning about \$110,000 a year.

Respondent maintains that the mine was shut down in September for safety and financial reasons. An independent safety consultant made several recommendations that the mine owner adopted. First, because it is likely that old coal mine workings will be encountered as the mine is developed, a program of drilling must be initiated to locate the old workings. Second, the mine's electrical system needs to be reworked. As a consequence, Respondent anticipates that the mine will be closed at least through the spring of 2004 if not for a longer period of time. Respondent discussed this closure with the MSHA District 9 Manager.

Respondent contends that the mine was closed for legitimate reasons that have nothing to do with Smith's discrimination complaint and that Smith would have been laid off along with all other management personnel. As a consequence, it believes that it should not have to continue Smith's economic reinstatement. Under the circumstances, Smith should not be in a better position than he would have been had he not filed his discrimination complaint. In addition, Respondent contends that Smith would have been laid off if Respondent had agreed to actually reinstate him in response to his application for temporary reinstatement.

I hold that I have jurisdiction to amend my July 1, 2003, order of temporary reinstatement. In *Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (April 2001), the Commission held that the administrative law judge retains jurisdiction over a temporary reinstatement proceeding during the investigation of the miner's complaint. In addition, the Commission stated that the judge does not surrender "any such jurisdiction after the Secretary files a complaint with the Commission on behalf of a miner." *Id.* at 389. The Commission concluded that after "a discrimination complaint is filed with the Commission, it is solely within the judge's discretion to entertain any motions made to amend, modify, enforce, or otherwise address his underlying order of temporary reinstatement." *Id.* Consequently, I reject the Complainant's argument that I lack jurisdiction to consider Respondent's motion.

In addition, I hold that it is appropriate to amend an order of temporary reinstatement under the appropriate circumstances. Respondent alleges that it agreed to settle the temporary reinstatement case because of the liberal standard applied in such cases. Under the settlement,

Respondent agreed to pay Smith \$8,461 per month, to pay his health insurance premiums, and to make the monthly payment on his wife's vehicle. Respondent states that circumstances have changed so dramatically that reopening the temporary reinstatement case is warranted. I find that it is appropriate to reopen my order of temporary reinstatement in this case to consider the issues raised by Respondent. For that reason, I reopen the case solely to consider whether Respondent's agreement to pay Smith the amounts listed above should be amended or eliminated in light of changed circumstances. I am not reopening the case to reconsider whether Smith's complaint of discrimination was frivolously brought.

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("Legis. Hist.").

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

In *Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 612, 620 (Oct. 2003), *aff'd* 25 FMSHRC 585 (Oct. 2003), Kennecott argued that, because Mr. Ondreako was let go as a result of a layoff, there was no position available for him at the mine and, if required to reinstate him, the company would be forced to lay off someone else. I held that this argument could be made any time an application for temporary reinstatement is granted following a layoff and I ordered the temporary reinstatement of Ondreako. I held that when a miner's complaint is determined to be non-frivolous, the employer must reinstate the miner regardless of whether it is economically beneficial for the employer to do so. *Id.* In enacting the temporary reinstatement provision, Congress determined that the employer must run the risk of paying a discharged miner whose claim may ultimately fail, rather than requiring a miner, who may prevail, to go through the discrimination proceeding without income. *See also Sec'y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2290, 2302 n.12 (Nov. 1993) (ALJ).

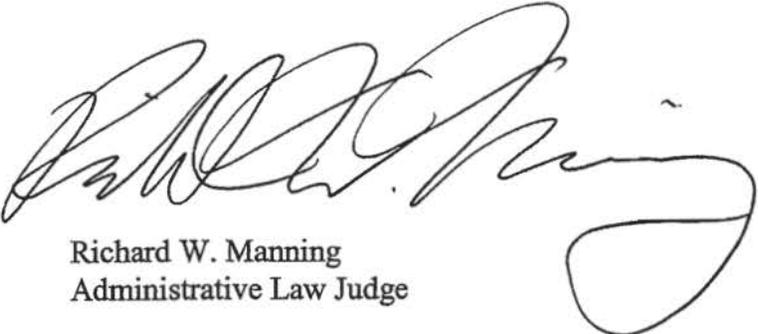
In *Sec'y of Labor on behalf of Haynes v. Decondor Coal Company, Inc.*, 10 FMSHRC 1810, 1814 (Dec. 1988), Administrative Law Judge Weisberger ordered the temporary reinstatement of Mr. Haynes but the judge did not reinstate him to his former position because his job had been eliminated due to a layoff "necessitated by business reasons." *Id.* The judge

reasoned that to do so “would be a windfall to Haynes and would clearly go beyond Congressional intent.” *Id.* Instead, the judge ordered the respondent to immediately reinstate Haynes once any position became available that he was qualified for by reason of his training or work experience. *Id.*

Respondent’s motion to amend my order of temporary reinstatement and the Complainant’s response raise many factual issues that may be impossible to resolve without a hearing, unless the parties can stipulate to key facts. The mine in the *Ondreako* case was large and other employees operated heavy equipment along with Ondreako. Mr. Ondreako alleged that he was included in the layoff because of his protected activities. In the present case, Smith was the only general mine manager and the layoff was a separate event. It is not clear whether Respondent, at the time of the September 2003 layoff, would have (1) retained Smith as the general mine manager; (2) offered Smith a lower paying position; (3) transferred Smith to another facility; or (4) laid Smith off along with his supervisor. It may be impossible to know the answer to these questions.

One way to look at the issue raised by Respondent’s motion is to consider what remedy would be appropriate had Respondent laid off all but five of its employees after Smith’s separation before the application for temporary reinstatement had been filed. Respondent would likely argue that, under these circumstances, Smith should not be reinstated as the general mine manager. Complainant would likely argue that any adverse action taken against Smith during the layoff would have been an additional indication of discriminatory animus. The parties should understand that by reopening the temporary reinstatement case to consider Respondent’s motion, I have not determined that the economic reinstatement that I granted Smith in my order of July 1, 2003, should be modified or revoked. I am reopening the case solely to consider this issue. The burden of persuasion lies with Respondent because it is seeking to modify or set aside the agreed upon settlement. Respondent will need to balance the cost of trying to meet this burden of persuasion at a hearing versus the cost of continuing Smith’s economic reinstatement.

For the reasons discussed above, the temporary reinstatement proceeding is **REOPENED** to consider Respondent’s motion and Complainant’s response. The parties shall schedule a conference call with me to discuss the issues raised by the motion and response and to discuss other issues that may have emerged since the motion and response were filed. The parties should be prepared to discuss potential hearing dates in the event I determine that a hearing is necessary.



Richard W. Manning
Administrative Law Judge

Distribution:

Robert C. Beal, Esq., Office of the Solicitor, U.S. Department of Labor, 525 S. Griffin St., Suite 501, Dallas, TX 75202-5036 (Fax and First Class Mail)

Mindy G. Barfield, Esq., Dinsmore & Shohl, 250 W. Main Street, Suite 1400, Lexington, KY 40507-1726 (Fax and First Class Mail)

Charles W. Newcom, Esq., Sherman & Howard L.L.C., 633 Seventeenth Street, Suite 3000, Denver, CO 80202-3622 (Fax and First Class Mail)

RWM

Federal Mine Safety & Health Review Commission Calendar Year 2003 Index

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