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

Martinka Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 93-45-R.
(Judge Weisberger, January 19, 1993).

Secretary of Labor, MSHA v. C.W. Mining Company, Docket No. WEST 92-210. (Judge Cetti, January 28, 1993)

Secretary of Labor, MSHA v. Mid-Continent Resources, Inc., Docket Nos. WEST 91-168, etc. (Judge Morris, January 27, 1993)

Secretary of Labor on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc., Docket No. KENT 92-259-D. (Judge Koutras, February 12, 1993)

Sherrell Steven Reid v. Kiah Creek Mining Company, Docket No. KENT 92-237-D.
(Judge Weisberger, March 10, 1993)

There were no cases filed in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 1993

ISLAND CREEK COAL COMPANY	:	
	:	
v.	:	Docket Nos. VA 91-47-R
	:	VA 91-48-R
SECRETARY OF LABOR, MINE SAFETY	:	VA 91-49-R
AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issues are whether the presence of an explosive accumulation of methane behind stoppings along the bleeder entries of a gob¹ in a longwall section presented an imminent danger and whether Island Creek Coal Company ("Island Creek") was complying with its VP-3 Mine ventilation plan in accordance with 30 C.F.R. § 75.316.² This case arose when inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two imminent danger orders and a citation to Island Creek after they measured the methane content of the air leaking from seals of three stoppings that separated the gob from the

¹ "Gob," in the context of this case, refers to the "space left by the extraction of a coal seam..." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms, at 497 (1968)(DMMRT). "Bleeder entries" are "panel entries driven on a perimeter of block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." DMMRT at 112.

² Section 75.316 provides in pertinent part:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

bleeder entries and determined that an area within the gob contained an explosive accumulation of methane. Commission Administrative Law Judge George A. Koutras vacated both orders and the citation. Island Creek Coal Co., 13 FMSHRC 592 (April 1991)(ALJ). For the reasons set forth below, we affirm the judge.

I.

Factual and Procedural Background

The gob, known as the South Gob, is an inaccessible 1.75 square mile area resulting from the mining of ten longwall panels. Each panel is about 5,600 feet long and, taken together, the 10 panels are about 8,000 feet wide. The gob is ventilated by air entering at the tailgate end of the longwall face, flowing through the gob, and exiting at three designated areas into bleeder and return entries. Air also exits through bore holes drilled from the surface and equipped with exhaust fans. This ventilation system is designed to dilute and render harmless any methane emitted in the gob. The VP-3 mine is a gassy mine that liberates more than one million cubic feet of methane per day.

As mining has progressed, development entries have been established using a continuous mining machine in advance of each longwall panel. Each development entry consists of four individual entries, and serves as the headgate entry when the longwall equipment is moved into the panel and as the tailgate entry when the longwall is moved past the entry into the next panel. The development entries are consecutively numbered and, at the time the citation and orders were issued, the No. 12 development entry was the headgate and the No. 11 entry was at the tailgate. At the time they were built, each entry was connected to the bleeder entries at the back and was connected to the south main returns at the mouth. Island Creek had installed stoppings at the mouth of all of the development entries leading to the south returns except at the No. 1 entry and at the current headgate and tailgate entries (Nos. 12 and 11, respectively). MSHA has not challenged the placement of these stoppings. Island Creek also installed stoppings between the gob and the bleeder entries on the Nos. 5 through 10 development entries.

On December 5, 1990, MSHA Inspector Arnold D. Carico conducted a ventilation inspection of the area around the South Gob. He did not detect any violations of safety and health standards in the headgate and tailgate entries of the longwall panel or in the bleeder entries for the gob. As he was inspecting the bleeder entries, he observed that stoppings were present in all four entries of the No. 10 development at the point where they connected with the bleeder entries. He tested for methane behind one of these stoppings by using his hand to locate air leaking through cracks in the stopping. He placed the tube of a hand-held methane detector into the cracks and took several readings of air escaping from the interior of the gob. He recorded the highest reading obtained, which was 6.2% methane. Inspector Carico then proceeded to the area where the four No. 9 development entries intersected with the bleeder entries. He performed the same type of test with his methane detector and found 8.3% methane in the air leaking from a crack in a stopping. Inspector Carico then traveled to the intersection of the four No. 8

development entries and the bleeder entries and measured 7.6% methane from a stopping crack.

After taking the reading at the stopping in the No. 8 development entries, Carico inferred that tens of thousands of cubic feet of methane were present in the gob and that the gob was not being ventilated properly because these stoppings blocked the air flow into the bleeder entries. Carico believed that a roof fall could ignite the methane³ and, thus, that an imminent danger existed. Accordingly, he issued an order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a) ordering the withdrawal of all miners from the VP-3 Mine.⁴ Inspector Carico also issued a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), because he believed that the stoppings in the Nos. 8, 9, and 10 development entries violated the mine's ventilation plan adopted and approved pursuant to 30 C.F.R. § 75.316.⁵ The inspector believed

³ Methane presents an explosion hazard when found in concentrations between 5% and 15%. Tr. Vol. I, 21; See also Wyoming Fuel Co., 13 FMSHRC 1210, 1213 n.3 (August 1991).

⁴ Section 107(a) of the Mine Act provides, in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(a)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The imminent danger order provided:

Methane concentrations were detected coming through permanent stoppings erected across the bleeder entry connectors between the gob and the South main bleeders at the following locations and in the following concentrations (as indicated by a Riken methane indicator): No. 2 Entry of No. 10 Development South [6.2%]; No. 4 Entry of No. 9 Development South 8.3%; No. 4 Entry of No. 8 Development South 7.6%; Citation No. 3354743 is being issued with and as contributing factor to this order.

⁵ The citation provided, in pertinent part:

The Ventilation, Methane, and Dust Control Plan approved for

that these stoppings impeded the movement of methane from the gob into the bleeder entries.

On the following day, December 6, MSHA Inspector Clardy Scammell used the same technique to take methane readings at the same stoppings and detected methane concentrations in the gob of 3.6% or less. He terminated the order of withdrawal because the measured methane levels were below the explosive range.

On December 13, 1990, Inspector Scammell again checked the methane levels of air leaking from the stoppings in the Nos. 8, 9 and 10 development entries using the same technique that had been used on the previous two inspections. He found 6.2% methane at a crack in a No. 10 entry stopping, 6.3% at a crack in a No. 9 entry stopping, and 5.75% at a crack in a No. 8 entry stopping. Based on these readings, he issued an imminent danger order withdrawing all miners from the VP-3 Mine. The order was terminated on December 20, 1990.

Island Creek filed notices of contest of the citation and orders and an expedited hearing was held before Judge Koutras on December 19-20, 1990. The United Mine Workers of America ("UMWA") intervened in the proceeding. In his decision, the judge stated that, based on the record, "one may reasonably conclude that the potential for a methane explosion is dependent on several essential ingredients; namely, fuel, oxygen and a ready ignition source." 13 FMSHRC at 636. The judge questioned whether MSHA had established the existence of a substantial body of explosive methane in the gob. 13 FMSHRC at 632. He noted that the inspectors had concluded that such a substantial quantity was present by testing for methane through small cracks in one of four stoppings at each of three of the eleven development entries adjacent to the bleeders. 13 FMSHRC at 628-29. The judge determined that "the presence of any explosive methane levels in the gob areas behind the stoppings . . . , standing alone, did not present an imminently dangerous condition." 13 FMSHRC at 636. The judge also stated he had "difficulty understanding how one may reasonably conclude that there was a reasonable likelihood of a roof fall in the gob area which would have sparked an ignition." 13 FMSHRC at 635.⁶ The

this mine was not being complied with. Item 10 of the Plan requires that "Bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way as to control air flow through such gob areas, . . ." Permanent stoppings were erected across all connectors between the gob and the South main bleeders at Nos. 8, 9, and 10 Developments, and had been plastered to minimize leakage from the gob to the bleeders. Methane was detected . . . leaking through these stoppings. . . . According to mine management the only locations where air is being intentionally regulated from the gob area are at No. 11 Development (tailgate) connectors and No. 1 Development connectors to the main bleeders and main returns.

⁶ MSHA asserted that, to a lesser degree, other ignition sources, such as an ignition at the working face, welding or cutting at the face or in the bleeders, open flames or bolting in the face or bleeders, or the use of sparking

judge reviewed the Secretary's evidence concerning the history of roof falls at the mine, the presence of sparking minerals (quartzite) in the roof, the history of mine fires, and MSHA reports concerning prior ignitions at the mine. 13 FMSHRC at 630-35. The judge held that, although "the presence of explosive gas levels in a mine, under certain conditions, is dangerous, ... any determination as to whether an imminent danger existed must be made on the basis of the circumstances as they existed at the time the order is issued, or as they might have existed had normal mining operations continued." 13 FMSHRC at 637.

The judge stated that he could not conclude that "Mr. Carico's reliance on the MSHA reports [concerning prior methane ignitions] provides any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of the methane in the gob ... were present when he issued the order, or were likely to be present if normal mining operations were to continue." 13 FMSHRC at 637.⁷ He then stated:

I recognize the fact that any judgment call by an inspector with respect to the existence of an imminent danger situation, when balanced against the safety of miners, must necessarily be made quickly and without delay. However, in any subsequent proceeding challenging the order, any imminently dangerous situation, which the inspector may have believed existed at the time he issued the order, must be proven. On the facts and evidence adduced in this case, I cannot conclude that MSHA has proven or established the existence of any ignition sources to support the inspector's imminent danger finding. I conclude and find that the inspector's speculative anticipation of a possible mine explosion, in the circumstances presented, falls short of the statutory requirement of reasonable expectation.

Id.

The judge noted that there was no evidence that explosive concentrations of methane were entering the bleeders or the working areas of the mine. 13 FMSHRC at 646. He also noted that neither the ventilation plan nor the Secretary's safety standards prohibit the existence of explosive concentrations of methane in the gob. Id. The judge found that Island Creek's evidence, which he found credible and supported in part by Inspector Carico, established that the gob was being adequately ventilated because the

tools in the face or bleeders, could propagate an explosion in the gob. The judge determined that the evidence in the record did not support a conclusion that any of these alleged ignition sources were present or would be present in the normal course of mining. 13 FMSHRC at 636. He also found that the inspectors' testimony concerning these alleged ignition sources was "less than credible and unsupported by any reasonably credible or probative evidence." Id.

⁷ The judge analyzed each withdrawal order separately in his decision, but his conclusions were the same. 13 FMSHRC at 638-39.

"air flow through the cited development areas allowed for the mixing of the methane with the air coursing through those areas and ... the methane which was mixing, or being diluted by the air, was coursing through the gob areas behind the stoppings in question ... into the mine bleeder system and out of the mine." Id. The judge concluded that MSHA failed to establish that Island Creek violated its ventilation plan and he vacated the citation alleging a violation of 30 C.F.R. § 316.

The Secretary filed a Petition for Discretionary Review of that part of the judge's decision vacating the imminent danger orders and the UMWA filed a Petition for Discretionary Review of the judge's vacation of the citation and the withdrawal orders. The Commission granted both petitions.

II.

Disposition of the Issues

Section 303(z)(2) of the Mine Act, 30 U.S.C. § 863(z)(2), requires that all abandoned areas of underground coal mines and areas from which pillars have been extracted must be ventilated by bleeder entries or be sealed off from the rest of the mine. This provision further states that "ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases." This section also provides that "[a]ir coursed through underground areas from which pillars have been ... extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split."

Island Creek contends that it fully complied with the Mine Act and the Secretary's safety standards because, pursuant to its ventilation plan, it provided sufficient ventilation in the gob to carry the methane away from the working areas of the mine through the bleeder entries. It maintains that the presence of methane in the bleeder entries at a level of less than 2% demonstrates that its ventilation controls were working and that no imminently dangerous conditions existed. Island Creek argues that explosive mixtures of methane are to be expected in the gob from time to time because the coal seam liberates large quantities of methane, but that the presence of methane in the gob does not, by itself, violate MSHA's safety standards or create an imminent danger. It maintains that the Secretary failed to prove the presence of an ignition source that could reasonably be expected to ignite the methane.

The Secretary and the UMWA contend that the mine's ventilation system did not induce the drainage of methane from all portions of the gob, in part, because the presence of the stoppings between the bleeder entries and the gob prevented the ventilation system from functioning properly. Both the Secretary and the UMWA argue that the methane accumulation in the gob created an imminent danger. The UMWA argues, in addition, that the presence of the methane demonstrated that Island Creek violated its ventilation plan.

A. Imminent Danger Orders

Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), the Commission noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164 quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (1975).

In Utah Power & Light Co., 13 FMSHRC 1617, 1627 (October 1991), the Commission reaffirmed that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. The Commission held that there must be some degree of imminence to support an imminent danger order and noted that the word "imminent" is defined as "ready to take place[;] near at hand[;] impending ...[;] hanging threateningly over one's head[;] menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission held that an inspector abuses his discretion, in the sense of making a decision that is not in accordance with law, if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

On review, the Secretary argues that the judge erred in finding that the MSHA inspectors did not reasonably conclude that explosive levels of methane in the gob created an imminent danger. The Secretary believes that his burden in an imminent danger case is to prove that the inspector "reasonably perceived" that the conditions at the mine created an imminent danger and that he is not required to show that an imminent danger "actually" existed. Sec. Br. 9 (emphasis in original). The Secretary contends that it was reasonable for the inspectors to rely on their knowledge that fires in the gob in 1972 and 1975 had been attributed to sparks caused by falls of quartzite roof and that two more recent fires in the gob were of an indeterminable origin, with quartzite a possible ignition source. The judge erred, the Secretary asserts, in failing to recognize that inspectors must be given "great latitude in making on-the-spot determinations of whether imminent dangers exist." Sec. Br. 11. The Secretary contends that in order to affirm the judge, the "Commission must determine that the inspectors acted irrationally, and abused

their discretion." Sec. Br. 14. The Secretary is asking the Commission to "independently examine the record evidence to determine whether a reasonable inspector could have reached the conclusions reached by Inspectors Carico and Scammell in this case." Sec. Br. 6.

The UMWA argues that the judge failed to focus on the potential risk of serious physical harm at any time. The UMWA asserts that whenever a large accumulation of an explosive mixture of methane is present, there is a potential that the methane will be ignited. Moreover, it contends that the MSHA inspectors were properly concerned that the methane could be ignited by a spark caused by a roof fall in the gob. The UMWA further argues that the judge placed an impossible burden on the Secretary in this case to pinpoint an exact ignition source in the inaccessible areas of the gob.

We conclude that the judge applied the appropriate analysis in his decision. The judge reviewed Commission and judicial precedent, including those decisions that stress the considerable discretion granted MSHA inspectors in issuing imminent danger orders. 13 FMSHRC at 626-28. He also specifically recognized that inspectors "are required to decide whether a hazard presents an imminent danger "quickly and without delay." 13 FMSHRC at 637. He determined that it was not reasonable for the inspectors to have concluded that "there was a reasonable likelihood of a roof fall in the gob area which would have sparked an ignition." 13 FMSHRC at 635. The judge held that "the inspector's speculative anticipation of a possible mine explosion, in the circumstances presented, falls short of the statutory requirement of reasonable expectation." 13 FMSHRC at 637. These findings demonstrate that the judge concluded that the inspectors abused their discretion and authority because, based on the facts readily available to them, it was not reasonable for them to have concluded that the presence of the methane "could reasonably be expected to cause death or serious physical harm." The Commission has held that, in imminent danger cases, the judge must determine "whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated." Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (August 1992)(emphasis added). We explained that, in making such a determination, a judge "should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order." 14 FMSHRC at 1292. Judge Koutras determined that the inspectors did not make a reasonable investigation of the circumstances and that the facts reasonably available to them did not support issuance of the imminent danger orders. 13 FMSHRC 629, 632, 635-36, 637.

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he

believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

It would be inappropriate for the Commission to reweigh the evidence in this case or to enter de novo findings based on an independent evaluation of the record. The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Rochester & Pittsburgh, 11 FMSHRC at 2163 quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

We conclude that substantial evidence supports the judge's findings of fact. The judge found that it was unreasonable for the inspectors to believe that methane at this location could be ignited given continued mining operations. He determined that, after the 1975 mine fire, Island Creek instituted a drilling program to locate sandstone formations containing quartzite. The judge examined the reports that had been issued by MSHA and its predecessor concerning earlier mine ignitions at the VP-3 mine. The judge found that, in these reports, MSHA had discounted roof falls as the source of the subsequent ignitions. 13 FMSHRC at 632-33, Exhs. G-8, G-9. The judge further concluded that ignitions possibly caused by roof falls prior to 1975 were "too remote in time to support any reasonable conclusion that [roof falls] pose a present ignition hazard." 13 FMSHRC at 633.

The judge found that the inspectors speculated that a large body of explosive methane was present in the gob and that such a condition presented an imminent danger based on their understanding of previous reports. 13 FMSHRC at 632. The judge also determined that the inspectors failed to make any effort to ascertain actual mining conditions or to evaluate the mine's ventilation system, and that the inspectors relied almost exclusively on the earlier MSHA reports to support the imminent danger orders. Id. As stated above, he determined that these reports indicated that quartzite was no longer a potential ignition source for methane at this mine. 13 FMSHRC 633-37. He then vacated the orders because he found that the reports did not provide "any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of the methane in the gob area in question were present." 13 FMSHRC at 637. The record as a whole contains substantial evidence to support the judge's findings. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

While we recognize that the presence of an explosive concentration of methane in a mine presents a hazard, it is significant that the methane accumulation in this case was in a gob and not in an active area of the mine. At the hearing, the MSHA inspectors admitted that explosive levels of methane are to be expected in the gob at this mine. Counsel for the Secretary conceded that an explosive accumulation of methane in this gob would create an imminent danger "[o]nly if there's such a significant ignition source [that] there is a significant danger." Tr. Vol. I, 153. On review, counsel for the Secretary states that the primary point of contention is whether "it was reasonable to conclude that an ignition source was present that rendered the methane an imminent danger." Sec. Br. 9. Thus, the Secretary concedes that,

in the circumstances of this case, the methane that had accumulated in the gob did not create an imminent danger in the absence of an ignition source. In this case, we agree with the judge that the Secretary failed to prove that an ignition source existed. Therefore, we need not and do not reach the issue of whether, in another case, the Secretary may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source.

We reaffirm our holding in Rochester & Pittsburgh that an inspector must have considerable discretion in issuing imminent danger orders. Our affirmance of the judge's decision in this case should not be construed as circumscribing an inspector's authority or indeed his obligation to issue a section 107(a) order whenever he finds that an imminent danger exists. We base our decision on the narrow ground that substantial evidence supports the judge's determination that MSHA failed to meet its burden of proving that it was reasonable for the inspectors, based on the information available at the time, to conclude that the conditions in the mine constituted an imminent danger.

B. Citation

The section of the ventilation plan at issue in this proceeding is, in all essential respects, identical to the language of 30 C.F.R. §§ 75.316-2(e) & 75.316-2(e)(1).⁸ The UMWA contends that MSHA established that the sealed stoppings Island Creek had constructed in the Nos. 8, 9 and 10 development entries were inconsistent with the mine's ventilation plan. UMWA Br. 16-17.

⁸ The relevant provisions of the mine's ventilation plan provides:

10. Bleeder entries, bleeder systems, or equivalent means shall be used in all active pillaring areas to ventilate the mined areas from which the pillars have been wholly or partially extracted so as to control the methane content in such areas. Bleeder entries or bleeder systems established after June 28, 1970, shall conform with the requirements of Section 75.316-2, 30 CFR 75.

- (a) Bleeder entries shall be defined as special air courses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses. Bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control air flow through such gob area, to induce drainage of gob gas from all portions of such gob areas, and to minimize the hazard from expansion of gob gases due to atmospheric changes.

Exh. G-4.

The UMWA argues that the plan required Island Creek to place regulators at those locations in order to provide the flexibility needed to adjust the air flow to remove methane before it could accumulate.⁹ It contends that, because it would be impractical for the plan to identify where the bleeder entries must be connected to the gob, the operator is required to provide connections at locations that will induce drainage from all areas of the gob. UMWA Br. 18. The UMWA also asserts that, contrary to the findings of the judge, Inspector Carico testified that his method of testing for methane in the gob was sufficiently accurate to indicate that a large amount of explosive methane was present in the gob. UMWA Br. 20.

We affirm the judge's decision vacating the citation alleging a violation of 30 C.F.R. § 75.316. Island Creek presented evidence at the hearing, credited by the judge, that the gob was being adequately ventilated in accordance with paragraph 10 of the mine's ventilation plan. MSHA witnesses admitted that whether the gob was connected with the bleeders at "strategic locations" is entirely dependent upon whether air was flowing through the gob to induce the drainage of methane from the gob into the bleeder entries. MSHA did not conduct a ventilation survey to determine the effectiveness of the mine's ventilation system. Island Creek did conduct such a survey, which it believes established that a satisfactory quantity of air was moving through the gob and adjacent bleeders, and that the gob atmosphere, including methane, was exiting the gob where intended. Island Creek's witnesses testified that it maintained the stoppings in the development entries so that it could control the air flow through the gob and that the ventilation survey demonstrated that its controls were working. Island Creek has been installing stoppings between the gob and the bleeder entries since at least 1987 and MSHA has never questioned their presence even though the ventilation plan has undergone semiannual review.

The judge credited the testimony of Island Creek expert witness Donald W. Mitchell that it is not unusual to find methane in a gob and that methane will gravitate to the higher elevations in the gob, which in this instance were the areas where the inspectors took the methane readings. 13 FMSHRC at 645. The judge noted that Inspector Carico conceded that explosive concentrations of methane are to be expected in some areas of a gob and that the area he tested for methane was one of "the highest elevations in the [gob] and that methane will go to that area even though it is enroute out of the mine." *Id.* Finally, the judge noted that Carico also conceded that the stoppings were installed to force the air to flow to another location where it would leave the gob and that, as the air flowed away from the stoppings, it would be picking up methane. 13 FMSHRC at 646. The ventilation plan, contrary to the assertions of the UMWA, does not require the installation of regulators at specific locations, other than between the headgate and tailgate entries and the bleeders. Exh. G-4. The record indicates that Island Creek had, in fact, installed regulators at those locations in the South Gob. Exh. C-2.

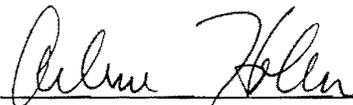
⁹ A regulator is a door, that can be of any size, located in a stopping. The regulator can be opened or closed as needed. See *DMMRT*, at 910.

The judge concluded that the gob was being ventilated in a manner that mixed and diluted the methane with air and that this mixture was coursing through the gob into the bleeder system and out of the mine. 13 FMSHRC at 646. Substantial evidence supports the judge's findings and his conclusion that Island Creek was in compliance with its plan -- a finding the Secretary did not choose to appeal. If the Secretary believes that specific accumulations of methane create a hazard in gobs or other inactive areas of underground coal mines, he should consider promulgating safety standards to deal with this problem. If the Secretary believes that this mine requires special provisions regarding methane in the gob, such as the installation of regulators in the disputed stoppings, he should seek to amend the mine's ventilation plan to specifically address the issue.

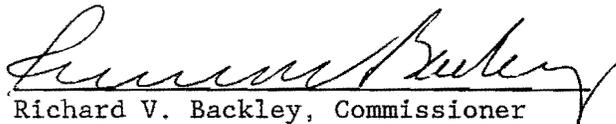
III.

Conclusion

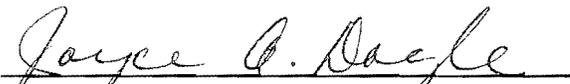
For the foregoing reasons, we affirm the judge's decision.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

Distribution

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Timothy M. Biddle, Esq.
Robert P. Davis, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Administrative Law Judge George A. Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 4, 1993

KERR-McGEE COAL CORPORATION :
 :
 :
 v. : Docket Nos. WEST 91-84-R
 : WEST 91-85-R
 SECRETARY OF LABOR, : WEST 91-220
 :
 MINE SAFETY AND HEALTH :
 :
 ADMINISTRATION (MSHA) :

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), and presents the issue of whether miners may choose as their representative for "walkaround" purposes under section 103(f) of the Mine Act,¹ a union, or the agent of a union, that is not the miners' collective bargaining representative under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (as amended)(1988)("NLRA"). This case arose when an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Kerr-McGee Coal Corporation ("Kerr-McGee") a citation alleging that Kerr-McGee had violated 30 C.F.R. § 40.4 when it failed to post at its Jacobs Ranch Mine, a nonunion mine, the names of certain miners' representatives not employed by Kerr-McGee. These individuals were agents of

¹ The term "walkaround" is used in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides in pertinent part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine ... for the purpose of aiding such inspection and to participate in pre- or post-inspection conference held at the mine....

30 U.S.C. § 813(f).

the United Mine Workers of America ("UMWA") and were designated as miners' representatives by certain miners employed at the Jacobs Ranch Mine.² The inspector subsequently issued an order of withdrawal pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), after Kerr-McGee declined to abate the alleged violation.

Following an evidentiary hearing, Administrative Law Judge Michael A. Lasher, Jr., upheld the citation and order. 13 FMSHRC 1889 (December 1991) (ALJ). The judge concluded that, although the UMWA did not represent the miners at the Jacobs Ranch Mine for collective bargaining purposes under the NLRA, the designation of nonemployee UMWA agents as miners' representatives did not constitute a "per se" abuse of the miners' representative process under the Mine Act and the Secretary's implementing regulations at 30 C.F.R. Part 40 ("Part 40"). For the reasons discussed below, we affirm.

I.

Factual and Procedural Background

A. Factual Background

Kerr-McGee owns and operates the Jacobs Ranch Mine, a surface coal mine employing approximately 270 miners and located in the Powder River Basin near Gillette, Wyoming. The employees at the mine have never been unionized. Dallas Wolf, an organizer for the UMWA, moved to Gillette in April 1990, for the purpose of unionizing miners in the Powder River Basin, including the Jacobs Ranch miners.

The UMWA held several meetings in Gillette that were organized by Wolf and attended by a number of Kerr-McGee miners. In July 1990, the UMWA also sponsored several days of safety training for Kerr-McGee miners. These training sessions were presented by Robert Butero, a UMWA safety and health representative. At the end of the training sessions, Wolf urged those in attendance to sign forms designating Wolf and Butero as their miners' representatives under Part 40.³ Seven of the Jacobs Ranch miners designated

² The regulations of the Secretary of Labor dealing with miners' representatives are contained at 30 C.F.R. Part 40. Section 40.4, entitled "Posting at mine," provides:

A copy of the information provided the operator pursuant to § 40.3 of this part [designating the miners' representative] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

³ The Secretary's regulation defines the term "representative of miners" as "[a]ny person or organization which represents two or more miners at a ... mine for the purposes of the Act." It equates the term to "[r]epresentatives authorized by the miners, miners or their representative, authorized miner

(continued...)

Wolf and Butero as their miners' representatives and themselves as alternate representatives.⁴ The record reflects that neither Wolf nor Butero actually acted in his capacity as miners' representative at the Jacobs Ranch Mine.

Under 30 C.F.R. § 40.3, miners' representatives are required to file with MSHA information regarding their designation and identity and to provide copies to the affected operator. Wolf mailed the miners' representative designation form to the MSHA District Office in Denver and its receipt was acknowledged. Kerr-McGee received its copy of the form and decided that it would not post the designation of Wolf and Butero at the mine pursuant to section 40.4 (n.2 supra), because it believed that it was not required to accept agents of the UMWA as miners' representatives. Kerr-McGee did not inform MSHA of its decision not to post the designation.

MSHA Inspector Jimmie Giles inspected the Jacobs Ranch Mine on October 25, 1990, in response to a complaint submitted to MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g), that the miners' representative designation form had not been posted at the mine. Ron Crispin, Kerr-McGee's manager of administration, informed Inspector Giles that the designation form was not, and would not be, posted. Crispin read to Inspector Giles a prepared statement that Kerr-McGee was not required to accept the designation of nonemployees as miners' representatives.⁵

Inspector Giles issued Kerr-McGee a citation alleging a violation of section 40.4, for failure to post the designation form on the mine bulletin board, and allowed Kerr-McGee 15 minutes to abate the condition by posting the form. After Crispin again declined to post the designation form, Inspector Giles issued an order of withdrawal pursuant to section 104(b) of the Act, 30

³(...continued)

representative," and other similar terms used in the Act. 30 C.F.R. § 40.1(b)(1) & (2). Thus, under Part 40, any two miners at a mine may designate "any person or organization" to represent them as a miners' representative.

⁴ Prior to this designation, there had never been a miners' representative designated under Part 40 at the mine. Since this designation, approximately 92 Jacobs Ranch miners have been designated as Part 40 representatives. S. Br. at 18-19 n.9.

⁵ The statement provides:

Kerr-McGee does not believe it can lawfully be required to accept the designation of a non-employee walkaround representative at the Jacobs Ranch Mine or to recognize any other action by a non-employee. MSHA Inspectors are entitled to, and encouraged to, talk to Jacobs Ranch employees as a part of all inspections. Inspections should proceed on that basis without outside interference.

Exh. C. to Stipulation, Exh. M-7.

U.S.C. § 814(b), for refusal to abate the alleged violation. Kerr-McGee finally abated the citation after receiving a letter from the MSHA district manager stating that Kerr-McGee would be assessed a daily penalty (see 30 U.S.C. § 820(b)) if it did not immediately abate the violative condition. Kerr-McGee filed timely notices of contest of the citation and the order, and the matter proceeded to an evidentiary hearing before Judge Lasher.

B. Procedural Background

Following the hearing, and before submission of the parties' post-hearing briefs, Kerr-McGee moved to reopen the record based upon newly discovered evidence. Kerr-McGee asserted that, in an unrelated proceeding after the hearing, its counsel had obtained from the UMWA several documents establishing that certain statements made by Wolf in his pre-hearing deposition in this matter were incorrect. Wolf had testified in his deposition that he did not have any letters or written reports regarding this case or his designation as a miners' representative. Kerr-McGee offered, as its newly discovered evidence, a series of internal UMWA memoranda to and from Wolf, which, it asserted, revealed that Wolf had been designated as a walkaround representative in order to facilitate on-going UMWA organizing activities.

In an unpublished order, the judge denied Kerr-McGee's motion to reopen. The judge stated that the prerequisites for reopening a record for the presentation of newly discovered evidence are:

the evidence [is] discovered after the completion of the trial; due diligence on the part of the moving party to discover the new evidence prior to trial is shown or inferred; the evidence is not merely cumulative or impeaching; the evidence is material; and the evidence is such that a new trial would probably produce a new result.

Unpublished Order at 2 (October 11, 1991)(citation omitted)("Order"). The judge determined that Kerr-McGee did not establish that it had exercised due diligence to discover the documents prior to trial. The judge next determined that the evidence was largely cumulative, and that a number of the documents had been discovered prior to trial and were either accepted into evidence or dismissed by the judge as irrelevant. The judge also noted that the veracity of Wolf's deposition testimony was a matter for impeachment and, as such, was not a sufficient basis for reopening the case. Finally, the judge rejected Kerr-McGee's argument that the newly discovered evidence would probably produce a different result. The judge explained that the documents merely revealed that union organizing activity was taking place in the Powder River Basin, and that this was established and undisputed at trial. Order at 2-3.

In his decision on the merits, the judge concluded that the designation of Wolf and Butero as miners' representatives at the Jacobs Ranch Mine did not constitute a per se abuse of the miners' representative process, and that Kerr-McGee's refusal to post the designation was not justified. The judge first determined, upon examination of Part 40 and section 103(f) of the Mine

Act, that a union may represent miners for walkaround and other Mine Act purposes even though it is not the collective bargaining representative of those miners under the NLRA. 13 FMSHRC at 1901. The judge pointed out that the language of section 40.1(b) (n.3 supra) expressly provides that a "representative of miners" includes "any individual or organization" that represents two or more miners, and does not set forth any restriction or qualification that the representative must be recognized as such under other labor laws. Id. (emphasis added). The judge relied on Utah Power & Light Co. v. Secretary, 897 F.2d 447 (10th Cir. 1990) ("UP&L"), aff'g, Emery Mining Corp., 10 FMSHRC 276 (March 1988), in which the United States Court of Appeals for the Tenth Circuit, affirming the Commission, held that walkaround rights may be extended to miners' representatives who are not employees of the affected operator. Id.

The judge further determined that a conflict did not exist between the Mine Act and the NLRA. The judge reasoned that the representative process has distinct meanings and purposes under each Act. 13 FMSHRC at 1902. He explained that under the NLRA, a representative is elected by a majority of workers for a broad range of collective bargaining purposes. In contrast, under the Mine Act and the Secretary's Part 40 regulations, a representative is chosen by two or more miners for the primary purpose of accompanying a mine inspector during an inspection. Id.

The judge also noted that MSHA has consistently interpreted the term "representative" in the Mine Act and Part 40 as any person qualified to be on a mine site, regardless of whether that person is an employee of the mine operator or a member of a labor or other organization. 13 FMSHRC at 1903. Finally, the judge observed that UP&L had clearly indicated that the Secretary and an affected operator could take appropriate action against any miners' representative who abuses the walkaround process by engaging in inappropriate activities, such as union organizing, during walkaround. 13 FMSHRC at 1904-05, citing UP&L, 897 F.2d at 452. The judge held that instances of abuse must be considered on a case-by-case basis. The judge concluded that the exercise of Mine Act rights by Kerr-McGee employees to designate nonemployee UMWA members as their representatives was not an abuse of the miners' representative process. 13 FMSHRC at 1905. The judge determined that "at best [Kerr-McGee] showed [that the] UMWA used Part 40 as a 'tool' to create employee interest and to enhance its standing." 13 FMSHRC at 1898 n.7. Accordingly, the judge denied Kerr-McGee's contests of the citation and order, and assessed a civil penalty of \$300. 13 FMSHRC at 1906.

The Commission subsequently granted Kerr-McGee's petition for discretionary review, which challenges the judge's decision on the merits and his denial of the motion to reopen. The American Mining Congress, the National Coal Association and the Wyoming Mining Association (collectively, "industry amici"), jointly, and the UMWA, separately, filed amicus curiae briefs in this proceeding, and the Commission heard oral argument.

II.

Disposition of Issues

A. Motion to Reopen

Kerr-McGee argues that the judge erred in denying its motion to reopen the record. We disagree.

Although the Commission's procedural rules, 29 C.F.R. Part 2700, do not specifically address motions to reopen a hearing on the basis of newly discovered evidence, Commission Procedural Rule 54(a), 29 C.F.R. § 2700.54(a), authorizes Commission judges to regulate the course of hearings and to dispose of procedural motions. The Commission also may properly look for guidance to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") (29 C.F.R. § 2700.1 (b)), and precedent thereunder. A motion to reopen the record to submit new evidence is not expressly addressed in the federal rules but, rather, is committed to the sound discretion of the trial judge. See generally Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). In general, an abuse of discretion occurs when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for its ruling. See, e.g., In re Coordinated Pretrial Proceedings, etc., 669 F.2d 620, 623 (10th Cir. 1982).

A motion for a new trial under Fed. R. Civ. P. 59 ("Rule 59") has certain similarities and affords some guidance. See J. Moore, J. Lucas & G. Grother, 6A Moore's Federal Practice ¶ 59.04[13] (2d ed. 1992) ("Moore's"). A motion to reopen, however, seeks to offer additional evidence before a decision has been rendered and, consequently, the standards for granting such a motion are less stringent than those for a motion seeking a new trial.⁶ Generally, in determining whether to grant a motion to reopen, it is appropriate to consider the time when the motion is made, the character of the additional evidence, and the effect of granting the motion. 6A Moore's at ¶ 59.04[13].

The judge applied the post-judgment Rule 59 criteria, urged upon him by Kerr-McGee, and did not expressly refer to the less stringent pre-judgment test. In applying the somewhat similar Rule 59 criteria, however, the judge, in effect, considered the essential factors of the pre-judgment test. Of particular importance, the judge characterized the "new" evidence as cumulative, and noted that a number of the allegedly newly found documents had been discovered prior to trial and rejected at trial as irrelevant. Order at 2. The judge also determined that admission of the evidence would not have altered his findings in any event. Order at 3. He explained that the evidence merely demonstrated that union organizing activity was taking place in the Powder River Basin, which had been established at trial and was not disputed. Id. Under the circumstances, any error in setting forth the stricter Rule 59 criteria was harmless.

⁶ The stricter criteria for a Rule 59 post-judgment motion are the ones cited by the judge in his pre-trial order.

Because a rational basis existed for the judge's denial of Kerr-McGee's motion to reopen, and the judge's error, if any, was harmless, we conclude that the judge did not abuse his discretion. Accordingly, we affirm his order denying the operator's motion to reopen the record.

B. Designation of Wolf and Butero as Miners' Representatives

1. Contentions of the parties on review

The thrust of the operators'⁷ argument is that the Mine Act should be construed to prohibit a union or a union member from being designated as a "representative of miners," unless that union also represents the miners under the NLRA. The operators assert that granting representative status to a nonemployee union agent infringes upon an operator's right to control access to its private property by nonemployees, including nonemployee union organizers. In support, the operators rely heavily on Lechmere, Inc. v. NLRB, 502 U.S. ___, 117 L.Ed.2d 79 (1992).

Kerr-McGee distinguishes UP&L, 897 F.2d 447, on the grounds that, in that case, the nonemployee miners' representative was a union member who sought to act as a representative at a union mine, whereas the present case involves a nonunion mine. Thus, Kerr-McGee asserts that UP&L is not controlling.

According to the operators, the Secretary's Part 40 Regulations and, in particular, the definition of "representative of miners," are legally infirm. The operators assert that the Part 40 definition of representative, which allows for multiple representation by "any" individuals or organizations, conflicts with provisions of the NLRA that prohibit a unionized employer from dealing with any agent other than the official collective bargaining agent. They argue that permitting a union member to act as a miners' representative at a nonunion mine not only intrudes upon the operator's right under the NLRA to control access to its private property by union organizers but also tends to create a favorable impression among the miners towards the union. The operators contend that the Secretary's interpretation of Part 40 is unreasonable and that to permit the kind of representation involved here amounts to a failure to accommodate Part 40 to the NLRA's regulatory scheme.

The operators contend that the designation of a union agent as a walkaround representative at a nonunion mine constitutes an abuse of section 103(f), even under UP&L, because it is plainly for an ulterior purpose. Kerr-McGee urges that the aim of designating UMWA representatives here was to foster their organizing efforts rather than to promote health and safety and, consequently, that aim was abusive of the Mine Act.

⁷ Unless otherwise noted, the arguments of industry amici are included in our discussion of Kerr-McGee's position and the term "operators" is used in reference to their arguments. Similarly, the arguments of amicus UMWA are incorporated in our discussion of the Secretary's position.

The Secretary responds that the operators' suggested approach to the miners' representative process is overly restrictive under the Mine Act and the Part 40 implementing regulations. The Secretary notes that nothing in Part 40 prohibits the Kerr-McGee miners from designating an agent of the UMWA or any labor union as their miners' representative under the Mine Act, even though the designated union is not the miners' collective bargaining representative under the NLRA. The Secretary emphasizes that section 103(f) of the Mine Act imposes no status limitations on who may serve as a miners' representative, and, accordingly, Part 40 regulations simply mirror the statute's broad approach.

The Secretary urges that deference should be given to his interpretation of the Mine Act and to his interpretation of the regulations that he has adopted. See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). The Secretary asserts that his interpretation of the relevant portions of Part 40 should be accepted, as it is reasonable, consistent with the Mine Act, and is supported by his "contemporaneous construction" of Part 40, published at the time Part 40 was promulgated. The preamble to the regulations specifically discussed and rejected the definition of "representative" as used in the NLRA, explaining that the purposes of the representation process under the two statutes were different.⁸

The Secretary further contends that UP&L, 897 F.2d 447, is dispositive. There, the Tenth Circuit held that nonemployees may serve as walkaround representatives. Under UP&L, an operator may take appropriate action against a designated representative only if he engages in specific conduct unrelated to safety or health. The Secretary contends that, as the judge found, Kerr-McGee has failed to show instances of such abusive conduct. The Secretary acknowledges that there was a union organizing campaign underway at the Jacobs Ranch Mine, but argues that, as shown by the record, the designation of the UMWA representatives was also intended to advance miners' safety. Thus, even

⁸ The preamble to Part 40 states:

[T]he NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representative in the context of collective bargaining. The meaning of the word representative under this [A]ct is completely different. Additionally the rights of nonunion miners would be severely limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only any one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated.

if the miners' representatives possessed a "mixed motive," i.e., safety and unionizing, there was no abuse of the walkaround function.

Finally, the Secretary argues that the Part 40 regulations do not impermissibly conflict with the NLRA. The Part 40 regulations do not impinge on Kerr-McGee's right under the NLRA to deny access to its property to nonemployees engaged in union organizing because the miners' representative has only a limited access, a carefully delineated right to assist with inspections, and may not use that access to engage in organizing activities.

2. Analysis

We find the judge's reasoning persuasive and conclude that this matter is controlled by the decisions of this Commission and the Tenth Circuit in the UP&L litigation. The general issue of whether an operator's miners may designate an individual who is not an employee of the mine operator as their miners' representative for walkaround purposes has been previously determined by the Commission. In Emery, the Commission held that "as a matter of statutory right a nonemployee may be chosen by the miners of a given mine as their representative and ... such a representative may properly be afforded the opportunity to participate in walkaround at that mine -- although without compensation from the operator." Emery, 10 FMSHRC at 284-85, aff'd, UP&L, 897 F.2d at 449-52. The Commission's conclusion in Emery was based on the language of section 103(f) of the Mine Act, which "imposes no employee-status limitation as to whom [miners] may choose [as their own representative]." 10 FMSHRC at 284. The Commission determined that the Secretary's Part 40 regulations' "broad definition of representative is in accord with the underlying statutory text [of section 103(f)]." 10 FMSHRC at 285.

In affirming the Commission's holding on this issue, the Tenth Circuit concluded that the Secretary's and the Commission's interpretation of section 103(f) was "both reasonable and supportable" and held that miners may authorize nonemployees to act as their representative under § 103(f) of the Act. 897 F.2d at 452. In reaching this conclusion, the Court determined that the underlying purpose of section 103(f) "can be furthered by allowing both employees and nonemployees to act as miners' representatives for walkaround purposes." Id. The Court noted that miners may benefit from the participation of nonemployee representatives in walkaround because such representatives "may have greater expertise in health and safety matters than an employee representative." 897 F.2d at 451.

In UP&L, the mine operator had argued that the Secretary's interpretation of section 103(f) in the Part 40 regulations was not reasonable, in part, because it would allow the representative of a union to gain access to a nonunion mine for purposes unrelated to the Act's safety objectives. 897 F.2d at 452. In addressing this argument, the Court stated:

While we recognize UPL's concern that walkaround rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights

altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.

Id. Contrary to Kerr-McGee's assertions on review, the Court did not base its holding on the fact that, in that case, the miners were represented for NLRA purposes by a union and, therefore, the designation of a nonemployee union member as a miners' representative was permissible. Rather, the Court interpreted the language of section 103(f) to permit representation by nonemployees generally, including agents of a labor organization.

We discern no basis in section 103(f) or Part 40 for applying the principles set forth in Emery/UP&L only to situations where the designated representative is a member of a union that also represents the miners for collective bargaining purposes under the NLRA. The language of section 103(f) does not prohibit miners from designating agents of a union as their walkaround representatives on the basis that such miners are not represented by the union for collective bargaining purposes. To the contrary, the Commission has held that, under the broad language of section 103(f), miners possess the right to designate a representative of their own choosing for section 103(f) purposes. Emery, 10 FMSHRC at 284-85; Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298 (September 1986). Further, the operators' position would limit nonunionized miners' right to designate representatives of their own choosing, thereby creating distinctions between unionized and nonunionized miners that have no basis in the statute.

The Commission held in Emery that section 103(f) specifically provides that the requirements set forth therein are "[s]ubject to regulations issued by the Secretary" and that the Secretary's pertinent regulations at Part 40 are consistent with the language of section 103(f). 10 FMSHRC at 285. Moreover, the Secretary's manner of enforcement of his regulations is consistent with those regulations and with Emery. Thus, the Secretary says that he does not determine who qualifies as a walkaround representative based on a person's status or motives. Oral Arg. Tr. 45-48. Instead, the Secretary focuses on the actual conduct of the miners' representative during the inspection. Oral Arg. Tr. 48. The Secretary states that it is irrelevant who is chosen as a miners' representative so long as the representative's "demeanor and behavior" is proper and consistent with the purposes of section 103(f). Id.

The Commission is aware, as was the 10th Circuit in UP&L, that allowing a union agent limited access to mine property under section 103(f) is subject to possible abuse. We agree with the Secretary and the judge that it is the conduct of a miners' representative, during a walkaround under section 103(f), rather than the motivation of such representative, that must be examined to determine whether there has been abuse. Although the UMWA agents, Wolf and Butero, are organizing mines in the Powder River Basin, there has been no showing here that they will, through their conduct, abuse the rights and corresponding responsibilities of section 103(f). Kerr-McGee's concerns as to possible future problems are speculative. Conduct by a miners' representative that constitutes abuse can be addressed on an individual basis by an operator

and the Secretary, while generally preserving the right of miners to select representatives of their choice. See UP&L, 897 F.2d at 452.

Kerr-McGee also seeks reversal of the judge's decision on the basis that Part 40, as applied here, conflicts with the NLRA. The NLRA broadly guarantees employees the right to "bargain collectively through representatives of their own choosing..." 29 U.S.C. § 157. The Mine Act, on the other hand, is a more narrowly tailored statute that pervasively regulates the safety and health of employees in one industry. In effect, the operators ask the Commission to read into section 103(f) of the Mine Act the concept of collective bargaining representation under the NLRA with the result that a nonemployee agent of a union could not be a miners' representative unless he is also a duly certified bargaining representative at that mine. When promulgating Part 40, the Secretary concluded that it would be inappropriate to incorporate the NLRA definition of a "representative" because "the meaning of the word representative under [the Mine] Act is completely different." 43 Fed. Reg. 29508 (see n.8 supra).

Although we cannot ignore other statutes when interpreting the Mine Act, nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. Our proper field of judicial inquiry is the Mine Act. See generally PBGC v. LTV Corp., 496 U.S. 633, 645-47 (1990). We agree with the Secretary that he is not required to integrate the NLRA's concepts of collective bargaining representation into his regulations implementing the Mine Act. Nor is this Commission required to integrate NLRA concepts into its interpretation of the Mine Act. See, e.g., UMWA on behalf of James Rowe et al., etc. v. Peabody Coal Co., 7 FMSHRC 1357, 1364-65 (September 1985), aff'd, 822 F.2d 1134 (D.C. Cir. 1987).

The restrictions that have developed under the NLRA concerning nonemployee access to an employer's property for organizing or related purposes arise under a statute "whose very purpose is the governance of labor-management relations." Peabody, 7 FMSHRC at 1365. The discrete safety and health purpose of the Mine Act, and the text of section 103(f), render these NLRA principles inapplicable here. As noted, the Secretary rejected the approach advocated by the operators when he promulgated Part 40. See UP&L, 897 F.2d at 452; Emery, 10 FMSHRC at 285. We hold that the concept of representative as it has developed under the NLRA is not determinative of the miners' representative designation process under Part 40.

The Supreme Court's decision in Lechmere does not require a different result. Lechmere construed the provisions of the NLRA governing the access rights of nonemployee union organizers to employers' private property. In Lechmere, the Court was concerned with "the relationship between the rights of employees under § 7 of the [NLRA] ..., 29 U.S.C. § 157, and the private property rights of employers." Lechmere, 117 L.Ed.2d at 85. The Court did not address general legal principles relating to the balancing of property rights of employers against federal regulatory requirements established under other statutes, such as the Mine Act. Lechmere does not reverse walkaround law as it has developed under the Mine Act and does not overrule UP&L.

Under the Mine Act, nonemployees may enter a mine for the limited purpose of accompanying MSHA inspectors during their inspection of a mine. The Mine Act entails pervasive regulation and a diminished expectation of full enjoyment of private property rights. For example, search warrants for government inspections are not required because, in part, the Mine Act "is specifically tailored to address [Congress' safety and health] concerns, and the regulation of mines [that] it imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection.'" Donovan v. Dewey, 452 U.S. 594, 603 (1981)(citation and footnote omitted). Accordingly, the Court's analysis of the property rights of employers in Lechmere, which relates solely to employee organizing rights under the NLRA, is not applicable to this case.

To the extent that Kerr-McGee is seeking a resolution of rights and obligations under the NLRA, it is in the wrong forum. If the Secretary, either through regulation or enforcement, requires an operator to take specific actions that could constitute an unfair labor practice or would otherwise conflict with the NLRA, the proper forum to resolve such conflicts is the National Labor Relations Board ("NLRB"). The NLRB may determine whether the Mine Act's requirements or the Secretary's implementing regulations serve as a defense to an unfair labor practice charge.

III.

Conclusion

For the foregoing reasons, the judge's decision is affirmed.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Distribution

Charles W. Newcom, Esq.
Sherman & Howard
3000 First Interstate Tower North
633 Seventeenth St.
Denver, CO 80202

Curtis B. Hendricks, Esq.
Kerr-McGee Corporation
P.O. Box 25861
Oklahoma City, OK 73125

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

Rosemary M. Collyer, Esq.
Thomas C. Means, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Michael A. Lasher, Jr.
Federal Mine Safety & Health Review Commission
1244 Speer Boulevard, Suite 280
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 22, 1993

UNITED MINE WORKERS OF AMERICA, :
ON BEHALF OF DAN NELSON :
 :
v. : Docket Nos. SE 88-92-D
 : SE 88-93-D
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
AND ROBERT KIYKENDALL :
 :
and :
 :
UNITED MINE WORKERS OF AMERICA, :
ON BEHALF OF DAN NELSON, :
RONALD SONEFF, TOMMY BOYD, :
STAN ODOM, AND CARROLL JOHNSON :
 :
v. :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
AND JOHN WEEKLY AND :
WILLARD (GENE) QUERRY :

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

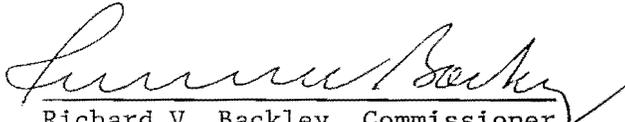
The United Mine Workers of America ("UMWA") filed these discrimination complaints pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988), alleging that certain officials of the Department of Labor's Mine Safety and Health Administration ("MSHA") had failed to protect the confidentiality of miners who had reported violations of MSHA's safety standards. The UMWA requested an order directing MSHA to stop disclosing to mine operators the names of miners reporting safety violations and sought assessment of civil penalties for MSHA's alleged violations of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). In an unpublished order dated February 14, 1992, Administrative Law Judge Avram Weisberger dismissed the UMWA's complaints on the basis of the Commission's decision in Wagner v. Pittston Coal Group, 12 FMSHRC 1178 (June 1990), aff'd mem. sub. nom. Wagner

v. Martin, No. 91-2025 (4th Cir. Nov. 5, 1991). The Commission granted the UMWA's petition for discretionary review and, at the parties' request, stayed this matter in April 1992, pending completion of their settlement negotiations.

On March 8, 1993, the UMWA filed a motion to dismiss this matter on the basis that the parties have reached a settlement agreement and that it no longer wishes to proceed with this case. The motion states that MSHA has issued an internal memorandum "reaffirming MSHA's policy that confidentiality be maintained during investigations of safety or health complaints." The motion states further that MSHA has agreed to investigate all reported violations of this policy.

Upon consideration of the motion and on the basis of the UMWA's representations, our prior stay is dissolved and this proceeding is dismissed.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Distribution

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Jerald Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 22, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. WEST 90-202-M
 : WEST 90-363-RM
CYPRUS TONOPAH MINING CORP. : WEST 90-364-RM

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), involves a dispute between the Secretary of Labor and Cyprus Tonopah Mining Corp. ("Cyprus") regarding two citations issued to Cyprus alleging violations of 30 C.F.R. §§ 56.3200 and 56.3130.¹ The citations were later modified to allege that the violations were caused by Cyprus' unwarrantable failure to comply with the mandatory standards.

¹ 30 C.F.R. § 56.3200, entitled "Correction of hazardous conditions," provides:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3130, entitled "Wall, bank, and slope stability," provides:

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

Following an evidentiary hearing, Administrative Law Judge Michael Lasher found that Cyprus had violated the standards and that the violations were caused by Cyprus' unwarrantable failure to comply with the standards, but that they were not significant and substantial ("S&S") in nature. 13 FMSHRC 1523 (September 1991)(ALJ). The judge also concluded that the citations were not duplicative, and could be modified following their termination. The Commission granted Cyprus' petition for discretionary review, which challenged all of these conclusions except the judge's determination that the violations were not S&S. For the reasons that follow, we affirm the judge's rulings, except for his determination that Cyprus' violation of section 56.3200 was caused by its unwarrantable failure, which we reverse.

I.

Factual and Procedural Background

Cyprus owns and operates an open pit molybdenum mine in Tonopah, Nevada. The lower pit of the mine, "Pushback One" ("PBl"), is the focus of this proceeding.

On February 27, 1990, Arthur Ellis, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the mine. Inspector Ellis, accompanied by Mike Curran, Cyprus' operations supervisor, observed that on the east wall of PBl there was only one partial bench "about one quarter of the way from the top ... and no benches the rest of the way down," and that the bench was partly full of loose and unconsolidated material.² Tr. I 16-17, 20. He noticed that the east wall was rather steep and had a "nose," or protrusion, that considerably narrowed the middle of the pit floor. He observed that most of the benches on the west wall of PBl were covered by loose and unconsolidated material and were impassable.

Inspector Ellis also observed a dozer descending into PBl and was informed by Mr. Curran and Robert Altamirano, Cyprus' safety manager, that miners were building a new berm along the base of the west wall because a previous berm had been filled with loose material that had sloughed from the wall. Inspector Ellis was told by Curran and Altamirano that material was continually filling up the benches, and the berm was being built in an attempt to prevent material from falling onto miners working at the pit bottom. The inspector was concerned that, if the west wall were disturbed in the process of building the berm, loosened material would collapse onto the dozer operator. He suggested that the berm be rebuilt by hauling material into PBl by truck, rather than by using existing material from PBl. This was subsequently done.

² A bench is defined as "a ledge, which ... forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank or bench face...." Dictionary of Mining, Mineral, and Related Terms, 96 (1968).

Later that evening, Inspector Ellis discussed his observations with his supervisor, Roger Breland, and requested ground control advice from MSHA's technical support division. The following day, on February 28, Ellis issued Citation No. 3459560, which alleged an S&S violation of section 56.3200, and stated:

There was loose material and rocks on high walls in the Push Back One pit. Benches were full and did not provide protection from falling material. The walls were about 145 ft. high. An access road ran next to the west wall and pumps were being utilized to pump water at the bottom of the pit. An employee enters the area to move and maintain pumps. The area was not posted or barricaded to prevent travel alongside the high walls.

S-Exh. 2. The citation was terminated on March 2, 1990, after the "entrance to Push Back One pit was barricaded and posted to prevent entry into the pit." S-Exh. 2.

Inspector Ellis also issued Citation No. 3645243 on February 28, which alleged an S&S violation of section 56.3130, and stated:

Benches between the 5545 level and the 5400 level in the Push Back One had accumulated with materials and would not provide an adequate catch bench to protect persons working below. An access road ran next to the west wall and pumps were being utilized to pump water from the bottom of the pit. Employee's [sic] enter the area to move and maintain pumps.

S-Exh. 1. The citation also provided that "[a]ll future mining will include benches that are cleanable and maintainable." S-Exh. 1. On March 2, 1990, the citation was terminated after mining activity in PB1 was abandoned.

Inspector Ellis modified both citations on March 1, 1990, prior to their termination, by adding unwarrantable failure findings, thereby changing the two 104(a) citations to one citation and one order issued pursuant to section 104(d)(1) of the Mine Act. The citation and order were again modified on September 5, 1990, to change the number of persons affected by the violations.³

Cyprus subsequently filed notices of contest and also filed a motion for partial summary judgment, alleging that the September 5 modifications were improper because they occurred after the citation and order had been terminated. The judge denied Cyprus' motion, and the matter proceeded to an evidentiary hearing.

³ The citations were modified on various other occasions for minor or technical reasons unrelated to the issues presented.

Following the hearing, the judge affirmed his pretrial ruling on the post-termination modifications. 13 FMSHRC at 1527. The judge also rejected Cyprus' allegation that the citations⁴ were issued for the same condition in the same area and, thus, were duplicative. 13 FMSHRC at 1549. The judge reasoned that the requirements of sections 56.3200 and 56.3130, and the conditions described in the two citations, differed. 13 FMSHRC at 1549-50. The judge concluded that Cyprus had violated both sections 56.3200 and 56.3130. 13 FMSHRC at 1550-51. The judge further determined that the violations were not S&S but were caused by Cyprus' unwarrantable failure to comply with the standards. 13 FMSHRC at 1551-55.

On review, Cyprus challenges all of the judge's adverse determinations and also argues that the judge did not address its claim that the Secretary failed to plead violations with requisite particularity.

II.

Disposition of Issues

A. Violation of section 56.3200

In concluding that Cyprus violated section 56.3200, the judge found:

there existed loose rock and material on walls and slopes of Pushback 1, which together with full and partly full, inadequately maintained, failing benches created a hazard to miners working in the narrow pit below and traveling along the haul road leading into the lower pit area. These hazardous ground conditions had not been taken down or corrected, and the area was not posted with a warning against entry or otherwise barricaded to impede entry....

13 FMSHRC at 1550.

On review, Cyprus argues that the judge's conclusion is not supported by substantial evidence. Cyprus further contends that the judge erred by adopting an interpretation of the standard whereby the mere presence of loose material would constitute a per se violation. Cyprus also contends that the judge's determination of the existence of a hazard is flawed because he failed to consider that the west wall sloped to an angle of repose, and because the factors he relied upon to determine the violation was not S&S could also support a conclusion that there was no hazard.

We disagree with Cyprus's arguments. The judge did not interpret the standard to require a finding of violation whenever loose material was

⁴ After finding the S&S allegations invalid, the judge modified the citation and order to section 104(a) citations. Consequently, we refer to the subject enforcement actions as "citations." See Mettiki Coal Corp., 13 FMSHRC 760, 764 (May 1991); Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1982).

present. Rather, he expressly considered factors in addition to loose material, stating that a hazard existed due to the "loose rock and material, filled benches, failing benches, tension cracks, and narrow pit floor." 13 FMSHRC at 1536. While the judge noted the testimony of Cyprus's witnesses that the west wall had reached an angle of repose, and was stable (See, e.g., 13 FMSHRC at 1537-38, 1540-41), he credited testimony of the Secretary's witnesses asserting that material on the west wall had a potential to move and, in fact, was moving and reaching the pit bottom. 13 FMSHRC at 1535, 1551 n.27.

Cyprus' further contention that the judge should have considered the same factors that he utilized in considering whether the violation was S&S to determine whether there was a hazard is without merit. In establishing that a violation is S&S, the Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Section 56.3200 requires that operators restrict miners' access to areas where hazardous conditions exist, whether or not it is likely that the hazard will result in an injury.

We also conclude that substantial evidence supports the judge's finding that ground conditions on the east and west walls and pit floor created a hazard within the meaning of section 56.3200.⁵ See Donovan v. Phelps Dodge Corporation, 709 F.2d 86, 92 (D.C. Cir. 1983). The judge credited Inspector Ellis' testimony that the benches on the west wall were full, that there was loose material on the faces, that the loose material "could come down and get somebody," and that the berm along portions of the west wall was "filled up." 13 FMSHRC at 1529 n.8 & 1530. In addition, the judge credited the testimony of David Ropchan, a mining engineer from MSHA's technical support division who had observed the conditions in PBl on March 6, 1990, that the west wall was in a "state of distress" in that there was a partial failure of the wall, resulting in partly or fully covered, inaccessible and ineffective catch benches. 13 FMSHRC at 1531, 1533. Mr. Ropchan testified that pieces of loose material, up to several feet in diameter, existed near the top of the west wall. 13 FMSHRC at 1532-33. He stated that such conditions were hazardous because they could feed rock onto the slopes below and allow material to roll into the pit. 13 FMSHRC at 1532. Ropchan observed that the rough surface of the west wall would allow falling rock to bounce, become airborne, and assume a "considerable horizontal velocity." 13 FMSHRC at 1533-34. He explained that such loose material was a threat to miners and equipment in the pit because the west wall benches would be unable to contain some falling material, and the west wall stood over a very narrow travelway. Id. Ropchan testified that large material and "material coming down with enough energy" could roll over the berm or "blow" through it. Tr. II 38-39.

The judge also credited Ropchan's written report, in which he stated that a berm placed along the west half of the haul road was too close to the

⁵ Evidence is undisputed that PBl was not posted or barricaded against entry and that miners were working in the area. Tr. I 63; Tr. III 15; 13 FMSHRC at 1536.

wall and too small to "provide sufficient rock fall protection considering the overall condition" of the west wall. 13 FMSHRC at 1535. Ropchan also stated in his report that tension cracks existed along the crest of the west wall.⁶ 13 FMSHRC at 1534.

With respect to the east wall, the judge credited Inspector Ellis' testimony regarding the scarcity of benches and the narrowness of the bottom of the pit, allowing only limited room for a miner to escape falling rock. 13 FMSHRC at 1529-30; Tr. I 16-17, 20. Ropchan also testified that the east wall would tend toward greater instability because of its protrusion. Tr. II 85-86. The judge also credited Ropchan's testimony that the condition of the wall posed some hazard to miners working in the narrow bottom of the pit. Tr. II 30, 37; 13 FMSHRC at 1531 n.10.

Cyprus challenges the judge's credibility determinations, arguing that MSHA's witnesses failed to investigate the conditions sufficiently, and that Cyprus' expert witnesses were better qualified than MSHA's. The Commission has recognized that:

[e]xpert witnesses testify to offer their scientific opinions on technical matters to the trier of fact. If the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert's opinion.

Asarco, Inc., 14 FMSHRC 941, 949 (June 1992).

The judge recognized Ropchan as well as two of Cyprus' witnesses, James Savely, a senior geological engineer in Cyprus' technical service assistance group, and Richard Call, the president of a geotechnical consulting firm, as experts. Tr. II 14; Tr. III 77, 116. The judge noted that, in weighing their testimony, he would consider such factors as experience, qualifications, familiarity with the precise conditions, and how convincingly the testimony was stated. Tr. II 15. The judge credited the testimony of Ropchan and other MSHA witnesses over that of Cyprus' witnesses because he found it to be more convincing, reliable, and objective. 13 FMSHRC at 1534, 1546. The judge also found Ropchan's conclusions regarding the conditions in PB1 to be "consistent with the general sense of the evidentiary record (including the various photographic exhibits therein)." 13 FMSHRC at 1534. In addition, Ropchan testified that he had examined the mine conditions sufficiently to reach his conclusions (Tr. II 91), and the judge credited this testimony. Furthermore, the judge noted that the mining conditions observed by Ropchan had remained materially unchanged from the time of citation. 13 FMSHRC at 1532 n.11. However, the judge noted that the conditions observed by Dr. Call were

⁶ Ropchan testified that such cracks are a precursor to slope failure. Tr. II 28-29.

different from those in existence of the time of citation. 13 FMSHRC at 1541.⁷ We find no circumstances in this case warranting the unusual measure of rejecting the judge's determination that the testimony of MSHA's expert witnesses should be credited over the testimony of Cyprus' expert witnesses. See generally Ranger Fuel Corp., 12 FMSHRC 363, 374 (March 1990).

Therefore, we conclude that substantial evidence supports the judge's finding that ground conditions existing in PBl created a hazard within the meaning of section 56.3200. We affirm the judge's finding that Cyprus violated section 56.3200.

B. Violation of section 56.3130

In concluding that Cyprus violated section 56.3130, the judge determined that the use of adequately maintained benches was a necessary part of the mining method employed in PBl, and that the benches had accumulated rock and other material and did not serve as adequate catch benches. 13 FMSHRC at 1536, 1550. The judge also found that Cyprus had not otherwise maintained wall, bank, and slope stability. 13 FMSHRC at 1551 n.27.

Cyprus argues that the judge's determination is erroneous because the judge misinterpreted the standard by holding that the "potential requirement of benches was the paramount requirement" of the standard. C. Br. at 25. Cyprus maintains that an operator is required to accomplish the purpose of the standard, that is, provide stable walls, benches and slopes where miners work or travel, by whatever mining method is appropriate. Cyprus also argues that the standard requires cleaning and scaling of benches only when the mining process is initiated. Cyprus further contends that the judge's finding of a violation of section 56.3130 is not supported by substantial evidence and that the standard is impermissibly vague.

Section 56.3130 expressly requires the use of mining methods that maintain wall, bank and slope stability where persons work or travel. The standard also requires that "[w]hen benching is necessary, the width and the height shall be based on the type of equipment used for cleaning of benches or for scaling..." 30 C.F.R. § 56.3130. The standard does not expressly require benching, nor does it set forth specific parameters for cleaning or maintaining benches if they are used.

The preamble to section 56.3130 further explains its application:

When benches are included in the "mining method," there must also be a maintenance system selected to prevent the deterioration of the ground from creating a fall of ground hazard. When required,

⁷ The judge explained, however, that the testimony of Mr. Savely and Dr. Call had more probative value as to whether the violation was S&S, rather than as to whether Cyprus had violated the standard, because they seemed to concede the hazard of rock fall, and only gauged its probability of occurrence. 13 FMSHRC at 1542 n.18.

the benches must be able to serve as catch benches. MSHA agrees with the commenter who stated that many factors contribute to the determination of bench width and height. The standard provides a performance-oriented approach without restrictions on width and height of benches, other than those necessitated by the equipment selected for the maintenance function.

51 Fed. Reg. 36192, 36193 (October 8, 1986). The purpose of the standard is to require mining methods that will maintain ground stability. The standard contemplates that benches, when included as part of an operator's mining method, must function as catch surfaces and must be maintained in order to prevent fall of ground hazards. Benches, therefore, must be accessible to maintenance equipment.⁸

Evidence regarding the state of the benches in PBl and Cyprus' failure to clean them is probative of the stability of the walls, banks, and slopes in PBl. The judge concluded that the east and west walls were not competent, relying upon the failure of the benches, as well as other evidence that the walls were not stable. As noted above, the judge credited Inspector Ellis' testimony regarding the lack of space on the east wall benches to catch material. The judge also credited statements in Ropchan's written report that the east wall did "not have adequate catch benches to protect against falling rock in the work and travel areas below." 13 FMSHRC at 1535. Cyprus acknowledges that it employed benching on its east wall as a method of ground control and that no consideration was given, when designing the benches, to making them accessible for maintenance. Tr. II 143; C. Br. at 35.

With respect to the west wall, the judge determined that benching was a necessary part of the mining method employed, in part because Cyprus had originally constructed benches on that wall and had adjusted its double-benching method to a single-benching method. Cyprus contends that, because it encountered unexpected problems in the west wall, it had to alter its mining methods and, on the day of the inspection, benches were no longer necessary because the wall sloped to an angle of repose and a berm existed along portions of its base. The record, however, reveals that, although Cyprus relied upon other methods, it did not abandon benching. As Cyprus acknowledged, when it adjusted its mining method due to conditions encountered on the west wall, it inserted a bench at the 5475 foot level and inserted "a wider than planned bench" on other portions of the west wall. C. Br. at 4, 33.

The judge credited MSHA witnesses' testimony that the west wall was in a state of distress in that benches had failed or were partially full of fallen material rendering some of them quite ineffective, and that a sufficient

⁸ We disagree with Cyprus' assertion that an operator is required under the standard to clean benches only upon their initial construction. The standard contemplates that benches must be cleaned whenever such activity would aid their ability to catch material, or to prevent ground from deteriorating and creating a hazard.

threat existed that the benches would be unable to catch material moving down the wall. 13 FMSHRC at 1529 n.8, 1532-33. The judge also credited testimony that material was moving down the wall and had partially filled an existing berm. 13 FMSHRC at 1535. Cyprus' operations supervisor conceded that some material from the wall had raveled to the bottom. Tr. III 33-34. In addition, the judge credited testimony from Ropchan regarding the inadequacy of the augmentation to the existing berm along portions of the west wall. 13 FMSHRC at 1535. In sum, substantial evidence supports the judge's finding that the east and west wall were not stable and that the benches were not maintained to fulfill their function as required by the standard.

We further agree with the judge that section 56.3130 is not impermissibly vague. The Commission has previously recognized that, in order to afford adequate notice, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990) (citations omitted). Section 56.3130 incorporates a "performance-oriented" approach so that it is "broad enough to apply to the wide variety of conditions encountered." 51 Fed. Reg. at 36193. The appropriate test in interpreting and applying such broadly worded standards:

is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

Ideal, 12 FMSHRC at 2416. The judge properly found that a reasonably prudent person would have recognized that section 56.3130 requires operators to adopt mining methods that maintain wall, bank, and slope stability, and that benches, when used, must be maintained so as to aid wall stability. Accordingly, we affirm the judge's determination that Cyprus violated section 56.3130.

C. Whether the violations were caused by Cyprus' unwarrantable failure

In concluding that the violations were unwarrantable, the judge rejected Cyprus' argument that the condition of the benches justified its failure to clean them. 13 FMSHRC at 1552. He found that Cyprus never planned to maintain its benches, and that the failure to clean them created the hazard of falling rock. Id. In addition, the judge determined that Cyprus' conduct in these instances was inconsistent with its abatement actions with regard to previous violations of sections 56.3200 and 56.3130. Id. The judge concluded that Cyprus':

failure to maintain and clean its benches was not merely due to inadvertence or inattention since it is beyond dispute that its management personnel were quite aware of the continuity of conditions, [but]

proceeded intentionally to expose miners on the haul road and in the very narrow pit despite ineffective failing catch benches, and the presence of loose rock and material.

Id.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Id. The Commission's determination also was based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Id.

Prior to this proceeding, MSHA inspectors had been concerned about the stability of the high walls in PBI and had previously issued citations, which were uncontested, for those conditions. In May 1989, nine months before Inspector Ellis' inspection, MSHA Inspector Ron Barri had visited the mine, in response to a miner's complaint about various matters including the condition of the west wall. On May 31, and June 1, 1989, Inspector Barri issued two citations that alleged S&S violations of sections 56.3200 and 56.3130. The section 56.3200 citation stated that there "were large piece[s] of loose material hanging on the west high wall ... above the ramp" and that the "area was not posted or barricaded to prevent travel alongside the high wall." S-Exh. 18. The section 56.3130 citation stated that benches on the south end of the east wall "had been allowed to accumulate materials and would not provide an adequate catch bench to protect haul truck traffic below," and that a "maintenance program for maintaining benches had not been established...." S-Exh. 19. Mr. Breland (supervisor of Ellis and Barri) had inspected the mine in June 1989, and held a post-inspection conference regarding the two citations issued by Inspector Barri. At the meeting, Breland, Cyprus' General Manager Bill Gibson, Curran, Altamirano, and a miners' representative discussed the pit walls, overall mining plan, and signs of failure in the west wall. Breland testified that they discussed the requirements of section 56.3130 and 56.3200 "fairly extensively." Tr. I 111.

The testimony in the instant proceeding reveals that Cyprus apparently believed that maintenance of a berm along portions of the west wall put it in compliance with section 56.3200. In May 1989, when cited for violating section 56.3200 because of conditions existing on the west wall, Cyprus had abated the citation by building a berm along the base of the west wall. S-Exh. 18. Although Supervisory Inspector Breland testified that Cyprus had been permitted to abate the earlier citation in such a fashion because MSHA understood that Cyprus was going to lessen the angle of the west wall, Curran testified that he did not understand that building the berm and lessening the angle of the west wall were linked. Tr. I 172; Tr. III 30-32. Curran understood that construction of the berm alone was sufficient to abate the citation. Tr. III 31-32. The description of the abatement action for the

May 1989 citation does not indicate that the angle of the west wall had to be reduced, but states only that "the west high wall in the pit ... has been barricaded with a large berm along its full length..." S-Exh. 18. Mr. Gibson also testified that, from the discussions of the closeout conference in June 1989, he understood that building a berm was sufficient for safe operation. Tr. II 211-12.

We also find significant the fact that on the day of Inspector Ellis' inspection, Cyprus was in the process of constructing a larger berm at the base of the west wall. The Commission has previously recognized that an operator's pre-citation efforts in mitigating a violative condition are relevant in reviewing an unwarrantable failure determination. See, e.g., Utah Power & Light Co., 11 FMSHRC 1926, 1933 (October 1989).

Because Cyprus' conduct apparently resulted from a good faith, albeit mistaken, belief that its actions were in compliance with section 56.3200, we conclude that substantial evidence does not support the judge's finding that Cyprus' violation of 56.3200 was caused by its unwarrantable failure. See generally Utah Power & Light Co., 12 FMSHRC 965, 972 (May 1990).

The record, however, supports the judge's conclusion that Cyprus' actions in violation of section 56.3130 were a result of its unwarrantable failure. The citation issued to Cyprus in June 1989, alleging a violation of section 56.3130, specifically provided that catch benches in PBl "had been allowed to accumulate[] materials and would not provide an adequate catch bench to protect haul truck traffic below." S-Exh. 19. The citation also provided that a "maintenance program for maintaining benches had not been established." S-Exh. 19. In order to abate the citation, Cyprus was required to clean a bench above a working area on the south wall. With respect to the close-out conference regarding the citation, Breland testified:

Also the 3130 I specifically had gone out on several of those benches with Mike Curran and my superintendent. I talked to him about what was going on there. They were or could have been accessed to do the bench maintenance that's required as part of the standard. However, they were not doing that and had not been doing that, and I explained the requirement there to keep those benches clear as long as there was staff beneath them.

Tr. I 111. Thus, Cyprus had been advised in June 1989, that it was required to adopt a maintenance program so that benches above where miners worked could be cleaned when necessary to maintain ground stability. Even after receiving such notice from MSHA, Cyprus constructed benches that it never intended to enter for maintenance purposes. Tr. II 111, 146.

Cyprus' experience with ground stability in PBl should have put it on notice that bench maintenance would, most likely, be necessary, and, as explained above, section 56.3130 requires an operator to maintain ground stability. The standard contemplates that benches, when used, be accessible to maintenance equipment. Cyprus continued to use benches in its mining, but

did not construct them so that they could be maintained. As the judge found, the benches did not serve their function as catch benches, and the unmaintained benches contributed to ground instability. 13 FMSHRC at 1550-51. We conclude that substantial evidence supports the judge's conclusion that Cyprus' failure to maintain the benches or take other adequate measures to maintain stability was aggravated conduct. Accordingly, we affirm his finding that Cyprus' violation of section 56.3130 was caused by its unwarrantable failure to comply with the standard.

D. Whether the citations are duplicative

Cyprus argues that the citations are duplicative because they address the same conditions in the same area of the mine. However, the requirements of sections 56.3200 and 56.3130 are different. Section 56.3130 requires that an operator use mining methods that maintain wall stability and sets forth additional requirements if benching is necessary. In contrast, section 56.3200 requires that, if a hazardous ground condition occurs, it be corrected and entry into the area be restricted until corrective work is completed. The standards are related in that an operator's failure to mine in a way that maintains stability may also result in a hazardous condition requiring an operator to restrict access until the hazardous condition is corrected. As the Commission has recognized:

[t]he 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory safety standard simply because the operator violated a different, but related, mandatory standard.

El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981). Thus, although Cyprus' violations may have emanated from the same events, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator. Accordingly, we affirm the judge's conclusion that the citations are not duplicative.

E. Modification of the citations following termination

Cyprus argues that the September 5, 1990, modifications to the citations changing the number of persons affected by the violations, were improper because the citations had been terminated. We agree in result with the judge's conclusion that the subject citations were not improperly modified.

In Wyoming Fuel Corp., 14 FMSHRC 1282 (August 1992) ("WFC"), the Commission held that, absent legal prejudice to the operator, the Secretary's modification of a section 104 citation, terminated pursuant to section 104(h) of the Mine Act, 30 U.S.C. § 814(h), was permissible. 14 FMSHRC at 1287-92. The Commission reasoned that termination of a section 104 citation is an administrative action of the Secretary that is meant to convey that a violative condition has been abated and to inform the operator that it will no longer be subject to a withdrawal order pursuant to section 104(b), 30 U.S.C. § 814(b), for failure to abate. 14 FMSHRC at 1289. The Commission drew an

analogy between the Secretary's modification of a terminated citation or order and the amendment of a pleading pursuant to Fed. R. Civ. P. 15(a), concluding that a modification should be permitted unless the operator would be legally prejudiced by the modification. 14 FMSHRC at 1290.

Here, Cyprus has offered no evidence that it was prejudiced by the modifications but only argues that the modifications were improper as a matter of law. We conclude that Cyprus' challenge to the modifications is without merit.

F. Particularity of citations

Cyprus argues that the citations failed to plead violations with sufficient particularity because they do not clearly set forth the time or location that the allegedly violative conditions existed and, furthermore, that it was confused as to the proper method of abatement. Cyprus contends that the judge failed to address this argument. In fact, the judge noted that Cyprus maintains that "both enforcement documents (the Citation and the Order) ... are impermissibly vague." 13 FMSHRC at 1525 (emphasis added). The judge, by considering specifically the merits of each alleged violation, implicitly rejected Cyprus' particularity argument.

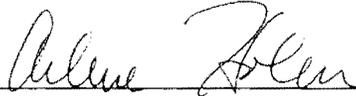
Section 104(a) requires that each "citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." The Commission has generally recognized that this requirement for specificity serves the purpose of allowing the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter. See, e.g., Mid-Continent Resources, Inc., 11 FMSHRC 505, 510 (April 1989)(citations omitted); Jim Walter Resources, Inc., 1 FMSHRC 1827, 1829 (November 1979); Old Ben Coal Co., 2 FMSHRC 1187, 1190 (June 1980); Ralph Foster and Sons, 3 FMSHRC 1181 (May 1981).

We conclude that the citations were sufficiently specific to provide notice to Cyprus that conditions existed that were alleged to be in violation of the cited standards and that corrective action was necessary. Moreover, Cyprus conducted extensive pretrial discovery that provided it with an opportunity to gain the information necessary to prepare adequately for trial. See, e.g., Annotation, Construction and Application of Provision of 29 U.S.C. § 658(a) that OSHA Citation "shall describe with Particularity the Nature of the Violation," 48 ALR Fed 466, § 6(b)(1980). In addition, the cited conditions were, in fact, adequately abated. Accordingly, we affirm the judge's implicit conclusion that the citations met the Act's specificity requirements.

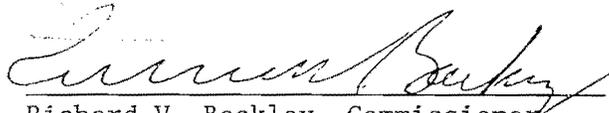
III.

Conclusion

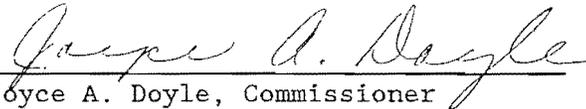
For the foregoing reasons, we affirm the judge's findings that Cyprus violated sections 56.3200 and 56.3130, that Cyprus' violation of section 56.3130 was caused by its unwarrantable failure to comply with the standard, and that the citations were not duplicative, could properly be modified following their terminations, and charged violations with sufficient particularity. We reverse the judge's finding that Cyprus' violation of section 56.3200 was caused by its unwarrantable failure. Accordingly, we remand to the judge for recalculation the penalty for Cyprus' violation of section 56.3200.



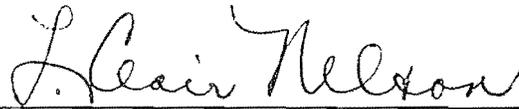
Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

Distribution

R. Henry Moore, Esq.
Buchanan Ingersoll
600 Grant Street
58th Floor
Pittsburgh, PA 15219

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

Michael A. Lasher, Jr.
Administrative Law Judge
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Blvd.
Denver, CO 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. KENT 91-179-R
 : KENT 91-185-R
PEABODY COAL COMPANY :

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The Secretary of Labor issued two citations to Peabody Coal Company ("Peabody") alleging violations of 30 C.F.R. § 75.316 (1990)¹ for operating mines without approved ventilation plans. Administrative Law Judge Gary

¹ 30 C.F.R. § 75.316 (1990), which adopted the language of 30 U.S.C. § 863(o), provided as follows:

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") revised its ventilation standards in 1992, superseding former section 75.316. Ventilation plan requirements are now set forth at 30 C.F.R. §§ 75.370-.372 (1992).

Melick upheld the citations. 13 FMSHRC 1332 (August 1991)(ALJ). The Commission granted Peabody's petition for discretionary review.

Peabody raises the following issues on review: (1) whether a certain ventilation requirement related to "deep cut" mining that the Secretary insisted be included in Peabody's plans should have been issued pursuant to the Mine Act's notice and comment rulemaking procedures; (2) whether Peabody was required to negotiate in good faith with the Secretary over the deep cut ventilation provision in the plans; (3) if such an obligation existed, whether Peabody negotiated in good faith over the disputed provision; and (4) whether MSHA acted reasonably in requiring the provision at issue.

For the reasons that follow, we affirm the judge's decision that the ventilation plan provision was mine specific and that Peabody was obligated to negotiate in good faith. We reverse with respect to the third issue, i.e., we conclude that Peabody negotiated in good faith. We remand the case to the judge for a determination of whether the disputed provision was, in fact, suitable to these mines.

I.

Procedural and Factual History

A. Factual Background

Peabody operates the Martwick Mine in Muhlenburg County, Kentucky, and the Camp No. 2 Mine in Union County, Kentucky. Both are underground coal mines that utilize a method of continuous mining known as deep cut mining.² MSHA's District 10 Office ("District 10") revoked Peabody's ventilation plans at the Martwick and Camp No. 2 Mines because Peabody refused to adopt a particular provision dealing with the ventilation of deep cuts. District 10 insisted that Peabody extend the line curtain during roof bolting to within 10 feet of the row of bolts being set and to provide a certain minimum air velocity. Under previously approved plans, the line curtain was not extended into deep cuts until after the roof was fully bolted. MSHA cited both Peabody mines for operating without approved ventilation plans in violation of section 75.316.

1. Martwick Mine

On December 4, 1990, District 10 informed the Martwick Mine that it was conducting its regular six-month review of the ventilation plan pursuant to section 75.316. Martwick submitted its plan on December 28, 1990. On January 10, 1991, District 10 rejected the Martwick plan and informed Peabody that it should include a provision outlining in detail the placement of line brattice and the volume of air reaching the end of the line brattice

² "Extended" or "deep cut continuous mining" is a method of mining that cuts deeper than 20 feet from the last full row of permanent roof supports. Remote-controlled continuous mining machines allow the operator to remain under permanent roof supports when making extended cuts.

in places where roof bolting was in progress. On January 17, District 10 and Peabody officials met. The parties discussed deep cut ventilation requirements. The particulars as to what Peabody was told were controverted.

On January 25, Peabody submitted a revised ventilation plan but failed to outline how it would ventilate deep cuts. The plan was rejected. Peabody then submitted a second revised ventilation plan that again did not provide for the ventilation of deep cuts. In explaining the omission in its transmittal letter, Peabody stated:

This item has never been included in any previous plans. Peabody has operated under previous ventilation plans at this location without safety problems or conflicts concerning this issue. Therefore, Peabody feels this plan submitted today without this item included meets all applicable laws and regulations.

Peabody attached to its letter a decision by Administrative Law Judge William Fauver in Peabody Coal Company, 10 FMSHRC 12 (January 1988)(ALJ), dealing with ventilation requirements at another Peabody mine. In that decision, the judge found that MSHA's District 3 guideline calling for ventilation of 3,000 cubic feet of air per minute during the roof bolting process was not mine specific. Judge Fauver concluded that MSHA could not insist upon inclusion of the provision because MSHA failed to show "individual analysis, evaluation and negotiation" concerning each mine. 10 FMSHRC at 16. Peabody asserted that its current situation and the case decided by Judge Fauver were identical and that it should not have to include the deep cut ventilation provision in its plan.

On February 11, MSHA cited Peabody for violation of section 75.316, for operating without an approved ventilation plan. Peabody submitted a revised ventilation plan, under protest, containing the changes required by MSHA.

2. Camp No. 2 Mine

Peabody submitted its six-month plan for the Camp No. 2 Mine to District 10 on November 28, 1990, and that plan was rejected on December 17. Peabody submitted a revised plan on January 4, 1991. District 10 again rejected the plan, informing Peabody that it must include a provision for ventilation of the deep cuts during the roof bolting stage. Peabody then submitted another plan that included the following provision:

Deflector curtains shall be used to ventilate deep cuts during the roof bolting cycle such that the current of air shall be of sufficient quantity to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases and dust, and smoke and explosive fumes.

MSHA found this provision unacceptable and rejected the plan.

By letter to District 10 dated February 13, 1991, Peabody requested a meeting and written notification of the reasons for the plan's rejection. A meeting between Peabody officials and MSHA ventilation specialists was held on February 19. Again, the particulars of MSHA's explanation to Peabody were controverted.

On February 19, Peabody resubmitted its ventilation plan. The plan contained no provision relating to the ventilation of deep cuts. MSHA replied that the plan was unacceptable because it failed to explain how deep cuts would be ventilated. On February 21, Peabody was again cited for operating without an approved ventilation plan. Under protest, Peabody submitted a revised plan complying with MSHA's demand.

B. Procedural History

Peabody filed notices of contests of both citations and moved for expedited hearings. The cases were consolidated and assigned for hearing. A hearing was held on August 7-8, 1991. The judge bifurcated the hearing and first heard the issue of whether the provision regarding the ventilation of deep cuts was specific to the particular conditions of the Peabody mines or was of such a general nature as to be subject to the notice and comment rulemaking process for mandatory safety and health standards set forth in section 101 of the Mine Act, 30 U.S.C. § 811. The judge concluded that "MSHA's insistence upon the inclusion of these particular ventilation requirements ... is not a general requirement subject to the rulemaking procedures but rather is mine specific." 13 FMSHRC at 1335.

The judge based his conclusion on the testimony of the MSHA witnesses, who outlined criteria that were examined on a mine-by-mine basis to determine whether the deep cut ventilation provision would be required in a particular plan. 13 FMSHRC at 1335. The judge found compelling the testimony of Martwick Mine Superintendent Charles Jernigan that he was told by MSHA "that the reason for the new requirements implemented at the Martwick Mine was its high methane liberation and that mines with deep cuts were being examined on a mine-by-mine basis." *Id.* The judge also attached weight to evidence that two deep cut mines in District 10 that liberate comparatively low quantities of methane were not required to incorporate the provision at issue. *Id.*

After announcing this determination orally at the conclusion of the first stage of the hearing, the judge recessed the hearing until the following morning and requested that the parties negotiate with respect to the ventilation provision. When no resolution was forthcoming, the judge heard testimony on the issues of whether good faith negotiations over the disputed provision had occurred between the parties and whether the ventilation plan provision proposed by MSHA was valid.

The judge determined that Peabody had failed to negotiate in good faith, as required by Carbon County Coal Company, 7 FMSHRC 1367 (September 1985). 13 FMSHRC at 1336. The judge reasoned that Peabody's "good faith

reliance on a colorable legal position," i.e., Judge Fauver's decision in Peabody Coal, supra, did not excuse Peabody from "negotiating regarding the specific underlying safety issue." Id. The judge held that, given Peabody's failure to negotiate in good faith, it was "clearly premature for the Commission to intervene in the approval-adoption process." Id. Accordingly, he declined to rule on the validity of the deep cut ventilation provisions and affirmed the citations against Peabody. 13 FMSHRC at 1337.

II.

Disposition of Issues

A. Whether the deep cut ventilation requirement was mine specific

Peabody asserts that the provision in dispute was not mine specific and should have been implemented through the Mine Act's notice and comment rulemaking procedures set forth in 30 U.S.C. § 811.

Section 303(o) of the Mine Act mandates the development of ventilation plans as follows:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title....

30 U.S.C. § 863(o)(emphasis added).

The legislative history of section 303(o) explains that mine ventilation plans must address the conditions of each mine:

[I]n addition to mandatory standards applicable to all operators, operators are also subject to the requirements set out in the various mine by mine compliance plans required by statute or regulation. The requirements of these plans are enforceable as if they were mandatory standards. Such individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like.

S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978).

The Commission and the courts have further emphasized the individual nature of roof control and ventilation plans. See Zeigler Coal Co. v.

Kleppe, 536 F.2d 398, 406-07 (D.C. Cir. 1976); Carbon County, 7 FMSHRC at 1370. See also Southern Ohio Coal Co., 14 FMSHRC 1, 10-11 (January 1992) ("SOCCO") (discussing Zeigler and Carbon County). Zeigler and Carbon County set forth limits on MSHA's authority by prohibiting MSHA from imposing general rules applicable to all mines in the plan approval process, but did not resolve the question of whether MSHA may require the inclusion of a provision that is applicable to a number of mines. In UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989), the D.C. Circuit, construing both Zeigler and Carbon County, clarified that mine plans need not "be confined exclusively to mine-specific conditions" but may contain generally applicable provisions so long as the provisions address the particular conditions of the mine to which they apply. 870 F.2d at 670. Dole recognized that the Secretary should utilize mandatory standards for requirements of "universal application." 870 F.2d at 672. Nonetheless, the court emphasized that the Secretary possesses "considerable authority" to determine which hazards are more properly addressed by the promulgation of mandatory standards under section 101 of the Mine Act. 870 F.2d at 671. The Court endorsed Carbon County for the proposition that the Secretary commits an abuse of discretion by requiring adoption of plan provisions without consideration of the particular conditions of a mine or by imposing plan provisions of "universal application" outside the mandatory standard promulgation process. 870 F.2d at 672.

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

The judge determined that the deep cut ventilation provision at issue was mine specific. 13 FMSHRC at 1334. He found that District 10 insisted upon the new requirement at the Martwick and Camp No. 2 mines primarily because of the mines' high methane liberation rates.³ He credited the testimony of MSHA witnesses as well as Peabody's mine superintendent in determining that MSHA applied this requirement on a mine-by-mine basis.

Peabody asserts that the deep cut ventilation provision was being applied across the district. Peabody terms the Secretary's position "self-serving," alleging that any mine-by-mine examination began only after this litigation commenced, as shown by the Secretary's announcement at the hearing that the new ventilation requirement would not be applied in one seam at the Camp No. 2 mine. Tr. III 84; P. Br. 20. Further, the mine

³ Martwick is subject to 15-day spot inspections under section 103(i) of the Mine Act, 30 U.S.C. § 813(i), because it liberates more than 200,000 cubic feet of methane during a 24-hour period. One MSHA official testified that MSHA determined that ventilation of deep cuts was necessary at Martwick because of the mine's methane liberation levels. Tr. 73. Camp No. 2 liberates methane at a rate of over 500,000 cubic feet during a 24-hour period and is subject to a 10-day spot inspection, pursuant to section 103(i) of the Mine Act.

plans that would not be required to incorporate the provision had not yet been approved. Peabody also asserts that the criterion of total methane liberation is too simplistic a measure of safety.

We find that substantial evidence in the record supports the judge's finding that the required provision was mine specific. All MSHA witnesses testified that they addressed application of the new requirement in District 10 on a mine-by-mine basis. The Martwick Mine superintendent testified that MSHA officials explained to him that the plan provision was being implemented based on methane levels at individual mines. The judge found that two other deep cut mines in the district, which liberate low levels of methane, would not be required to include the provision. While, as Peabody argues, methane liberation is not the only relevant factor in evaluating mine ventilation, a number of factors were considered by MSHA before imposing the new plan provision. MSHA also took into account the depth of the cut, the size of the continuous miner and the height of the coal. Tr. 18-19, 121-27.

We conclude that the deep cut ventilation requirement was not applied by rote process, as condemned in Carbon County, 7 FMSHRC at 1373, but, instead, was based on specific conditions at the two mines. While the requirement may also be appropriate for similarly situated deep cut mines, its general application does not render it invalid. See Dole, 870 F.2d at 669-72. The record evidence does not suggest that the requirement is of such universal application that the Secretary committed an abuse of discretion by failing to promulgate it as a mandatory standard. Accordingly, we affirm the judge's finding that MSHA's deep cut ventilation requirement was mine specific.

B. Whether Peabody negotiated in good faith

Peabody asserts that, even if the provision was sufficiently mine specific in nature, it was nonetheless substantively invalid because it was not "suitable" to the conditions in Peabody's mines within the meaning of section 303(o) of the Mine Act and 30 C.F.R. § 75.316. The judge did not reach the merits of the provision because he determined that Peabody had not fulfilled its duty of good faith negotiation with MSHA over the provision.

On review, Peabody urges that only MSHA, not an affected operator, is required to conduct good faith negotiations over plans but that, in any event, Peabody had so negotiated. In support of its argument, Peabody asserts that the good faith negotiation requirement is intended solely as a check on the Secretary's potential abuse of power. We disagree. The Commission's and the courts' longstanding view has been that both the Secretary and the operator are required to enter into good faith discussions and consultation over mine plans. As the Dole court noted, "[t]he specific contents of any individual mine [ventilation or roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager." 870 F.2d at 667. In Carbon County, the Commission explained this process:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission.

7 FMSHRC at 1371 (citation omitted)(emphasis added). See also Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 & n.8 (December 1981); Jim Walter Resources, 9 FMSHRC 903, 907 (May 1987).

Thus, we affirm the judge's determination that both Peabody and the Secretary were required to engage in good faith negotiations. However, we conclude that the record does not support the judge's finding that Peabody failed to negotiate in good faith. Rather, the record reveals that adequate discussion occurred between the parties. Judge Fauver's decision, on which Peabody relied, involved nearly identical facts. Peabody asserted that its previously approved plans were suitable to the conditions of the two mines and sought from MSHA the reasons for imposing the new requirement. Peabody requested and attended meetings with MSHA to discuss the ventilation provision and proposed an alternative.

Reliance on a cognizable legal position is not indicative of bad faith negotiation by an operator in the plan approval process. Peabody communicated its legal position to the Secretary and engaged in discussions concerning the disputed provision. Having presented to the Secretary a position that was arguably controlling, Peabody was not obligated to abandon its position. Accordingly, we reverse the judge's conclusion that Peabody failed to negotiate in good faith.

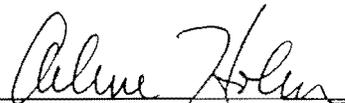
C. The merits of the disputed provision

We remand to the judge to decide whether the disputed provision was "suitable" to Peabody's mines, as contemplated by 30 U.S.C. § 863(o). The Secretary bears the burden of proving that the plan provision at issue was suitable to the mines in question. See JWR, 9 FMSHRC at 907 (involving ventilation plans), and SOCCO, 14 FMSHRC at 13 (involving safeguards).

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that the ventilation plan provision was mine specific but reverse his conclusion that Peabody did not negotiate in good faith. We remand for consideration of whether the disputed provision was suitable to the mines in question.



Arlene Holerl, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

Distribution

C. Gregory Ruffennach, Esq.
Smith, Heenan & Althen
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005

Tina Gorman, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 31, 1993

SHERRELL STEVEN REID :
 :
 v. : Docket No. KENT 92-237-D
 :
 KIAH CREEK MINING COMPANY :

DIRECTION FOR REVIEW AND ORDER

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act"), the parties have filed a "Joint Petition for Discretionary Review/Joint Motion to Vacate ALJ Decision, Approve Settlement Agreement, and Dismiss Proceeding." For the reasons set forth below, the petition and joint motion are granted.

On March 10, 1993, Administrative Law Judge Avram Weisburger issued a decision finding that the complainant had not established a violation under section 105(c) of the Mine Act. Prior to the issuance of the judge's decision, the parties had engaged in settlement negotiations. On March 12, 1993, they entered into a settlement agreement. Upon informing the judge's office of the settlement, they learned that the judge had already issued his decision.*

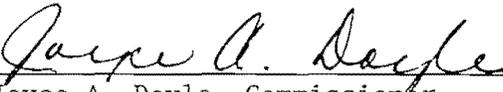
The judge's jurisdiction in this matter terminated when his decision was issued on March 10, 1993. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. The joint petition for discretionary review is granted.

Oversight of proposed settlements is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC 668, 674-675 (May 1986). The parties attached to their joint motion a copy of their settlement agreement, which is signed by Kiah Creek's President and by Complainant Reid. We have reviewed the settlement agreement, motion, and record and, upon full consideration, we approve the settlement and grant the motion. See, Duval Corporation, 8 FMSHRC 662 (May 1986); Western Fuels - Utah, Inc., 11 FMSHRC 134 (February 1989); Birchfield Mining, 11 FMSHRC 1428 (August 1989); Medusa Cement, 12 FMSHRC 1913 (October 1990).

* We note that the judge issued his decision shortly after receipt of final briefs. Parties should inform a judge when settlement negotiations may obviate the need for a ruling on the merits.

Accordingly, this proceeding is dismissed.


Arlene Holen, Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Distribution

Tony Opegard, Esq.
Appalachian Research & Defense Fund
of Kentucky, Inc.
630 Maxwellton Court
Lexington, KY 40508
for Sherrell Steven Reid

Billy R. Shelton, Esq.
Baird, Baird, Baird & Jones
P.O. Box 351
Pikeville, KY 41502
for Kiah Creek Mining

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 1 1993

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. PENN 91-1302-R
: Order No. 3690652; 6/24/91
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 91-1304-R
ADMINISTRATION (MSHA), : Order No. 3702374; 7/2/91
Respondent :
: Docket No. PENN 91-1305-R
: Order No. 3690658; 7/3/91
: Dilworth Mine
: Mine ID 36-04281
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 91-1462
Petitioner : A.C. No. 36-04281-03740
v. :
: Dilworth Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Daniel Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.
Theresa Timilin, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Weisberger

These consolidated cases are before me based upon petitions for assessment of a civil penalty filed by the Secretary of Labor (Petitioner), alleging violations of various mandatory safety standards. Pursuant to notice, the cases were heard in Waynesboro, Pennsylvania, on October 28, 1992. George Rantovich, Randy Cunningham, Ronald Gossard, Ronald Hixson, Marlon Whoolery, James Samuel Conrad, Jr., and James W. Reed, testified for the Petitioner. James Hunyady, John Burr, Patrick M. Wise, and Robert Belesky, testified for Respondent.

Respondent filed a Post-Hearing Brief on January 11, 1993. Petitioner's Proposed Findings of Fact and Brief was filed on February 4, 1993.

I. Citation No. 3702400

A. Introduction

On June 5, 1991, on the 8-D Section during the evening shift, Paul Checoski, the mechanic on the section, locked and tagged the power center supplying power to a 7,200 volt cable. The cable was then moved, and another cable was attached to it by John Holonich, a roof bolter, and John Rerko, a miner operator. Neither of these was a qualified person meeting the requirements of 30 C.F.R. § 75.153. In making the connection between the two cables, threaded ends are screwed together by hand and then tightened with a wrench if necessary. This is the only way for the cables to be connected to one another.

Randy C. Cunningham, a roof bolter, and Don Jones, a foreman, neither of whom is qualified pursuant to Section 75.153 supra, connected the extended cable to the load center. Cunningham indicated that when he made the connection to the load center, he and Jones "might have wiped some dirt out" (Tr. 56), but "it wasn't bad, it was just dry dirt." (Tr. 57) He also said that the area was damp, and there were mud puddles at various locations.

Once the connections were made, and before the power was restored, Cunningham asked Sam Basle, the section foreman, whether the connection should be inspected by a qualified person before the cable is energized. Basle checked with the maintenance foreman, Cy Wilson. According to Cunningham, Basle said that Wilson told him said that such an inspection is not necessary. When the cable was energized after the connections had been made, it functioned properly and there were no sparks.

On June 19, 1991, George Rantovich, an MSHA inspector, inspected the subject mine in response to Section 103(g) complaint that had been received in the MSHA office on June 13, or June 14, 1991. He issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.511 based on the incident that had occurred on June 5, 1991. Specifically, the citation alleges as follows: "Evidence indicates that on the 8-D section 72.00 cable, an examination by a qualified person was not conducted on the additional cable connectors and plugs before the power was restored on cable." [sic]

30 C.F.R. § 75.511, as pertinent, provides as follows: "No electrical work shall be performed on low, medium, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to

maintain electrical equipment under the direct supervision of a qualified person."

As his rationale for the issuance of the citation at issue, Rantovich indicated that a person not qualified would not recognize the dangers presented by the presence by mud and water in the ends of the high voltage cables that had to be connected. He indicated that should such mud and water be present and not removed, there is a danger of an explosion causing injuries, once the cables are connected and energized. Ronald J. Gossard, an MSHA electrical supervisor corroborated Rantovich's testimony in this regard. Respondent has not impeached or contradicted this testimony.

B. Discussion

The record is clear that the persons who connected the extension to the cable, and the cable to the load center, were not qualified as that term is defined in Section 75.153, supra, nor were they performing this work under the direct supervision of a qualified person. However, in order for the activities at issue to be violative of Section 75.511 supra, they must fall within the ambit of that section i.e., they must be "electrical work". In this connection, Rantovich relied on the MSHA Program Policy Manual ("PPM"), dated April 1, 1991, which defines electrical work as "the work required to install or maintain electric equipment or conductors". The PPM lists as examples of work not required to be performed by a qualified person, inter alia, the following: "inserting low-and-medium-voltage cable couplers into receptacles or withdrawing low-and-medium-voltage cable couplers from receptacles". Rantovich and Gossard, in essence, argued that since coupling low and medium-voltage cables are examples of work not requiring a qualified person, then coupling a high voltage cable would be considered work requiring a qualified person. Although weight is to be accorded the Secretary's interpretation of her regulations, the interpretation is not binding where it goes beyond the plain meaning of the regulations especially, where the regulations, reiterate statutory language. (See, King Knob Coal Co., 3 FMSHRC 1417, 1420, N.3, (1981)).

Section 75.511 supra, contains the exact language found at Section 305(f) of the Federal Coal Mine Health Safety Act of 1969, (P.L. 91-173), ("the 1969 Act"), which has been incorporated in the Federal Mine Safety and Health Act of 1977 ("the 1977 Act"). Both the parallel language in the Senate version of the 1969 Act, S.2917, and the House Bill, H.R. 13950, provided that, "no work" shall be performed on high voltage circuit or equipment except by qualified persons." (emphasis added) The House of Representative Conference Report accompanying S. 2917 specifically qualified this provision by providing that, "no electrical work", is to be performed except

by a qualified person. (H.R. Rep. No. 91-761, 91st Cong., 1st Session, at 25, found in Legislative History of the Federal Mine Health and Safety Act of 1969, ("Legislative History of the 1969 Act"), at 1479 (emphasis added). This language was continued and enacted in Section 305(f) of the 1969 Act.

Neither the 1969 Act, nor the 1977 Act, nor the Code of Federal Regulations, defined the term "electrical work". Since the word "electrical" was added by the Conference Report, supra and enacted in Section 305(f) supra it must be concluded that it was meant to limit or to modify the type of work required to be performed by a qualified person or under his supervision. The term "electric" or "electrical" is defined in Webster's Third New International Dictionary, ("Websters") (1986), as "1a: of relating to, or produced by electricity... ." The activities at issue, connecting one end of the cable to another end by hand, are clearly physical or mechanical acts and not "electrical" work, although the activities are performed on electrical equipment.¹ See, U.S. Steel Mining Co., 13 FMSHRC 1451 (Judge Koutras) (1991); Consolidation Coal Co., 12 FMSHRC 2643 (Judge Weisberger) (1990). I thus find that the activities at issue herein do not fall within the scope of section 75.511 supra, and hence the citation at issue is to be vacated.

II. Orders No. 3690652, 3690658, and 3702374, and Citation Nos. 3690660, 3690659, and 3702375

A. Order No. 3690652

Findings of Fact and Discussion

In the track haulage entry at Respondent's Dilworth Mine, power is supplied to the trolley wire by way of a 600 volt dc wire that is supported from the roof by being attached to wooden planks (hangers) which are installed at 10 foot intervals, and are bolted to the roof. An insulator attached by its top to the plank, and by its bottom to the trolley wire, serves to insulate the energized trolley wire from the wooden plank and the coal in the roof.

On June 24, 1991, Ronald Hixson, an MSHA inspector, while inspecting the track haulage entry at approximately 10:30 a.m., observed flames on one of the planks close to the No. 8 crosscut. The plank, was 2 to 3 inches thick, 14 inches long, and 10 inches wide. He said that the flames were 1 to 3 inches in height, and covered an 8 inch square area. He indicated that there were three different areas where the plank had been burnt. Also, he

¹To the extent that U.S. Steel Mining Co., Inc, 5 FMSHRC 1752 (Nov. 1983) (Judge Broderick) cited by Petitioner is inconsistent with my decision, I choose not to follow it.

said that the roof was warm. Power was then removed from the wire by a switching it off, and the flames went out.

On June 24, 1991, the miners at the Dilworth mine were on vacation, and accordingly there was no pre-shift examination of the area in question. Hixson indicated in this regard that had he not noticed the fire, it could have smoldered or developed into a large fire, as a few hours could have elapsed before someone entered the area. He noted the presence of combustible materials such as the planks, and sloughage, and the presence of heat in the roof. He indicated that, as a consequence, within minutes there could have been a major fire, or explosion, had he not immediately corrected the situation. He concluded that there was an imminent danger, and an order was subsequently issued under section 107 of the Federal Mine Safety and Health Act of 1977 ("the 1977 Act").

Once the power was removed and the flames went out, the trolley wire was removed from a clip which prevented electrical contact between the trolley wire and the plank. Also, the area of the roof that was warm was cooled with water. Subsequent to these actions, Hixson left the underground area and, once outside the mine, wrote and issued a section 107(a) withdrawal order (Government Exhibit No. 4).²

Section 3(j) of the 1977 Act supra defines an imminent danger as "...the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated". (Emphasis added) It thus would appear that once the conditions constituting an imminent danger have been dealt with, and no longer constitute an imminent danger, the subsequent issuance of an order under section 107, is not proper.

The definition of imminent danger contained in Section 3(j) of the 1977 Act, supra is the same as that contained in the Coal Mine and Safety Act of 1969 ("the 1969 Act"), 30 U.S.C. § 801 et seq. The Senate Report accompanying the 1969 Act states that once an inspector finds that an imminent danger exists, "...he

²The following testimony of Hixson offers a possible explanation why he did not write a withdrawal order at 10:30 a.m. when he encountered the "situation" is as follows: "When we discovered the flame, the initial reaction was to get it out to find out exactly how much we -- how much of a problem we had. Probably in that hour time period where we discussed what kind of a violation or what kind of a citation that was going to be issued. But it was not of primary concern at the time that we found the situation." (Tr. 161).

would be required" to issue an order requiring the withdrawal of workers from the section of the mine where the danger exists "...until it is determined by an inspector that the condition no longer exist." (S. Rep. No. 411, 91st Cong. 1st Sess. at 37 (1969)), reprinted in Legislative History of the 1969 Act, supra at 163). To the same affect is the following language in the Section by Section Analysis, of the Senate Report, supra, with regard to the duration of the imminent danger order, "The order remains in effect until the inspector determines that there is no danger." (Legislative History supra at 215). The analysis further states that, "The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice. The seriousness of the situation demands such immediate action." (Legislative History, supra at 215).

The House Report accompanying H.R 13950, the House version of the Bill that became the 1969 Act, explains that subsection a of Section 104 deals with the finding of an imminent danger by an inspector and that "When this occurs, the representative will determine the area where the danger exists and immediately issue an order requiring the mine operator to withdraw all persons, except those necessary to take corrective action from the affected area until the danger is abated." (H.R. Rep. No. 91-563, 91st Cong., 1st Sess., at 8, reprinted in Legislative History, supra at 1038). (Emphasis added)

Hence, in requiring inspectors to issue withdrawal orders in the presence of an imminent danger, Congress clearly intended to have miners immediately withdrawn once the dangerous condition is discovered, and to remain withdrawn until there is no longer any danger as determined by the inspector. Thus, to effectuate this legislative intent, the withdrawal order should be issued during the time the conditions constituting the imminent danger are in existence. It does not serve any purpose to issue such an order once the conditions are no longer an imminent danger. (See, Utah Power and Light Co., 13 FMSHRC 1617 at 1621, wherein the Commission, after analyzing the legislative history of withdrawal orders for an imminent danger concluded as follows: "Thus, the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners.") Hence, it is clear that once the danger has been abated and is no longer in existence, the hazard is no longer impending, and as such, the withdrawal of miners is no longer required.

In the instant case, in the judgment of Hixson, an imminent danger presented itself because there were flames on the wooden plank, the roof was hot, combustible material such as coal sloughage, and wooden planks were present, and the mine was considered to be gassy. However, the imminent danger order was

not written³ and issued until Hixson was outside the mine, power to the wire had been turned off, the fire had been extinguished, and cold water had been poured on the hot area to cool it.⁴ Since there was no longer any imminent danger when the order was issued, it cannot be found to be valid.⁵ (See, Consolidation Coal Co., supra.)

B. Citation 3690660

As a result of the conditions Hixson observed on June 24, 1991, he issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.516 in that "...due to the breakdown of the insulator or dampness in the 8-D haulage at No. 8-D crosscut a proper insulator to insulate the 550 volt dc trolley wire from the mine roof and wooden planks was not provided."

30 C.F.R. § 75.516 supra, as pertinent, provides that power

³Section 107(d) of the 1977 Act, supra provides, in essence, that withdrawal orders shall be given "promptly" to the operator and "...shall be in writing" (emphasis added). Section 107(c) of the Act mandates that a withdrawal order "...shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of coal or other mine from which persons must be withdrawn and prohibited from entering." In the case at bar, the written order issued pursuant to Section 107 supra, was not issued until Hixson was outside the mine and there was no longer any imminent danger.

⁴In some circumstances a timely verbal order of withdrawal is valid where it is subsequently committed to writing (See Consolidation Coal Co., 14 FMSHRC 2066 (Judge Melick) (1992)). However, the record does not convincingly establish that Hixson issued a verbal withdrawal order at a time when the perceived danger was in existence. On cross-examination, he indicated that he did not tell Respondent's representatives that he was going to issue a withdrawal order as he approached the burning hanger (wooden plank). He also indicated, on cross-examination, that he did not recall when he told Respondent's representative Patrick Wise, who was present, that "this was a 107(a) situation and people should be withdrawn" (Tr. 162).

⁵In Complainant's brief it is argued, in essence, that the stipulation by the parties that the 107(a) order was properly served on Respondent, establishes that Respondent was given proper notice that there was an imminent danger. The key issue is not whether Respondent was aware of a dangerous condition, but rather, whether Complainant issued a withdrawal order during the time when an imminent danger existed. As set forth above, the record does not establish that the withdrawal order was timely issued.

wires "shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs." 30 C.F.R. § 75.516-1 defines the term "well-insulated" as follows: "well-insulated insulators is interpreted to mean well-installed insulators. . ." Hixson explained that he issued the citation alleging a violation of Section 75.516 supra, as the failure of the insulation is a violation i.e., that the insulator did not do what it was designed to do i.e., to keep the electricity in the wire. Gossard testified that if the insulator fails, electricity from the wire will then ground to the plank and roof, causing heat, which could lead to combustion.

Gossard also indicated that the trolley wires at Respondent's mine were a 600 volt system, whereas the insulators at issue were not designed specifically for use with a 600 volt wire system. He said the insulators could be used with either a 300 or 600 volt wire system. He indicated, in essence, that accordingly, when the insulators are used with a 600 volt system, arcing is more likely to occur if the insulators are not functioning properly. In essence, he recommended using an insulator designed to be resistant to moisture in order minimize the risk of arcing.

Complainant cites the fact that combustion had occurred, (as described in II(A) infra) as evidence that the hangers and insulators failed to operate as designed. Complainant also refers to Hixson's testimony which sets forth his opinion that Section 75.516 supra is intended to prevent the hazards attendant upon contact between power wires and combustible materials. In this connection, Complainant argues that since combustion occurred, electrical current from the trolley wires came in contact with the combustible wooden plank. For the reasons that follow I find Complainant's arguments to be without merit.

Section 75.516 supra requires that wires such as the trolley wires in issue shall be supported on "well-insulated insulators and shall not contact combustible materials roof or ribs". Hence, the plain language of Section 75.516 supra indicates that this Section is violated only if, (1) the insulators are not "well insulated" or (2) the trolley wires contact combustible material, roof, or ribs.

1. Well insulated insulators

Section 75.516-1 defines well insulated insulators as meaning, "well-installed insulators". At best, the evidence herein tends to establish that the insulators did not serve their intended purpose due perhaps to moisture. However, there is a lack of evidence to base a conclusion that the insulators were not "well-installed". There is no evidence in the record to base a conclusion as to the manner in which the insulators were installed. Indeed, the parties stipulated that the insulators at

issue were "well installed". (Tr. 115) Thus, I conclude that the trolley wires were well insulated.

2. Trolley wires in contact with combustible material

Also, Section 75.516 supra is violated if the trolley wire comes in "contact" with combustible material, roof or ribs. Section 75.516 supra contains the identical language that was set forth in Section 305(k) supra of the 1969 Act and which was incorporated in the 1977 Act. Neither the 1969 Act nor the regulations clarify as to whether section 305(k) (Section 75.516 supra) intended to prohibit physical or electrical contact between a trolley wire and combustible material. However, enlightenment as to as to Congressional intent is found in the legislative history of the 1969 Act. The Senate Report, in its section by section analysis, indicates that section 206(g) of the Senate Bill, whose language was reiterated in Section 305(k) of the 1969 Act, requires that all power conductors be "not allowed to touch combustible material, roof, or ribs." (Legislative History, supra at 193). To the same affect, the House Report in its analysis of Section 305(l) of the House Bill whose language was reiterated in Section 305(k) of the 1969 Act, states that Section 305(l) requires that all underground power conductors be "not allowed to touch combustible materials, roof or ribs". (Legislative History, supra, at 1079). Thus, I conclude that Congress intended that trolley wires not touch combustible material i.e. not come in physical contact with these materials .

There is insufficient evidence before me to conclude that the trolley wires were touching any combustible material. None of the witnesses who were present at the time, Hixson, Marlan Whoolery a union work-around, or Patrick M. Wise, Respondent's safety escort, provided any description of the spatial relationship of the wire to the combustible materials, roof, ribs or plank. Hixson indicated that once the power was off and the flames went out, he took the trolley wire out of the clip located at the bottom of the insulator between the insulator and the trolley wire (See Government Exhibit No. 5). This testimony does not establish that the wire was touching the plank or other combustible surfaces.

Whoolery, indicated that when he observed the plank burning, the hanger was no longer attached to the plank. After the power was turned off, he removed the hanger from the wire. If the wire was attached to the hanger, but the hanger was not attached to the plank, I cannot conclude that the wire was in contact and touching the plank or other combustible material.

Therefore, for all the above reasons, it is concluded that Petitioner has not established a violation herein of Section 75.516 supra as alleged.

C. Order No. 3690658

On July 3, 1991, Hixson, upon entering the 7-D track entry, observed smoke "billowing" from the base of a hanger (Tr. 149). He said that he then had the power turned off. Hixson said that the roof was extremely hot where the pipe hanger was attached to the roof. According to Hixson, there was a one-foot distance between the hanger and the roof. The hanger was attached to the roof by a pipe which was not insulated. An insulator separated the roof from the energized wire. Hixson said that the roof felt hot for about two feet around the pipe. According to Hixson, the roof consisted of coal, shale and rock, and sloughage was present.

After approximately an hour, the roof had cooled off, and there was no longer any smoke observed. Whoolery, who was present with Hixson, indicated that after the power was turned off, he was not part of a conversation between Hixson and Wise but heard "bits and pieces" and that "I think it was explained it was a 107-A" (Tr. 187). According to Hixson, "right after the power was removed", he told Respondent's personnel that he was going to issue an imminent danger withdrawal order (Tr. 169). Hixson issued a written imminent danger order outside the mine at 11:35 a.m., after a new hanger was installed to replace the one that had become hot.

The critical issue for determination is whether an imminent danger still existed when Hixson issued a 107(a) withdrawal order. The order was issued in writing at 11:35 a.m., outside the mine, clearly after the condition constituting an imminent danger was no longer in existence. The earliest that Hixson orally informed Respondent that he was going to issue a withdrawal order was after the power was removed from the mine hanger. Once power was removed, the "heavy" smoking stopped, but there was still smoking and "hot spots" (Tr.170). The roof was "extremely" hot around the area where the pipe entered the roof (Tr. 150). The order subsequently issued by Hixson cites the following conditions as constituting the imminent danger: "A hot hanger ... was found ... the hanger had gone to ground causing the mine roof to become hot with a large amount of smoke. The mine roof ... had coal in this area" [sic]. In his testimony, Hixson explained that the presence of smoke indicated a fire, and that he issued the 107(a) order because there was an "uncontrolled" fire that had a potential for disaster (Tr.159). Ron Gossard, an MSHA electrical supervisor testified, in essence, that smoke indicates that combustion was taking place. According to Gossard, the presence of smoke can lead to smoke inhalation, exposure to carbon monoxide, and the impediment of exit from the mine. He also indicated that the amount of heat in the coal roof is dependent on the amount of current that passes into the coal strata, as well as the passage of time. I accept his testimony due to his expertise and experience. Hence, I find that even

though power had been turned off when Hixson orally advised Respondent that he was going to issue a 107(a) order, there still was a fire in the coal roof. Gossard opined that given the combustion, the roof will fracture and "in all probability" drop out of the main mine roof (Tr. 237). When this occurs, particles of smoldering coal are exposed and "can very readily" burst into flames (Tr. 237). This "could happen quickly" (Tr. 237) Gossard also indicated that with the roof falling out, "there's a very distinct possibility that when this roof fractures it will bring a long section of trolley wire down with it" (Tr. 238). In this event trolley wire contacting the rail will cause arcing.

Within the framework of this testimony I affirm the oral notification of withdrawal issued by Hixson when the power was turned off, and subsequently committed to writing as Order No. 3690562.

D. Citation No. 3690659

On July 3, 1991, in addition to the imminent danger order, Hixson issued a Citation alleging a violation of Section 75.516 supra. According to Hixson, smoke was coming from the point where the pipe hanger was attached to the roof. He did not specifically indicate that the trolley wire was touching the roof, or any other combustible material. Whoolery indicated that there was a glow around the insulator, the plastic on the trolley wire was smoldering, and that coal in the roof was burning. He too did not specifically state that the trolley wire was touching any combustible material. Neither Whoolery nor Hixson nor any other witness or any other evidence has indicated the manner in which the insulators were installed. I thus find that it has not been established that the insulators were not well installed. It also has not been established that the trolley wire was in contact with any combustible material, roof or ribs. Thus, for the reasons set forth above, II (B) infra, I conclude that it has not been established that there was any violation of Section 75.516 supra, and thus Citation No. 3690659 must be dismissed.

E. Order No. 3702374

On July 2, 1991, James Samuel Conrad, Jr., an MSHA inspector, was at the subject mine to perform a methane spot inspection. At approximately 8:45 a.m., in the track haulage entry, he observed that the roof was smoldering and there was smoke around the metal rod in the roof. He said the roof was warm to touch for an approximately five foot radius around the smoke. He said that the only obvious reason for this heat was the failure of an insulator, as there was no other source to generate smoke out of a hole where the metal rod had been placed in the coal. He then cut off power to the trolley wire, removed the insulator from the rod, and proceeded to pick down coal from the roof. Water was applied for approximately 45 minutes to cool the roof. Also the hanger was replaced.

Conrad indicated that there was coal four inches into the roof. In addition, he said that sloughage was present, and there were wooden cribs in the intersection. He said that all these items were combustible.

James W. Reed, a union walk-around who was with Conrad, also observed a "good bit" of smoke coming out of the coal in a 4 foot wide area surrounding the pipe hanger (Tr. 224). He also said that the slate was hot to the touch above the coal. He indicated that the coal from the roof that had been "picked down" had fallen to the ground. (Tr. 226) He said that this coal was still "smoking" when it was on the ground (Tr.226). According to his testimony, the coal was hosed down for about a little more than 10 minutes, and "it was cooled down pretty much and we felt we had it pretty much in control" (Tr.227). [sic] He said that at approximately 9:35 a.m., the situation was "under control and we left...". (Tr. 229) Prior to that time, Conrad did not orally advise Respondent of any withdrawal order.

At about 10:35 a.m., after the imminently dangerous conditions ceased to exist, Conrad told Respondent's representative Robert Velesky, that he probably will issue a section 107 order with regard to the hot hanger.

At the end of the inspection at about 1:00 p.m., Conrad issued a written imminent danger order indicating that the order was issued 8:45 a.m., and terminated 9:35 a.m. In essence, Conrad said he did not issue the order earlier, because "I was more concerned with the facts of dealing with the condition at hand. And I felt the paperwork was just a preliminary thing, a follow-up." (Tr. 217) [sic]. He also indicated that he took into consideration the fact that Hixson had previously issued a 107(a) order "on very similar circumstances". (Tr.217).

I find that the evidence does not establish that the 107(a) order was issued at a time when the conditions constituting an imminent danger were still in existence. Therefore as explained above, II(A) infra, I conclude that the Section 107(a) order was not properly issued.

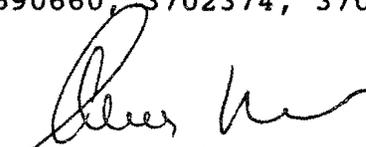
F. Citation No. 3702375

On July 3, Conrad issued a citation citing the conditions observed by him on July 2, and alleging a violation of 30 C.F.R. § 75.516. In the citation he alleged that a "shorted out insulator that was supporting the energized trolley and feed wire caused the roof coal in the immediate mine roof to catch fire." However, there is no evidence in the record with regard to the manner in which the insulators were installed. Specifically, there is no evidence that the insulators were not well installed. Also, there is no evidence that the trolley wire was touching the roof or any other combustible material.

Therefore, for the reasons set forth above, II(B) infra, I find that it has not been established that there was a violation of Section 75.316 supra. Accordingly the citation should be dismissed.

ORDER

It is hereby **ORDERED** that Order No. 3690658 be affirmed and Notice of Contest Docket No. PENN 92-1305-R be **DISMISSED**. It is further **ORDERED** that the following Orders and Citations be **DISMISSED**: 3690652, 3690659, 3690660, 3702374, 3702375 and 3702400.



Avram Weisberger
Administrative Law Judge

Distribution:

Daniel Rogers, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Theresa C. Timilin, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 3 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-752
Petitioner	:	A.C. No. 15-16666-03512
v.	:	
	:	No. 3 Mine
WILLIAMS BROTHERS COAL	:	
COMPANY, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee for Petitioner;
Hufford Williams, Vice President, Williams Brothers Company, Incorporated, pro se, for Respondent.

Before: Judge Feldman

In this proceeding the Secretary seeks to impose a civil penalty on the respondent for an alleged non-significant and substantial violation of the mandatory safety standard in Section 77.1605(d), 30 C.F.R. §77.1605(d).¹ Pursuant to notice, an evidentiary hearing was held in Prestonsburg, Kentucky, wherein Clifford Crum testified on behalf of the Secretary and Hufford Williams testified for the respondent. The parties stipulated to my jurisdiction in this matter and waived the filing of post-hearing briefs. At the culmination of the hearing, I issued a bench decision vacating the citation in issue and dismissing this case. This decision formalizes my bench ruling.

The dispositive facts in this matter are not in dispute. On March 23, 1992, Mine Safety Inspector Clifford Crum issued Citation No. 3810327 for an alleged violation of Section 77.1605(d). The citation was based upon one inoperable right lower front headlight and two inoperable rear taillights on the respondent's Caterpillar front-end loader, Model No. 980B,

¹ Section 77.1605(d) provides: "Mobile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required." The subject front-end loader was equipped with the requisite audible warning system. (Tr.46).

located on the surface of the respondent's underground No. 3 Mine.² It is undisputed that the front-end loader had three operational headlights on the front and two operational headlights on the rear. It is also undisputed that two operational headlights on the front and two operational headlights on the rear satisfy the requirements of Section 77.1605(d). (Tr. 31-32). Inspector Crum testified however, that the respondent was cited under the theory that all equipment on a piece of machinery must be operational. (Tr. 20-21). In this regard, Crum considered the violation to have been abated when the respondent replaced the front headlight and removed the inoperable taillights. (Tr. 19-20). At the hearing, I issued the following bench decision which is edited with non-substantive changes:

The issue is whether Section 77.1605(d) has been violated. This section requires loading and haulage equipment to have lights on both ends. The operable part of this section is lights in the plural sense.

In issue is the condition of the front and rear of this front-end loader. Starting with the front, the equipment has a standard two light operational mode with two additional headlights that can be added as an option.

The undisputed testimony indicates that three of the four front headlights were operational. Mr. Crum's testimony indicates that if only two headlights were operational and there were only two headlights installed on the vehicle, there would be no violation. However, we have the anomalous situation of a citation issued for three operational headlights where only two headlights are required.

My view of Section 77.1605(d) is that if two lights are sufficient, certainly three lights are sufficient. Although it would have been preferable to have the fourth light operational, I find that the three operational headlights satisfied Section 77.1605(d) with regard to the front of the loader.

Turning to the rear end of the loader, the testimony reflects two operational headlights. What were not operational were two taillights. Mr. Crum testified that removal of these inoperable taillights abated the

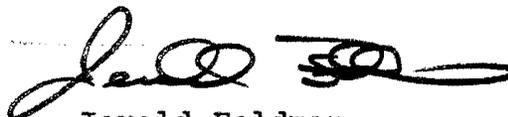
² The loader is only used on the surface to load stockpiled coal into dump trucks. It travels approximately 50 to 60 feet during the loading process. It is used only during the day shift from approximately 6:00 a.m. until 3:00 p.m. (Tr 41-43).

alleged violation with respect to the rear of the vehicle. I am hard pressed to conclude that there's been a violation with regard to the rear because the taillights were inoperable if removing the taillights abates the situation.

Therefore, I conclude that both the front and rear of the loader satisfied the requirements as intended under Section 77.1605(d) in that headlights were provided on both ends. I am hereby vacating the citation and dismissing the case. (See Tr. 56-58).

ORDER

In view of the above, Citation No. 3810327 **IS VACATED** and this civil penalty proceeding **IS HEREBY DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Hufford Williams, Williams Brothers Coal Co., Inc., 415 Card Mountain Road, Mouthcard, KY 41548 (Certified Mail)

vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 5 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 93-64
Petitioner : A.C. No. 46-01867-03937
v. :
 : Blacksville No. 1
CONSOLIDATION COAL COMPANY, :
Respondent :

SUMMARY DECISION

Before: Judge Merlin

The above captioned case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. § 815(d), and section 2700.27 of Commission regulations, 29 C.F.R. § 2700.27. The twelve citations which were issued under section 104(a) of the Act, 30 U.S.C.A. § 814(a), charge violations of section 50.30-1(g)(3) of the Secretary's regulations, 30 C.F.R. § 50.30-1(g)(3), for overreporting of employee hours on the Quarterly Employment and Coal Production Report (MSHA Form 7000-2).

This case involves the same issue as in Consolidation Coal Co., Docket No. WEVA 93-7, wherein the parties filed cross motions for summary decision. 14 FMSHRC ____ (March 4, 1993). In that case, I determined that summary decision was proper under Commission rules, 29 C.F.R. § 2700.64(b), since no issue of material fact was in dispute, but rather only the appropriate amount of penalties to be assessed in accordance with statutory criteria. 30 U.S.C.A. § 820(i). To date the parties in this case have not filed cross motions. However, since the issues and parties in this case are identical to those in WEVA 93-7 (only different mines are involved) I find that summary decision lies here as well.

In Docket No. WEVA 93-7, the summary decision rejected the Secretary's motion for imposition of a \$500 penalty for each overreporting of employee hours subsequent to my May 24, 1990, decision in Consolidation Coal Co., 12 FMSHRC 1129, but prior to the Commission's June 9, 1992, decision, 14 FMSHRC 956. Instead penalties of \$100 apiece were assessed for such violations. The summary decision in WEVA 93-7 is controlling and therefore, penalties of \$100 each should be assessed for the violations herein.

In light of the foregoing, it is **ORDERED** that the Secretary's findings of violations for the twelve citations in the subject penalty petition be **AFFIRMED**.

It is further **ORDERED** that penalties of \$1,200 be **ASSESSED** and that the operator **PAY** such penalties within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Daniel E. Rogers, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 8 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. KENT 92-415
v. : A. C. No. 15-16448-03562 A
FRED JONES, EMP. BY CHRISTIAN :
ENERGIES, INC., : Christian Energies No. 2
Respondent : Mine

DECISION APPROVING SETTLEMENT

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
Mr. Fred Jones, Williamsburg, Kentucky, pro se.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, on January 27, 1993, in London, Kentucky, petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$11,400 to \$2800 was proposed because of the limited financial resources of the respondent. I have considered the representations and documentation submitted in this case, including the representations on the record at hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of \$2800 in 14 equal monthly installments of \$200 each, beginning within 30 days of the date of this order, and continuing until paid in full.


Roy J. Maurer
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U. S. Department
of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203
(Certified Mail)

Mr. Fred Jones, 3707 Lot Mud Creek Road, Williamsburg, KY 40769
(Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 9 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-748
Petitioner : A.C. No. 15-14074-03610
v. :
PEABODY COAL COMPANY, : Martwick Underground
Respondent :

DECISION

Appearances: Darren Courtney, Esquire, Office of the
Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for Petitioner;
David R. Joest, Esquire, Peabody Coal
Company, Henderson, Kentucky for Respondent

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Peabody Coal Company (Peabody) with one violation of the mandatory standard at 30 C.F.R. Section 75.400 in a citation issued pursuant to Section 104(d)(1) of the Act.¹

The citation at bar, No. 3417103, alleges a "significant and substantial" violation and charges as follows:

¹ Section 104(d)(1) of the act provides, in part, as follows:

"If, upon the inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also find that, while the conditions created by such a violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

Coal dust and float coal dust were permitted to accumulate under the bottom rollers with the bottom rollers running in the coal dust at twelve locations along the 2nd North West main conveyor belt, three rollers between Nos. 6, 8, and 70 crosscuts and (1) between No. 71 and 72 with accumulations measured 12 inches deep, five feet long and four feet wide, measured with steel tape, No. 1 sample collected, one between Nos. 75 and 76 crosscut, one between No. 81 and 82 crosscut, four (4) bottom rollers running in coal dust at No. 84 crosscut No. 2 spot sample collected, accumulative measured at locations five (5) feet long, eleven inches deep and four feet wide, one roller in coal dust at No. 88 crosscut, accumulations measured five (5) feet long and 12 inches deep four (4) feet wide No. 5 Spot sample collected and one bottom roller running in coal dust at No. 89 crosscut.

The cited standard provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

At hearings Peabody admitted the twelve cited violative conditions and conceded that those conditions constituted a "significant and substantial" violation. It denies only that the violation was the result of its "unwarrantable failure." "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. See Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007 (1987); Emery Mining Corporation, 9 FMSHRC 1997 (1987). Within this framework of law, it is clear that the admitted illegal accumulations in this case were the result of Peabody's unwarrantable failure.

According to the undisputed testimony of Mine Safety and Health Administration (MSHA) inspector, Darrold Gamblin, the twelve cited accumulations in fact existed on October 28, 1992, as he described them in the citation at bar. The existence of such a large number of significant accumulations along the northwest belt line in itself constitutes such an obvious and unusual number and size of violative conditions that it may reasonably be inferred from that evidence alone that management knew of the conditions. Moreover, the absence of any evidence of any concurrent cleanup efforts in the presence of such

a large amount of accumulations constitutes an inexcusable omission of an aggravated nature. See Peabody Coal Company, 14 FMSHRC 1258 (1992).

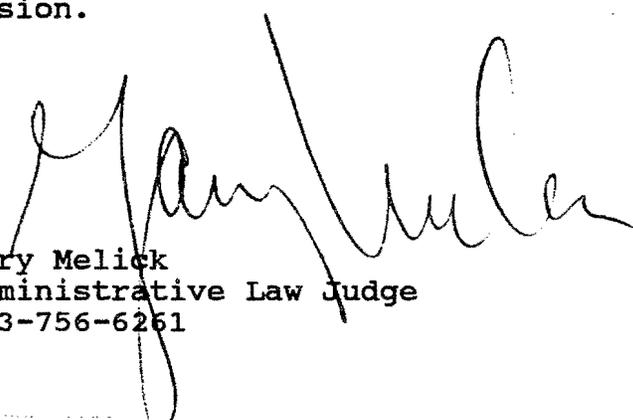
In addition, the undisputed testimony of Peabody's belt examiner, David Arbuckle, that the conditions he reported in the belt inspection report (Joint Exhibit No. 2) needed correction on October 25, 1991 (i.e., "second northwest-clean bottom rollers from No. 68 to No. 83-bad [top roller] No. 94") also clearly describes a serious and major problem with the accumulation of loose coal in proximity to an ignition source. Again, according to Arbuckle's undisputed testimony, that problem remained uncorrected at the time of the examination three days later when he again inspected the area and again noted in the belt inspection report that the same coal accumulations still needed correction. Since these reports were countersigned by the mine foreman or other "certified official" of Peabody, the operator was placed on written notice of the condition and failed to correct it for at least three days. It may reasonably be inferred that this was one of the conditions also cited on October 28, by Inspector Gamblin since it was within the same area cited by Gamblin. These aggravated circumstances are sufficient alone to constitute unwarrantable failure.

Finally, the practice at the Martwick Mine at the time of the instant violation of failing to note in the belt inspection reports that "corrections" to the conditions noted in the reports (in this case, the cleanup of coal accumulations) had in fact been made was a particularly serious omission of an aggravated nature and constitutes high negligence. For this additional and independent reason the violation herein was the result of unwarrantable failure.

Considering the above evidence, it is clear that the Secretary has sustained her burden of proving that the violation charged in Citation No. 3417103 was the result of the unwarrantable failure of the operator to comply with the law.

ORDER

Citation No. 3417103 is AFFIRMED and Peabody Coal Company is directed to pay a civil penalty of \$500 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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

David R. Joest, Esq., Peabody Coal Company,
1951 Barrett Court, P.O. Box 1990, Henderson,
KY 42420-1990 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

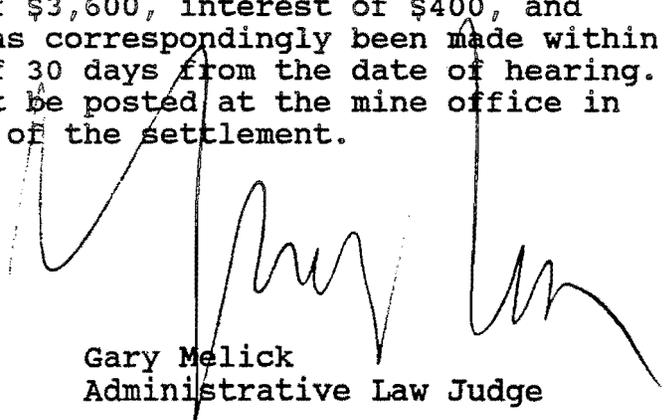
MAR 9 1993

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-867-D
ON BEHALF OF	:	MSHA Case No. BARB CD-92-14
ROBERT C. TEANEY,	:	
Complainant	:	No. 1 Mine
	:	
ROBERT C. TEANEY,	:	
Intervenor	:	
	:	
v.	:	
	:	
BLACK MOUNTAIN COAL MINING,	:	
INCORPORATED,	:	
Respondent	:	
	:	
ROBERT C. TEANEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. KENT 93-264-D
	:	MSHA Case No. BARB CD-92-53
BLACK MOUNTAIN COAL MINING,	:	
INCORPORATED,	:	
Respondent	:	No. 1 Mine
	:	

AMENDED DECISION APPROVING SETTLEMENT

Before: Judge Melick

Pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c) the Decision Approving Settlement issued in these proceedings on February 23, 1993, is hereby amended to include within its incorporated terms payment by Respondent of attorney fees for \$1,000 to counsel for Robert C. Teaney. It is further noted that payment of backpay of \$3,600, interest of \$400, and attorney fees of \$1,000 has correspondingly been made within the corrected timeframe of 30 days from the date of hearing. This Amended Decision must be posted at the mine office in accordance with the terms of the settlement.


Gary Melick
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215 (Certified Mail)

William A. Hayes, Esq., 2309 Cumberland Avenue,
P.O. Box 817, Middlesboro, KY 40965 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project of the
Appalachian Research and Defense Fund of Kentucky,
Inc., 630 Maxwellton Court, Lexington, KY 40508
(Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 9, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 92-765
Petitioner	:	A. C. No. 36-04281-03785
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Dilworth
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The above-captioned case was the subject of an extensive conference call between the undersigned and counsel for both parties on January 28, 1993.

In accordance with the conference call discussion on February 8, 1993, the Solicitor filed a motion to approve settlement of the two violations. The originally assessed penalties were \$684 and the proposed settlements are for \$684. I have considered the representations and documentation submitted in this case along with the discussions on January 28, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of \$684 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Richard W. Rosenblitt, Esq., Office of the Solicitor, U.S.
Department of Labor, 14480 Gateway Bldg., 3535 Market St.,
Philadelphia, PA 19104

Daniel Rogers, Esq., Consol Inc., Consol Plaza, 1800 Washington
Road, Pittsburgh, PA 15241

rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 9 1993

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING
Contestant :
 : Docket No. WEVA 91-224-R
 : Citation No. 3315515; 2/14/91
v. :
 : Docket No. WEVA 91-227-R
 : Citation No. 3315517; 2/19/91
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. WEVA 91-229-R
ADMINISTRATION (MSHA), : Citation No. 3315562; 2/21/91
Respondent :
 : Arkwright No. 1 Mine
 :
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-1159
Petitioner : A. C. No. 46-01452-03876R
v. :
 : Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER LIFTING STAY
ORDER OF DISMISSAL
ORDER TO PAY

Before: Judge Merlin

The above-captioned cases were the subject of an extensive conference call between the undersigned and the parties on February 1, 1993. On February 12, 1993, the Solicitor filed a motion to approve settlement of the eighteen violations involved in this case. Three of the violations, Citation Nos. 3315515, 3315517, and 3315562, were also the subject of notice of contest proceedings, WEVA 91-224-R, 91-227-R and 91-229-R. The originally assessed penalties were \$4,380 and the proposed settlements are for \$2,677.

The Solicitor advises that the operator has agreed to pay the originally assessed penalty for nine of the violations, Citation Nos. 3315515, 3315562, 3306386, 3306387, 3314481, 3314482, 3314883, 3306397, and 3314484. I have reviewed these

violations along with the Solicitor's motion and find that the proposed penalties are appropriate. The Solicitor moves to dismiss Citation Nos. 3315576, 3315577, 3315578, 3315579, and 3315580 because they were previously contained in WEVA 91-1833 and were incorrectly duplicated in this case.

The Solicitor also requests that Citation Nos. 3315517, 3315573, 3315574 and Order No. 3306392 be modified.

Citation No. 3315517 was issued for a violation of 30 C.F.R. § 75.1403 because the red reflector for a turn was off the shaft heading switch. The originally assessed penalty was \$157 and the proposed settlement is \$94. The Solicitor requests that the citation be modified to reduce the likelihood of injury from reasonably likely to unlikely and to delete the significant and substantial designation. The reason for the reduction and modification is that gravity was less than originally thought. As the Solicitor advised during the conference call, the indicator was visible under normal lighting even without the reflector.

Citation No. 3315573 was issued for a violation of 30 C.F.R. § 77.1104 because fine dry coal and coal dust accumulated on the raw coal crusher frame and floor, and fine damp coal accumulated at the transfer. The originally assessed penalty was \$157 and the proposed settlement is \$94. The Solicitor requests that the citation be modified to reduce the likelihood of injury from reasonably likely to unlikely and to delete the significant and substantial designation. The reason for the reduction and modification is that gravity was not as high as originally thought. As the Solicitor advised during the conference call, the raw coal crusher was run only once a week and not for a long enough time to generate heat to ignite the combustible material.

Citation No. 3315574 was issued for a violation of 30 C.F.R. § 77.402 because an electric drill in the repair shop was equipped with a switch lock. The originally assessed penalty was \$213 and the proposed settlement is \$120. The Solicitor requests that the citation be modified to reduce the likelihood of injury from reasonably likely to unlikely and to delete the significant and substantial designation. The reason for the reduction and modification is that gravity was not as high as originally thought. As the Solicitor advised during the conference call, the drill had recently been purchased and was stored in a sealed box awaiting modification of the switch to comply with the Act which would have been done before normal mining operations began. These circumstances also reduce negligence.

Order No. 3306392 was issued as a 104(d)(2) order for a violation of 30 C.F.R. § 75.400 because float coal dust accumulated on the bottom, roof and ribs from halfway between Nos. 2 and 3 entries to the No. 4 entry. The originally assessed penalty was \$769 and the proposed settlement is \$350. The

Solicitor request that the order be modified from a 104(d)(2) order to a 104(a) citation and that negligence be reduced from high to moderate. The reason for the modification and reduction is that negligence was not as high as originally thought. As the Solicitor advised during the conference call the accumulation arose because the miner responsible to rock dust this area was assigned to other duties in order to abate citations that had been written earlier by the inspector. The operator's conduct was therefore not "aggravated". Emery Mining Corp., 9 FMSHRC 1997 (Dec. 1987)

I have considered the representations and documentation submitted in this case along with the discussions on February 1, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlements is **GRANTED**.

It is **ORDERED** that Citation Nos. 3315517, 3315573, and 3315574 be **MODIFIED** to reduce the likelihood of an injury from reasonably likely to unlikely and to delete the significant and substantial designations.

It is **ORDERED** that Order No. 3306392 be **MODIFIED** from a 104(d)(2) order to a 104(a) citation and to reduce negligence from high to moderate.

It is further **ORDERED** that the stays in WEVA 91-224-R, 91-227-R and 91-229-R be **LIFTED** and that these cases be **DISMISSED**.

It is further **ORDERED** that Citation Nos. 3315576, 3315577, 3315578, 3315579, and 3315580 be **DISMISSED** without prejudice to the operator's notice of contest or the Secretary's penalty petition filed in Docket No. WEVA 91-1833.

It is further **ORDERED** that the operator pay a penalty of \$2,677 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)
Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Daniel E. Rogers, Esq., Consol, Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421
rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 9 1993

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1011
Petitioner	:	A. C. No. 46-01452-03860
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Arkwright No. 1
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The above-captioned case was the subject of an extensive conference call between the undersigned and the counsel for both parties on February 1, 1993.

In accordance with the conference call discussion, the Solicitor, on February 12, 1993, filed a motion to approve settlement of the two violations involved in this case. The originally assessed penalties were \$338 and the proposed settlements are for \$265.

The Solicitor advises that the operator has agreed to pay the originally assessed penalty for Citation No. 3717918. I have reviewed this violation along with the Solicitor's motion and find that the proposed penalty is appropriate.

With respect to the other violation in this case, Citation No. 3717916, the Solicitor requests that the citation be modified by changing the evaluation of negligence from moderate to low and reducing the proposed penalty from \$288 to \$215. Citation No. 3717916 was issued for a violation of 30 C.F.R. § 75.503 because the conduit for the right side bolter emergency stop switch on the continuous mining machine was pulled out of its gland. As became apparent during the conference call, the reason for the reduction and modification was that the condition had not been present when the equipment was examined earlier in the shift but must have developed immediately prior to the issuance of the citation.

I have considered the representations and documentation submitted in this case along with the discussions on February 1, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlements is **GRANTED**.

It is **ORDERED** that Citation No. 3717916 be **MODIFIED** to reduce negligence from moderate to low.

It is further **ORDERED** that the operator pay a penalty of \$265 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail) _____

Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Daniel E. Rogers, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421

rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 9 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 92-1054
Petitioner	:	A. C. No. 46-01455-03902
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Osage No. 3

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The above-captioned case was the subject of an extensive conference call between the undersigned and the parties on February 1, 1993. On February 5, 1993, the Solicitor filed a motion to approve settlement of the six violations involved in this case. The originally assessed penalties were \$1,725 and the proposed settlements are for \$1,052.

The Solicitor advises that the operator has agreed to pay the originally assessed penalties for five of the violations, Citation Nos. 3718022, 3718025, 3718184, 3718185, and 3718186. The Solicitor requests that Order No. 3718027, be modified from a 104(d)(2) order to a 104(a) citation and the penalty reduced from \$851 to \$178. The Solicitor advises that the degree of fault was not as high as originally thought. The cited combustible materials were not immediately removed so as to accomplish abatement because the miner on the section had been assigned to abate another more serious violation. Therefore, although the operator was at fault its conduct cannot be characterized as "aggravated" as that term has been interpreted and applied by the Commission to establish unwarrantable failure. Westmoreland Coal Co., 7 FMSHRC 1338 (Sept. 1985); Emery Mining Corp., 9 FMSHRC 1997 (Dec. 1987). The agreed upon settlement reached at the February 1 conference call, wherein the reasons for the modification and reduction were discussed, was approved by the undersigned.

I have considered the representations and documentation submitted in this case along with the discussions on February 1, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlements is **GRANTED**.

It is **ORDERED** that Order No. 3718027 be **MODIFIED** from a 104(d)(2) order to a 104(a) citation and to reduce negligence from high to moderate.

It is further **ORDERED** that the operator pay a penalty of \$1,052 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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

Daniel Rogers, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421

rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 10 1993

SHERRELL STEVEN REID, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 92-237-D
 :
 : No. 1 Mine
KIAH CREEK MINING COMPANY, :
Respondent :

DECISION

Appearances: Tony Oppeward, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Incorporated for Complainant.
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C. for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Sherrell Steven Reid, (Complainant) on January 21, 1992, which alleges, in essence, that he was discharged by Kiah Creek Mining Company, (Respondent) in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Respondent filed an answer on February 3, 1992, and the case was subsequently assigned to me on February 20, 1992. On March 2, 1992, in a telephone conference call initiated by the undersigned with counsel for both parties, the parties indicated that they wanted to explore settlement of this case. In a subsequent conference call on March 11, 1992, the parties indicated that they were not able to settle this case, and it was agreed that it be set for hearing June 10-11, 1992, and a Notice was issued on March 13, 1992, to that affect. On May 15, 1992, Respondent filed a motion to continue which was not opposed by Complainant. The Motion was granted and the matter was rescheduled for hearing on September 15-17, 1992. The case was subsequently heard on those dates in Paintsville, Kentucky, and also on October 1, 1992, in Louisa, Kentucky.

The parties were granted time to file post hearing briefs three weeks after receipt of the transcript of the hearing. The hearing transcript was received in the office of Administrative Law Judges on October 23, 1992. On December 2, 1992, Respondent's counsel filed a statement indicating he and complainant's counsel agreed to request an extension until January 15, 1993 for the filing of Briefs. This request was

granted. On January 15, 1993, Complainant's counsel sent by facsimile a request for an extension to February 8, to file his brief due to "caseload demands", and indicated that Respondent's counsel did not object to this request. This request was granted, but it was indicated that no further extensions will be granted. On February 4, 1993, Complainant's counsel sent by facsimile a request for an extension until February 17, 1993, to file his brief citing that he was overwhelmed by his caseload commitment. The request was granted. Respondent filed its Brief on February 5, 1993, and Complainant filed his brief on February 9, 1993. On March 3, 1993, Complainant's Reply Brief was received. Respondent's Reply Brief was received on March 5, 1993.

Findings of Fact and Discussion

Charles Steven Reid¹, a miner, had been employed by Respondent at its No. 1 underground mine for approximately for four-and-a-half months until he was fired on August 13, 1991. According to Reid, no one prior to August 13, 1991, including his foreman William E. Whetsel, had complained to him or issued any warning about the quantity of his production.

On the evening shift August 13, 1991, Reid's Section was involved in pillar mining. According to Reid, he was instructed by his foreman, William Whetsel, to cut into the heading at the No. 4 entry towards the old works. Reid indicated that during the shift he indeed made such a cut, and also cut into the heading toward the old works at entry No. 3. Essentially, he testified that, for safety reasons, he cut into these two headings for only 14 feet, removing 9 car loads of coal. He indicated that he did not cut any further for fear of encountering methane, black damp, or water, which are all found in the old works. Also, he testified that when he took the first cut off entry No. 5, he cut only 13 or 14 feet deep. He indicated that he was concerned about the hazards of a roof fall due to a crack in the roof. In addition, the third cut that he took extended only 14 feet, as he heard thumping which he said was indicative of a bad roof. Reid indicated that for the same reasons, and also due to dribbling from the roof, his fourth cut was limited to only 13 to 14 feet. He also limited his fifth cut to only 14 feet, as he felt that cutting any further would be hazardous.

During the shift Whetsel did not reprimand Reid for any of his actions. After approximately 6 hours into the shift, Whetsel ordered the crew to go above ground early. According to Reid,

¹The complaint identifies the Complainant as Sherrell Steven Reid. At the hearing, the Complainant gave his name as Charles Steven Reid.

after the crew reached the surface, Whetsel told him that "...there's no use for you to come out tomorrow because I've got nothing for you to do on the second shift any more" (Tr.91). In addition, Reid said that Whetsel told him "you didn't get enough coal worth s_t out of them places" (Tr. 91). Reid testified that he told Whetsel as follows: "You and I know that the top is bad up there and if I cut them any deeper, I would have endangered my life."(sic) (Tr. 91) He said that in response Whetsel told him that he had dry chained.

In contrast, Whetsel indicated that at the end of the shift he told Reid that he (Reid) was dry chaining and that he was not needed any more. According to Whetsel, he discharged Reid because he "felt we could run coal better then what we did" (Tr. 63). On cross-examination, Whetsel indicated that he told Sammy Fraley, Jr., Respondent's superintendent, that he had fired Reid, and that were only nine cuts taken, and only 95 car loads produced. In this connection, Reid indicated that when he spoke to Fraley after being fired by Whetsel, the latter told him that Whetsel had indicated that he had fired Reid for dry chaining, and not getting enough coal. According to Reid, Fraley indicated to him that the production reports showed 9 cuts and 95 loads, and that it was his position to support Whetsel. Fraley did not specifically rebut this testimony of Reid.

Whetsel indicated that on August 13, 1991, he had timed Reid, and it was taking him 85 seconds to load a buggy, whereas the normal time is approximately 30 seconds. According to Fraley, when Whetsel called him on the evening of August 13, to tell him that he had fired Reid, Whetsel told him that he had discharged Reid for dry chaining, and that he was taking up to 85 seconds to load a buggy.

Essentially, it is Complainant's position that because he had engaged in protected activities, any of his actions that resulted in decreased coal production constituted a justified work refusal, and hence these activities are protected. Hence, an analysis must be made of Reid's activities to determine if these activities are protected, and if his conduct can be termed a work refusal.

Protected Activities

The first cut that Reid took on the evening of August 13, off of the No. 5 entry, (see Complainant's Exhibit No. 2) was only 13 to 14 feet deep, resulting in a quantity of coal which filled only 8 cars. According to Reid, in essence, he did not cut any deeper because there was a crack in the roof. He indicated the crack was 2 to 3 inches below the level of the rest of the roof. He also observed draw rock, approximately 6 inches to 1 1/2 feet thick, and saw pieces of coal dribbling down from the roof. In contrast, James Burlin Adkins the chief electrician

on the day shift, testified that he was in the area in question between the day shift and evening shift on August 13, and did not see any cracks in the roof of the No. 5 heading. To the same effect, Michael Taylor, the miner operator on the day shift on August 13, described the roof on the No. 5 entry as being of sandstone. He said that there were no problems, and that he had not observed any cracks. Rodney Coleman, who assisted Reid on the evening shift of August 13, 1991, moving cables of the miner, also described the roof as being of sandstone. He said that he did not remember any cracks or defects in the roof. He was asked whether he heard any thumping of the top, or saw any dribbling on the ribs in the number five entry, and he said he did not remember "seeing anything" (Tr.157) I find this testimony to be insufficient to rebut the positive testimony of Reid as to his observation of cracks in the roof in the evening of August 13.

Reid also limited the length of cuts No. 3 and 4 that he took (See Respondent's Exhibit No. 2), and thus decreased production due to the conditions of the roof which he described as very bad. He said he had heard thumping, and observed dribbling. Goebel Burke, Michael Taylor, Whetsel, and Fraley, all essentially described the roof at the working face as being of sandstone, and in good condition. However, no witnesses specifically contradicted or impeached Reid's testimony as to the conditions that he observed in the roof on the evening of August 13, when he took cuts 3 and 4. In this connection, Larry Haley, the shuttle operator on Reid's shift, said that the roof in the No. 5 entry was cracked real bad and was ready to fall out. Paul Helton, who previously, worked as an MSHA inspector and roof control specialist, testified that, in general, a miner operator is in the best position to know how safely a cut can be made. Taylor who runs a miner, testified to the same effect.

The key issue for resolution is whether Reid's failure to take full cuts, constitutes a valid work refusal protected by the Act. It is well established that under Section 105(c) supra, a miner has the right to refuse to perform work which he reasonably believes poses a safety hazard. (See, Robinette, 3 FMSHRC 803 (1981), Pasula, 2 FMSHRC 2786 (1981)). Within the framework of the facts set forth above, I find that Reid reasonably believed that cuts deeper than the cuts he had made in the areas referred to as No. 1, 3 and 4 in Respondent's Exhibit No. 2, posed a discrete safety hazard considering the roof condition observed by him. According to Reid, he pointed out the cracks in the roof to Whetsel, and the latter told the crew to watch the cracks. In contrast, Whetsel indicated that he did not discuss the roof conditions with Reid on August 13. Even if Reid's version is found more credible, his prima facie case is beset with difficulty, inasmuch as, at no time during the work shift of August 13, did he communicate to Whetsel or any one else in management that he refused to cut beyond 13 or 14 feet in the areas in question due to safety concerns with the conditions of

the roof.

In Leeco, Inc. v. Ricky Hays, 965 F.2d 1081 (D.C. Cir., 1992), the D.C. Circuit Court considered the appeal of an operator from a decision by Commission Judge Koutras who had found that a miner who was fired for not performing one part of his job, was discriminated against under Section 105(c) supra of the Act, where he had unsuccessfully complained to a supervisor about the dangers performing this task, even though he did not bring to his employer's attention the fact that he was refusing to perform this task. The court in Leeco, supra, in remanding to the Commission for reconsideration of how the miner's conduct therein qualified as an activity protected under Section 105(c) of the Act, specifically held that it was "...unable to sustain the ALJ's conclusion that such a concealed stoppage is protected by the Act." (Leeco, supra at 1085.) The court, in Leeco, supra at 1085 indicated, in essence, that to conclude that a failure to perform a job amounted to the same thing as a communicated refusal because the operator was already aware of safety related complaints "...obviously represented a significant extension of, if not a departure from pre-existing law..." The Court in Leeco, supra, at 1084 in its review of existing law noted as follows:

So far as we can tell in all prior Commission and court decisions upholding a miner's right to refuse unsafe work, the miner has expressly or implicitly made his employer aware of the fact that he would not continue to perform his assigned task. See, e.g., Gilbert, 877 F.2d at 458. Price v. Monterey Coal Co., 12 FMSHRC 1505 (1990); Secretary ex rel Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983); Bush, 5 FMSHRC at 997; Haro v. Magma Cooper Co., 4 FMSHRC 1985 (1982); Secretary ex rel v. Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126 (1982); Robinette, 3 FMSHRC at 807.

Hence, as explained in Leeco, supra, existing law has not recognized a miner's right to refuse unsafe work in a situation where the miner has not made his employer aware that he would not continue to perform his assigned task.

Thus, in light of existing law, I cannot find that the scope of protected activities set forth in section 105(c) of the Act supra, extends to a miner who has not communicated his work refusal for safety related concerns to his employer. Accordingly, I conclude that complainant has not established that his actions in not cutting beyond 13 to 14 feet in the areas in question, were protected under Section 105(c) of the Act. Accordingly, I conclude that his discharge did not violate Section 105(c) of the Act supra, and thus his complaint of discrimination must be dismissed.

ORDER

It is hereby ORDERED that this case be DISMISSED.


Avram Weisberger
Administrative Law Judge

Distribution:

Tony Opegard, Esq., Mine Safety Project of the ARDF of Kentucky,
Inc., 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

Billy R. Shelton, Esq., Baird, Baird, Baird, & Jones, P.S.C., 415
Second Street, P.O. Box 351, Pikeville, KY 41502 (Certified
Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 10 1993

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 92-249-R
v.	:	Citation No. 2804441; 3/13/92
	:	
SECRETARY OF LABOR,	:	Mine No. 7
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 01-01401
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-328
Petitioner	:	A.C. No. 01-01401-03887
	:	
v.	:	Mine No. 7
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: R. Stanley Morrow, Esq., Birmingham, Alabama, for Contestant/Respondent;
William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent/Petitioner.

Before: Judge Fauver

The company's notice of contest and the Secretary's petition for civil penalties were consolidated for hearing and decision, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Nine of the ten citations involved were settled. A hearing was held on the remaining charge, Citation No. 2804441.

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

FINDINGS OF FACT

1. Jim Walter Resources, Inc., operates an underground coal mine, known as Mine No. 7, which produces coal for sale or use in or substantially affecting interstate commerce.

2. On March 13, 1992, Federal Mine Inspector Bill Deason inspected the No. 1 longwall section of Mine No. 7. He observed that the operator had endangered off approximately 75 feet of the travelway in the No. 4 entry because of bad roof (beginning at the forward crosscut), that some roof had fallen in and near the crosscut (as shown in Exhibit G-2), and that in Entry No. 3, near the crosscut, there were a crack across the entry and a brow. He found that the roof conditions constituted a hazard to miners who were required to travel through the crosscut, and therefore issued Citation No. 2804441, charging a violation of 30 C.F.R. § 75.202. The regulation provides that "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." § 75.202(a).

3. The company promptly submitted a supplement to its roof control plan, providing for additional roof and rib support in the area where the miners were traveling. Specifically, it proposed to support the area by installing additional timbers on five foot centers in the No. 3 entry to a point outby the brow, and to install additional cribbing on five foot centers from the rib line to the shields in the No. 3 entry (as shown in Exhibit G-3). The plan was promptly approved by MSHA and the citation was terminated. The supplemental plan, although acknowledging that it was "submitted as a result of the conditions being experienced", was submitted under protest by the company, which stated in the plan: "No. 7 Mine does not agree with the necessity of the plan and is only doing so to abate the citation issued " Exhibit G-3.

4. The company had previously endangered off a travelway in No. 3 entry because of bad roof, so that in the course of two shifts travelways in Nos. 3 and 4 entries were endangered off because of bad roof. The No. 3 entry had been re-opened before the No. 4 entry was closed.

5. Advancement of the longwall put stress on the roof across the crosscut intersecting Nos. 3 and 4 entries, as evidenced by the conditions observed by Inspector Deason. Additional roof support was needed to protect the miners who traveled through the crosscut (in the area shown in Exhibit G-3).

DISCUSSION WITH FURTHER FINDINGS

I find that the evidence sustains the inspector's finding that the roof where the miners were traveling was hazardous and required further support to comply with 30 C.F.R. § 75.202(a).

The company contends that the citation is unenforceable because it was based upon an unwritten, arbitrary policy of the Subdistrict Manager of MSHA's Birmingham Office. About ten years ago, the Subdistrict Manager (Mr. Weekly) adopted an enforcement policy to cite a violation if the forward longwall crosscut was used as a travelway without additional roof support or

safeguards. Mr. Kenneth Ely, an MSHA supervisor, testified that Mr. Weekly's concern was that roof pressures created by advancing the longwall exerted substantial pressure on the forward intersection of the longwall entries (such as the forward crosscut connecting Nos. 3 and 4 entries) and that, as a regular occurrence, the roof in that area would deteriorate and present a hazard of falling without warning.

The Secretary contends that this enforcement policy is not arbitrary but was arrived at on the basis of the Subdistrict Manager's review of roof control plans, accident reports, etc., and his discussions with MSHA supervisors, inspectors, and roof specialists, as well as his own background and experience in mining and mine safety and health. Mr. Ely testified that the MSHA inspectors attempted to "marry" the manager's policy to existing mine conditions, and that MSHA recognizes that enforcement citations and orders must be supported by the facts independent of a manager's policy.

The company contends that the manager's policy is not enforceable because it was not promulgated in accordance with § 101(a) of the Act, which requires formal rulemaking procedures (in compliance with § 553 of the Administrative Procedure Act) for any rule "promulgating, modifying, or revoking a mandatory health or safety standard."

The Commission has held that MSHA's Program Policy Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [the Commission]." Old Ben Coal Company 2 FMSHRC 2806, 2809 (1980). A fortiori, a Subdistrict Manager's unwritten policy is not a safety standard or modification binding on the Commission and cannot independently support a § 104(a) citation. Rather, it is a local MSHA office directive to inspectors. Citations or orders issued under such a policy must stand or fall on their factual merits, based on actual mining conditions.

The evidence as to the mining conditions sustains the inspector's finding of a violation of 30 C.F.R. § 75.202.

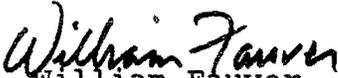
Considering the criteria for civil penalties in § 110(i) of the Act, I find that a civil penalty of \$800.00 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.
2. Jim Walters Resources, Inc., violated 30 C.F.R. § 75.202 as alleged in Citation No. 2804441.

ORDER

WHEREFORE IT IS ORDERED within 30 days from the date of this Decision, Jim Walters Resources, Inc., shall pay the approved settlement civil penalties of \$2,814 and a civil penalty of \$800 for the violation charged in Citation No. 2804441, for a total of \$3,614 in civil penalties.


William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, Alabama 35203 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P. O. Box 830079, Birmingham, Alabama 35283-0079 (Certified Mail)

/fccca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 10 1993

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket WEVA 92-657-R
	:	Citation No. 3108710;1/13/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 92-658-R
	:	Citation No. 3108711;1/13/92
	:	Humphrey No. 7 Mine
	:	Mine ID 46-01453
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 92-838
	:	A. C. No. 40-01453-04005
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor;
Daniel Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Weisberger

Statement of the Case

These consolidated proceedings involve the issue of the validity of various citations and orders issued by the Secretary (Petitioner), to the Operator (Respondent), alleging violations of various mandatory safety standards. Pursuant to notice, a hearing was held in Washington, Pennsylvania, on December 1, 1992. At the hearing, Petitioner moved to vacate Order No. 3108710 (Docket WEVA 92-657-R), and this motion was granted based on the representations and documentation submitted by

Petitioner. Petitioner also moved to approve a settlement that the parties had reached with regard to Citation Nos. 3108711, 3108762, 3108920, and 3108604. These motions were granted based upon the representations of counsel. In addition, Petitioner moved to withdraw Citation No. 3108711, and this motion was granted based upon the representations of counsel.

At the hearing, Charles J. Thomas testified for Petitioner, and Mike Jackson, and Stanley Brozick, testified for Respondent. Petitioner filed a post-hearing brief on January 21, 1993. Respondent filed a post-hearing brief on January 29, 1993.

Findings of Fact and Discussion

I. Violation of 30 C.F.R. § 75.1003(c)

On January 16, 1992, MSHA Inspector Charles J. Thomas, while inspecting the 6 SW Longwall at Respondent's Humphrey No. 7 Mine, approached the working section in a covered personnel carrier. Two other personnel carriers were located inby on this same track, one in front of the other. The trolley wire, which supplies power to the personnel carrier, and which was suspended from the roof of the entry, was not guarded above the outby personnel carrier. Thomas issued Citation No. 3108919 alleging that "... the trolley wire is not guarded over the extra personnel carrier at the man-trip station", in violation of 30 C.F.R. § 75.1003. At the hearing, the parties agreed that the issue to be determined is whether the cited condition constitutes a violation of 30 C.F.R. § 75.1003 which, as pertinent, provides that "trolley wires shall be guarded adequately ... (c) at man-trip stations". The initial issue to be determined is whether the personnel carriers are "man-trips", and whether the area where the outby carrier was located on January 16, 1992, was a "man-trip station".

A. Man-Trips

The personnel carriers at issue are covered, have a capacity of transporting 12 men, and are used to transport a longwall crew, consisting of 7 men, to and from the section. The personnel carrier has two trolley poles, one located at the inby end of the carrier, and the other at the outby end of the carrier. These poles are utilized to make the connection with the overhead trolley wire and thus provide power to move the personnel carrier. When the personnel carrier is traveling inby it uses only the inby trolley pole. To prepare the personnel carrier for the outby trip, the operator of the carrier has to remove the inby trolley pole from the trolley wire and connect it to the pole "dog." The operator must then "undog" the outby pole, and connect it to the trolley wire.

The term "man-trip" is not defined in either the regulations

or in Section 310(d) of the Federal Mine Safety and Health Act of 1977, "the 1977 Act", or Section 310(d) of the Federal Coal Mine Health and Safety Act of 1969 ("the 1969 Act"), both of which contain the same language as Section 75.1003, supra.

According to Stanley Brozick, Respondent's Safety Supervisor at the mine in question, he does not know of any definition of the term "man trip." He opined that a covered carrier is not a "man-trip". He explained that prior to 1971 or 1972, Respondent, and other operators, utilized uncovered "man-trips" pulled by locomotives to transport miners to and from the section. He indicated that these man-trips did not remain on the section, but instead dropped persons off as they travelled inby. He indicated that the places where persons entered and exited the man-trip were termed mantrip stations. However, Brozick indicated that, now, a "man-trip" is considered synonymous with the term "portal bus." Mike Jackson, a safety escort employed by Respondent at the Humphrey No. 7 Mine, concurred. In contrast, Thomas opined that a "man-trip" is the same as a personnel carrier as the latter carries miners. Hence, the record fails to convincingly establish a recognized definition in the mining industry of the term "man-trip".¹

Respondent refers to 30 C.F.R. § 75.1403-6 and 30 C.F.R. § 75.1403-7 as support for its proposition that personnel carriers powered by electricity from a trolley wire are not to be considered man-trips, which are pushed or pulled by locomotives. Sections 75.1403-6, supra, and Section 75.1403-7 supra, contain criteria by which an inspector is to be guided in issuing safeguards to minimize hazards with respect to the transportation of men. Separate criteria are provided for "self-propelled personnel carriers" and for "man-trips". The terms "self-propelled personnel carrier" and "man-trip" are not defined in Section 75.1403-6, supra, and Section 75.1403-7, supra. There is no indication that a personnel carrier powered by electricity from a trolley wire, to which it is connected by way of a pole attached to the personnel carrier, is not within the scope of the term "man-trip."

In U.S. Steel Company, Inc., 7 FMSHRC 865 at 868 (1988) the Commission set forth its analysis of Section 75.1003 supra as

¹Petitioner, at the hearing, made reference to the following definition of the "man-trip" as set forth in A Dictionary of Mining, Mineral, and Related Terms (United States Department of the Interior, (1967)): "a. A trip made by mine cars and locomotives to take men rather than coal, to and from the working places." Inasmuch as this defines the term "mantrip" when used as an adverb, it is not of much probative value with regard to a definition of that term when used as a noun, as in the instant case.

follows:

As the language of section 75.1003 specifies, in order to effectuate the purpose of the standard, guarding is especially necessary at mantrip stations. Miners are discharged at such stations and pass under trolley wire in the process. Further, a common hazard presented by unguarded trolley wire at a mantrip station is the possible shock hazard to the mantrip operator when he stands to remove the trolley pole from the overhead wire.

Clearly the hazards intended to be protected against by Section 75.1003, supra, apply to all vehicles transporting miners that are powered by trolley wires. Since the carriers at issue are used to transport miners to and from the working section, I find that they are man-trips within the purview of Section 75.1003, supra.

B. Man-trip Station

During normal mining operations, one personnel carrier is left in place to be used, in the event of an emergency, by those personnel working on the section between shifts. The other carrier transports men to the section at the beginning of the shift, and then transports them from the section at the end of the shift.

During normal mining operations, a specific area, such as the one in question, is used by miners to get off the personnel carrier at the beginning of the shift, and to enter the personnel carrier at the end of the shift. However, as the longwall mining advances outby, the area in which the miners get on and off the personnel carrier is also moved outby. According to Thomas, the locations where miners enter and exit the personnel carrier are moved outby approximately once a week, depending upon the speed at which the longwall face advances outby. Respondent's witnesses have not contradicted or impeached this testimony.

In U.S. Steel Company, Inc., supra, at 868, the Commission, in evaluating whether the location where the man-trip therein stopped was a "man-trip station" at which the trolley wire must be guarded, held that "... a mantrip station can be established through routine or regular stopping practice, as well as by explicit designation. Such a construction of the standard is founded in the practicalities of daily mining operation and furthers the protective concerns of Congress cited above." In this connection, the Commission, in U.S. Steel, supra, at 867, analyzed the legislative intent regarding the enactment of the language in the 1969 Act that is repeated in Section 75.1003(c), supra, as follows:

The primary purpose of the guarding requirement in

section 75.1003 is to prevent miners from contacting bare trolley wires. As noted above, this standard repeats section 210(d) of the Mine Act, 30 U.S.C. § 870(d), which, in turn, was carried over unchanged from section 310(d) of the 1969 Coal Act, 30 U.S.C. § 801, et seq., (1976) (amended 1977). The legislative history of the 1969 Coal Act relevant to section 75.1003 reveals a strong Congressional concern with the hazards associated with bare trolley wires:

This section requires that trolley wires and trolley feeder wires be insulated and guarded adequately at doors, stoppings, at mantrip stations, and at all points where men are required to work or pass regularly Also, this section would require temporary guards where trackmen or other persons work in proximity to trolley wires and trolley feeder wires. The Secretary or the inspector may designate other lengths of trolley wires or trolley feeder wires that shall be protected.

... The guarding of trolley wires and feeder wires at doors, stoppings, and where men work or pass regularly is to prevent shock hazards.

Because of the extreme hazards created by bare trolley wires and trolley feeder wires, the committee intends that the Secretary will make broad use of the authority to designate additional lengths of trolley wires and trolley feeder wires that shall be protected.

S. Rep. No. 411, 91st Cong., 1st Sess. 77 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 203 (1975):

In U.S. Steel, supra, at 868, the Commission, in analyzing Section 75.1003, supra, indicated that to effectuate the purpose of Section 75.1003, supra, guarding is necessary at man trip stations where miners are discharged and walk under trolley wires. Also recognized was the hazard at a man-trip station of a possible shock to the man-trip operator when he stands to remove the trolley pole from the overhead wire.

According to Thomas, in essence, due to the requirement of only a 12 inch minimum clearance between the rib and the carrier on the tight side of the entry, the operator of the carrier normally slides back an access door in the roof of the carrier to allow him to reach up and "undog" the trolley pole and attach it

to the trolley wire. Since the pole must be "undogged" from a spring, and placed on the trolley wire, which according to Mike Jackson, Respondent's expert, is located a minimum of 16 inches from the roof of the carrier, I conclude that there was a possible shock hazard to the man-trip operator when engaging in this activity under unguarded wire at the area in question at the beginning and end of a shift.

Further, since the use of the area in question by miners to exit and enter personnel carriers was not random or a one-time-only stop, but instead was used regularly, although for a limited time, I conclude within the framework of U.S. Steel, supra, that the particular location in question was a man-trip station. Since the trolley wire above the area in question was not guarded, I conclude that Respondent violated Section 75.1003 supra.

II. Significant and Substantial

According to Thomas, in order to "undog" the trolley pole and place it on the trolley wire, operators of the carrier in question have their arms, head and shoulders outside the access door, and on top of the carrier. He indicated that he has driven a portal bus, and he positioned his head outside on top of the carrier while "undogging" the trolley wire. He also said that most of the operators he observed performing this procedure, positioned their head outside, on top of the carrier. He indicated that if a person 6-foot tall was required to do this procedure, his head would be a foot from the wire.

Thomas indicated that he has always seen operators performing the "undogging" procedure using two hands. Thomas indicated that it takes two hands to "undog" the pole, as it is spring loaded. According to Thomas, in the procedure of moving the pole from the "dog" to the trolley wire, the operator's hand would be between an inch and a foot away from the wire. He indicated that generally, the operator would be exposed to the hazard of shock or burn, if he were to come in contact with the trolley wire when he reached in to "undog" the trolley pole and put it on the wire.

Thomas opined that a reasonably serious injury was reasonably likely to occur as a result of the lack of guarding herein. He explained that contact with the wire would have been reasonably likely to occur, as the procedure of undogging the pole and placing it on the wire had to be performed twice a shift, on each of three daily shifts. He indicated that generally the working conditions are cramped, and that if the operator should get mud on his shoes and slip, he then "could" come in contact with the wire (Tr.82). On-cross-examination he indicated that such contact "may occur someday" (Tr.83).

Jackson indicated that he has operated a carrier and, in general, he used one hand to put the pole on the wire. He also indicated that there is no reason for the operator to place his head out of the vehicle. In this connection, he indicated that an operator would be less likely to put his head out if the wire is unguarded, as the visibility is better, and it is thus easier to see where to place the pole on the wire. Brozick indicated that the base of the pole is practically at eye level. Hence, according to Brozick, to release the "dog", it is not necessary for the operator's head to be above the carrier except, on occasion, if the roof is low.

A "significant and substantial" violation is described, in section 104(d)(1) of the Mine Act, as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

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

Company, Inc., 6 FMSHRC 1866, 1868 (August 1984);
U.S. Steel Mining Company, Inc., 6 FMSHRC 1573,
1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

The first two elements of the Mathies test have been met, inasmuch as I have found that there was a violation of 75.1003 supra. The evidence also clearly establishes that, due to the violation herein, the hazard of contact with a 120 volt trolley wire resulting in injuries was contributed to. The issue herein is whether the third element of Mathies has been met, i.e., whether there was a reasonable likelihood of an injury producing event, i.e. contact with the unguarded trolley wire. Certainly, given the proximity of the wire to the roof of the carrier, there was a possibility of the operator making inadvertent contact with the unguarded wire in the procedure of "undogging" the pole, and placing it on the wire. Petitioner has not described with specificity the exact manner in which the undogging of the trolley pole is performed, aside from Thomas' testimony that the "dog" is spring loaded and two hands are required to perform this procedure. Also, the distances between the operators hands and the trolley wire that Thomas testified to are, at best, estimates, and vary with the height of the roof and the height of the operator. Petitioner has not proffered documentation of any incidents where inadvertent contact with an unguarded wire has resulted from "undogging" a pole from a carrier of the type in issue, and placing it on a trolley wire. For all these reasons, I conclude that it has not been established that there was a reasonable likelihood of contact with the wire. Accordingly, it has not been established that the violation herein was significant and substantial.

III. Penalty

According to Thomas, the cited condition would have been obvious to a trained foreman, as it was obvious to him. Also, on July 30, 1990, October 11, 1990, November 12, 1991, and November 25, 1991, Respondent had been previously cited for not having a guarded trolley wire at a man-trip station, and Respondent paid the penalties assessed for these violations. Further, Thomas indicated that, prior to the date of the citation, at issue, he had a discussion with the mine foreman, and John Haizer, the superintendent, with regard to how much guarding was necessary. I conclude that Respondent's negligence herein was moderate. Further, considering the gravity of the violation, as evidenced by Thomas' testimony that should one come

in contact with the electric trolley wire, burns or electric shock could result, and considering the remaining factors set forth in section 110(i) of the Act, I conclude that a penalty of \$300 is appropriate for this violation.

ORDER

It is hereby ordered that (1) Respondent shall, within 30 days of this decision, pay a civil penalty of \$300 for the violation cited in Citation No. 3108919, and a civil penalty of \$930, based on the granting of the parties' Motion to approve a settlement regarding Citation Nos. 3108711, 3108762, 3108920, and 3108604; (2) Order No. 3108710 (Docket No. WEVA 92-657-R) is VACATED; (3) Citation No. 3108711 be withdrawn; and (4) Citation No. 3108919 be amended to a violation that is not significant and substantial.



Avram Weisberger
Administrative Law Judge

Distribution:

Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Boulevard, Room 516,
Arlington, VA 22203 (Certified Mail)

Daniel Rogers, Esq., Consolidation Coal Company, 1800 Washington
Road, Legal Department, Pittsburgh, PA 15241 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 10 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-935
Petitioner	:	A. C. No. 46-01318-04064
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor; Daniel Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary (Petitioner), alleging a violation by the Operator (Respondent) of 30 C.F.R. § 75.517. An answer was duly filed, and pursuant to notice, the case was scheduled for hearing on December 2, 1992, in Washington, Pennsylvania, and heard on that date. Richard Gene Jones, and Michael G. Kalich, testified for Petitioner, and Richard Lee Moats, testified for Respondent. The parties filed post-hearing briefs on January 22, 1993.

Findings of Fact and Discussion

I. Violation of 30 C.F.R. § 75.517

On March 12, 1992, Richard Gene Jones, an MSHA Inspector, inspected the 5-North Conveyor System of Respondent's Robinson's Run No. 95 Mine. He observed a 12/4 power 120 volt cable that was not in place hung on the wall, but instead was lying on the ground in rib sloughage. When he picked it up, he noticed that the outer jacket rubber insulation was torn for approximately five inches. He also indicated that beneath the area where the rubber insulation was torn, some of the insulation surrounding

the copper wires had been "peeled" or "scraped" and he could see the wiring inside (Tr.30). Jones issued Citation No. 3107821 alleging a violation of 30 C.F.R. § 75.517 in that the 12/4 power cable "is not insulated adequately and fully protected. Near the off-track side switch there is a location in the cable with an extensively damaged 5-inch place that exposes the electrical damaged conductors... ." (sic) Section 75.517, supra, provides, as pertinent, that power cables "shall be insulated adequately and fully protected."¹

According to Jones, the purpose of the rubber outer jacket is to provide protection to the cable wires from moisture, and dust. It also protects the cable from being hit by foreign objects. According to Jones, the outer jacket also provides electrical insulation.

The outer jacket of the cable in question was completely removed for a distance of approximately 8 inches in length. The width of the exposed area extended approximately 180 degrees around the circumference of the cable. Further, the insulation surrounding the individual interior copper wires was damaged, and was no longer providing physical protection against moisture and dust. Nor was it providing electrical insulation, i.e. protection from phase-to-phase, and phase-to-ground contact. Respondent's witness, Richard Lee Moats, did not rebut or impeach the testimony of Jones in these regards. Nor did Respondent offer any other evidence impeaching or contradicting Jones' testimony in these regards. Accordingly, based on Jones' testimony, I find that inasmuch as the cable in issue was not insulated adequately and fully protected, Respondent herein did violate Section 75.517, supra.

II. Significant and Substantial

¹Initially, it was Respondent's position at the hearing that, in essence, a violation of Section 75.517, supra, does not occur in the absence of the proof that the violative condition was caused by the Operator's negligence. I do not find this argument persuasive, as it is well established that the mandatory safety regulations impose strict liability on the operator. (See, Western Fuels-Utah, 10 FMSHRC 256 (1988); Asarco, Inc., 8-FMSHRC 1632 (1986)). As such, if the facts establish that a certain condition is violative of a mandatory standard, an operator is liable even in the absence of any negligence on its part. A discussion of the Operator's negligence is set forth subsequently in this decision (Section III, infra) as it relates to the issue of the operator's penalty.

According to Jones the violation herein is significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

With regard to the first element of Mathies, supra, I have already found that the evidence establishes a violation of Section 75.517, a mandatory safety standard.

According to Jones, should the power cable be energized, a person coming into contact with the unprotected non-insulated section of the exposed power cable could suffer burns, electric shock, or heart fibrillation. He also indicated that should phase-to-phase, or phase-to-ground contact occur as a consequence of the lack of the rubber insulation around the copper wires, arcing could result, which could cause a fire, especially in the presence of methane. In the main, this testimony of Jones has not been contradicted, and, in essence, finds support in the testimony of Michael G. Kalich, an MSHA electric inspector, who also testified for the Petitioner. I thus find that the second element of Mathies, supra, has been met. Accordingly, the critical issue to be determined is whether the third element of Mathies, supra, has been met, i.e., whether there was a reasonable likelihood of either a person coming in contact with the energized exposed portion of the cable, or of phase-to-phase, or phase-to-ground contact in the cable when energized.

The cable was attached to a coal feeder at one end. The other end of the cable was attached to an on/off switch which allows a miner to operate the coal feeder from a remote position. When cited by Jones, the cable was not energized, as the section was idle, and was not producing coal. The circuit breakers which energized the cable were both in the off position. Hence, there was no hazard at that time.

However, it is critical, when making a determination as to whether a condition is significant and substantial, to evaluate that condition in terms of the continuation of normal mining operations. (See U.S. Steel, 6 FMSHRC 1573, 1574). In this connection, Kalich explained that, when production would resume, the circuit breakers at the power center and feeder would be re-set, thus causing electric power, 120 volts, to flow to the damaged area of the cable in question. Richard Lee Moats, a mine escort who testified for Respondent, stated that the foreman of a section normally instructs his crew, at the beginning of the shift before work commences, to check all cables and, as such, the crew would have located the damaged area prior to reintroducing electric power. Moats is neither a member of a work crew working in the area, a foreman, or supervisor of a foreman. Accordingly, I do not place much weight on his testimony as to specifically what occurs in the area in question in normal mining operations.

According to Moats, on the date the citation was issued, after the power was turned off, he examined the damaged area. He indicated he saw that two of the copper wires had been severed. On the other hand, Jones testified that it was extremely hard to

see the wires as they were too extensively damaged to check. He said that it was difficult to tell if the wires were touching. However, he indicated that he did not examine the wires to see if they were touching. I observed Moats' demeanor, and I find his testimony credible that, upon looking inside of the cable, he did see that two wires were not touching, and I accept his testimony in this regard.

According to Moats, since two of the wires were severed, the femco monitoring system would prevent the circuit breakers at the power center from being reset, and power would not flow to the wires in question. In contrast, according to Kalich, if two of the wires in the cable are severed, current will still flow to these wires. Further, in rebuttal, Kalich stated that the femco system at the power center serves as protection only from the power center to the feeder, and does not monitor the 12/4 cable in issue, whose only protection is a 10 amp fuse. He indicated that the feeder contains a transformer which reduces 480 volts of current entering the feeder to 120 volts, which is transferred out to the cable in question. Kalich explained that, accordingly, if two of the wires in the cable are severed, only 120 volts would go beyond the transformer in the feeder to the high side of the transformer. Kalich explained that accordingly, there would not be enough current to trip the breaker, which is set for 480 volts. Moats, who was recalled in rebuttal, did not contradict the specific testimony of Kalich in these regards. Accordingly, and based on Kalich's extensive work experience as an electrical inspector, I accept his testimony in these regards.

According to Jones, when he originally passed the cable in question and observed that it was not in its place on the rib, but instead was on the ground in sloughage, he bent to pick it up to put it back on the rib. In this regard, he indicated that men in the working crew automatically pick up cables that are laying on the floor. Respondent did not contradict or impeach the testimony of Jones in this regard. I therefore accept it.

According to Kalich, arcing would result even if two of the wires were severed, as they could come in contact when the cable is picked up. Also, Kalich indicated that even if the wires barely touched, arcing could result, which could lead to a fire. He also noted that normally it could take up to a minute for a fuse to blow, and that, in the one minute interval, arcing upon phase-to-phase or phase-to-ground contact can occur.

I find the testimony of Moats that two of the four wires were severed, to be insufficient to diminish the likelihood of contact between the wires, given the fact that the interior wires were bare for approximately three inches, as testified to by Jones and not contradicted by Moats. Further, according to the uncontradicted testimony of Kalich and Jones, since the damaged cable was in coal sloughage, and the coal seam is considered to

be very volatile, arcing from the cable can result in ignition. This testimony was not contradicted by Respondent or impeached.

Jones also noted the presence of methane on the date of the citation. Although the amount of methane found at the face was within the permissible range, and the area in question was approximately 450 feet from the face, it should be noted that the mine is considered to be a liberator of methane, as it liberates a million cubic feet in a 24 hour period.

According to Moats, on the date the citation was issued, an emergency stop located at the feeder was locked out. Accordingly, it would have to be unlocked and then reset to allow power to flow. Moats indicated that, based upon his review of a schematic diagram, Government Exhibit No. 3, he concluded that with the emergency stop switch activated, power is cut off to the cable in question. Moats, in his testimony, however, did not specifically refer to the flow of power in this schematic diagram to support his opinion. In contrast, Kalich, indicated the specific circuit that is affected by the emergency stop.² He also indicated that the flow of power to the remote switch, via the cable in question, is a separate circuit.³ Hence, according to Kalich with the emergency stop switch activated power still flows to the cable in question. Moats did not rebut this testimony. Hence, due to the detailed nature of this testimony and the expertise of Kalich, I accept it.

Within the framework of all of the above, I conclude that there was a reasonable likelihood of either a person coming in contact with the exposed portion of the cable when energized, or of arcing from the cable when energized causing a fire. Jones and Kalich essentially testified that a person coming in contact with the bare exposed wire in the cable would reasonably likely suffer from burns, electrical shock, or fibrillation. Their testimony also indicated that in the event of fire caused by arcing, smoke inhalation, carbon monoxide poisoning, or other injury would have been reasonably likely to have occurred. Respondent has not rebutted this testimony and, accordingly, I have accepted it. Therefore, for all the above reasons, I conclude that it has been established that the violation herein was significant and substantial (See U.S. Steel, supra).

III. PENALTY

I find, based on the testimony of Petitioner's witnesses, that once power would be restored, and normal operations' would resume, should one contact the bare exposed wire, or should

²The green and yellow lines on Government Exhibit No. 3.

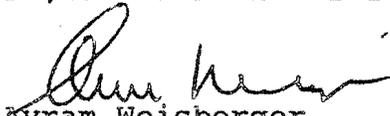
³See the red lines below "A" on Government Exhibit No. 3.

arcings occur, serious injuries could result. Thus, the violation was of a high degree of gravity.

According to Kalich, the rib near where the cable at issue was located appeared as if a bumper of a car, or something sharp, had hit it or rubbed against it. He also noted the presence of sloughage such as loose, fine coal, which also supported this conclusion. He said that when he made his inspection at approximately 9:25 a.m., the shift was idle, and the coal that had been knocked from the rib appeared fresh. He thus opined that the incident knocking the cable off its place on the wall and removing the insulation, occurred during the midnight shift. He further opined that during an inspection of the belt which was required to be performed between 5:00 a.m. to 8:00 a.m., the person making the inspection would have passed this area and should have observed the cable in question. He also indicated that when he cited the cable, a supervisor was working 100 feet outby and, although he would not have seen the cable, he would have passed this area during the shift. On the other hand, Jones could not establish with any certainty the exact time when the incident occurred. Considering all of the above and, taking into account the further factors set forth in Section 110(i) of the Act, I find that a penalty of \$250 is appropriate.

ORDER

It is ordered that within 30 days of this decision, Respondent pay a civil penalty of \$250 for the violation found herein.


Avram Weisberger
Administrative Law Judge

Distribution:

Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Boulevard, Room 516,
Arlington, VA 22203 (Certified Mail)

Daniel Rogers, Esq., Consolidation Coal Company, 1800
Washington Road, Legal Department, Pittsburgh, PA 15241

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 11 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-783
Petitioner	:	A.C. No. 46-01816-03805
	:	
v.	:	Gary No. 50 Mine
	:	
UNITED STATES STEEL MINING	:	
COMPANY, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., Arlington, Virginia, for
Petitioner;
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Fauver

This is a civil penalty case under the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

FINDINGS OF FACT

Safeguard No. 3238838

1. MSHA Inspector James Bowman conducted a regular
inspection at Respondent's Gary No. 50 Mine on May 23, 1989.
The mine produces coal for sale or use in or substantially
affecting interstate commerce.

2. The inspector observed two vehicles whose trolley poles
frequently came off the trolley wire as they traveled along the
track, thereby de-energizing the equipment.

3. He found that the problem was caused, at different
locations, by kinks, bends and twists in the wire and by an
excessive distance between the track and the trolley wire.

4. He found that the loss of power created a number of transportation hazards, including loss of illumination, communication and brakes, and the fact that as the pole swung loose it could propel or loosen rock, strike persons, and create arcs and sparks.

5. Based upon his evaluation of the hazards, Inspector Bowman issued Safeguard No. 3238838, which requires that trolley wire "be installed within a gauge where anti-swing devices can be used on all equipment and installed without excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason."

6. The conditions found by Inspector Bowman were abated by repairing the wire trolley and by moving the track closer to the wire.

Citation No. 3579261

7. MSHA Inspector Earl Cook conducted a regular inspection at Gary No. 50 Mine on February 4, 1992.

8. As he traveled along the 5K track entry in a jeep, the trolley pole came off the trolley wire at numerous locations, thereby de-energizing the equipment.

9. He found that this condition violated Safeguard No. 3238838 and therefore issued Citation No. 3579261.

DISCUSSION WITH FURTHER FINDINGS

Safeguard No. 3238838

Under the Act and regulations, MSHA inspectors have the authority to issue safeguards based upon hazards involving transportation of men and materials in underground coal mines. A safeguard regarding a specific transportation hazard may be issued at one mine even if that hazard is commonly encountered at other mines. Southern Ohio Coal Co., 14 FMSHRC 1, 5-8 (1992).

In Southern Ohio Coal Co., 7 FMSHRC 509 (1985), the Commission distinguished safeguards from safety standards adopted through rulemaking procedures. The latter are liberally construed, but safeguards issued by an inspector are to be narrowly construed. Thus, recognizing safeguards as an "unusually broad grant of regulatory power," the Commission stated:

... [A] safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required. [Id. at 512.]

In BethEnergy Mines, Inc., 14 FMSHRC 17 (1992), the Commission reaffirmed its holding in Southern Ohio Coal Co., stating:

... [A] safeguard must be interpreted narrowly in order to balance the Secretary's unique authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard The focus of judicial inquiry is on whether the safeguard is based on specific conditions at a mine and, as to those specific conditions, whether it affords the operator fair notice of what is required or prohibited by the safeguard. [Id. at 25.]

See also Rochester and Pittsburgh Coal Co., 14 FMSHRC 37, 41 (1992).

On May 23, 1989, MSHA Inspector James Bowman inspected 6-B and 6-C track entries at the subject mine. He testified that:

When I went to those two sections, there was two vehicles on the track. I was following one and I think it was numbers 33 and 97, and the poles would come off in almost exactly the same -- would come off in exactly the same spots numerous different times on those two tracks. It was probably more than 30 times because I was, you know -- there were so many that I just quit counting. So, what I started looking for was the causes for the pole to come off the wire to de-energize the piece of equipment. And the causes of that was the gauge of the wire in relation to the rail and kinks, bends and twists in the wire. [Tr. 12.]

Pursuant to 30 C.F.R. § 75.1403, Inspector Bowman issued Notice to Provide Safeguard No. 3238838, which stated:

The trolley wire was inadequately installed in 6-B and 6-C sections in that the wire gauge was much wider than the track. Kinks, bends and twists were present in the trolley wire, causing the trolley pole to de-energize on numerous occasions. The wire gauge is so wide that anti-pole swing devices can not be used at several locations along the 6-B and 6-C track entries by Jeep No. 97 and personnel carrier No. 33.

This is Notice to Provide Safeguard. All trolley wire shall be installed within a gauge where anti-swing devices can be used on all equipment and installed without excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason.

The safeguard thus noted two conditions that caused a transportation hazard of the pole coming off the wire. First, at various places the wire was not installed close enough to the track so that the trolley pole with an anti-swing device would stay on the trolley wire. Inspector Bowman testified that "what

I saw was the wire so far outside the gauge that it was impossible for the wire to -- for the pole to stay on the wire because the anti-swinging device would not allow it to swing far enough to reach the distance that they had the wire from the rail." Tr. 17-18.

Second, the safeguard stated that "kinks, bends and twists were present in the trolley wire, causing the trolley pole to de-energize "

The safeguard required that trolley wire be installed within a gauge where anti-swing devices can be used on all equipment and installed without "excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason."

The Secretary contends that "excessive" refers to any kink, bend or twist in the wire that causes the pole to fall from the trolley wire. The company contends that the word "excessive" means an excessive number of kinks, bends or twists that cause the pole to fall from the wire and that, in any event, if there is ambiguity the safeguard is not enforceable because it fails to give fair notice of the prohibited conduct.

I find that the term "excessive" as used in the safeguard reasonably refers to the degree of distortion in the wire caused by any kink, bend, or twist and that if any of these causes the trolley pole to fall from the wire it is "excessive" within the meaning of the safeguard.

The phrase "while traveling along the track within reason" reasonably means "at a reasonable rate of speed given the track conditions and equipment in the area," as stated by Inspector Bowman. Tr. 51.

Inspector Bowman testified that the two prohibited conditions (excessive distance of wire from track and any excessive kink, bend, or twist) created a transportation hazard of the trolley pole becoming disconnected from the trolley wire. This hazard created further hazards. The swinging pole could hit a person, it could propel or loosen rocks, it could cause sparks and arcs, and, by disconnecting the power, it would cause a loss of communication, lights, and brakes. In addition, when the distance from the track to the trolley wire was too wide to use the anti-swinging device, employees or supervisors might be tempted to block out or tie off the anti-swinging device in order to keep the pole connected to the wire. This would create a hazard of operating without this important safety protection.

I find that the safeguard was "based on an evaluation of the specific conditions at the mine and the determination that such conditions created a transportation hazard in need of correction" and that it "provided the operator with sufficient notice of the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." Southern Ohio

Citation No. 3579261

On February 4, 1992, Inspector Cook issued Citation No. 3579261, charging a violation of Safeguard No. 3238838 and 30 C.F.R. § 75.1403, citing five locations where the gauge from the track to the trolley wire was too wide to keep the trolley pole (with an anti-swing device) from falling from the trolley wire and ten locations where kinks in the trolley wire caused the pole to fall from the wire.

The cited conditions were abated by sliding the track to within a gauge that would allow the pole to stay on the wire while using an anti-swing device and by removing the kinks in the trolley wire.

I find that the conditions cited by Inspector Cook were proved by the evidence and constituted a violation of Safeguard No. 3238838 and 30 C.F.R. § 75.1403.

The company contends that if a violation existed, it was not "significant and substantial."

The Commission has held that a violation is "significant and substantial" if there is a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825, (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4, (1984). This evaluation is made in terms of "continued normal mining operations" without abatement of the violation (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)), and must be based on the particular facts surrounding the violation. (Texasgulf, Inc., 10 FMSHRC 498, (1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 1007, (1987)).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See judges' decisions in Consolidation Coal Company, 14 FMSHRC 748-752 (1991) and Mountain Coal Co., 14 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d) (1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice ... which could reasonably be expected to cause death or serious

physical harm before [it] can be abated,"¹ and expressly places S&S violations below an imminent danger.² It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

As stated above, the violation of Safeguard No. 3238838 presented a number of safety hazards: a disconnected trolley pole would stop the power immediately causing a loss of lights, communication, and brakes;³ the disconnected pole could strike someone, it could propel or loosen rocks and it could cause sparks. Also, a wide gauge between the track and trolley wire could tempt employees or supervisors to block out the anti-swing device in order to keep the pole from falling from the wire. This would create another hazard of the pole striking them. Taken as a whole, I find that the hazards caused by the risk of a disconnected trolley pole presented a reasonable likelihood of an accident involving serious injury.

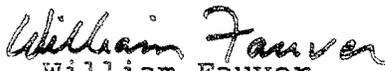
Considering the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$690 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Safeguard No. 3238838 was validly issued.
3. Respondent violated Safeguard No. 3238838 and 30 C.F.R. § 75.1403 as alleged in Citation No. 3579261.

ORDER

Respondent shall pay a civil penalty of \$690 within 30 days of the date of this decision.


William Fauver
Administrative Law Judge

¹ Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977.

² Section 104(d) (1) limits S&S violations to conditions that "do not cause imminent danger...."

³ With the power off, all vehicle lights would go off, and the vehicle phone would not transmit, although the driver could hear incoming messages. Electric brakes would be inoperative. Backup brakes would be available if they were working properly.

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington,
Virginia 22203 (Certified Mail)

Billy M. Tennant, Esq., United States Steel Mining Company, Inc.,
600 Grant Street, Pittsburgh, Pennsylvania 15219 (Certified
Mail)

/fcca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

MAR 16 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-141
Petitioner : A.C. No. 34-01692-03501JNG
: :
v. : Docket No. CENT 92-163
: A.C. No. 34-01692-03502JNG
PERRY SISK, :
Respondent : Kanima Mine

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Perry Sisk, pro se, Checotah, Oklahoma,
for Respondent.

Before: Judge Lasher

This proceeding arises on the filing by the Secretary of Labor of two complaints proposing penalties in the above two dockets pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) wherein the Secretary seeks assessment of penalties for a total of eight alleged violations, seven in Docket No. CENT 92-141 and one in Docket No. CENT 92-163.

At the hearing of these two consolidated proceedings in Little Rock, Arkansas, on January 21, 1993, a bench decision was rendered (T. 57-63) which decision is here **AFFIRMED**.

It is noted that the actual occurrence of the violative conditions and practices described in the eight citations was conceded by Respondent both prior to and during the hearing (T. 12, 34), who made a substantial challenge, however, to the question of the jurisdiction of the Mine Safety enforcement process over his particular operation and on that basis contends that there being no jurisdiction there of course could not be violations of the Act of implementing regulations.

At the outset of the hearing the parties stipulated that the Administrative Law Judge had jurisdiction to determine the matter

and also that the penalty levels reflected in MSHA's initial proposed penalties would not affect the ability of the Respondent to continue in business.

It was also stipulated and it also appears (See Ex. D-1) that Respondent has not history of previous violations and that Respondent, upon notification by MSHA of the occurrence of the violations, proceeded in good faith to timely abate the same.¹

Based on the evidence presented of record I find that Respondent is a sole proprietorship owned by Mr. Sisk and that in September 1991, when the citations in question were issued, approximately 11 total employees were on the payroll. At this time Respondent had a contract with Inter-Chem Coal Co., Inc., coal brokers, to pick up coal at the Kanima Mine owned by Wendall Johnson.

Respondent was not a subcontractor of Wendall Johnson who owned the surface coal mine in question where Respondent picked up the coal for delivery elsewhere, but rather, was an independent contractor as is more fully shown subsequently.

The Kanima Mine, located five miles east of Stigler, Haskell County, Oklahoma, had a stockpile located some one and one-half miles from the entrance to the mine at which were located scales.

Respondent's contract with Inter-Chem which ran for a period of approximately ten weeks called for Respondent to pick up coal from the stockpile and deliver the same to Oklahoma Gas and Electric Power Plant in Muskogee, some 70 miles distant.

Respondent used four trucks, each having its own driver (Mr. Sisk drove one of the trucks himself) who would, on a typical day, arrive at the mine at approximately six a.m., proceed to the stockpile, load the trucks (taking approximately 20 minute to tal), and then proceed to Muskogee. The trucks would be weighed before being loaded and again after being loaded. While the truck was being weighed, it would be necessary for the truck driver to get out of the truck and go into the scale house, a distance of approximately five steps, to sign a ticket. After delivery of the coal to Muskogee, the trucks on a typical day would return to the Kanima Mine and repeat the process. On a typical day during the ten-week period, each of the four drivers

¹ In terms of the mandatory statutory penalty criteria, there remain for subsequent consideration the size of the Respondent and the seriousness of the violations and any negligence involved in the commission thereof, since I do subsequently determine that there does exist jurisdiction over the Respondent under the 1977 Mine Act.

would pick up and deliver four loads at the Kanima Mine. The four truck drivers were employees of Mr. Sisk.

Mr. Sisk did not have an identification number assigned by MSHA until after the subject citations were issued.

The primary business of Wendall Johnson, doing business at the Kanima Mine, was selling coal from the stockpile in question.

Mr. Sisk, as reflected by his assumption of the responsibility for abating the infractions cited by MSHA and the other clear evidence of the employment relationship with the truck drivers in question shown in the record, had control over and the responsibility for the safety of the working conditions of these employees.

In the 1977 Amendment to the Mine Safety Act, Congress amended the definition of a "mine operator" to include "any independent contractor performing services or construction at such mine," 30 U.S.C. § 802(d).

The Mine Act declares that the "operators" of the nation's mines have primary responsibility for preventing the existence of unsafe and unhealthful conditions, 30 U.S.C. § 801(e). In Bituminous Coal Association v. Secretary of Interior, 547 F.2d, 240, 246-247 (4th Cir., 1977), herein BCOA, the Court interpreted the definition of "operator" to include independent contractors performing services at the production-operator's mine, and held that the Secretary has the power to cite the independent contractor, the operator, or both, for independent contractor violations.

The Secretary's administrative rule on independent contractors found at part 45, 30 C.F.R. (see § 45.2, definitions), defines independent contractor as "any person, partnership, corporation, subsidiary of a corporation, firm, association, or other organization that contracts to perform services or construction at a mine." Here, it is clear that the Respondent fits this definition of independent contractor, since he is a person performing services at a mine. This is in accord with the Senate Committee report on the 1977 Amendments, stating that, "It is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." Senate Report No. 91-181, 95th Congress, reprinted in U.S. Code and Congressional Administrative News (1977), 3401, 3414.

Here also, the Respondent's connection was more than just a one-time or brief incursion on mine property such as occurred in the case of an electric facility company employee meter reader who read a meter monthly near a mine access road in Old Dominion Power Co. v. Donovan, 722 F.2d 82 (4th Cir. 1985). In that case, the Fourth Circuit determined there was no jurisdiction, since the meter employee rarely went on to mine property. By contrast,

the meter employee rarely went on to mine property. By contrast, in this case, Respondent's employees during the period in question regularly were on mine property performing work directly related to the business of the mine itself. The contacts here occurred every day over a period of some ten weeks. See Secretary v. Lang Brothers, Inc., 14 FMSHRC 413 (Sept. 24, 1991) for the proposition that such a period of time and exposure constitutes much more than a de minimus contact. ²

CONCLUSIONS OF LAW:

1. Respondent is subject to the provisions of the 1977 Mine Act:

2. Respondent having so conceded, the eight violations described in the eight citations contained in the two subject dockets are found to have occurred.

PENALTY ASSESSMENT:

In addition to the penalty assessment factors previously found, it is further determined that Respondent is a small operator and that the gravity and negligence determination made by the Inspector on the fact of the citations, there being no challenge to the contrary, are accurate. Based on these findings, I find no reason to either raise or lower the MSHA's proposed assessment in this matter.

ORDER

Respondent **SHALL**, within 30 days from the issuance of this written decision, **PAY** to the Secretary of Labor the total sum of \$285.00 (\$50.00 for Citation No. 3407357 in Docket No. CENT 92-163; \$39 each for Citation Nos. 3407346, 3407347, 3407349, 3407355, 3407356; and \$20.00 each for Citation Nos. 3407348 and 3407359.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

² As Petitioner contends, Respondent had a "continuing presence" at the mine (T. 56).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

MAR 16 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-109-M
Petitioner	:	A.C. No. 48-00007-05548
	:	
v.	:	Mountain Cement Company
	:	
MOUNTAIN CEMENT COMPANY,	:	
a Wyoming Partnership,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-321-M
Petitioner	:	A.C. No. 48-00007-05563A
	:	
v.	:	Mountain Cement Company
	:	Albany County, Wyoming
	:	
PAUL MILLER, JR., employed	:	
by MOUNTAIN CEMENT COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-322-M
Petitioner	:	A.C. No. 48-00007-05565A
	:	
v.	:	Mountain Cement Company
	:	Albany County, Wyoming
	:	
PAUL ESTEVE, employed by	:	
MOUNTAIN CEMENT COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-323-M
Petitioner	:	A.C. No. 48-00007-05566A
	:	
v.	:	Mountain Cement Company
	:	Albany County, Wyoming
	:	
JAMES F. MAY, employed by	:	
MOUNTAIN CEMENT COMPANY,	:	
Respondent	:	

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

v.

RICK G. WILSON, employed by
MOUNTAIN CEMENT COMPANY,
Respondent

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

v.

WILLIAM SMITH, employed by
MOUNTAIN CEMENT COMPANY,
Respondent

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

v.

THOMAS G. JACKSON, employed
by MOUNTAIN CEMENT COMPANY,
Respondent

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

v.

STEVEN M. BONER, employed
by MOUNTAIN CEMENT COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 92-324-M
A.C. No. 48-00007-05568A

Mountain Cement Company
Albany County, Wyoming

CIVIL PENALTY PROCEEDING

Docket No. WEST 92-325-M
A.C. No. 48-00007-05569A

Mountain Cement Company
Albany County, Wyoming

CIVIL PENALTY PROCEEDING

Docket No. WEST 92-358-M
A.C. No. 48-00007-05567A

Mountain Cement Company
Albany County, Wyoming

CIVIL PENALTY PROCEEDING

Docket No. WEST 92-376-M
A.C. No. 48-00007-05564A

Mountain Cement Company
Albany County, Wyoming

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner against Respondents pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The civil penalties sought here are for the violation of Section 110(a) and Section 110(c) of the Act.

The eight cases herein were assessed penalties totaling \$7,900. The Secretary agreed to settle the cases for voluntary civil penalty payments totaling \$5,300.00.

The proceedings all involve MSHA Citation No. 3451535 which was issued to the corporate mine operator on June 7, 1990, citing a violation of 30 C.F.R. § 56.15006.

The violation was issued because special protective clothing was not worn by an employee attempting to poke and unplug the preheat tower. The Secretary's investigation of the serious burn injury accident, related to the issuance of the above-cited violation, indicated that it was an established practice, by both management and employees at this mine, to unplug or poke the preheat tower without wearing protective clothing.

It is the Secretary's position that each of the above-named Respondents, acting as agents of the corporate mine operator within the meaning and scope of Sections 3(e) and 110(c) of the Mine Act, knowingly authorized, ordered, or carried out the aforesaid violation of the corporate mine operator. Further, it is the Secretary's position that each of the respondents allowed and condoned the existence of the practice not to use, or require the use of, the hot suit when efforts related to unplugging the preheat tower took place, prior to the issuance of the aforesaid violation.

The Respondents each take the position that, but for purposes of the Mine Act, nothing contained herein shall constitute an admission by any of the Respondents that they knowingly violated the Mine Act or its regulations.

The Settlement agreement involves the full payment of the proposed penalty for the company case filed in Docket No. WEST 91-109-M. It also includes the full payment of the proposed penalty for Docket No. WEST 92-376-M, which involves the agent who was on duty at the time the accident occurred, and which resulted in the violation being issued. The settlement further includes reduced penalties of \$500.00 for each of the other Section 110(c) cases involved in these proceedings.

Therefore, the settlement is allocated among the various cases as follows:

<u>Docket No.</u>	<u>A/O No.</u> 48-00007	<u>Respondent</u>	<u>Penalty</u>	<u>Settlement</u>
WEST 91-109-M	-05548	Mountain Cement Co.	\$1,500	\$1,500
WEST 92-358-M	-05567-A	Thomas Jackson Vice President	1,200	500
WEST 92-323-M	-05566-A	James May Superintendent	1,000	500
WEST 92-322-M	-05565-A	Paul Esteve Superintendent	1,000	500
WEST 92-324-M	-05568-A	Rick Wilson Shift Foreman	800	500
WEST 92-321-M	-05563-A	Paul Miller Shift Foreman	800	500
WEST 92-325-M	-05569-A	William Smith Shift Foreman	800	500
WEST 92-376-M	-05564-A	Steve Bonar Shift Foreman	<u>800</u>	<u>800</u>
	TOTALS		\$7,900	\$5,300

The Secretary submits that the violation involved a degree of both negligence and seriousness because it resulted in a miner's suffering a serious burn injury, and that it was abated in good faith after its issuance. The Secretary further submits that corporate operator is a medium-size operator with an average history of prior violations for an operation its size. It is also noted that none of the agent Respondents has a prior history of Section 110(c) violations.

I have reviewed the settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

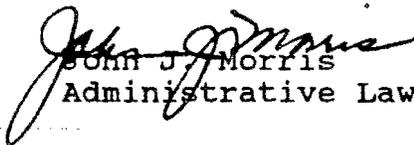
ORDER

1. The settlement agreement is **APPROVED**.
2. In WEST 91-109-M and WEST 92-376-M the Petition for Assessment of a Civil Penalty and the proposed civil penalties are **AFFIRMED**.

3. Respondent's Mountain Cement Company and Steve Bonar are **ORDERED TO PAY** to the Secretary of Labor their respective penalties of \$1500 and \$800 within 30 days of the date of this decision.

4. In the remaining six cases, the Petition for Assessment of a Civil Penalty and the amount of the Proposed Settlement are **AFFIRMED**.

5. Respondents Jackson, May, Esteve, Wilson, Miller, and Smith are **ORDERED TO PAY** to the Secretary of Labor within 30 days their respective penalties of \$500 each.


JOHN J. MORRIS
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Allen Gardzelewski, Esq., CORTHELL & KING, P.O. Box 1147, Laramie, WY 82070 (Certified Mail)

Phillip Nicholas, Esq., NICHOLAS LAW OFFICE, P.O. Box 928, Laramie, WY 82070 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

MAR 16 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 92-45-M
Petitioner : A.C. No. 05-04119-05510
 :
v. : Docket No. WEST 92-88-M
 : A.C. No. 05-04119-05511
NOLAND INCORPORATED, :
Respondent : Noland Pit

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Kent F. Williamson, Esq., Cortez, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, in these civil penalty proceedings, charges Noland, Incorporated, ("Noland") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

A hearing on the merits was held in Durango, Colorado on September 22, 1992.

The parties waived the filing of post-trial briefs and submitted the issues on oral argument.

Stipulation

At the commencement of the hearing the parties filed a written stipulation and they agreed as follows:

1. Respondent is engaged in mining and selling of sand and gravel in the United States and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Noland Pit, MSHA I.D. No. 05-04119.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

6. Additionally, Citation Nos. 3630511, 3630517, 3630518, 3630648, 3630650, 3630651, 3630654 and 3630614KF and order numbers 3630615 and 3630617 are admitted into evidence for the truthfulness and relevancy of the facts and designations contained therein. The sole issue remaining with regard to the above listed citations and orders is whether the plant was in operation at or about the time of the inspections. This issue alone will determine whether the alleged violations occurred. (See Judge's order of February 6, 1993).

7. Order numbers 3630620 and 3630646 are admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

8. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

9. The proposed penalty will not affect Respondent's ability to continue business.

10. The operator demonstrated good faith in abating the violations.

11. Respondent is a small mine operator with 4,560 tons of production in 1990.

12. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

In view of paragraph 6 of the stipulation as to the truth and relevancy of the ten citations/orders therein, it is appropriate to set forth the text of the enforcement documents.

Citation Nos. 3630511, 3630517, 3630518,
3630648, 3630650, 3630651, 3630654, 3630614
and Order Nos. 3630615 and 3630617

Citation 3630511 alleges Respondent violated 30 C.F.R. § 56.12040.¹ The violative condition cited by MSHA reads as follows:

The metal cabinet/enclosure containing motor circuit 480VAC switchgear for the "Telsmith Cone Crusher" motor and the "Pioneer Screen" drive motor was observed having unsafe access. Operating controls, such as overload relay reset button and circuit breaker ON-OFF levers were not installed so that they can be operated without danger of contact with energized conductors, parts and terminals. Voltage in this cabinet was 480VAC. The cabinet door was not locked and hot-line tools were not available as an alternative measure. If a person was to unintentionally contact an energized 480VAC component there could easily be an electrocution. Normal practice is not to enter equipment when energized however it has been done on occasions without incident.

Citation No. 3630517 alleges Respondent violated 30 C.F.R. § 56.12001.² The violative cited condition by MSHA reads as follows:

The utility/distribution transformer located at the MCC room was not properly protected by circuit breakers or fuses of the correct type and capacity. The transformer is believed to be 15KVA, single phase, 60KZ; primary wired for 480VAC and the secondary for two voltages, 240/120v. The primary was improperly protected by an MCP (Meter Circuit Protector) 30 amp circuit breaker set to trip

¹ § 56.12040 Installation of operating controls

Operating controls shall be installed so that they can be operated without danger of contact with energized conductors.

² § 56.12001 Circuit overload protection.

Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

at 120 amps. The secondary conductors from the transformer were not protected by fuses or a breaker. The individual branch circuits at the 100 ap panel were protected by circuit breakers.

Citation No. 3630518 alleges Respondent violated 30 C.F.R. § 56.12018.³ The violative condition cited by MSHA reads as follows:

Some principal power switches located at the genset van MCC room were not labeled to properly show what they control and identification could not be readily made by location. These were on 480 and 240/120 VAC circuits.

Citation No. 3630648 alleges Respondent violated 30 C.F.R. § 56.14201.⁴ The violative condition cited by MSHA reads as follows:

The entire length of the conveyors were not visible from the the starting switches inside the crusher control van, and an audible waring (sic) system was not provided to warn persons that the conveyors would be starting.

Citations No. 3630650 alleges Respondent violated 30 C.F.R.

³ § 56.12018 Identification of power switches.

Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

⁴ § 56.14201 Conveyor start-up warnings.

(a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

(b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

§ 56.11002.⁵ The violative condition cited by MSHA reads as follows:

Handrails were not provided on the access stairway to the generator/electrical trailer to prevent a person from slipping or falling! The trailer floor was about 43 inches above ground level.

Citation 3630651 alleges Respondent violated 30 C.F.R. § 56.18002.⁶ The violative condition cited by MSHA reads as follows:

Records were not being kept by the operator that a competent person designated by the operator was examining each working place at least once each shift for conditions which may adversely affect safety or health. It is intended that such examinations will assist the operator in detecting potentially dangerous conditions which can unnecessarily expose persons to hazards.

Unsafe conditions were found as a result of this inspection resulting in the issuance of citations and orders. It is apparent that effective safety exams are not being conducted as required by the standard.

⁵ § 56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

⁶ § 56.18002 Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

These records shall be made available for review by the Secretary or his authorized representative.

Citation No. 3630654 alleges Respondent violated 30 C.F.R. § 56.15001.⁷ The violative cited by MSHA reads as follows:

First aid material at the Noland Pit did not include a stretcher and blanket in the event of an emergency.

Citation No. 3630614 alleges Respondent violated 30 C.F.R. § 56.14107.⁸ The violative condition cited by MSHA reads as follows:

The head pulley, tail pulley and belt drive on the 5X16 conveyor under the Red Pioneer screen were not guarded to protect a person from contact with the pinch points. The head pulley was approximately 57 inches above ground level, the tail pulley was approximately 9 inches above ground level and the drive was approximately 60 inches above ground level. The pinch points were easily accessible while the conveyor was in operation. This condition existed for 6 days. This is an unwarrantable failure condition.

Order No. 3630615 alleges Respondent violated 30 C.F.R. § 56.14107.⁹ The violative cited by MSHA reads as follows:

⁷ § 56.15001 First-aid materials.

Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

⁸ § 56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

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

⁹ Cited in footnote 8.

The head pulley on the output #1 conveyor was not guarded to protect a person from contact with the pinch point. The pinch points were approximately 62 inches above ground level and easily accessible while in operation. The condition existed for at least 6 days. This is an unwarrantable failure condition.

Order No. 3630617 alleges Respondent violated 30 C.F.R. § 56.14107.¹⁰ The violative condition cited by MSHA reads as follows:

The head pulley on the primary reject conveyor under the primary screen was not guarded to protect a person from contact with the pinch points. The pinch points were approximately 53 inches above ground level and easily accessible while the conveyor is in operation. This condition has existed for at least 6 days. This is an unwarrantable failure condition.

Discussion and Further Findings

The parties stipulated that the sole issue in connection with the above citations and orders is whether the plant was in operation at or about the time of the inspection. That issue will determine whether the alleged violations occurred. (Stipulation, paragraph 6).

On this credibility issue I credit the testimony of Randy Smith. He was the Noland Crusher operator for eight years before quitting in March 1991. He quit because of an accident involving his uncle, Wayne Noland. When he quit in March 1991, the plant was running while he didn't think it was in "full operation" it was "producing sand."

I credit Mr. Smith since he appears to be a totally disinterested witness. At the time he quit the company, he was running a 950 loader stacking sand. (Tr. 67). In such an occupation he would be in a position to know if the plant was in operation. He also indicated the plant had produced about 500 yards of sand. (Tr. 68).

The testimony of Randy Smith that the plant was in operation is further confirmed by MSHA's inspector Ronald J. Renowden. He indicated that after returning from the house (from reviewing

¹⁰ Cited in footnote 8.

Part 50 records) the pit and the crusher were operating. (Tr. 87). Also there was material coming off the belts and going into the crusher. The whole plant, including every conveyor, was in operation. (Tr. 88).

Mr. Dennehy also testified that when the inspectors returned to the plant from Mr. Noland's home they noticed they were feeding the feed hopper and the crusher. In addition, material was coming off the belt screens and being stockpiled. (Tr. 21).

Respondent's witnesses, Ricky F. Noland and Wayne Noland, testified as to many reasons why the plant was not operational. The new crusher was being assembled; test runs were still being conducted; a second conveyor and hopper had to be built; a lot of different construction had to be done. Further, the various electrical amperages had to be set; on the day of the inspection there was no power at the wash plant. When the plant started up on March 26, 1991, Mr. Noland was aware everything had not been aligned and adjusted.

Respondent's evidence is not persuasive since Respondent was able to start the plant on the same morning the inspectors arrived. It is true that Mr. Noland thought he was operating the plant at MSHA's request. But the fact is that he was able to "turn on" the plant at about 10 a.m. on the morning of the inspection. This causes me to conclude the plant was "in operation" at or about the time of the inspection.

While Mr. Noland had requested a CAV (Compliance Assistance visit) inspection from MSHA there is no indication he would receive such an inspection. In fact, Mr. Renowden told Mr. Rick Noland that he didn't think MSHA could do a CAV inspection. (Tr. 79, 80).

For the foregoing reasons and on the basis of the sole issue as presented by the parties I find the plant was "in operation" at or about the time of the inspection. Accordingly, the eight citations and two orders received in evidence herein should be affirmed.

Civil Penalties

Section 110(i) of the Mine Act mandates consideration of six criteria in assessing civil penalties.

The stipulation here indicates Noland as a small operator producing some 4,560 tons of production in 1990.

The stipulation further indicates the penalty will not affect the operator's ability to continue in business.

Exhibit G-1 establishes a favorable prior history with only five assessed violations for the two year period ending March 25, 1991.

Noland was negligent since the violative conditions were open and obvious.

I consider the gravity of the violative conditions in Citation Nos. 3630511, 3630517, and 3630518 to be high since these violation involve electrocution hazards.

The gravity involved in Citation Nos. 3630648, 3630650, 3630651 and 3630654 is moderate and do not involve life threatening hazards.

Citation No. 3630614 and Order Nos. 3630615 and 3630617 involve unguarded equipment. Such conditions can cause severe injuries including amputation. The gravity is accordingly high.

The penalties contained in the order of this decision are appropriate.

Order No. 3630620

The facts involved in this order and the subsequent order are more complex than in the previous 10 citations/orders. In view of this factor it is appropriate to enter findings of fact based on the credible evidence.

As a threshold matter, the parties stipulated that the above two orders are admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevency of any asserted therein.

Order No. 3630620 alleges a violation of 30 C.F.R. § 56.14107.¹¹ The condition alleged by MSHA to be violative of the regulation reads:

The wash plant feeder which was driven by a chain drive attached to the tail pulley of the wash plant feed conveyor was not guarded to protect a person from contact with the pinch points and chain drive. The pinch points and chain drive were approximately 24 inches above ground level and approximately 9 ft from the hopper's opening. The pinch points & chain drive were easily accessible while in operation. This condition has

¹¹ Cited in footnote 8.

existed for at least 6 days. This is an unwarrantable failure condition.

In connection with this order it is uncontroverted that Citation No. 3630614 is the underlying D-1 citation. (Tr. 25, Ex. G-3).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial reliable and probative evidence establishes the following:

Findings of Fact

1. The sand plant (also called the wash plant) was not in operation on March 26. It had probably last been in operation in late October when freezing conditions caused the company to pull the pump. (Tr. 129, 130).

2. On the day of the inspection there was no power at the sand plant. The plant is separate from the crusher. (Tr. 25, 117, 129, 130).

3. The guard had been removed to clean up behind and around the conveyors. (Tr. 119-121).

4. The sand plant had not been in operation from January 1991 through March 26, 1991 because of the power disconnect. (Tr. 146).

Discussion and Further Findings

It is apparent the sand wash plant was not in operation nor did it have the capability to operate since power was not available.

A plant operator and the plant electrician should know if this portion of the plant could function.

In the previous 10 citations I relied on the testimony of MSHA's witness, Mr. Renowden. However, that testimony is not persuasive here since Mr. Renowden was not testifying as to the conditions at the wash plant.

Mr. Dennehy, who issued this order stated he "never saw the wash plant in operation." (Tr. 55, 56).

In addition, Randy Smith stated: "I don't know about the wash plant." (Tr. 69).

Since the sand plant was not operating nor capable of operating there could be no moving machine parts to cause injury as provided in C.F.R. 56.14107.

For the above reasons Order No. 3630620 should be vacated.

Order No. 3630646

This Order alleges a violation of 30 C.F.R. § 56.14112(b).¹² The condition alleged by MSHA to be violative of the regulation reads:

The guard on the left side of the sand stacker tail pulley had been removed, allowing access to the fins on the self cleaning tail pulley. This conveyor was located in the wash plant. The fins were approximately 1 ft above ground level and easily accessible while in operation. This condition has existed for at least 6 days. This is an unwarrantable failure condition.

Discussion and Further Findings

The previous findings of fact set forth in connection with Order No. 3630620 are appropriate and are incorporated herein.

The same basic conditions exist since this machinery could not be operated no violation of C.F.R. § 56.14112 could occur.

Order No. 3630646 should be vacated.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation No. 3630511 is **AFFIRMED** and a civil penalty of \$50 is **ASSESSED**.
2. Citation No. 3630517 is **AFFIRMED** and a civil penalty of \$50 is **ASSESSED**.
3. Citation No. 3630518 is **AFFIRMED** and a civil penalty of \$50 is **ASSESSED**.

¹² § 56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to-

(b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

4. Citation No. 3630648 is **AFFIRMED** and a civil penalty of \$30 is **ASSESSED**.
5. Citation No. 3630650 is **AFFIRMED** and a civil penalty of \$30 is **ASSESSED**.
6. Citation No. 3630651 is **AFFIRMED** and a civil penalty of \$30 is **ASSESSED**.
7. Citation No. 3630654 is **AFFIRMED** and a civil penalty of \$30 is **ASSESSED**.
8. Citation No. 3630614 is **AFFIRMED** and a civil penalty of \$300 is **ASSESSED**.
9. Order No. 3630615 is **AFFIRMED** and a civil penalty of \$300 is **ASSESSED**.
10. Order No. 3630617 is **AFFIRMED** and a civil penalty of \$300 is **ASSESSED**.
11. Order No. 3630620 is **VACATED**.
12. Order No. 3630646 is **VACATED**.


John J. Morris
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Kent F. Williamson, Esq., Post Office Box 1618, 215 North Linden Street, Suite D, Cortez, CO 81321 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard #280
DENVER, COLORADO 80204-3582
(303) 844-5266/FAX (303) 844-5268

MAR 16 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 92-139-M
Petitioner : A.C. No. 05-02798-05518
v. :
CALCO INCORPORATED, : Salida Plant
Respondent :

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

Robert K. Murray, Esq., Golden, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA) charges Respondent Calco Incorporated ("Calco") with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et. seq. (the "Act").

Hearings were held in Denver, Colorado, on December 14, 1992, and January 8, 1993.

The parties waived post-trial briefs and requested an expedited decision.

STIPULATION

At the commencement of the hearing the parties filed a written stipulation stating as follows:

1. Calco is engaging in mining and selling of quick-lime and limestone in the United States, and its mining operations affect interstate commerce.

2. Calco is the owner and operator of Salida Plant Mine, MSHA I.D. No. 05-02798.

3. Calco is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (the " Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The operator demonstrated good faith in abating the violation.

8. Calco is a Metal/Non-metal mine operator with 38,401 tons of production in 1991.

The five citations involved here allege violations of 30 C.F.R. § 56.14107(a) which provides:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

BACKGROUND

ARTHUR LEE ELLIS has been a metal/non-metal mine inspector for five years. Prior to MSHA his experience was in underground mining.

On August 6, 1991, Mr. Ellis inspected Calco's Salida plant. The plant manager, Lawrence Martinez, accompanied him on the inspection.

Citation No. 3905779

The above-numbered citation reads as follows:

A tail pulley and chain and sprock sprocket guard were not provided on the screen plant conveyor, exposing employees to the possibility of being caught in the pinch points. The tail pulley and chain drive was located under the feed hopper and approximately 6" above ground level.

EVIDENCE

Mr. Ellis issued this citation when he found there was no guard on the tail pulley or chain drive under the feed hopper. Exhibits R-1 and R-2 are photographs of the screen plant conveyor and Exhibit P-2 is a schematic drawn by the inspector. Exhibit P-2 depicts the chain sprocket, tail and head pulleys and identifies pinch points as No. 1, No. 2, and No. 3. The area outlined in red on Exhibit P-2 shows the outside parameters of the side of the screen plant conveyor.

The chain sprocket has grease fittings at the tail pulley and drive and the pulley itself is 12 inches above the ground. The pinch points are located at the bottom and at the chain drive sprocket. The belt, which moves material uphill, is 30 inches wide. The pulley moves at 60 to 70 RPM, and the sprocket moves at approximately 100 RPM.

In the inspector's opinion, it was reasonably likely that an accident could occur. However, he agreed that the distance between the side wall of the conveyor and the pinch points was a narrow 18 inches. The inspector indicated that an employee would maintain the plant conveyor twice a shift by servicing the equipment and removing the spillings.

A likely injury could be permanently disabling, including the loss of a limb.

MSHA records indicate that 75 to 80 percent of fatalities caused by moving machine parts involve conveyor belts. (Ex. P-3, P-9).

The citation was terminated by the installation of a spring guard placed around the pinch points and by further agreement that the company would not use any shovels to remove accumulations under the equipment. The grease zerts themselves were moved outward 18 inches to 2 feet from their present location.

To accomplish this, holes were made in the outside panel of the plant conveyor. It is 10 feet from the outside edge of the conveyor to the pinch points. It is 18 inches from the tail pulley to the chain sprocket.

In the inspector's opinion, miners would be in close proximity to shovel and remove spillage. Accidents have occurred involving the use of tools and workers have been sucked into pinch points and killed or disabled. The equipment the inspector had in mind was shovels, hoes, and hammers. However, he had never seen such an injury occur.

LAWRENCE MARTINEZ testified for Calco. He is the plant manager and is familiar with the citations. Mr. Martinez confirmed that the conveyor belt itself was 18 inches from the side of the conveyor when the conveyor is installed. (The conveyor is not installed in photographs R-1 and R-2.)

No maintenance is performed on the equipment when it is operating as the unit has a lockout to shut down operations and this is the procedure used by Calco. It was Mr. Martinez's opinion that it was not possible for any miner to be caught in the pinch points. They would not crawl back in the narrow space to clean up any accumulations. Mr. Martinez agreed the grease zerts are maintained once a shift when the equipment is shut down and locked out. He also indicated that employees have never entered without a lockout.

MICHAEL OVERSOLE is the Calco maintenance supervisor. He testified that no one could be caught in the pinch points. There is a very narrow space between the pinch points and the side wall. Anyone would have a difficult time in getting back there.

When accumulations develop, the conveyor is lifted with a loader and since it is on wheels it is pushed out of the way of any accumulations.

Mr. Oversole further identified a hole near the structure measuring 2 feet by 2 feet (marked on Exhibit P-2). It is possible to go through this hole to grease the zerts. This would not be done unless the equipment was locked out. However, it is possible to grease the zerts without turning off the equipment. If a miner was greasing or adjusting the belt, he could be seen from the outside of the conveyor.

VIRGIL FULLER, a Calco employee, is in charge of lubrication and greasing the equipment and he has greased it on numerous occasions. In fact, no one else greases it.

Mr. Fuller described in detail the disconnect and the lock-out procedures. During lockout when Mr. Fuller greases the tail

pulley, it is necessary for him to bend over, turn sideways and squeeze back into the area of the bushing. The opening is about 15 inches.

Mr. Fuller does not enter through the holes in the rear of the equipment. He enters from the open conveyor side and then moves into the narrow space. (Tr. 206).

DISCUSSION AND FURTHER FINDINGS

The disposition of this citation turns on the construction to be given to the cited regulation, Section 56.14107(a). Should the regulation require compliance in all places irrespective of whether a miner might contact the moving machine parts. On the other hand, should the scope of the regulation be limited to situations where there is a reasonable likelihood that a miner could contact the moving machine parts.

The regulation stripped of its surplusage merely states that "moving machine parts shall be guarded to protect persons from contacting ... moving parts that can cause injury." In this case it is uncontroverted that Calco always follows a lockout procedure. However, MSHA's regulation does not recognize lockouts as an exception to compliance. In short, compliance with the regulation is required. In sum, the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. FMSHRC, 606 F.2d 417, 419-420 (4th Cir. 1979).

On the basis of the evidence presented here and for the foregoing reasons, I conclude that this citation should be affirmed and a penalty assessed.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated as being of an S&S nature "if, based on 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 Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;

(3) a reasonable likelihood that the hazard contributed to will result in an injury; and
(4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4, See also Austin Power Co., v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988) aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The facts here establish a violation of the underlying guarding regulations. A measure of danger to safety was contributed to by the violation. Given the difficulty of entering and working on an 18 inch space coupled with the company's evidence of a lockout procedure, it would appear the facts fail to establish (3) of the Mathies formulation. However, the Commission has recently indicated that "the Mathies test requires an evaluation of the violation at the time of the citation including an examination of the risk of serious injury, given the presence of the violative condition in normal mining operations." Gatliff Coal Company, Inc., 14 FMSHRC 1982 (December 1992).

Here it appears the equipment was unguarded and a worker could be seriously injured (establishing (4) of the Mathies formulation). Normal mining operations would not involve a shutdown and lockout. Further, it is not possible for the operator to prevent a worker from maintaining the equipment in close proximity to the unguarded pinch points.

The operator abated this violative condition by extending the grease zerts 18 inches to 2 feet through the outside panel of the conveyor. Such an abatement should protect the workers on this site. The S&S allegations are affirmed.

CIVIL PENALTIES

Section 110(1) of the Act mandates consideration of six criteria in assessing appropriate civil penalties.

Calco is a small operator since it produced 38,401 tons of limestone and quicklime in 1991. The penalties contained in the order are appropriate considering the operator size.

Penalties will not cause the operator to discontinue in business. However, the evidence shows the operator's weak financial condition and this factor has been considered. (See sealed Ex. R-7.)

The operator has a favorable history. Exhibit P-1 indicates the operator paid six violations in the two-year period ending August 5, 1991.

Calco was negligent since the violative condition of Citation No. 3905779 was open and obvious.

If a worker became entangled in the pinch points, he would be seriously injured; hence, the gravity must be considered as high.

Calco demonstrated statutory good faith in abating the violative conditions.

Citation No. 3905781

The above-numbered citation reads as follows:

A tail pulley guard was not provided on the limestone feed conveyor belt, exposing employees to the possibility of being caught in the belt pinch points. The tail pulley was located about 2' above ground level. An employee passes through this area several times a shift.

EVIDENCE

Mr. Ellis issued this citation when he found exposed pinch points on the operator's limefeed tail pulley. Specifically, the pinch points were at the bottom of the tail pulley. The described area is shown slightly behind the angle iron to the front of the hopper as shown in Exhibit P-4. There was no guard and an employee that was observed in this area was cleaning up with a broom and shovel. Debris can be seen on the floor of the area in Exhibit P-4.

The pulley moves at 60 to 80 RPM and is in constant motion. The pinch point is 2 inches off the ground and the inspector believed an injury could easily happen as a miner could slip and fall. Further, his clothing could be caught in the pinch point. In addition to cleaning up around the area, it would also be necessary to grease and adjust the belt. In the inspector's opinion, injury could include loss of a limb.

The condition was terminated by the installation of a guard on the equipment.

The distance from the tail pulley to the angle iron is 3 to 4 inches; it is the same distance to the pinch point.

Mr. Martinez testified for Calco that there was no guard on this equipment. However, the pinch point was one foot above the floor and a person would have to be very low to the ground to get his hand into the pinch point. He would, in fact, have to fall at a perfect angle to become entangled.

The angle iron shown in Exhibit P-4 is the same as the angle iron on the side away from the camera. Exhibits R-3 and R-5 show the guards that were installed by the operator.

The only reason anyone would be in this area would be to clean up or service the equipment. Workers shovel the gravel while the belt is moving.

A worker could stick his hand directly into the pinch point. Mr. Martinez would shut off the equipment if the belt had to be worked on.

The metal screens shown in Exhibits R-3 and R-5 were installed after the citation. As a result of the installation, no one person can reach into the pinch points. The machine is greased three times a week. It is necessary to clear the rubble every shift or every other shift.

Mr. Oversole testified the pinch point was under the angle iron a foot or so off of the floor. In his opinion, the frame provides adequate protection from the pinch point, and it was his view that no one could fall into the return belt of the equipment.

Miners would be in the general area of the conveyor when it was running.

VIRGIL FULLER, testifying for Calco, indicated he is familiar with the equipment in Exhibit P-4. The pinch point is at the bottom of the equipment about 7 inches above the floor. However, if a person slipped, he could not get tangled up in the pinch point. The angle iron frame provides adequate protection from the pinch point. However, he would ask that a guard be put there. If anyone came in contact with the pinch point, it would be a deliberate attempt because it would not be an inadvertent act.

On cross-examination Mr. Fuller agreed that it would be possible to reach into the pinch point but that in his opinion the point was inaccessible. It is 6 to 8 inches to contact the pinch point. You could not get your hand in and out quickly. However, a person could purposely put his hand into the pinch point.

DISCUSSION AND FURTHER FINDINGS

The position of the pinch point indicates from the evidence that it would be difficult for a miner's body to become entangled. However, entanglement with clothing could occur. Given the strict compliance imposed by Section 56.14107(a), it is necessary

for the operator to guard against the stated contingency even though the occurrence of that contingency might be unlikely.

For the above reason, Citation 3905781 should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The formulation in Mathies and Gatliff apply here. The record generally meets the Mathies criteria. Following Gatliff, the evidence indicates a risk of serious injury exists particularly if a miner's clothing becomes entangled in the pinch point. Even though such entanglement is remote, workers in close proximity were exposed.

The S&S allegations should be affirmed.

CIVIL PENALTIES

In connection with Citation 3905781, the operator must be considered as negligent since employees work in the area and the condition was open and obvious.

Further, gravity must be considered as high since if a worker became entangled he could be seriously injured.

The remaining penalty criteria have been previously discussed.

Citation No. 3905782

The above-numbered citation reads as follows:

The tail pulley guard was not adequate, head pulley guard was not provided and back portion of chain drive guard was not provided on the No. 2 limefeed conveyor belt, exposing employees to the possibility of being caught in the pinch points. The tail pulley was located approximately 2' above cement floor and the head pulley and chain drive were in front of and above 18" to 24" from a ladder used by employees to check on small grizzly and clean rocks from grizzly which is between the ladder and head pulley (about 18" to 24" wide). This is done on a regular basis.

EVIDENCE

Mr. Ellis wrote one citation for three different conditions on the same piece of equipment.

Concerning the tail piece, an inadequate guard, as shown in Exhibit P-6, was on the equipment. After abatement, the new guard is shown in Exhibit R-6.

In addition to the above-described condition at the tail pulley, there were also pinch points at the head pulley and in the chain drive to its right. The condition at the head pulley is shown in Exhibit P-5. The pinch points are where the conveyor contacts the head pulley. Since the material is moving uphill into the grizzly, the pinch point would be on the far side of the head pulley and away from a worker.

Additional pinch points are shown in the chain drive which appears to be partially enclosed and to the right of the head pulley.

These pinch points are 7 feet off the ground and only accessible by a ladder. It is necessary for employees to climb the ladder to pick any large rocks off of the grizzly and this clean-up occurs several times a shift.

The head pulley moves at 60 to 80 RPM and the sprocket (to the right in P-5) moves at 120 RPM.

Mr. Ellis expressed the view that if a miner on the ladder lost his balance, his clothes or part of his body could become entangled. He considered it reasonably likely that there could be a permanent disabling injury or loss of limb.

Mr. Ellis agreed that the pinch point at the conveyor and the head pulley were 3-1/2 feet away from a worker on the ladder. In addition, the distance involved would be increased by the 18-inch head pulley. He also indicated the pinch point was 2 feet 9 inches from the face of the ladder. The limestone would be moving uphill toward the ladder. He believed a person's arm can reach 2 to 3 feet depending on the turn of the torso. He believed a person or his clothing could be caught in all three of the pinch points involved here.

Mr. Martinez testified the manner in which he stepped on the second rung to throw rocks out of the grizzly. He had never been concerned that an employee could be hurt by slipping or falling.

Exhibit R-6 shows the tail pulley after a guard was attached. The pinch point itself at the tail pulley is within 5 inches of the floor. Mr. Martinez believed that if a person laid down on the floor he could put his hand in the pinch point.

Mr. Martinez indicated the equipment is maintained three times a week. Further, they have adjusted the belt with the conveyor running.

Mr. Oversole indicated a worker could not contact the pinch point at the bottom of the tail pulley unless he was really trying.

Mr. Oversole has cleaned out the grizzly himself and it is only necessary to go up the ladder high enough to see the rocks. This is usually four rungs down from the top. The first rung is at chest level and there is no need to go any higher.

Mr. Fuller expressed the view that the pinch point on the tail pulley was 7 to 8 inches above ground. He further indicated the guard that was installed at the time of the inspection was adequate.

In connection with the head pulley: a worker normally goes up two rungs on the ladder and is leaning forward. It is unlikely he will fall backwards. To get tangled up in the head pulley, you have to go higher on the ladder and reach around the head pulley to contact the conveyor belt.

Mr. Fuller has climbed the ladder to clean out the grizzly on two or three occasions. He has cleaned out the grizzly when the conveyor was moving. In his opinion, you cannot reach the pinch point from a position of being waist high on the ladder.

Mr. Fuller indicated he is a rank and file person with Calco and he has not been paid for testifying. He has been employed there for eight years, and the company runs a safe operation.

DISCUSSION AND FURTHER FINDINGS

Concerning the tail pulley: the evidence establishes its guard at the time of the inspection was not adequate. Exhibit P-6 shows the opening between the old guard and the conveyor. While it was claimed that the metal piece along the edge of the conveyor also served as a guard, it is apparent that a sufficient opening exists for a person to slip a hand or clothing or even a tool into the pinch point through the unguarded opening. (Compare Ex. P-6 and Ex. R-6, the before and after.)

The operator's witnesses testified as to the difficulty of contacting the pinch point and the necessity of reaching over the head pulley to make that contact. I'm not persuaded by that testimony as it is all premised on how high the employee stands on the ladder. The employee, if he slips, would almost automatically reach forward since he can only fall if he goes backwards. He thereby exposes himself to contacting the pinch point formed by the conveyor and the head pulley.

Citation No. 3905782 should be affirmed and a penalty assessed.

SIGNIFICANT AND SUBSTANTIAL

The formulation in Mathies applies here. The evidence establishes an underlying violation of 30 C.F.R. § 56. 14107(a). A discrete measure of danger to workers was contributed to by the unguarded equipment. The various conditions in this citation indicate a reasonable likelihood existed that the hazard will result in an injury. It is also reasonable that an injury would be serious and possibly fatal.

The S&S allegations should be affirmed as to Citation No. 3905782.

CIVIL PENALTIES

The operator was negligent as these violative conditions were open and obvious.

The possibility of being caught in pinch points results in the gravity as being considered high.

The additional civil penalty criteria has been previously discussed.

Citation No. 3905783

The above-numbered citation reads as follows:

The head pulley and tail pulley guard were not adequate in that a person could reach behind the guards and touch the pulleys on the No. 1 limefeed conveyor belt, exposing employees to the possibility of being caught in the pinch points. The tail pulley was approximately 2' above a cement floor and the head pulley was approximately 6' high above a cement floor. An employee passes through this area several times a day.

ARTHUR ELLIS issued the above citation on August 6, 1991. He observed a tail pulley with a small guard. The pulley itself was about 10 inches above the cement floor. The head pulley was 6 feet above the floor and fed into another conveyor. A worker could touch the head pulley and it had bars welded onto it.

The chain drive and sprocket were exposed.

Mr. Ellis believed the guard was not adequate as it did not cover the pinch points. There was nothing covering the tail pulley on the back. About 8 to 10 inches were uncovered. If a worker was caught by the moving machine part, he would be injured.

Exhibit P-7 is a photograph of the head pulley and the drive on Conveyor No. 1. The head pulley is in the center of the photograph and the pinch points are at the top.

In the inspector's opinion, the bars on the head pulley create additional pinch points.

The conveyor belt moves material uphill and the pinch points would be on top.

There are pinch points at the sprocket where it meets the chain.

In Mr. Ellis's opinion the pinch points were not adequately guarded at the bottom of the tail pulley and a worker could be caught by the moving shaft.

Mr. Ellis expressed the view that it was reasonably likely that an accident would occur since employees walk by this area and service the equipment. Workers would also clean up if a spill occurred. Both the tail pulley and head pulley are cleaned up on a daily basis. At the tail pulley Mr. Ellis observed gravel that had been spilled.

Mr. Ellis also believed that the loss of a hand, finger, or arm was possible, and he considered it easy for a worker to be injured if he slipped or fell into the pinch points. He had seen workers cleaning with a broom and shovel and the equipment could be pulled into the pulley. In addition, clothes could be caught.

The head pulley is 6 feet above the ground and 2 feet from the walkway. If a worker tripped and fell, he could only fall into the area of the tail pulley. He could not fall into head pulley area.

The inspector believed the company was negligent since the violation could be easily seen and management should have known about it.

The inspector testified that workers have been injured by equipment of this type and he identified Exhibits P-3 and P-9 as MSHA reports generally relating to injuries involving moving machine parts. He has also learned of a number of instances involving tools and, as a result, he marked this violation as possibly causing a permanent disability.

Inspector Ellis agreed that he measured the vertical distance to the center of the head pulley. The distance was 72 inches, plus or minus 2 inches. It was also 1-1/2 to 2 feet from the frame over to the conveyor. It was 7-1/2 feet to the unguarded pinch points from where Mr. Ellis was standing to make his vertical measurement.

Mr. Ellis was familiar with 30 C.F.R. § 56.14107(b), which provides as follows:

Guards shall not be required where the exposed moving parts are at least 7 feet away from walking or working surfaces.

It was Mr. Ellis's opinion that the guards were not adequate.

LAWRENCE MARTINEZ, plant manager, testified the bars welded on the head pulley are 1/4 to 3/8 of an inch. The distance from where he was standing below the head pulley was 6 feet vertically and 2 feet laterally, or a total of 8 feet.

The company has a lock-out procedure and does not grease the equipment when it is running. Exhibit R-13 shows the head pulley of the conveyor.

Virgil Fuller is shown in R-13. Mr. Fuller is 6 feet tall and to reach the pinch point he would have to reach an additional foot. In Mr. Martinez's opinion the pinch point in the vicinity of the head pulley is inaccessible. Further, the addition of the 3/4 inch riser did not create any additional pinch point.

Exhibit R-14 shows the feed conveyor tail pulley section. The tail pulley is not greased when the machine is "on the run."

The conveyor belt is adjacent to where people walk several times a day.

Exhibit R-13 shows the head pulley and Exhibit R-14 shows the tail pulley.

MICHAEL OVERSOLE testified the parallel ribs welded on the head pulley were 3/8 of an inch round stock mild steel. There was 2 inches between each rib. There was a 1/4 inch gap. A person could not get a finger into the 3/8 inch gap.

In Mr. Oversole's opinion, the guarding on the equipment was adequate when the citation was issued.

Mr. Oversole agrees that he adjusts the conveyor belts when they're installed, and then once after they stretch for wherever adjustment is needed. They do not grease the head pulley area and they clean around the head pulley and tail pulley once a shift.

Exhibit P-6 appears to show a gap but it could not be more than 2-1/2 inches. It would be possible to get a hand in this area but you still could not reach the pinch point.

VIRGIL FULLER, in addition to his other qualifications, is also an emergency medical technician certified by the State Board of Health. In addition, he is a licensed minister and preaches when requested.

Mr. Fuller identified himself in Exhibit R-13 where he is reaching upward and standing against a conveyor belt. Even in that position, he is 10 to 12 inches from the pinch points.

Mr. Fuller is 6 foot 1 inch; the vertical distance adjacent to the head pulley is 6 feet and the horizontal distance to the head pulley is 1 1/2 to 2 feet.

Measured on a curve with a tape measure, it is 88 inches from the ground level to the pinch point. The measurement would be 7 feet 4 inches. In Mr. Fuller's opinion, it would not be possible to become tangled up in the conveyor, nor could a worker become tangled in the head pulley.

Exhibit R-14 shows the tail pulley and it was received as an accurate photograph of the present guard. The opening in the tail pulley area is 2 1/2 to 3 inches and it is an additional 18 inches to the pinch point. No worker at Calco could reach the pinch points.

On the head pulley the welded ribs were 3/8 inch when new. A worker could only get his fingers between the conveyor and the head pulley if he did so purposely. The tail pulley pinch point is inside the frame and if a worker put his hand into the open area he would have to go an additional 8 to 10 feet to reach the pinch point, and this would not be possible.

Mr. Fuller indicated he services the equipment when it is operating at four grease points on the drive side and he has a grease tube permanently affixed to the machine.

A pinch point could be contacted if a person had a reach of 88 inches. Mr. Fuller could not reach the pinch point nor would his shirt sleeve become entangled.

In Exhibit R-13 he is leaning as far as he could go and could only go an additional 1 inch.

Mr. Martinez could reach the pinch point because he is taller.

The equipment is greased once a week. There's often gravel on the floor near this equipment.

On the head pulley there is a grease zert 8 to 10 inches outside of the guards. In addition, there is a grease tube.

When Mr. Fuller rebuilt the guards they had to be extended.

Exhibit P-6 shows the tail pulley guard.

There's a 2-1/2 inch gap in the bottom of the skirting. The skirting is a 1/4 inch by 4 inch piece of metal and, in addition, a 1/2 inch by 5 inch rubber skirting. The skirting serves to keep the material on the belt.

DISCUSSION AND FURTHER FINDINGS

AMENDMENT

This case originally commenced December 1992. At that time the Secretary sought to amend her citation so as to include therein allegations that the sprocket and chain drive guard were unguarded.

Respondent claimed surprise and its motion for a continuance was granted. The case was re-set to January 8, 1993. No written amendment was filed, but inasmuch as the parties had discussed the nature of the amendment at the December hearing, the operator could not have been surprised by the amendment and the Secretary was permitted to orally amend the citation and add in the citation an allegation that the "sprocket and chain drive guard" were unguarded or not adequately guarded.

This citation involves a question of law.

The question of law is whether moving machine parts should be guarded when those exposed moving parts are "at least 7 feet away from walking or working surfaces" as contained in Section 56.14107(b).

It is clear that the vertical measurement under the head pulley was at least 6 foot and the horizontal distance was 1 1/2 to 2 feet. The Secretary argues that the distance involved should be "as the crow flies." On the other hand, the operator correctly argues that even the crow could fly, he (the crow) could not fly through the lower conveyor belt. In Exhibit R-13 Mr. Fuller is leaning on the lower conveyor belt and reaching forward in the direction of the head pulley pinch points.

In connection with this matter, I find the operator's testimony to be credible concerning the distance involved between the walking or working surface and the exposed moving parts. That distance, as Mr. Fuller testified, was 7 feet 4 inches. By virtue of Section 56.14107(b) no guards are required under these circumstances.

I further credit the operator's testimony as to the tail pulley. The operator, in my view, is in a better position to describe the relative distances from the opening in the tail pulley guard to the pinch point. While I agree there is an opening, there is no credible evidence that any worker could reach to the pinch point even if he placed his hand deliberately in the area.

The sprocket and chain guard drive which the Secretary claims was also unguarded is a greater distance from the floor than the head pulley is from the floor. Accordingly, the sprocket and chain guard drive is greater than 7 feet from the working surface and under § 56.14107(b) no guarding is required. (See Exhibits P-7 and R-13.)

For the foregoing reasons Citation No.3905783 should be vacated.

Citation No. 3905784

The above-numbered citation reads as follows:

A tail pulley guard was not provided on the Brig conveyor belt, exposing employees to the possibility of being caught in the belt pinch points. The tail pulley was of the self-cleaning type and located about 1' above basement (sic) floor. Employees must pass by tail pulley to get to electrical switch gear.

ARTHUR ELLIS issued the above citation when he observed a self-cleaning tail pulley without a guard. Workers were exposed to the possibility of being caught by the pinch points and this could cause a serious injury to a worker.

Exhibit P-8 is a drawing purporting to show the tail pulley as well as a door to the motor control center. The drawing is Mr. Ellis's best recollection of the scene.

The pinch point is at the bottom of the tail pulley. In addition to persons being entangled, tools could also be entangled.

It was a foot from the tail pulley to the ground and the inspector estimated that the pulley moves at 60 to 80 RPM. From the pulley to the door is 10 feet.

Workers would go alongside the conveyor to get to the door.

In rebuttal testimony Inspector Ellis stated he was in error on this point. He indicated there was no walkway along the side

of the briquette conveyor. Exhibits R-8 and R-11 each show a side of the conveyor.

Mr. Ellis noted that in the area near the pinch points workers sometimes went to service the equipment.

He believed that the violation was significant and substantial and reasonably likely to cause an injury. The most likely injury would be loss of a limb as a worker could trip and fall into the pinch point or be pulled into the equipment.

He believed it was easy for an accident to occur as employees pass this area several times a day.

The tail pulley was a foot off the floor. He considered the negligence to be moderate as management should have known of the condition.

LAWRENCE MARTINEZ testified that the ceiling deck as shown on Exhibit R-11 is 4 feet above the briquette conveyor. Anyone walking in this area would necessarily stoop over. It would not be possible to walk alongside the conveyor without stooping down.

Exhibit R-9 is taken from the adjacent walkway with the camera pointing upward on the conveyor belt.

The tail pulley has sealed bearings and no maintenance is required except to change the bearings. On Exhibit R-10 the material is transported uphill. The pinch points on the tail pulley are difficult to see due to the installation of guards after the citation was issued.

Exhibit R-11 shows the briquette conveyor with the photograph taken from underneath the platform.

The briquetter system is only operated about 16 hours a month and it depends upon the requests made by the customers for the briquette products. The briquetter is usually operated about every two months.

The function of the briquetter is to take powder or rock and briquette it, much like a charcoal briquette.

Employees walk by this area daily and the panels shown in the background of R-8 hold electrical switches to operate the equipment.

On August 6, 1991, there were no guards on the conveyor.

Mr. Martinez drew a plan view of the briquetter building. He identified the various portions of the building as well as the described platform which was 4 feet above the floor.

He indicated a walkway is located at the end of the conveyor belt, and if you fell, you would not fall into the conveyor belt. A switch gear is right at the end of the walkway.

The electrical controls shown in the back of Exhibit R-8 were for the blower, the bag house, and related equipment.

It is possible to turn off the blower, the bag house, and related electrical equipment while the briquetter is still running. It is possible to turn the machinery on and off if a spillage occurs. There's no necessity to maintain the equipment while the system is running.

MICHAEL OVERSOLE, maintenance superintendent, agrees with Mr. Martinez's drawing in R-12. He indicated the conveyor is protected from an accident due to the platform. A worker could not become entangled even if he slipped and fell.

If the briquetter is running, the lime will burn your eyes but visibility is no problem when you enter the area.

It is necessary to walk by the end of the tail pulley to reach the electrical controls.

VIRGIL FULLER handles the lubrication of equipment in the plant. The briquetter has sealed bearings so there is no occasion to be in the vicinity of the conveyor belt. In addition, a worker could not get tangled up in the pinch points on the belt and any entanglement would have to be deliberate. The briquetter system operates about 16 hours a month.

When Mr. Fuller goes onto the walkway he checks the rollers under the conveyor and checks the alignment of the conveyor belt. (See Drawing R-12 identifying the walkway area and the area where the conveyor is located.)

DISCUSSION AND FURTHER FINDINGS

Exhibits R-8, R-9, R-10, and R-11 are photographs of the tail pulley involved here. In the background of R-8 are the electrical panels that control the briquetter. To reach these panels a workman would have to pass by the tail pulley. Exhibits R-8 and R-11 show spillage from the briquetter. Removal of that spillage would require a worker to be in close proximity to the unguarded pinch points which were described in detail by the inspector.

The operator contends there's no necessity for any workers to be in close proximity to the unguarded tail pulley. However, Exhibit R-9 clearly shows an electrical panel directly above the conveyor. The electrical panels, according to the evidence,

control the operation of the bag house, et cetera. These electrical panels above the tail pulley, however, do not control the running of the actual briquetter itself.

I do find from Exhibit R-9 that the electrical panels are in quite close proximity to the tail pulley. For this reason, this citation should be affirmed since entanglement is a definite possibility.

Citation No. 3905784 should be affirmed and a penalty assigned.

SIGNIFICANT AND SUBSTANTIAL

The formulation in Mathies applies. The evidence establishes an underlying violation of 30 CFR 56.14107(a). A discrete measure of danger to workers was contributed to by the unguarded tail pulley. It appears there is a reasonable likelihood that the hazard will result in an injury. A worker using the electrical panel could become entangled. If such an event occurred, injury could possibly be fatal.

The S&S allegations are affirmed.

CIVIL PENALTIES

The operator was negligent as this condition was open and obvious.

The gravity must be considered as high in view of the possibility of entanglement.

Other statutory criteria has been previously discussed.

ESTOPPEL

ROBERT MURRAY, president and counsel for Calco, asserts other MSHA inspectors have not cited the company for the conditions observed by Mr. Ellis.

As a general rule, equitable estoppel cannot be asserted against the Secretary. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Further, prior non-enforcement does not bar the Secretary from citing violative conditions. Conesville Coal Preparation Company, 12 FMSHRC 639, 672 (April 1990.)

For the foregoing reasons, I enter the following:

ORDER

1. Citation No. 3905779 is **AFFIRMED** and a penalty of \$50 is **ASSESSED**.

2. Citation No. 3905781 is **AFFIRMED** and a penalty of \$50 is **ASSESSED**.

3. Citation no. 3905782 is **AFFIRMED** and a penalty of \$75 is **ASSESSED**.

4. Citation No. 3905783 is **VACATED**.

5. Citation No. 3905784 is **AFFIRMED** and a penalty of \$50 is **ASSESSED**.


John J. Morris
Administrative Law Judge

Distribution:

Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Robert K. Murray, Esq., CALCO INC., P.O. Box 1520, Golden, CO 80402-1520 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 17 1993

BOBBY GENE STROUTH, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. VA 91-34-D
CAVALIER MINING CORPORATION, :
Respondent : NORT CD 90-16

ORDER OF DISMISSAL

Appearances: Edward G. Stout, Esq., Bressler, Curcio & Stout,
P.C., Bristol, Virginia, for Complainant;
No appearance for Respondent at the hearing.

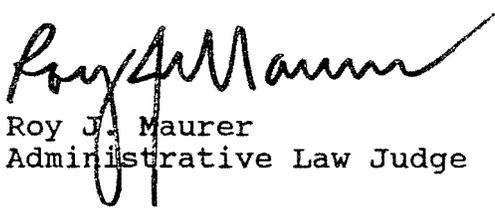
Before: Judge Maurer

This case came on to be heard on December 15, 1992, in Abingdon, Virginia. No appearance was made on behalf of respondent because the respondent is currently involved in bankruptcy. This bankruptcy, originally filed under Chapter 11 has since been converted to a Chapter 7 bankruptcy proceeding from which there may or may not ever be any funds left over for distribution. In the meantime, section 362 of the Bankruptcy Code (11 U.S.C. § 362) provides for a stay that effectively prohibits this discrimination action from proceeding to judgment.

In consideration of these circumstances, the complainant has filed a motion to withdraw his complaint in this matter, without prejudice to him refiling it, at his option, within 90 days after respondent is discharged from its bankruptcy proceeding. The respondent does not object to the grant of this motion.

In light of the foregoing circumstances, the complainant's motion to withdraw his complaint and dismiss this case, without prejudice, is **GRANTED**.

It is hereby **ORDERED** that this case be **DISMISSED** without prejudice to the complainant refiling it with this Commission, at his option, within 90 days after respondent is discharged from its bankruptcy proceeding.


Roy J. Maurer
Administrative Law Judge

Distribution:

Timothy W. Gresham, Esq., Penn, Stuart, Eskridge & Jones,
208 E. Main Street, P. O. Box 2288, Abingdon, VA 24210 (Certified
Mail)

Edward G. Stout, Esq., Bressler, Curcie & Stout, 600 Cumberland
Street, P. O. Box 1478, Bristol, VA 24203 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
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MAR 18 1993

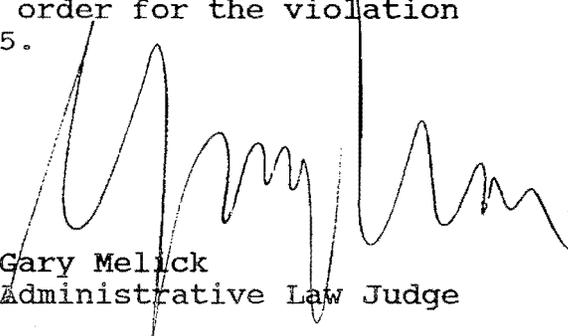
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 90-100
Petitioner : A.C. No. 15-04322-03530
 :
v. : Docket No. KENT 90-215
 : A.C. No. 15-04322-03531
GATLIFF COAL COMPANY, INC. :
Respondent : Gatliff No. 1 Mine
 :
GATLIFF COAL COMPANY, INC., : NOTICES OF CONTEST
Contestant :
 :
v. : Docket No. KENT 89-242-R
 : Citation No. 3178703; 8/3/89
 :
SECRETARY OF LABOR, : Docket No. KENT 89-243-R
MINE SAFETY AND HEALTH : Citation No. 3178704; 8/3/89
ADMINISTRATION (MSHA), :
Respondent : Docket No. KENT 89-244-R
 : Citation No. 3178706; 8/3/89
 :
 : Docket No. KENT 89-245-R
 : Citation No. 3178707; 8/3/89
 :
 : Docket No. KENT 89-246-R
 : Citation No. 3178708; 8/3/89
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 : Docket No. KENT 89-247-R
 : Citation No. 3178709; 8/3/89
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 : Docket No. KENT 89-248-R
 : Citation No. 3178710; 8/3/89
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 : Docket No. KENT 89-249-R
 : Citation No. 3178711; 8/3/89
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 : Docket No. KENT 89-250-R
 : Citation No. 3178712; 8/3/89
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 : Docket No. KENT 89-251-R
 : Citation No. 3178713; 8/3/89
 :
 : Docket No. KENT 89-252-R
 : Citation No. 3178714; 8/3/89
 :
 : Gatliff No. 1 Mine
 : Mine ID No. 15-04322

DECISION APPROVING SETTLEMENT

Before: Judge Melick

The captioned cases were remanded by the Commission on December 7, 1992, for reassessment of civil penalties for Citation No. 3178705 in Docket No. KENT 90-100 under Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner thereafter filed a motion to approve a settlement agreement as to this citation. A reduction in penalty from \$4,000 to \$500 is proposed. I have considered the fact that following trial and appeals to this Commission, the original Section 104(d) order was modified to a Section 104(a) citation without "unwarrantable failure" findings. I have also considered the trial transcript and evidence in this case and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$500 within 30 days of this order for the violation charged in Citation No. 3178705.



Gary Melick
Administrative Law Judge

Distribution:

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

Robert I. Cusick, Esq., Wyatt, Tarrant and Combs,
2600 Citizens Plaza, Louisville, KY 40202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 17 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 92-799
v. : A.C. No. 46-01968-03982
: :
CONSOLIDATION COAL COMPANY : Docket No. WEVA 92-800
Respondent : A.C. No. 46-01968-03983
: :
: Docket No. WEVA 92-801
: A.C. No. 46-01968-03986
: :
: Blacksville No. 2

DECISION

Appearances: Caryl Casden, Esq., U.S. Department of Labor,
Office of the Solicitor, Arlington, Virginia
for Petitioner;
Daniel Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

These single citation proceedings are before me as a result of petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., (The Act). This matter was heard in Morgantown, West Virginia on November 17, 1992, at which time Richard McDorman testified on behalf of the Secretary and Kenneth Ryan and David Lemley testified on behalf of the respondent. At the hearing, the petitioner moved to settle Docket No. WEVA 92-799 which involves a \$20 proposed assessment for Citation No. 3718465 for an alleged non-significant and substantial violation of 30 C.F.R. §75.517. This citation alleges a damaged cable jacket on the trailing cable of a loading machine. The proposed settlement involves the respondent's agreement to pay the penalty as assessed. The petitioner's motion for approval of settlement was granted at the hearing and will be incorporated as part of this decision.

The remaining dockets each involve 104(d)(2) orders for violations designated as significant and substantial which allegedly occurred as a result of the respondent's unwarrantable failure. The parties' post-hearing briefs and their stipulations concerning the pertinent jurisdictional issues and the relevant civil penalty criteria found in Section 110(i) of the Act are of record.

PRELIMINARY FINDINGS OF FACT

Docket No. WEVA 92-800

Richard McDorman has been a Mine Inspector for approximately four years. He also has fifteen years experience in the mining industry including employment as a mine foreman. His educational background includes a Bachelor of Science Degree in Mine Engineering from West Virginia University. (Tr. 22-23).

On July 9, 1991, McDorman conducted a preinspection conference at the Blacksville No. 2 Mine with the respondent's management personnel. (Tr. 50). At this conference, the importance of having conventional firefighting hose for each working section was discussed. As an alternative to standard 1 1/2 inch diameter firehose, McDorman advised management that the 1 1/4 inch diameter waterline attached to the continuous miner could be used as a firehose. This could be accomplished if the operator obtained a fitting adapter that would enable a 1 1/2 inch firefighting nozzle to be connected to the end of the 1 1/4 inch waterline. In accordance with McDorman's suggestion, the respondent obtained the requisite fitting adapter and special wrenches. (Tr. 51).

On November 6, 1991, McDorman inspected the firefighting equipment in the No. 6 South Section of the Blacksville No. 2 Mine. McDorman was accompanied by company representative David Lemley and Bill Keechal, the miner's representative. The No. 6 South Section is a continuous miner section with seven entries. In this section the water supply outlet for the fire suppression system was located at the loading point.¹ McDorman noted that the firehose located near the loading point, for use in the event of fire at a working face, was 500 feet in length. (Tr. 29,31-32). To determine if this hose length was adequate, McDorman used the foreman's section map to determine the distances between the water supply at the loading point and the working faces of each entry. McDorman ascertained that the distance from the water supply to the No. 7 working face, the entry in which the continuous mining machine was then located, was 486 feet and within reach of the hose. (Tr. 30,72). However, the 500 foot hose was inadequate for the No. 1 and No. 2 working faces which were 660 and 580 feet from the water supply line, respectively. (Tr. 33,34). Although McDorman did not witness the continuous mining operations in the No. 1 and No. 2 entries, McDorman and respondent witnesses Kenneth Ryan and David Lemley testified that

¹ The loading point is the location at which coal is brought in shuttle cars from the working face and loaded onto a conveyor belt for transportation outby. (Tr.76).

the water supply and section loading point location had not been moved since the No. 1 and 2 entries were mined approximately one week before. (Tr. 97,122,135-136).

After determining that the conventional firehose could not reach the No. 1 and No. 2 faces when they were being mined, McDorman inspected the waterline at the continuous miner to determine whether it could be adapted for use as a firehose.² (Tr. 38). As noted by McDorman at the preinspection conference, such adaptation requires a standard 1 1/2 inch nozzle and a special fitting to plumb the nozzle to the 1 1/4 inch continuous miner waterline. Although a nozzle was present in the section, it took approximately 45 minutes to locate the necessary fitting. McDorman testified that three mine personnel on the section, as well as Section Foreman Kenneth Ryan, were all unfamiliar with the procedure for plumbing the nozzle to the waterline at the continuous miner. (Tr. 46,48).³

As a result of his inspection, McDorman issued Order No. 3716493 for an alleged significant and substantial violation of 30 C.F.R. §75.1100-2(a)(1). This mandatory safety standard requires, in pertinent part, that "... waterlines shall extend to each section loading point and be equipped with enough firehose to reach each working face"⁴

FACT OF OCCURRENCE

Docket No. WEVA 92-800

The respondent, in its brief, argues that the Secretary should not prevail because the No. 7 entry observed by McDorman during continuous miner operations was less than 500 feet from the water supply at the loading point. Alternatively, the respondent asserts that the subject order is defective because it concerns an alleged failure to train personnel in the use of the

² This water hose is used to supply water to the continuous mining machine for the purpose of dust suppression and for a fire suppression system in the event the continuous miner catches fire. (Tr.34). This water hose is not considered adequate as a firehose because it has no nozzle to project water. (Tr. 35-36,39).

³ The Mine Safety and Health Administration's Program Policy Manual allows the waterline on the continuous miner to be used as a firefighting hose if it is equipped with a standard firefighting nozzle. (Tr. 35-36, Ex. P2).

⁴ Section 75.1100-2(a)(1) provides three exceptions to the requirement of sufficient firehose for reaching each working face which were not present and are not relevant in this case. (Tr. 41).

special fitting hardware for the continuous miner water supply line rather than a substantive violation of the cited mandatory safety standard in Section 75.1100-2(a)(1).

The essential facts are not in dispute. The 500 foot length of hose in the No. 6 South Section could not reach the working faces in the No. 1 and No. 2 entries. Although these were idle faces at the time of McDorman's November 6, 1991, inspection, these entries were mined the previous week. It is undisputed that this hose could not reach these working faces at that time.⁵ The testimony also reflects that the water supply line to the continuous miner could not be adapted for firefighting purposes. Although the No. 1 and No. 2 entry faces were idle at the time of McDorman's inspection, his observations, given the fact that the water supply had not been recently moved, provided an adequate basis for his conclusion that a violation had occurred.⁶ Therefore, the order citing a violation of Section 75.1100-2(a)(1) was properly issued and will be affirmed.

Docket No. WEVA 92-801

At the hearing, the respondent stipulated to the occurrence of the violation cited in Order No. 3314602 of the mandatory safety standard contained in 30 C.F.R. §75.807. Section 75.807 requires, in pertinent part, that all underground high-voltage transmission cables must be installed or placed so as to afford protection against damage, and that these cables must be guarded where miners regularly work. In addition, these cables must be securely anchored, and properly placed to prevent contact with trolley wires.

In view of the respondent's stipulation, the facts surrounding the issuance of Order No. 3314602 can be briefly summarized. On September 16, 1991, Mine Inspector McDorman inspected the No. 6 North supply track of the respondent's Blacksville No. 2 Mine. At approximately 3:15 a.m., McDorman noticed a 7,200 volt high voltage cable lying on the mine floor

⁵ Respondent witnesses Ryan and Lemley testified about an additional 500 foot firehose in a barrel approximately 1,200 feet from the loading point in the No.6 South Main Haulage Section. (Tr. 112-115, 131). As this hose was in the Main Haulage Section rather than the No. 6 South Section, it was not available as a firehose for the No. 1 and No. 2 working face entries. In addition, McDorman testified that no one told him about this additional hose at the time of his inspection. (Tr. 137-138).

⁶ A citation need not be based on the issuing inspector's direct observations if there is a basis for concluding that the cited violation has occurred. See Emerald Mines Company v. FMSHRC, 863 F.2d 51, 63 (D.C. Cir. 1988).

for a distance of approximately 250 feet, 15 feet in by block 30. (Tr. 146,151,230). One block further in by McDorman noticed an additional section of high-voltage cable on the floor for a distance of 25 feet. (Tr.151). The cable was lying only three to five feet from one side of the track. (Tr. 146). In another area of the mine, near the Orndorff shaft, McDorman observed high-voltage cable contacting the DC feeder wire. (Tr. 151). He noticed that there were grooves in this cable where it had been rubbed by the trolley feeder wire. (Tr. 147).

The subject high-voltage cable was described as 2 1/2 inches in diameter surrounded by an exterior rubber jacket insulation. (Tr. 148,158,259). This cable is shielded with a metal sheathing around the wires embedded inside the cable. The purpose of this shielding is to contain a high-voltage charge inside the cable and to trip a circuit breaker in the event that the cable is damaged. (Tr. 192-193). The high-voltage cable is normally hung from the mine roof with spads and wire placed approximately ten to twenty feet apart. (Tr. 190-191).

With regard to the fallen cable, McDorman expressed his concern for mine personnel riding in a mantrip or jeep which could derail and damage the cable. In such an event, the occupants could sustain shock, electrical burn or electrocution. McDorman also testified that the cable observed rubbing against the trolley feeder wire was a potential ignition source if the insulation was penetrated. (Tr. 155,178-179).

FURTHER FINDINGS AND CONCLUSIONS

Significant and Substantial

The next issues for determination are whether the firehose and high-voltage cable violations cited by McDorman were properly designated as significant and substantial. The Commission has held that a violation is "significant and substantial" if, based on 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 Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard

contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Docket No. WEVA 92-800

Applying the Mathies test, it is clear that the first element is satisfied as a result of the respondent's failure to provide adequate firehose as required by Section 75.1100-2(a)(1). The second and third elements in Mathies must be viewed in the context of safety standards that are intended to prevent or minimize injury in the event of an emergency. Violations of such standards create discrete safety hazards that are fundamental contributing causes to injuries although they may not be the proximate cause of such injuries. For example, the failure to have adequate escapeways in a mine would be a fundamental cause of serious or fatal injuries should a fire occur although it may not be considered the proximate cause. Likewise, the failure to have an adequate length of firehose that will reach the working face is the functional equivalent of having no firehose at all. This creates a discrete and continuing safety hazard which impedes mine personnel from defending against the persistent danger of a fire in an underground mine.

It is inconceivable, given the remedial nature of the Mine Act, particularly in this case involving a mine meeting the criteria of section 103(i) of the Act, that Congress contemplated that the inability to fight fire could be construed as a non-significant and substantial hazard. Thus, I conclude that the absence of firehose that could reach the working faces is a violation that results in a discrete safety hazard, and, it is reasonably likely that the continued existence of this hazard will materially contribute to serious or fatal injuries when viewed in the context of continued mining operations.⁷

⁷ This conclusion is consistent with the Court of Appeals' discussion of respirable dust exposure, wherein, it recognized that a presumption that a violation is significant and substantial is consistent with Congressional intent where the violation exposes miners to the cumulative effects of a fundamental hazard. See Consolidation Coal v. FMSHRC, 824 F.2d 1011, 1085-1086 (D.C. Cir. 1987). I construe the continuing inability to fight fire, which has not been adequately rebutted by the respondent, as a fundamental hazard constituting a significant and substantial violation.

Therefore, the violation was properly characterized as significant and substantial without addressing the issue of the likelihood of fire.⁸

Docket No. WEVA 92-801

As noted above, a significant and substantial violation requires a finding of a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a serious nature. In this case, the respondent has conceded that the high-voltage cable exposed on the mine floor next to the supply track and the cable exposed to the trolley feeder wire constitute violations of Section 75.807. It is clear that the exposure of this high-voltage cable to possible derailment and to the moving trolley feeder wire creates a discrete safety hazard associated with the possibility of electric shock injury or fire.

However, I am not convinced that the evidence of record demonstrates a reasonable likelihood that this hazard will result in serious injury. In this regard, the risk of injury is diminished by the number of events which must occur. Specifically, there must be (1) a derailment of a vehicle carrying mine personnel; (2) the derailment must occur in an area where the 275 feet of cable is exposed in this mine which contains approximately 15 miles of track (tr.242); (3) the vehicle must derail on the side of the track where the cable is exposed (tr.236); (4) the derailed vehicle must come into contact with the cable and penetrate the rubber jacket insulation; (5) the metal shielding must fail to trip the circuit breaker and prevent serious injury; and (6) the disconnecting devices intended to immediately de-energize the voltage cable in the event of damage must also fail (tr.154-156). Given this series of events which must occur before mine personnel are exposed to the risk of serious injury, I am unable to conclude that the cable in proximity to the supply track created a reasonable likelihood of such injury. With regard to the cable exposed to the trolley feeder wire, McDorman admitted that this condition, alone, should not be viewed as a significant and substantial violation. (Tr. 194). Consequently, I am removing the significant and substantial designation from Order No. 3314602.

⁸ While I am not specifically addressing this issue, I wish to note that the excessive quantities of methane liberated by this Section 103(i) mine, and, the potential ignition sources described by McDorman, provide a basis for concluding that it is reasonably likely that fire and resultant serious injuries could occur. (Tr. 101-104).

Unwarrantable Failure

The remaining issue concerns whether the subject violations are attributable to the respondent's unwarrantable failure. The Commission has noted that unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1977 (December 1987); Youghiogheny & Ohio Coal Company, supra; Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). The Commission has held that "unwarrantable failure" requires conduct that is not justifiable or behavior that is inexcusable. Such conduct is more than ordinary negligence characterized by "inadvertence," "thoughtlessness" and "inattention". Emery Mining Corporation, 9 FMSHRC at 2001, 2010.

Docket No. WEVA 92-800

McDorman's opinion that the inadequate firehose is a result of the respondent's unwarrantable failure is undermined by McDorman's own testimony. Significantly, in response to McDorman's suggestion at the preinspection conference, the respondent did obtain the fittings and the special wrench necessary to convert the waterline on the continuous miner to a firehose. The fact that this hardware could not be readily located contributes to the fact of the violation. However, as the respondent took the trouble to acquire this hardware, its unknown whereabouts is more appropriately attributable to ordinary negligence manifested by inadvertence rather than aggravated conduct requiring a conscious disregard or indifference to the risk associated with inadequate firefighting equipment. With regard to the inadequate firehose length, McDorman's testimony that he had to refer to a section map to determine the distances to the working faces reflects that these distances were not obvious and these distances were subject to change. Therefore, distances greater than 500 feet could be overlooked as a result of ordinary negligence. Consequently, I am modifying McDorman's 104(d)(2) Order No. 3314603 to a Section 104(a) citation.

Docket No. WEVA 92-801

The record supports an unwarrantable failure finding with respect to the respondent's violation of Section 75.807. As a threshold matter, the 275 feet of fallen high-voltage cable was clearly visible from the jeeps and mantrips traversing the 6 North supply track. (Tr. 183-184,266). Moreover, this condition was well known to management in that it was repeatedly noted in the preshift examination book prior to the afternoon shift starting at 4:00 p.m., on September 15, 1991, and prior to the midnight shift on September 16, 1991. In fact, David Lemley, the respondent's safety escort, testified that the shift foreman told

him at the beginning of the midnight shift that he had sent wiremen to rehang the cable. (Tr. 243-244). However, the cable was not reinstalled at 3:15 a.m. when McDorman issued Order No. 3314602 to Lemley. Thus, the condition was not corrected even though it had been noted in the preshift examination book approximately 12 hours before.⁹ Finally, at the hearing the respondent stipulated to the fact that it received seven previous citations for violation of the same mandatory safety standard pertaining to high-voltage cable during the proceeding 24 month period. (Tr. 171,184,185).

The failure of the respondent to correct the condition despite its repeated reference in the preshift examination book, particularly when viewed in the context of its history of similar violations, evidences a conscious disregard of the risk associated with the downed cable. Although I have concluded that this violation was not significant and substantial in nature, the condition posed a risk of serious electric shock injury or electrocution which warranted the respondent's immediate attention. Thus, I conclude that the petitioner has met its burden of establishing an unwarrantable failure on the part of the respondent.

ULTIMATE CONCLUSIONS

As noted above, I am removing the unwarrantable failure component of Order No. 3716493 in Docket No. WEVA 92-800. Consequently, this order is modified to a 104(a) citation. The gravity of this violation is serious and the underlying negligence associated with this violation is moderate. In view of my findings and the statutory civil penalty criteria contained in Section 110(i) of the Act, I am assessing a penalty of \$750.

With respect to Order No. 3314602 in Docket No. WEVA 92-801, I also consider the gravity associated with this violation to be serious given the risk of electrocution. However, I have removed the significant and substantial designation. I find that the failure to correct the condition, despite its repeated entry in the examination log and the history of similar violations, dictate against a substantial reduction in the proposed penalty. Considering the criteria in Section 110(i) of the Act, I am imposing a penalty of \$900 for this violation.

⁹ At trial, the respondent claimed that it was prevented from rehangng the high-voltage cable because it was required to abate another violation cited by McDorman for an unguarded trolley switch. I find Lemley's testimony in this regard to be lacking in credibility. (Tr. 250-256). Moreover, this testimony was rebutted by McDorman. (Tr. 203-206).

Finally, I am incorporating the \$20 settlement for Citation No. 3718465 in Docket No. WEVA 92-799. My decision in this regard is consistent with the statutory criteria and is supported by the Secretary's presentation in support of the settlement motion at trial.

ORDER

Based upon the above findings of fact and conclusions of law, it **IS ORDERED** that:

- (1) Order No. 3716493 is modified to a citation issued under Section 104(a) of the Act and **IS AFFIRMED** as modified.
- (2) Order No. 3314602 **IS AFFIRMED** and the significant and substantial designation for the underlying violation **IS DELETED**.
- (3) The proposed settlement agreement concerning Citation No. 3718465 **IS APPROVED**.
- (4) The respondent **SHALL PAY** a total civil penalty of \$1,670 within 30 days of the date of this decision. Upon receipt of payment, these matters **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, Virginia 22203 (Certified Mail)

Daniel E. Rogers, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 18 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-610
Petitioner : A.C. No. 15-15637-03539
v. :
: Docket No. KENT 92-700
BROKEN HILL MINING COMPANY, : A.C. No. 15-15637-03540
INCORPORATED, :
Respondent : No. 1 Mine
:

DEFAULT DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee
for Petitioner;

Before: Judge Feldman

These cases are before me based upon petitions for assessment of civil penalties filed by the Secretary against the respondent corporation. This matter was heard on January 21, 1993, in Huntington, West Virginia. At the hearing, the Secretary presented his direct case through the testimony of Mine Inspectors John Church and Buster Stewart. Although being duly served with Notices of Hearing dated November 18, 1992, and January 13, 1993, the respondent failed to appear at the scheduled hearing. For the reasons noted below, I find the respondent has defaulted in this matter. Consequently, I am issuing the following default judgment in accordance with Commission Rule 63(b), 29 C.F.R. §2700.63(b).

As noted at trial, Hobart Anderson, President of the respondent corporation, has had ample notice of this proceeding. On the day of the hearing I directed counsel for the petitioner to call Mr. Anderson's office at 9:00 a.m., to determine why he had not arrived at the hearing. Mr. Anderson's office is only a few minutes from the hearing location. Mr. Anderson's secretary was advised that a default decision would be issued if he did not appear at the hearing by 10 a.m. Although Mr. Anderson's secretary stated that she would contact him by beeper, Mr. Anderson failed to appear.

On January 22, 1993, Mr. Anderson called me to apologize for his failure to participate in the hearing. On January 28, 1993, I issued an Order to Show Cause directing Mr. Anderson to explain why a default decision should not be issued. Mr. Anderson

replied on February 18, 1993. In his response, Mr. Anderson apologized and stated that, "There was confusion on my part as to the date of hearing. I did not realize that the hearing was on for that date." Mr. Anderson's "confusion" does not constitute an adequate justification for his failure to appear.

Despite Mr. Anderson's failure to attend, I required the Secretary to present its direct case to support the 104(a) citations and 104(b) orders issued in these proceedings. The testimony of Inspectors Church and Stewart concerning the occurrence of the violations as alleged and the significant and substantial nature of these violation is of record and need not be repeated. Therefore, I am affirming the citations for the specified violations as issued.

However, I am troubled by the rationale provided by Inspector Stewart for the issuance of the 104(b) orders. The respondent is apparently mining its No. 1 Mine on a contract basis. Mining operations were suspended approximately January 1, 1992, when Island Creek Coal Company sold its ownership interest in the No. 1 Mine to A. T. Massey. During this change in the underlying ownership of the mine, the respondent's coal production activity was temporarily suspended and the mine was placed in non-productive status. (Tr.40-41). Inspector Stewart testified that the 104(b) orders associated with the citations noted below were issued to ensure that the cited violations would be abated prior to the respondent's resumption of coal production. In this regard, Inspector Stewart testified that:

I issued the [104(b) orders] because compliance and noncompliance could not be determined, you know, there was no one at the mines (sic). You didn't know whether they was fixed or whether they wasn't fixed (sic). And we had extended them all the time that I felt was necessary and justified. (Tr. 46).

Inspector Stewart further testified that he did not intend to issue the 104(b) orders. However, he stated that he could not find anyone at the mine in order to determine if the violations had been abated. (Tr.81-82). Finally, Inspector Stewart testified that it was his belief that the 104(b) orders increased the proposed penalties for the underlying citations. (Tr. 94).

Section 104(b) of the Mine Act authorizes the issuance of withdrawal orders for failure to abate a citation. Section 104(a) of the Act, however, requires that the operator be afforded a reasonable abatement period to correct a violative condition. In the current case, the abatement orders were issued because the mine was idle and the inspector was unable to determine if the violation was terminated. It is the failure to abate rather than the inspector's inability to determine if abatement has occurred which provides the basis for the

imposition of sanctions under Section 104.¹ The Secretary has failed to establish that the pertinent violations were not abated at the time of the March 13, 1992, issuance of the subject orders. Accordingly, the 104(b) orders must be vacated.

In view of the above, I am vacating the 104(b) orders shown below and I am reducing the assessed penalties for the underlying violations associated with these orders. My decision with respect to the citations and orders in issue is as follows:

Docket No. KENT 92-610

<u>Citation or Order No.</u>	<u>Date</u>	<u>Type of Action</u>	<u>30 C.F.R. Section</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
3814394	9/25/91	104 (a) C	75.523-3	\$112	\$112
3814395	9/25/91	104 (a) C	75.523-3	\$112	\$112
3805841	12/12/91	104 (a) C	75.1722A	\$240	\$160
3806378	3/13/92	104 (b) O			vacated
3805842	12/12/91	104 (a) C	75.523-2(c)	\$240	\$160
3806379	3/13/92	104 (b) O			vacated
3805843	12/12/91	104 (a) C	75.503	\$ 85	\$ 85
3805845	12/12/91	104 (a) C	75.523-2(c)	\$240	\$160
3806342	3/13/92	104 (b) O			vacated
3805846	12/12/91	104 (a) C	75.400	\$325	\$218
3806343	3/13/92	104 (b) O			vacated

Docket No. KENT 92-700

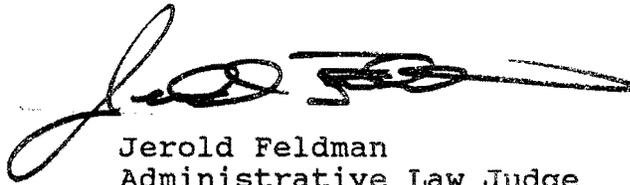
3814396	9/25/91	104 (a) C	75.523-3	\$305	\$204
3806345	3/13/92	104 (b) O			vacated
3814397	9/25/91	104 (a) C	75.523-3	\$305	\$204
3806346	3/13/92	104 (b) O			vacated

¹ Although the operator is obliged to keep the inspector informed concerning its progress in its abatement efforts, imposition of this obligation presupposes active mining operations.

3805844	12/12/91	104 (a)	C	75.503	\$240	\$160
3806341	3/13/92	104 (b)	O			vacated
3805847	12/12/91	104 (a)	C	75.316	\$325	\$218
3806344	3/13/92	104 (b)	O			vacated

ORDER

ACCORDINGLY, a Default Judgement IS ENTERED in favor of the Petitioner, and the Respondent IS ORDERED to pay a civil penalty of \$1,793 in satisfaction of the violations in issue. Payment is to be made within (30) days of the date of this decision.


 Jerold Feldman
 Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Hobart W. Anderson, President, Broken Hill Mining Co., Inc., P.O. Box 989, Ashland, KY 41105 (Certified Mail)

VMY

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-543
Petitioner	:	A. C. No. 15-11620-03531
v.	:	
	:	Hall No. 2 Mine
PYRAMID MINING, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Darren L. Courtney, Esq., U.S. Department of Labor, Office of the Solicitor, 2002 Richard Jones Road, Nashville, Tennessee, for Petitioner; Frank Stainback, Esq., Holbrook, Wible, Sullivan, & Mountjoy, P.S.C., Owensboro, Kentucky for Respondent.

Before: Judge Weisberger

Statement of the Case

At issue in this civil penalty proceeding is whether the operator (Respondent) violated 30 C.F.R. § 48.27(a) as alleged by MSHA inspector Darrel N. Gamblin in an order he issued under section 104(g)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act")¹. Pursuant to notice, a hearing in this matter

¹In the 104(g)(1) Order (Order No. 3416888, Government Exhibit No. 1, Page 1), Gambling referred to a Citation issued the same date alleging a violation of 30 C.F.R. § 48.27. Subsequently, on December 23, 1991, the order was amended to delete this reference and in its place, an addition to the order was made indicating a violation of 30 C.F.R. § 48.7. At the hearing in this matter on December 8, 1992, Petitioner served the Respondent with a written modification of the original 104(g)(1) order amending it to indicate a violation of 30 C.F.R. § 48.27, rather than 30 C.F.R. § 48.7. Respondent's counsel accepted service, but argued that this modification "comes to late". However, Respondent's counsel indicated, in essence, that he was not alleging prejudice if this modification were to be allowed. He also stated that he was not surprised by the amendment. Also, at the hearing, evidence presented by both parties pertained to the issue of a violation under Section 48.27 supra rather than Section 48.7 supra.

was held in Evansville, Indiana, on December 8, 1992. Darryl N. Gamblin testified for Petitioner and Ricky Stone, Curtis J. Bryant and Mike Hollis testified for Respondent. On February 17, 1993, Respondent's brief was received. Petitioner's Proposed Findings of Fact and Post Hearing Brief was received on February 22, 1993. Respondent's Reply Brief was received February 25, 1993. On February 29, 1993, Petitioner's Reply Brief was received.

Findings of Fact and Discussion

I.

The auger mining site at issue is operated by Westlo, Inc., ("Westlo") under contract with Respondent. On May 29, 1993, at 7:00 a.m., Respondent instructed one of its employees, Ricky Stone, to go and work at the subject site. Stone arrived at the site at approximate 7:10 a.m. He was assigned to operate a bulldozer that had been modified with a conveyor ("stacker"). Prior to that time, Stone had never operated a stacker although he had 12 years experience operating heavy equipment including bulldozers.

Gamblin asked Stone if he had received any type of training, and Stone indicated that he had not. Gamblin also asked Curtis J. Bryant, the Westlo on-site supervisor, about training. Bryant told him that he was showing Stone around. According to Gamblin, Bryant did not indicate that Stone was being task trained. There was no record of Stone having been task trained for this piece of equipment, and Stone did not have any certificate regarding task training.

Gamblin issued an order requiring the withdrawal of Stone pursuant to Section 104(g)(1) of the Act on the ground that he had not received task training. Gamblin explained that the prime hazard of operating a stacker is getting caught between the conveyor system and the rollers.

Gamblin indicated that subsequent to the issuance of the order, he discussed the order with Charles Kennedy, Respondent's mine superintendent, and the latter did not indicate that Stone was task trained. Also, Gamblin spoke to Mike Hollis, Respondent's safety director, over the telephone regarding the order. According to Gamblin, Hollis, did not indicate that Stone was task trained, but indicated that he had been trained on a bulldozer.

Stone testified that before he operated the stacker at issue, Curtis J. Bryant, the Westlo supervisor on the site,

showed him how to operate the stacker. He said that Bryant showed how to "kick" the conveyor in and out of gear, how to move it, and how back it under the auger. He said that Bryant spent about one hour providing the training.

According to Stone, when Gamblin asked him if he had task training, he did not know what Gamblin was talking about, and said "what is task training" (Tr. 71). Stone indicated that Gamblin did not respond, but started to write the citation.

Bryant testified that when Stone arrived on May 29, 1991, the first day of operations, he took him to the stacker, and explained the function of each lever on the equipment. Bryant said that he showed Stone how to hook the stacker to the conveyor, and Stone then did this procedure 2 or 3 times while Bryant stood there to see that Stone was operating the stacker properly. According to Bryant, he then spent about an hour working with Stone showing him the operation of the stacker. Bryant remained approximately 30 to 40 feet away when Stone operated the equipment. Bryant explained that when Gamblin issued the 104(g) withdrawal order on May 29, 1991, he had not yet filled out the paper work on Stone's training, and that he still had to train Stone on some additional matters. Bryant explained that he still had to train Stone in further operations such as aligning the "tail piece of the stacker underneath your conveyor on your the auger correctly". (Tr. 103) [sic]. He also had to train Stone to direct the alignment of coal trucks under the stacker.

According to Stone, on June 4, 1991, he returned to the premises and, in front of Gamblin, Bryant showed him the same things that he had shown him before on May 29. He said this training lasted about 3 to 5 minutes, and the order was then abated. He then received a certificate.

The Commission, in Southern Ohio Coal Co., 14 FMSHRC 1781, 1785, (November 23, 1992) set forth the following with regard to the burden of proof regarding the violation of a safety standard as follows: "The Mine Act imposes on the Secretary the burden of proving a violation of a safety standard. See Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152 (November 1989); Consolidation Coal Company, 11 FMSHRC 966, 973 (June 1989)." Hence, in order for the challenged 104(g)(1) order to be sustained, the Secretary must establish, a violation by Respondent of 30 C.F.R. § 48.27 supra which, in essence, requires the following task training:

- a. Instruction in the health and safety aspects and safe operating procedures related to stacker operation given in an on the job environment (30 C.F.R. § 48.27(a)(1)); and
- b. Supervised practice during non-production (30 C.F.R. § 48.27(a)(2)(i)); or

c. Supervised operation during production (30 C.F.R. § 48.27(a)(2)(ii)).

It is incumbent upon the Secretary to establish that Stone did not receive such training. There is no record of Stone having received such training. Stone was not given a certificate certifying that he had received such training, and neither Bryant nor Stone indicated to Gamblin that Stone had received "task training". However, I observed the demeanor of Stone and Bryant, and found their testimony credible that Bryant had in fact, prior to Gamblin's arrival, provided Stone with approximately an hour of instruction and supervision regarding the operation of the stacker. (c.f., L.J's Corporation, 14 FMSHRC 1278 (1992)). However, the training was not complete, as Bryant still had to train Stone to line up the stacker and the auger, and to direct the alignment of coal trucks under the stacker. Nonetheless, Stone operated the stacker until the transmission "hung" between two gears and it became inoperative. (Tr.69) Section 48.27 supra provides, in this connection, that a miner shall not perform new work tasks until training "has been completed." Since Stone operated the stacker before training was completed, Section 48.27 supra was violated by Respondent.²

Gamblin, in his order, indicated that the violation herein was significant and substantial. However, no testimony was offered in support of this conclusion. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

²I do not find that Respondent was still in the process of training Stone when cited. Once Stone began to operate the loader after the one hour instruction, there is no evidence that Bryant provided any further instruction. Bryant remained in the area, and had told Stone that "if he had was having any problems or did not understand anything just holler at me" (Tr. 91). However, there is no evidence that Bryant took any action to actively direct or observe Stone operating the stacker.

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury".

U.S. Steel Mining Co., 6 FMSHRC 1834, 1336 (August 1984).

Although injuries can result from lack of training in operating a stacker, the record is devoid of any proof that there was a reasonable likelihood of the occurrence of an injury of a reasonably serious nature that was contributed to as a result of the violation herein. (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). To the contrary, the record indicates that Stone had 12 years experience operating heavy equipment including bulldozers. Also, I find the testimony of Bryant and Stone credible regarding the extent of training provided to Stone. I also accept their testimony, based on observations of their demeanor, that on June 4, approximately five minutes of training was provided to Stone which was accepted by Gamblin in abating the order at issue. They also indicated that this training did not include anything in addition to the training previously given on May 29, when cited. I thus find that Respondent was in substantial compliance with Section 48.27 supra when cited. For all these reasons I conclude that the violation was not significant and substantial. For the same reasons I conclude that the violation was of a low level of gravity, and that Respondent was negligent to only a slight degree in connection with the violation. Considering all remaining factors set forth in Section 110(i) of the Act, I find that a penalty of \$20 is appropriate for the violation found herein.

ORDER

It is ORDERED that Order No. 341688 be amended to indicate a violation this is not significant and substantial. It is further ORDERED that Respondent pay \$20 within 30 days, as a civil penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Darren L. Courtney, Esq., Office of the Solicitor, U.S.
Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215 (Certified Mail)

Frank Stainback, Esq., Holbrook, Wible, Sullivan, & Mountjoy,
P.S.C., 100 St. Ann Street, P.O. Box 727, Owensboro, KY 42302-
0727 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 22 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-136-M
Petitioner : A.C. No. 41-00076-05537
v. :
: Chico Plant No. 57
CHICO CRUSHED STONE :
PARTNERSHIP, :
Respondent :

DECISION

Appearances: Daniel Curran, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner;
C. Gregory Ruffennach, Esq., Smith, Heenan
and Althen, Washington, D.C., for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging Chico Crushed Stone Partnership (Chico) in a citation issued pursuant to section 104(d)(1) of the Act with one violation of the mandatory standard at 30 C.F.R. § 56.3200.¹ The Secretary also issued Order No. 3899014 under

¹ Section 104(d)(1) of the Act provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also

Section 104(b) of the Act for Chico's alleged failure to abate the violation charged in the citation.²

The general issue before me is whether Chico violated the cited regulatory standard and, if so, whether the violation was "significant and substantial," whether the violation was the result of the operator's "unwarrantable failure," whether the subsequent order of withdrawal was properly issued pursuant to Section 104(b) of the Act and the appropriate civil penalty to be assessed.

The citation at bar, No. 3899013, alleges a violation of the mandatory standard at 30 C.F.R. § 56.3200 and charges as follows:

Allegation: The pit walls hasn't [sic] been scaled since last summer.

Findings: The b [sic] west highwall at the Jones Property had loose material hanging from it. The highwall is app. 100 feet high and employees are required in the area at various times. The

fn. 1 (continued)

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

² Section 104(b) of the Act provides as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

last shot was shot on 5/3 and the walls had not been scaled.³

This is an unwarrantable failure.

The cited standard provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

In May 1991 the pit area of Chico Plant No. 57 located on the "Jones Property" had adjacent highwalls on the north, south and west sides. On May 6, 1991, only the northern 200 feet of the 400 foot west highwall was actively being mined for its limestone product. The west highwall was 80 to 100 feet high in the area being actively mined (see Exhibit No. P-2). The mining cycle consisted of drilling and firing explosive shots from the top of the highwall, examining the area for unfired shots and hanging material, removing the blasted limestone product (muck) from the pit and cleaning the top for the next shot.

It is undisputed that at the time Citation No. 3899013 was issued on May 6, 1991, muck or debris consisting of varying sized limestone rocks that had recently been blasted off the northern half of the west highwall lay at the base of the highwall some 20 to 50 feet high and extended into the pit to about 150 feet from the base of the highwall. The credible testimony of blaster Donny Lee Ruddick supports a finding that debris, apparently overburden consisting of soil and rocks blasted from the top, also lay at the base of the highwall around the "point" (see Exhibit No. P-2) -- the only other area identified by the Secretary as being within the scope of the citation at bar. According to Ruddick's testimony, supported by the blasting records (Exhibits R-3 through R-5), this material remained following blasting on April 26 and May 1, 1991, and was 35 to 50 feet high at the base of the highwall and extended at a 37 degree angle of

³ At hearing the cited area of the west highwall was further delineated on Exhibit P-2 as the area outlined in red.

repose to about 75 feet from the base. It is noted that MSHA Inspector Kirk also acknowledged that there were in fact boulders in this area up to 24 inches by 24 inches in size. He could not, however, recall that the material was piled at the dimensions described by Ruddick.

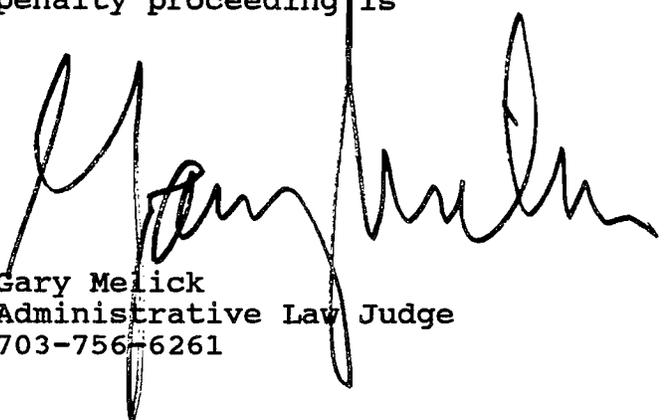
According to Inspector Kirk, at the time he issued the citation, the muck at the base of the highwall provided a sufficient barrier so that the loose material on the highwall presented no hazard to persons. Indeed, he testified that there would in fact be no hazard to persons from loose material on the highwall unless and until the muck was cleared to within 10 feet of the highwall. Kirk testified, however, that it is MSHA's policy to nevertheless charge the mine operator with a violation under the cited standard even though no present hazard exists if men are in the process of removing the muck -- apparently based on the possibility that at some time in the future persons might become exposed to the hazard if the muck was cleared to within 10 feet of the highwall face and no action was taken to scale the loose material off the highwall.

The Secretary's position is however untenable. It is a basic premise of our system of jurisprudence that one may not be penalized for a violation that may or may not be committed in the future. In any event, the cited standard protects only against existing hazardous conditions, not future possibly hazardous conditions. Moreover, since the Secretary concedes in this case that "ground conditions" on the highwall did not "create hazards to persons" at the time the citation was issued, there clearly could be no violation of the cited standard. The citation would also fail on the basis that the "affected area" involving a hazard was, according to the Secretary, only within 10 feet of the highwall and there is no evidence that any "work or travel" occurred within that affected area.

Under the circumstances the Secretary has failed to sustain her burden of proving that a violation has occurred. Citation No. 3899013 and Order No. 3899014, issued under Section 104(b) of the Act and premised upon that citation, must accordingly be vacated.

ORDER

Citation No. 3899013 and Order No. 3899014 are hereby vacated and this civil penalty proceeding is DISMISSED.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Daniel T. Curran, Esq., Office of the Solicitor,
U.S. Department of Labor, 525 South Griffin Street,
Suite 501, Dallas, TX 75202 (Certified Mail)

Michael Heenan, Esq., Smith, Heenan and Althen,
1110 Vermont Avenue, N.W., Suite 400, Washington, D.C.
20005-3593 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 24 1993

MONTEREY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. LAKE 92-216-R
: Citation No. 3842177; 1/24/92
:
SECRETARY OF LABOR, : No. 1 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID 11-00726
Respondent :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 92-252
Petitioner : A.C. No. 11-00726-03701
v. :
: No. 1 Mine
MONTEREY COAL COMPANY, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., U.S. Department of Labor,
Office of the Solicitor, Chicago, Illinois, for
the Secretary of Labor;
Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C., for Monterey Coal Company.

Before: Judge Weisberger

Statement of the Case

At issue in these consolidated cases is the validity of a citation issued on January 24, 1992, by MSHA inspector Jimmy Ray Lee alleging a violation of 30 C.F.R. § 75.606 as follows: "The trailing cable supplying power to the number 1332 ratio feeder was not protected to prevent damage from mobile equipment. The cable had tire tracks on it for a distance of eight feet and was pushed into the mine floor 2 inches." Section 75.606 supra provides as follows: "Trailing cables shall be adequately protected to prevent damage by mobile equipment."

Pursuant to notice, the cases were scheduled for hearing, and were heard in St. Louis, Missouri, on December 15, and 16, 1992. At the hearing, Jimmy Ray Lee, Jerry Collier, and Lonnie Conner, testified for Petitioner. Raymond Houlihan, Floyd W.

Johnson, Paul Mihalek, Robert Whitmore, Allan Silkwood, and Richard Mottershaw, testified for Respondent. Subsequent to the hearing, Respondent filed a post-hearing brief on January 27, 1993. On January 29, 1993, the Secretary filed a post-trial brief. On February 5, 1993, Respondent filed a reply brief.

I. Findings of Fact

1. The floor of the entry in question is 18 feet wide. A roadway in the entry is 10 feet wide with loose material on either side. The widest vehicle that travels the roadway in this area is nine feet wide.

2. On January 24, 1992, a cable, which was attached to a feeder and was not energized, was lying not in the floor of the entry but was approximately three feet from the rib in loose material that had accumulated from sloughage off the rib. The cable was close to the demarcation between this material and the roadway, but it was not in the roadway. The cable was not in the normal path of the vehicles that travel the entry in question.¹

3. An eight foot long section of the cable had rubber tire track marks on it indicating that it was run over, for approximately an eight foot distance, by either a rubber-tired battery or diesel mobile vehicle. MSHA inspector Jimmy Ray Lee issued a citation alleging a violation of Section 75.606 supra.

4. The cable had been pushed approximately two inches into the material by the vehicle that had run over it.

5. There is no evidence in the record as to why and exactly when the cable was run over.

6. The composition of the material into which the cable had been pushed when it was run over was clay mixed with rock dust. There were also pieces of crushed stone in the material. There is no specific measurement of the depth of the loose material, or the fire clay which was underneath it. However, underneath the clay was limestone, a hard material.

¹According to Allan Silkwood, the safety superintendent of the subject mine, employees are instructed to drive toward the right side inby, in order to avoid the cables and other equipment that are placed along the left side inby. Thus, there appears to be corroboration for the opinion of Floyd W. Johnson, the construction coordinator at the mine, that a vehicle travelling the normal path would not have hit the cable in issue and run over it. However, it appears not to be controverted that, in fact, a vehicle did run over the cable in question for a distance of eight feet.

7. Lee examined the cable visually and by touch. No damage to the outer insulation was noted. Nor was any abnormality detected upon this examination which would indicate the existence of internal damage. Also, a megger test was performed which indicated a reading of infinity. This reading exceeded the requirements for a determination that the inner insulation around the three power conductor and two ground wires was not broken. After these examinations, Lee moved the cable to within a few inches of the rib, and abated the citation.

8. Jerry Collier, a supervisory electrical engineer employed by MSHA, opined that had the cable not been moved in abatement, it could have been run over again, and its insulation could have been punctured by a sharp object laying on the floor. He also indicated that in the process of being run over, the cable could be crushed, which could cause a conductor to act as a knife, and cut another conductor or ground cable, causing an electrical short and possible arcing. He indicated that if the cable were to be repeatedly being run over and crushed, the inner conductors would be bared.

Floyd W. Johnson, Respondent's construction coordinator, testified, in essence, that he never encountered a megger test indicating a fault with insulation as a consequence of a cable being run over by a vehicle with rubber tires. He opined that, accordingly, even if vehicles would continue to run over the cable, it would not be further damaged, as it was "smashed into the ground. No longer was anything coming in contact with it" (Tr. 172). In contrast, Collier indicated that there can be internal damage to the conductors even if there is no such indication in the megger test. In this connection, Robert Whitmore, a staff electrical engineer for Respondent, agreed that it is possible that internal damage would not show up in a megger test. Thus, I accept Collier's opinion and find that it is possible that there was internal damage to the conductors. Since there is no evidence why and exactly when the cable was run over, I cannot find that had the cable not been repositioned in abatement, it would not have been run over again given continued mining operations.

II. Discussion

A. Violation of Section 75.606 supra

As correctly argued by Respondent, Section 75.606, supra imposes a standard regarding the adequacy of protection against damage. It is essentially Respondent's position that because the cable was not in fact damaged, as established by visual inspection, inspection by touch, and megger testing, it must be concluded that the standard was not violated, as the cable was adequately protected. Respondent also refers to the protective aspects of the construction of the cable, the placement of the

cable outside the roadway on loose gob where it was cushioned, the lack of evidence that it was run over more than once, and the agreement of the witnesses that it was run over by a vehicle with rubber tires. Respondent also argues that had Congress intended to require the placement of the cable to afford protection against damage it would have done so, as it so specified in other sections of the Act.² I do not accept Respondent's arguments for the reason that follow.

In analyzing the scope to be accorded the wording of Section 75.606, supra³, reference is made to the Legislative History of Section 207(f) of the Federal Coal Mine, Health and Safety Act of 1969 ("The 1969 Act") (Public Law 91-173). The Senate Report indicates as follows regarding its analysis of Section 306(f) of the Senate Bill (S.2917), whose language was continued in Section 206(f) supra of the 1969 Act as follows: "Trailing cables must also be protected against damage from other mobile equipment. As the wheels or tread links of mining machines pass over trailing cables, the insulation is torn from the cables causing shock hazards and short circuits which can easily result in a mine fire. In 1968 two mine fires were caused by not protecting cables from damage by mobile equipment." (S. Rept. 91-411, 91st Congress, 1st Sess., September 1969, at 71, (Reprinted, in Legislative History of Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173), ("Legislative History"), at 197. Hence, in enacting section 306(f) supra, Congress was concerned with the recognized hazard of insulation being torn from cables as a result of being run over by wheels of mining machines. Clearly, exposure to this hazard can result from the cable's location, as well as from inadequate insulation. In other words, the cable can be protected from damage by its construction, as well as by its location. Conversely, improper placement of the cable, as well as inadequate insulation, can expose the cable to the hazard of insulation being torn from it as a result of being run over. Congressional concern would be thwarted if the protection mandated by Section 306(f) supra of the 1969 Act would be interpreted narrowly not to include the location of a cable.

The evidence in the record tends to establish that the cable, when cited, was not damaged. However, an analysis must be made not only of the condition of the cable at the time Respondent was cited, but also the continuation of mining

²Respondent cites, in this regard, 30 U.S.C. § 868(h), and 30 U.S.C. § 870.

³The wording of Section 306 (f) supra, was incorporated by reference in the Federal Coal Mine Health and Safety and Health Act of 1977, ("the 1977 Act") set forth as a regulatory safety standard in Section 75.606 supra.

operations must be taken into account. In this connection, I take into account the following factors: the presence of pieces of crushed stone in the material where the cable was lying, the presence of a hard limestone floor underneath the loose material and clay, the location of the cable in the material close to the demarcation between the loose material and the roadway, the relative narrow tolerance between the 9-foot wide vehicles that travel the roadway and the 10-foot wide roadway, the fact that the cable was indeed run over at least once⁴, the lack of an explanation to indicate that the incident in question in which a vehicle ran over the cable was a one-time-only event, and the possibility that there may have been internal damage to the conductors in the cable in spite of the megger test. Within this framework I conclude that had the cable not been moved, there was a possibility of additional incidents of it being run over, leading possibly to damage to the insulation of the cable, or to the interior conductors. Hence, I conclude it has been established that the cable was not adequately protected to prevent damage by mobile equipment. I find that Respondent did violate Section 75.606 supra as alleged.

B. Significant and Substantial

The law is well established with regard to the requisites in establishing that a violation is significant and substantial as alleged herein by Lee.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

⁴See, U.S. Steel Mining Co., 6 FMSHRC 155 (January 1984) (Judge Melick) (violation of Section 15.606 supra upheld where a cable was found under a tire); See also, National King Coal 13 FMSHRC 33,38 (January 1991) (Judge Cetti) (violation of 75.306 supra established where a cable was damaged by mobile equipment. As dictum, it was noted that MSHA does not have to prove that a cable was damaged in order to sustain a finding of a violation of Section 75.606). For the reasons set forth above, I choose not to follow U.S. Steel Mining Co., 6 FMSHRC 1664 (Sept 1984) (Judge Koutras) (citation alleging a violation of Section 75.606 supra, was ordered vacated, where the cable that had been run over was not damaged).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

I have already found a violation herein of a safety standard. Also, I found that the violation herein contributed to the hazard of damage to the insulation of the cable and inner wires. Should this occur, an electrical shock could result to a person handling the cable. Arcing or an electrical short could also result, triggering a fire. Hence, I find that the first two elements of Mathies, supra, have been met. Thus, the issue for resolution is whether there was a reasonable likelihood of the occurrence of an injury producing event i.e. electric shock to a miner, or a short or arcing causing a fire or an explosion.

At the time the condition was cited, the cable was not energized. However, Lee testified that immediately prior to the issuance of the citation he observed two miners walking from the coal feeder⁵ to which the cable was attached, toward the power

⁵The feeder is used solely in connection with coal production. When cited, the area in question was devoted to construction and not coal production.

center. These employees told him that they were going to energize the cable.⁶

In essence, according to Lee, once power would have been restored to the cable, injuries would likely have resulted. In this connection, he said that miners handle the cable when the feeder is moved to another location, and hence could come in contact with a damaged cable, leading to electrical shock, burns, or even a fatality. Collier cited statistics indicating 21 electrocutions between 1970 and 1987 as a result of mishandling cables, 132 non-fatal injuries between 1983 and 1987 due to damaged cables resulting in a loss of 1,675 workdays, 40 accidents involving persons handling cables and contacting bare cables, and seven fatalities resulting when persons handled cables and touched bare conductors.

Collier opined that there was a reasonable likelihood that the cable in question was damaged. He indicated that there can be internal damage to the cable that does not show up in a megger test. In this connection, he testified that even a little damage can set up a hazardous condition. He cited a fatal accident that occurred in 1981 where only a pinhole in a cable (as a result of carbon tracking) led to a loss of insulation on the interior bare wires which resulted in a fatality. He also opined that should the violative condition have continued, there was a reasonable likelihood that a serious accident would have resulted. He indicated, in essence, that when mobile equipment runs over a cable, it has "a crushing effect" (Tr. 79). He also indicated that contact with a sharp object on the floor when the cable is run over, could lead to a puncture which could result in a real hazard. He also indicated that when the cable is run over, the conductors eventually will be damaged even if there is no immediate failure.

It is undisputed that in order for an injury, fire, or explosion to occur, there first must be some damage to the cable. Although the cable was run over, an examination by visually inspecting it and touching it, did not reveal any damage to the cable's outer jacket. While the cable might have been subject to additional incidents of being run over, it would appear that the likelihood of damage was mitigated by the fact that the one-and-three-quarter inch diameter cable had been pushed approximately two inches into the material upon which it was resting. This

⁶Raymond Houlihan, the construction foreman, was asked whether men were assigned to work on the feeder the day the citation was issued, and he indicated that he could not recall. I find this testimony is not sufficient to rebut Lee's specific testimony that men told him that they were going to energize the cable.

material was described as soft, and on top of a layer of fire clay that also was described as soft. Further, mobile equipment in the area that could possibly run over the cable all had rubber tires. In addition, the cable was not in the roadway itself where vehicles travel, but on soft material adjacent thereto. Although Collier testified regarding the numbers of injuries occasioned by contact with exposed cables, these figures do not indicate how many incidents occurred as a result of a cable having been run over. Nor do these statistics indicate whether the exposed cables had been previously visually inspected or subject to a megger test. In this connection, according to Johnson, over a 13 year period he had inspected "a lot" of cables that had been run over by rubber-tired equipment, and never saw or found a damaged cable. He also said "I have never megged one that's showed bad" (Tr. 165) [sic]. Richard Mottershaw, Respondent's Safety Regulatory Compliance Specialist, testified in the same fashion.⁷ Respondent's statistics indicate that from 1970 through 1992 there have not been any incidents of reportable electrical shock accidents from trailing cables. Also, the cable at issue is described by its manufacture as having rope-lay-stranded conductors which "...insure excellent flexibility and resistance to wire breakage", and, "An extra-heavy-duty jacket is reinforced with webbing to provide maximum protection from mechanical damage, the cause of most portable cable failures." (Exhibit C-1)

It is possible that internal damage could have existed and yet not have been revealed in the megger test. However, Robert Whitmore, Respondent's staff electrical engineer, testified that in the absence of damage to the outer jacket of the cable, any internal damage not revealed by the megger test, would not result in any danger to miners, especially if the conductors are tested one phase at a time. He indicated that this was the manner in which the cable in question was tested. His testimony in this regard has not been rebutted or impeached by Petitioner.

Therefore, for all the above reasons, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event as a consequence of the violation herein. Hence it is concluded that the violation was not significant and substantial.

⁷Robert Whitmore, employed by Respondent in a staff electrical engineering position, testified that the No. 1 Mine's electrical supervisor told him that in the eleven months subsequent to the issuance of the citation in issue, the cable has remained in service, and there have not been any accidents, injuries, or maintenance trouble with this cable.

C. Penalty

1. Negligence

Lee indicated that he had issued 3 or 4 citations covering the same violation. However, there is no specific evidence as to how long the cable in issue had been lying near the edge of the demarcation between the loose material and the roadway before it was cited on January 24. Whitmore indicated that the cable was not in that position when he left the area the previous day. According to Houlihan, the cable had been in the area for about two months and had not been run over before the accident at issue occurred. According to Mottershaw, the cable had been used for several months without injury.

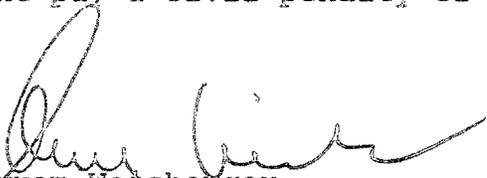
It is Respondent's policy, as set forth in the testimony of Houlihan, that a cable must be inspected visually by walking around it before it is energized. Also, once it has been ascertained that a cable has been run over, it is Respondent's policy to visually check it, and perform a megger test before it is energized. Based on all the above, I conclude that Respondent was negligent herein only to a slight degree.

2. Gravity

Should the violative condition have resulted in a breach of the cable's insulation, it could have led to either an electrical shock, electrocution, fire, or explosion. However, as discussed above, infra, the possibilities of this occurring are somewhat remote. Considering these factors, as well as the remaining statutory criteria, set forth in Section 110(i) of the Act, as stipulated to by the parties at the hearing, I find that a penalty of \$125 is appropriate for this violation.

ORDER

It is ORDERED that the citation herein be amended to reflect the fact that it is not significant and substantial. It is further ORDERED that the Respondent pay a civil penalty of \$125 within 30 days of this decision.


Avram Welsberger
Administrative Law Judge

Distribution:

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

Thomas C. Means, Esq., Glenn D. Grant, Esq., Crowell & Moring,
1001 Pennsylvania Avenue, NW, Washington, DC 20004-2505
(Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 24 1993

BUCK MOUNTAIN COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 93-221-R
: Order No. 3082392, 3/05/93
SECRETARY OF LABOR, : Buck Mountain Slope Mine
MINE SAFETY AND HEALTH : Mine I.D. No. 36-02053
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Richard Kocher, Buck Mountain Coal Company, R.D.4,
Pine Grove, Pennsylvania, for Contestant;
Gretchen Lucken, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for Respondent.

Before: Judge Barbour

This proceeding concerns a Notice of Contest filed by Buck Mountain Coal Company ("Buck Mountain") pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), challenging the propriety of an order of withdrawal, issued pursuant to section 103(k) of the Act, 30 U.S.C. § 813(k), at its Buck Mountain Slope Mine on March 5, 1993. The notice of contest was received by the Commission shortly before the close of business, Friday, March 12, 1993. In addition to contesting the order of withdrawal, Buck Mountain requested that the contest be heard on an expedited basis. Pursuant to that request a hearing was convened on Thursday, March 18, 1993, in Tremont, Pennsylvania.¹

¹ It is appropriate to note that the hearing could not have been held on such short notice without the complete cooperation of counsel for the Secretary and the representative of Buck Mountain and without the assistance of the representatives of the Pennsylvania Department of Environmental Resources, Bureau of Deep Mine Safety, who went out of their way to accommodate the parties and the Commission by making space available for the hearing at the Department's office in Tremont.

It is also appropriate to note that due to the need for expedited resolution of the case, this decision has been prepared without the benefit of the transcript.

BACKGROUND OF THE CONTEST

Buck Mountain Slope Mine is an anthracite coal mine located in eastern Pennsylvania, approximately 70 miles north and east of Harrisburg. The mine employs five to six miners who work a single shift. The mine is owned and operated by Buck Mountain, a partnership composed of three partners.

On the morning of March 5, 1993, a methane explosion occurred in the underground portion of the mine, on the No. 4 Level East Gangway Section. Three miners were burned and taken to the hospital. (As of the date of the hearing, one miner remained hospitalized.) The accident was immediately reported and a MSHA rescue and investigation team was sent to the mine. To insure the safety of persons in the mine and to control the situation while MSHA conducted its accident investigation, MSHA issued the section 103(k) order that is the subject of this proceeding. The order states:

The mine has experienced a three (3) miner non-fatal ignition accident in the underground No. 4 Level East Gangway Section. This order is to assure the safety of any person in the coal mine. An investigation will be conducted to determine the safety of the mine. Only those persons selected from company officials, the Pennsylvania State Officials, miners representatives, and others deemed by MSHA to have information relevant to the investigation may enter or remain in the affected area.

Exh. G-3 at 2.

The order was issued at 9:35 a.m., and it affected the entire underground portion of the mine. Forty minutes later it was modified as follows:

The 103(k) Order No. 3082392, dated 3-5-93, is modified to ensure that there is no misunderstanding of the following requirements associated with the order. They are:

(1) ventilation facilities and fan operations will not be altered and changed without prior approval; (2) the plans to restore the mine to normal operation must be approved by MSHA prior to this investigation; (3) relocation or changing of mine equipment material or facilities must be approved by MSHA prior to their initiation[;]

(4) relocation or changing of mine equipment material or facilities must be approved by MSHA prior to implementation.

G. Exh. 3 at 3.

Following issuance and modification of the order, the MSHA accident investigation commenced. As of the hearing date, the immediate investigation had been completed, although a report of the investigation and its findings had not been issued. In addition, John Shutack, District Manager of MSHA District No. 1, the district in which the mine is located, testified that he and District No. 1 personnel still must conduct a review and evaluation of the entire ventilation system at the mine.

On March 11, 1993, Shutack sent to Buck Mountain three (3) letters, each advising Buck Mountain that portions of its ventilation plan had been revoked in conjunction with the investigation. The first letter revoked a portion of the plan which had been granted on January 11, 1988, and which allowed Buck Mountain a waiver from the requirement that its mine fan be continuously in operation. See G. Exh. 4 at 1; G. Exh. 1 at 1. Under regulations in effect when the waiver was granted, an MSHA District Manager could waive the requirement that a main mine fan be kept in continuous operation if he was satisfied that the waiver would provide no less than the same measure of protection to miners. See 30 CFR §§ 75.300, 75.3001-1, 75.300-3 (1988).²

The letter states, "This is to advise you that your request for waiver from continuously operation of the main fan, approved on January 11, 1988, for your Buck Mountain Slope Mine, has been reviewed in conjunction with the investigation of the explosion of methane gas accident that occurred on March 5, 1993, and is hereby revoked." G. Exh. 4 at 1. Similarly worded letters revoked Buck Mountain's "request for waiver from line brattice maintained within 10 feet of the face" and Buck Mountain's "waiver to equip your fan with a manometer [rather than with a pressure-reading gage.]" Id. at 2-3. (See 30 CFR § 75.330(b)(2)(1988) and 30 CFR § 75.371(1)(1992); 30 CFR § 75.300-2(a)(3)(1988) and 30 CFR § 75.310(a)(4)(1992).)

Buck Mountain was adamantly opposed to the revocations. Buck Mountain personnel expressed to MSHA District 1 personnel, including Shutack, their opposition to any requirements to continuously operate the main mine fan; install line brattice to within 10 feet of the face and equip the fan with a

² The regulation was subsequently revised, and the regulation currently in effect states in pertinent part, "[m]ain mine fans shall be continuously operated, except as otherwise approved in the ventilation plan." 30 CFR § 75.311 (1992).

pressure-reading gage rather than a manometer. Buck Mountain, which had not resumed mining since the accident, believed that if it turned on the fan in order to begin again to mine, it would signal its acceptance of the waivers and be unable to turn it off without being in violation of its ventilation plan. It had similar concerns regarding the other two revocations.

When Buck Mountain was unable to persuade Shutack to rescind the revocations, Richard Kocher, the foreman at Buck Mountain, filed the notice of contest on Buck Mountain's behalf. The pleading states in pertinent part:

Main fan stoppage plan had a waiver to shut fan off after men are out of coal mine. The Arlington Inv[estigation] Team shut down all ventilation . . . now they want to run fan 24 hrs. . . . There is not any reason to operate fan 24 hrs. a day[,] 7 days a week.

The same reasons I have stated go on the line brattice petition and waiver to equip fan with a manometer.

The fan operated like this for 7 years, starting 1 hr. before preshift, and never had any methane trouble.

Notice of Contest.

At the commencement of the hearing, Richard Kocher, stated that he would represent Buck Mountain.³ The Secretary was represented by Gretchen Lucken, who called Shutack and MSHA Inspector Clyde Turner to testify on MSHA's behalf. At the close of the hearing the parties orally presented their positions and waived briefing of the issues.

THE EVIDENCE

District Manager Shutack was the first to testify. Shutack stated that in 1987 Buck Mountain had applied for the waivers that are at the center of the current controversy, and he identified copies of Buck Mountain's applications. G. Exh. 2. Shutack explained that the applications were investigated and

³ Also present at the hearing to advise or consult with Kocher were David Williams, a certified mining engineer, and Ronald Lickman, owner of the Buck Mountain coal rights and of the land on which the mine is situated. With the agreement of counsel for the Secretary, Williams and Lickman were permitted to not only consult with Kocher, but also to cross-examine the Secretary's witnesses and to make statements on Buck Mountain's behalf.

that as a result of the investigations, he approved the waivers. G. Exh. 1. Shutack noted the language in the letters of approval that the approvals "may be modified or terminated if warranted by subsequent changing conditions or in the event an inspection or investigation reveals . . . [non]compliance with . . . [the waivers'] provisions." Id.

With regard to the waiver of the requirement to operate the fan continuously, Shutack stated that the assertion on Buck Mountain's application that in the five years prior to applying for the waiver the mine had an average methane percentage of "0 percent" was checked against MSHA inspection records and was found to be accurate. G. Exh. 2 at 2. (In other words, prior to granting the waiver, MSHA was satisfied that there was no history of methane at the mine.)

Shutack, then described the events of March 5, 1993, how he was advised of the explosion and how he immediately went to the mine where the section 103(k) order was issued. MSHA's investigation of the accident followed, during which MSHA sought to re-establish ventilation in the mine in order to thoroughly examine the mine in search of the cause of the explosion. Shutack explained that during the course of the investigation, it was determined that the mine was subject to erratic liberations of methane, ranging from 1 percent to 5 percent or higher.⁴ According to Shutack, it was also determined that Buck Mountain was not maintaining line brattice to within 20 feet of the face, as required under its waiver and that the mine map was not accurate.⁵ This latter finding was disturbing to Shutack in that the map showed seals existing in the intake air slope which were not, in fact, in existence. Shutack feared that methane or carbon monoxide could seep into the mine from the unsealed and worked-out-areas. Shutack stated that without accurate knowledge of the conditions potentially affecting ventilation he could not be certain the mine was adequately ventilated and could not consider any waivers from the mandatory ventilation requirements.

Shutack agreed, however, that during the course of the investigation the main mine fan was not run continuously and that there even were times on March 6 when electrical problems caused

⁴ Methane presents an explosion hazard when found in concentrations between 5 percent and 15 percent. See Wyoming Fuel Co., 13 FMSHRC 1210, 1213 n. 3 (August 1991).

⁵ Although citations were issued alleging violations of mandatory safety standards by Buck Mountain due to these and other conditions, the merits of the alleged violations are not at issue in this proceeding.

the fan to be shut off while MSHA inspection personnel were underground. However, Shutack maintained that MSHA personnel were specially trained for underground investigative work and were alert to the dangers of inadequate ventilation.

Shutack was asked about air samples taken during the course of the inspection. He stated that on March 6 very little methane had been found. (See G. Exh. 6 at 1). However, immediately after the explosion, explosive methane levels and higher were found in the chute and gangway near the explosion area. (Bottle sample No. I6765 revealed 13.3 percent methane in the No. 6 Chute and bottle sample No. F3032 revealed 22.86 percent methane in the No. 4 Level Gangway - No. 6 Chute. Id. at 3-4.) Shutack did not know, however, if any samples were taken to establish whether the methane that was detected had come from the unsealed, worked-out areas of the mine, and he admitted that he could not say for certain that these areas were a source for methane or other air contaminants. In fact, he did not know the source of the methane that had exploded and that continued to be found in the mine.

Finally, Shutack testified that the area where the explosion had occurred was a "blind area," a dead end which was difficult to ventilate. He agreed that if the No. 5 and No. 6 Chutes were connected, ventilation would be improved greatly and methane would be much less likely to accumulate.

Shutack testified that the immediate post-accident investigation revealed the need for a survey and evaluation of the entire ventilation system at the mine to make certain methane was being diluted, rendered harmless and carried away. He had determined that the section 103(k) order could not be modified or terminated and the survey could not begin until Buck Mountain agreed to run continuously the main mine fan (under the waiver the company had been allowed to start it one-half hour before the mine was preshifted), to install line brattice to within 10 feet of the face (rather than to within 20 feet as allowed under the waiver) and to install a main fan pressure-reading gage (rather than to use a manometer as allowed under the waiver).

Shutack further stated that he orally informed Kocher of these conditions and formally advised the company of them by the letter dated March 11, 1993, G. Exh. 4.⁶ If Buck Mountain complied with these conditions, a review of the entire ventilation system of the mine could commence. In addition, Buck Mountain would be required to submit a new ventilation plan.

⁶ In addition to representing conditions for the lifting or modification of the Section 103(k) order, the letters are also understood by the parties to constitute revocation of part of the mine's ventilation plan.

On cross-examination, Shutack agreed there were potential hazards to the miners from the fan running continuously. In the winter the slope could ice-up and the buggy could derail. Further, there was little, if any, clearance along the slope from which men could work to remove ice.

Shutack testified, that he was not forever wedded to the revocation of the waivers and that he was not precluding the approval of similar waivers in the future. However, given the accident and the information currently at his disposal, he believed he had to insist that Buck Mountain accept revocation of the waivers before the section 103(k) order could be terminated.

CLYDE TURNER

MSHA Inspector Clyde Turner testified that he was a member of the MSHA team that investigated the accident. Turner described that part of the investigation in which he participated. According to Turner, on March 10, 1993, the main mine fan was started at 6:00 a.m., prior to the investigation team entering the mine. The team went underground and around 11:45 a.m., turned off the underground auxiliary fans and air movers. Team personnel were stationed at various spots and instructed to monitor methane levels. Turner testified that after approximately 30 minutes, .2 percent methane was detected in the gangway. At the face of the No. 5 Chute methane was found to be .5 percent and in the No. 6 Chute methane was found at levels of up to 1 percent. Turner believed that if the main mine fan had been stopped methane would have accumulated to the explosive range in two and one-half to three hours.

Turner also believed that the problem with not having the fan running continuously was that methane could build up to levels above the explosive range while the fan was shut off. Once the fan started the levels would begin to decrease, which would result in methane in the explosive range spreading through the mine as the ventilation moved the methane around and ultimately out of the mine. Turner could think of no circumstances under which it would be safe to allow methane levels to build up and, as he stated, the first and most effective defense to methane was to ventilate it, which was why continuous fan operation was required unless specifically exempted by the ventilation plan. Turner believed that unless continuous fan operation was required, the explosion of March 5, would recur sooner or later.

Turner was asked his opinion why the mine, which had been virtually free of methane, had begun to experience methane liberations. He stated that the depth at which mining was taking place could be a factor in that methane was more likely to be released at greater depths. Further, he stated that methane was known to be liberated in "pockets" and Buck Mountain might be

mining through such a pocket. He admitted that as mining progressed it was possible the area currently liberating methane could be by-passed and the mine could again be virtually methane-free. However, he did not expect that this would be the case. He stated that in his experience once methane was encountered the problem persisted.

Under questioning from Kocher, Turner agreed that on March 7, the day mine ventilation was restored, all methane in the mine had been rendered harmless and carried away within one hour. (On March 7 the fan had not run continuously.) He also agreed that if the fan ran continuously there was a good possibility of winter ice building up on the slope. Men would have to chop the ice to remove it and in so doing could fall and injure themselves. He further agreed that because operation of the fan would prevent closure of the door at the slope portal, there was a potential fire hazard in that a brush fire in the area of the mine could enter the mine through the portal door opening. However, Turner was quick to note that these hazards were speculative, whereas the hazard about which he was concerned -- methane -- was actually present.⁷

RICHARD KOCHER

Buck Mountain's case was presented through cross-examination of the Secretary's witnesses and through the statements of Kocher. Kocher presented as evidence and read into the record two statements explaining why, in Buck Mountain's view, the main mine fan does not have to be run continuously to remove methane from the mine. See C. Exhs. 1 and 2. Kocher pointed out that during his preshift examinations of March 6 and 7, before ventilation was re-established in the affected area, he found varying amounts of methane in varying locations, the highest amount being 4.8 percent on March 7 in the No. 6 Chute, C. Exh. 1 at 2. However, after ventilation was re-established the most found was .9 percent and most tests revealed much less -- either .2 or .1 percent or no methane at all. Id. at 3-4.

Further, Kocher contended that methane found by MSHA officials was in the "blind" No. 6 Chute, the chute where ventilation will be greatly enhanced when the chute is cut through to the No. 5 Chute. C. Exh. 2 at 1. (This contention, however, flies in the face of the MSHA bottle sample results which showed traces of methane in by the main fan before ventilation was restored. G. Exh. 6 at 1 and 2.) Further, Kocher contended that during MSHA's investigation on March 5-11, when the fan was shut off all night, no methane was found in the mine. C. Exh. 2 at 1. (This contention, however, is

⁷ At the close of Turner's testimony, the Secretary rested. Buck Mountain, through Lickman, moved for a directed verdict. I denied the motion.

contradicted by Turner's uncontested testimony concerning the results of his in-mine methane tests on March 10.) Kocher, also noted that ventilation at the last open cross-cut in the mine was 12,000 cubic feet per minute, more than twice the 5,000 cubic feet per minute required by the regulations. Id. (MSHA does not dispute this contention.)

Kocher emphasized that for the past 7 years, with the exception of the March 5 accident, there had been no accident at the mine. He maintained that since the mine has been in operation the fan has been started in the morning and has been shut off after work; and that given the dedication to safety at the mine and the fact that no methane was found at the mine prior to March 5, there is no reason to change the ventilation plan because "with the ventilation plan we already have & the large quantity of air flow that [the] fan produces[,] [the methane] is proven controllable." C. Exh. 2.

RONALD LICKMAN

In his closing statement, Lickman summed up Buck Mountain's position: That the Secretary had not proven the existence of methane in such dangerous quantities that the fan should be run around-the-clock, especially when continuous operation of the fan could lead to other hazards endangering miners.

THE VALIDITY OF THE ORDER

Section 103(k) of the Act, the section under which the contested order was issued, states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

The section gives MSHA plenary power to make post-accident orders for the protection and safety of all persons. Miller Mining Company, Inc. v. FMSHRC, 713 F.2d 487, 490 (9th Cir. 1983). Section 3(k) of the Act, 30 U.S.C. § 802(k), includes an explosion within the statutory definition of "accident", as does

the Secretary's regulatory definition of "accident", found at 30 CFR § 50.2(h)(5). Thus, there can be no doubt the explosion of March 5, 1993, was the type of occurrence that properly could trigger a section 103(k) order to insure the safety of persons in the mine.

It is likewise clear that given the issuance of the order, Buck Mountain cannot resume mining without the approval of MSHA, provided MSHA's conditions for the resumption of mining are reasonably related to insuring the safety of persons in the mine. The testimony establishes that MSHA is ready and willing to approve such a resumption provided Buck Mountain accepts the conditions upon which MSHA insists. There is no suggestion that the conditions are incapable of being carried out. Moreover, I am persuaded that under the present circumstances, they are both reasonable and necessary to insure safety.

The explosion of March 5 is a calamity that overshadows this proceeding. The distress and concern of Buck Mountain's representative and consultants over what has occurred was readily apparent at the hearing. The only thing fortunate about the accident is that the three miners involved were injured, rather than killed, which is cold comfort indeed.

The thrust of Shutack's testimony is that he believes Buck Mountain should be required to continuously operate the fan, advance line brattice within 10 feet of the face and install a manometer at least until there has been a complete review of the mine's ventilation system. Shutack credibly testified that without the institution of these procedures, he will be unable to initiate and complete that review.

The evidence suggests that at this time implementation of the provisions enhance, not diminish, the effectiveness of the mine ventilation system's ability to dilute, render harmless and carry away methane. Given the fact methane is being liberated now in potentially dangerous quantities, as graphically established by the explosion; the fact that the source of the methane is, at this point, uncertain; and given the fact the old, worked-out areas are not effectively sealed off from the intake, as MSHA had supposed, it seems the height of responsibility and reason to insist upon Buck Mountain's acceptance of the provisions prior to modifying or terminating the order.

It is, after all, the Secretary's duty systematically to evaluate the conditions and practices at the mine and keep the section 103(k) order in effect until he can determine the hazards that caused the explosion have been corrected and will not recur. In light of the current conditions at the Buck Mountain Slope Mine, I conclude that, to make such a determination, the Secretary may insist that Buck Mountain implement the three provisions at issue.

Therefore, I find Order No. 3082392 was properly issued and is valid.

THE SECTION 103(K) ORDER
AND
THE MINE VENTILATION PLAN

There is an aspect of this case that deserves further comment. As the parties recognize and as the record reveals the three provisions MSHA insists be implemented before MSHA will terminate or modify the section 103(k) order are contrary to provisions in Buck Mountain's current ventilation plan. Should Buck Mountain choose to implement the provisions in order to allow MSHA to terminate or modify the section 103(k) order while MSHA conducts its complete review of the miner's ventilation system, Buck Mountain will not, in my view, be signaling the acceptance of the provisions as a permanent part of its ventilation plan. Rather, the effect of Buck Mountain's acceptance would be temporarily to suspend the provisions of the ventilation plan while MSHA initiates and completes its review of the ventilation system. When the review is finished, the suspension will no longer be in effect, and MSHA must then advise Buck Mountain regarding the results of its studies and regarding any changes it proposes in the existing ventilation plan.

It will be at this point that the well recognized principles of Secretarial approval and operator adoption of a ventilation plan come into effect. If differences then exist between the Secretary and Buck Mountain concerning the provisions, the Secretary and Buck Mountain must negotiate in good faith and for a reasonable period concerning the dispute. If they remain at odds, review may be obtained by Buck Mountain refusing to adopt the disputed provision or provisions, thus triggering litigation before the Commission. See Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985).

It must be emphasized that the validity of the provisions currently in dispute as a part of Buck Mountain's ventilation plan is not at issue in this case, and it would be improper to express any opinion in that regard. Because there is no allegation by the Secretary that Buck Mountain is in violation of its ventilation plan, the plan is not before me. Rather, the sole issue is the validity of the section 103(k) order. To rule on the merits of the ventilation plan would be to express the kind of declaratory judgement the Commission has cautioned is unwarranted under the Mine Act. Kaiser Coal Corp., 10 FMSHRC 1165, 1170-1171 (September 1988).

ORDER

In view of the foregoing, Buck Mountain's contest is DENIED and Section 103(k) Order No. 3082392 is AFFIRMED.

David F. Barbour

David F. Barbour
Administrative Law Judge
(703)756-5232

Distribution:

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

Richard Kocher, Partner, Buck Mountain Coal Company No. 2, R.D. 4, Pine Grove, PA 17963 (Certified Mail)

Richard Lickman, 101 N. Centre Street, Suite 309, Pottsville, PA 17901 (Certified Mail)

/epy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 26, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-715
Petitioner : A. C. No. 36-04281-03782
: :
v. : Dilworth Mine
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The above-captioned case was the subject of an extensive conference call between the undersigned and counsel for both parties on January 28, 1993. On March 1, 1993, the Solicitor filed a motion to approve settlement of the four violations involved in this case. The originally assessed penalties were \$1,086 and the proposed settlements are for \$937.

In accordance with the conference call discussion, the Solicitor advises that the operator has agreed to pay the originally assessed penalty for two of the violations, Citation Nos. 3699761 and 3679100. The Solicitor requests that the penalties for Citation Nos. 3691011 and 3691019 be reduced and the citations be modified.

Citation No. 3691011 was issued for a violation of 30 C.F.R. § 75.509 because the operator did not danger and tag a plug for a power circuit which was being worked on. The originally assessed penalty was \$506 and the proposed settlement is \$425. The Solicitor also requested that the citation be modified by reducing the type of injury from fatal to permanently disabling because the voltage was not as great as originally thought. The agreed upon settlement was reached at the January 28 conference call wherein the reasons for the modification and reduction were discussed and approved by the undersigned.

Citation 3691019 was issued for violation of 30 C.F.R. 75.1722 because a crossunder provided for the No. 1 belt was not guarded. The originally assessed penalty was \$168 and the proposed settlement is \$100. The Solicitor also requested that the citation be modified by deleting the significant and substantial designation. The Solicitor advised that the reason for

the modification is foot traffic underneath the belt was unlikely when the belt was moving.

I have considered the representations and documentation submitted in this case along with the discussions on January 28, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlements is **GRANTED**.

It is **ORDERED** that Citation No. 3691011 be **MODIFIED** to reduce the type of injury from fatal to permanently disabling.

It is further **ORDERED** that Citation No. 3691019 be **MODIFIED** to delete the significant and substantial designation.

It is further **ORDERED** that the operator pay a penalty of \$937 within 30 days of the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Nancy F. Koppleman, Esq., Office of the Solicitor, U. S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Daniel E. Rogers, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 26, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-814
Petitioner : A. C. No. 36-04281-03790
v. :
 : Dilworth Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Appearances: Anita Eve Wright, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Merlin

This matter was the subject of a calendar call on March 16,
1993. At that time, all the citations in this docket were
discussed on the record.

Settlements were reached in five of the eleven violations in
this case. These settlements were approved on the record pursu-
ant to the requirements of section 110 of the Act. Four of the
violations, Citation Nos. 3702400, 3690659, 3702375 and 3690660,
were dismissed because they were previously contained in PENN 91-
1462 and were incorrectly duplicated in this case. A partial
settlement decision was issued on February 11, 1993, for Citation
No. 3702372. Finally, the remaining violation which was not
settled, Citation No. 3702203, is being removed from this docket,
placed in a newly created docket and assigned for hearing on the
merits. A separate order to that effect is being issued.

In accordance with the conclusions reached on the record at
the calendar call, it is ORDERED that total settlements be
APPROVED in the designated amount of \$599.

It is further ORDERED that the operator PAY \$599 within 30 days of the date of this decision.

It is further ORDERED that Citations Nos. 3702400, 3690659, 3702375 and 3690660 be DISMISSED.


Paul Merlin
Chief Administrative Law Judge

Distribution:

Anita Eve Wright, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Daniel Rogers, Esq., Consol Inc., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Robert H. Stropp, Jr., Esq., UMWA, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 26 1993

GARY L. DAY, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 92-547-D
 : BARB CD 92-15
 :
ADENA FUELS, INCORPORATED, : Diamond No. 1 Mine
Respondent :

ORDER OF DISMISSAL

Counsel for the parties have agreed to settle this matter, and counsel have moved jointly to dismiss Complainant's discrimination complaint on the basis of the settlement agreement. The record reveals no reason why their motion should not be granted. ACCORDINGLY, this matter is DISMISSED.¹



David Barbour
Administrative Law Judge
(703) 756-6200

Distribution:

Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

Mr. Gary Lee Day, HC 65, Box 494, Similax, KY 41764 (Certified Mail)

Jerry Wayne Slone, Esq., Weinberg & Campbell, Adena Fuels, Inc., P.O. Box 727, Main Street, Hindman, KY 41822 (Certified Mail)

\epy

¹ The settlement agreement is confidential and the parties have requested that it not be made part of the record of this proceeding. Therefore, with the concurrence of counsel, the agreement has been placed under seal in the official file.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 29 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
v. :
MOUNTAINTOP RESTORATION, INC., : Docket No. KENT 92-897
Respondent : A. C. No. 15-15684-03541 R
: Docket No. KENT 92-898
: A. C. No. 15-15684-03542 R
: Mountaintop Restoration
: No. 2

DECISION APPROVING SETTLEMENT

Appearances: Darren L. Courtney, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Danny Patton, Safety Director, Mountaintop
Restoration, Inc., Paintsville, Kentucky, for
Respondent.

Before: Judge Maurer

These cases are before me upon a petition for assessment of
civil penalty under section 105(d) of the Federal Mine Safety and
Health Act of 1977 (the Act). At the hearing, the parties
jointly moved to settle these cases based primarily on the
financial plight of the respondent on the following basis:

<u>CITATION NO.</u>	<u>PROPOSED ASSESSMENT</u>	<u>PROPOSED SETTLEMENT</u>
3512086	\$ 371	\$ 371
3512087	434	434
3512088	434	434
3512089	434	150
3512090	434	434
3512091	241	20
3512092	434	434
3512093	241	20
3512095	371	100
3512096	371	371
3512097	434	434
3512098	241	20
3512341	371	371
3512342	241	20

3512351	371	371
3512352	434	434
3512353	371	371
3512354	434	434
3512355	371	371
3512356	294	294
3817171	227	50
3817172	147	50
3817179	147	*1
3817181	241	241
3817182	276	276
3817184	119	50
3817186	147	50
3817187	119	50
3817196	227	227
3517775	1785	750
9875791	<u>192</u>	<u>50</u>

TOTAL

10954

7732

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, respondent shall pay a total penalty of \$7732 in 18 equal monthly installments of \$429.56 each, beginning within 30 days of this order, and continuing until paid in full. Upon payment in full, these cases are **DISMISSED**.


 Roy J. Maurer
 Administrative Law Judge

^{1/} Citation No. 3817179 was actually issued to an independent contractor, a trucking company, and clearly marked as such. But somehow or other it was included with this group of citations that was assessed against this respondent. It simply does not apply to this respondent and I have ignored it in approving the settlement of these cases.

Distribution:

Darren L. Courtney, Esq., Office of the Solicitor,
U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215 (Certified Mail)

Mr. Danny Patton, Safety Director, Mountaintop Restoration, Inc.,
P. O. Box 940, Paintsville, KY 41240 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 29 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1008
Petitioner	:	A.C. No. 46-02208-03595
v.	:	
	:	Docket No. WEVA 92-1096
MARTIN SALES & PROCESSING,	:	A.C. No. 46-02208-03597 R
Respondent	:	
	:	Docket No. WEVA 92-1097
	:	A.C. No. 46-02208-03598 R
	:	
	:	Docket No. WEVA 92-1108
	:	A.C. No. 46-02208-03599 R
	:	
	:	Mine No. 1

SUMMARY DEFAULT DECISIONS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for fifty-one (51), alleged violations of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations. The respondent, through counsel, filed answers to the proposals and three of the cases were consolidated for hearing in Charleston, West Virginia, on Wednesday, February 10, 1993. The hearing was continued at the request of the respondent, and after the addition of another case, a consolidated hearing was scheduled in Charleston, West Virginia, on Friday, March 19, 1993. The hearing was subsequently cancelled on February 24, 1993, and an Order to Show Cause was issued by me after the petitioner filed a Motion for Summary Order of Default because of the failure by the respondent to respond to its pre-trial discovery requests.

The petitioner initiated timely discovery in these matters pursuant to the Commission's applicable Rules found at Part 2700, Title 29, Code of Federal Regulations, and served the respondent with interrogatories, requests for admissions, and requests for the production of documents. Of particular interest to the

petitioner was the apparent position taken by the respondent that it is financially unable to pay any of the proposed civil penalty assessments. This position was stated in a January 24, 1993, letter from the respondent's counsel to the petitioner's counsel, with two attachments itemizing the respondent's debts. The letter states as follows:

Pursuant to our previous discussions, I have enclosed a copy of financial information from my client's bank, Bank of Mingo. Additionally, as you are aware, my client is no longer operating the mine. As a result of this idle status of the mine, my client has no income to pay any debts at this time. If additional information is required regarding the ability of my client to pay, please contact me at your convenience.

On January 5, 1993, I issued an Order compelling the respondent to answer the petitioner's discovery requests and I took note of the fact that the petitioner's requests to the respondent were timely filed, and the respondent had ample time to respond and advanced no objections or excuses for failing to fully respond. Thereafter, on January 11, 1993, I issued another Order directing the respondent to respond to the petitioner's second request for production of documents.

The petitioner's counsel states that she has repeatedly attempted to contact the respondent's counsel regarding these cases, and has sent counsel letter asking him to respond to her discovery requests, all to no avail. The only response from the respondent's counsel appears to be the aforementioned letter dated January 24, 1993. With regard to that letter, petitioner's counsel states that she received the letter on March 5, 1993, and that the attachments post-date the cover letter. Petitioner's counsel further states that the letter and attachments merely show that the respondent has outstanding debts, do not answer the bulk of her discovery requests, and do not establish that the respondent does not have the means to pay the assessments.

In view of the respondent's failure to respond to its discovery requests, the petitioner filed a motion for summary order of default on February 25, 1993. That same day, I issued an Order directing the respondent to show cause as to why it should not be held in default and immediately ordered to pay the proposed civil penalty assessments because of its failure to respond to the petitioner's discovery requests and for its failure to comply with my previously issued orders directing it to reply to those requests. The respondent has not replied to my Order.

Discussion

Commission Rule 63, 29 C.F.R. § 2700.63, provides for the summary disposition of proceedings, and it states as follows:

(a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

(b) Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

The respondent has failed to respond to my Order to Show Cause of February 25, 1993. It has also failed to adequately respond to my previous orders compelling it to respond to the discovery requests filed by the petitioner. Under all of these circumstances, I conclude and find that the respondent is in default and the petitioner's motion for summary decision IS GRANTED.

ORDER

Summary default judgment is entered in favor of the petitioner, and the respondent IS ORDERED to immediately pay to the petitioner (MSHA), the following proposed civil penalty assessments as the final civil penalty assessments for the contested violations in these proceedings:

Docket No. WEVA 92-1008

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3578142	2/10/92	75.1704	\$3,500

Docket No. WEVA 92-1096

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2743723	5/2/91	75.1721(a)	\$300
2743724	5/2/91	75.321	\$600
2743725	5/2/91	75.1721(b) (6)	\$600
2743726	5/2/91	75.1721(b) (7)	\$600
2743727	5/2/91	75.1721(b) (8)	\$600
2743728	5/2/91	75.1721(c) (1)	\$800
2743729	5/2/91	75.1721(b) (9)	\$600
2743731	5/2/91	49.2(a) (1)	\$600

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2743732	5/2/91	75.1200	\$600
2743733	5/2/91	75.508	\$600
2743735	5/2/91	75.300	\$600
2743736	5/2/91	75.305	\$800
2743737	5/2/91	75.306	\$600
2743738	5/2/91	75.512	\$600
2743739	5/2/91	75.1704-2(c) (1)	\$600
2743740	5/2/91	77.800-1(a)	\$600
3757415	6/19/91	70.400	\$200
3757119	9/24/91	75.212(c)	\$ 90
2723528	10/9/91	75.900	\$800
2723531	10/10/91	75.901	\$800

Docket No. WEVA 92-1097

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2723533	11/19/91	75.503	\$78
9921772	1/09/92	70.207(a)	\$119
3742612	1/21/92	75.1725(a)	\$655
3742614	1/21/92	75.220(a) (1)	\$1,000
3753662	1/21/92	75.316	\$850
3753664	1/21/92	75.400	\$1,071
3753665	1/21/92	75.2030	\$1,071
3753666	1/21/92	75.204(f) (7)	\$714
3742626	1/23/92	75.1106-5(a)	\$560
3575141	2/10/92	75.523-2(a) (2)	\$445
3575147	2/10/92	75.516	\$445
3575148	2/10/92	75.1100-2(e) (2)	\$112
3575149	2/10/92	75.1722(a)	\$560
3742640	2/10/92	75.503	\$445
3754206	2/10/92	75.400	\$714
3754207	2/10/92	75.1722(b)	\$714
3754208	2/10/92	75.1722(b)	\$213
3575152	2/11/92	75.1100-2(a) (1)	\$655
3575153	2/11/92	75.900	\$259
3575154	2/11/92	75.316	\$655

Docket No. WEVA 92-1108

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3575155	2/11/92	75.1403	\$445
3754209	2/11/92	75.515	\$259
3754210	2/11/92	75.1103-4(a) (3)	\$572
3754211	2/11/92	75.400	\$168
3754212	2/11/92	75.1722(a)	\$714

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3575157	2/12/92	75.523-3(b)(2)	\$445
3575159	2/12/92	75.513-1(a)(1)	\$168
3575160	2/18/92	75.305	\$470
3754213	2/18/92	75.220(a)(1)	\$1,357
3754214	2/18/92	75.208	\$1,143


 George A. Koutras
 Administrative Law Judge

Distribution:

Carol B. Feinberg, Esq., Office of the Solicitor, U.S. Department
 of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203
 (Certified Mail)

J. Thomas Hardin, Esq., Hardin Law Offices, Main Street, P.O.
 Box 1416, Inez, KY 41224 (Certified Mail)

Winford Davis, President, Martin Sales & Processing, P.O.
 Box 728, Kermit, WV 25674 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 29 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1016
Petitioner	:	A.C. No. 46-01453-04017
v.	:	
	:	Docket No. WEVA 92-1017
CONSOLIDATION COAL COMPANY,	:	A.C. No. 46-01453-04019
Respondent	:	
	:	Docket No. WEVA 92-1065
	:	A.C. No. 46-01453-04027
	:	
	:	Docket No. WEVA 92-1095
	:	A.C. No. 46-01453-04030
	:	
	:	Humphrey No. 7
	:	
	:	Docket No. WEVA 92-1166
	:	A.C. No. 46-01452-03883-R
	:	
	:	Arkwright No. 1

DECISION

Appearances: Charles Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Petitioner; Daniel Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Feldman

The above proceedings are before me as a result of petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., (The Act). These matters were scheduled for hearing in Morgantown, West Virginia.

At the hearing, the parties moved to settle the citations associated with Docket Nos. WEVA 92-1016, WEVA 92-1017, and WEVA 92-1065 in their entirety. With respect to Docket No. WEVA 92-1095, the Secretary presented his direct case for Order No. 3108895 and Citation No. 3108433. After the Secretary's presentation I expressed my concern regarding certain factual issues. I urged the parties to confer during a recess to discuss

settlement. The parties did ultimately reach an accord with respect to this order and citation. The remaining citation in Docket No. WEVA 92-1095 was incorporated in the parties' settlement motion presented at the hearing. Thus, Docket Nos. WEVA 92-1016, WEVA 92-1017, WEVA 92-1065 and WEVA 92-1095 have all been disposed of through the settlement process.

With regard to the remaining docket, the parties reached settlement on 12 of the 13 citations contained in Docket No. WEVA 92-1166. The settlement motion proffered by the parties concerning all of these dockets was granted on the record and will be incorporated as part of this decision. The motion was supported by information that was provided that pertained to the penalty assessment criteria set forth in Section 110(i) of the Act.

The only matter heard was Citation No. 3313118 in Docket No. WEVA 92-1166. Spencer A. Shriver testified on behalf of the Secretary and William Lafferty and Robert Gross were called upon to testify on behalf of the respondent. The parties stipulated to my jurisdiction in this matter. At the conclusion of the hearing, the parties elected to make closing statements in lieu of filing post-hearing briefs. This decision formalizes the bench decision I rendered at the conclusion of the parties' closing presentations.

The essential facts are not in dispute and can be briefly stated. Spencer A. Shriver has been a mine inspector for 15 years. He has a Masters Degree in electrical engineering and he is a certified mine electrician and registered professional engineer in West Virginia. (Tr.115-116).

On October 21, 1991, Shriver inspected the respondent's Arkwright No. 1 Mine in accordance with Section 103(g) of the Act as a result of a complaint received concerning the operating condition of the respondent's jeeps and mantrips. Shriver was accompanied by company representative Fred Morgan. Upon inspecting the No. 9 Jeep, Shriver noted a damaged fuse holder evidenced by several wraps of black plastic tape around the outer perimeter of the fuse holder. The fuse holder is in line between the jeep motor and the conductor coming down from the trolley wire through the trolley pole. (Tr.118). The fuse holder contains a fuse that is designed to stop the flow of current (blow) in the event the conductor on the jeep became short circuited to the frame. The fuse holder is comprised of a phenolic plastic material that is designed to withstand heat resulting from arcing and ultimate fuse failure. (Tr.118-212).

Upon removing the tape, Shriver observed that the end cap of the fuse holder had broken away. He proceeded to open the fuse holder and noticed evidence of black soot which indicated the presence of electrical arcing. He also observed a 1/8 inch hole that had burned through the metal end of the fuse which also indicated that arcing had occurred. Based on the fact that the

No. 9 Jeep was on the track parked in the mantrip spur, from which jeeps are routinely taken back into the mine at the beginning of each shift, Shriver concluded that the jeep was in service. (Tr.120). Consistent with this conclusion, Shriver testified that he did not recall anyone alleging that the jeep was out of service. (Tr.121).

Based upon these observations, Shriver issued Citation No. 3313118 citing a violation of the mandatory safety standard specified in section 75.1725(a).¹ The citation stated:

On wells bottom, No. 9 Jeep has fuse holder broken on trolley pole. Fuse is taped into place but is not making efficient electrical contact into end sockets. A 1/8 inch hole has been burned in end of fuse from arcing. A catastrophic failure of the fuse is reasonably likely if the fuse remains in service. Persons riding near the pole would be exposed to flash burns and physical burns. Also, vehicle would be disabled if fuse blew, and could result in wreck on main line.

The subject citation characterized the alleged violation as significant and substantial. In support of his S&S designation, Shriver testified that he believed that there were two hazards associated with the defective fuse holder. The first hazard concerned the possibility of injuries sustained to occupants of the jeep in the event of a catastrophic failure of the fuse holder.² In such event, passengers of the jeep could sustain flash burns to the eyes, actual physical burns to the head and body, and possible shrapnel wounds. (Tr.131,133-134). The second hazard was a loss of power due to fuse failure which could result in a wreck caused by a collision with another track vehicle.

Shriver provided conflicting testimony regarding the significant and substantial nature of these two hazards. For example, Shriver testified that it was possible for the fuse to just heat up and crumble away causing an interruption of the flow of current without catastrophic consequences. (Tr. 196-197). Moreover, Shriver testified that he could not remember any signs of melting on the fuse holder. (Tr.202). In addition, Shriver testified that there were vent holes on each end of the fuse holder through which the conductor passed through. Thus, Shriver

¹ Section 75.1725(a) provides:

"Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

² Shriver equated a "catastrophic failure" with an explosion and disintegration of the fuse holder. (Tr. 133-134).

conceded that the fuse holder was not airtight further minimizing the chances of catastrophic failure due to heat or pressure buildup. (Tr.190,194,226). Significantly, Shriver stated that, with the exception of a fuse holder failure created by overloading the fuse contained therein by two hundred to three hundred percent in a laboratory setting, Shriver has never known of a catastrophic failure of a jeep fuse holder. (Tr. 212,216). In fact, Shriver admitted that this laboratory test was not analogous to the routine current flowing through a jeep fuse. (Tr.218). Finally, Shriver testified that it was unlikely from a "statistical standpoint" that a catastrophic failure would occur. (Tr.199-200).

William Lafferty and Robert Gross, employees of the respondent, testified that in over 25 years of their combined mine experience, they had never heard of a catastrophic failure of a fuse holder. Gross also testified that he had contacted an applications engineer of the fuse manufacturer who was also unaware of any past catastrophic fuse holder failure. (Tr.241).

As noted in my bench decision, I credit Shriver's testimony that something "dramatic" such as popping or sparking might have occurred given the continued operation of the jeep (Tr.202). However, the testimony, when considered in its entirety, does not provide an adequate basis for concluding that catastrophic failure of the fuse holder with resultant serious injury was likely to occur.

Shriver's testimony regarding the likelihood of a wreck was also contradictory. In this regard, he stated that, assuming the jeep lost power and was stranded on the track, the engineer of a locomotive, if alert, could "probably see [the jeep] and probably could stop." (Tr.155). Shriver also indicated that headlights on a locomotive project approximately 200 feet. (Tr.156). While a stalled track vehicle contributes to a potential wreck, one must assume that the operators of other vehicles are alert and in control of such vehicles. Thus, I conclude that this hazard was also not significant and substantial in nature.

As a result of the trial record, I issued the following bench decision which is edited with non-substantive changes:

The first issue is the fact of occurrence. Section 75.1725(a) provides that mobile equipment shall be maintained in safe operating condition or be removed from service. There is no indication that this jeep was removed from service at the time of the inspection. There was no such allegation at the time of the inspection by Mr. Morgan and Mr. Morgan isn't here to testify. So I conclude that the jeep was in service.

The issue of the safe operation of the jeep is dependent upon the condition of the fuse holder. I believe that the testimony is un rebutted that the fuse holder was damaged. It resulted in a loose connection which caused arcing and would have ultimately resulted in failure of the fuse.

Therefore, I believe it was a violation of the regulation in that it was not safe to be in a vehicle in which the fuse could fail at any moment. In such an event, power could not be restored until the fuse was replaced. Restoration of power could be further delayed if replacement of the fuse holder was necessary. This would expose the jeep to a possible wreck and establishes that the jeep was not being operated in a safe condition.

Having established the fact of occurrence, the second issue is the significant and substantial question. I find that a vehicle de-energized and exposed on a track creates a hazard. However, it is a hazard that can be mitigated by the person operating another vehicle on the track. Thus, I presume the attentiveness of the other operator and the ability of that operator to control the vehicle and avoid an accident.

I now turn to the second hazard concerning catastrophic failure which was really the thrust of Mr. Shriver's testimony. I acknowledge Mr. Shriver's expertise in the area of electrical engineering. However, I am called upon to conclude, if I were to accept the Secretary's arguments, that there is a reasonable likelihood that damage to the fuse holder would result in catastrophic failure. In analyzing this issue, I am being called upon to conclude that something is reasonably likely to happen that has never happened before with the exception of a laboratory experiment that tripled the normal current to determine how much abuse a fuse holder could withstand. I do not equate this laboratory experiment with routine operation of a jeep.

Moreover, even if I were to conclude that such a catastrophic failure could occur although it has not been shown to have previously occurred in the course of regular mining operations, I am asked to conclude that it would occur at a time when passengers would be so close to the fuse holder that they would sustain serious injuries. I am unable to conclude that such an event was likely to occur.

Therefore, I conclude that this was a violation of 75.1725(a). However, I am modifying the 104(a) citation to reflect that this violation was not significant and substantial in nature.³ Consequently, I am assessing a \$105 penalty. (Tr.266-273).

In view of the above, I have removed the significant and substantial designation from Citation No. 3313118. As a result, I have reduced the proposed assessment from \$157 to \$105. The penalty assessment for this citation and for the other citations that have been settled in all of these docket proceedings is as follows:

Docket No. WEVA 92-1166

<u>Citation or Order No.</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>	<u>Modified from S&S to Non S&S</u>
3715568	\$213	\$128	*
3715569	\$213	\$213	
3715570	\$213	\$128	*
3715571	\$213	\$128	*
3715572	\$213	\$128	*
3716074	\$105	\$105	
3715580	\$ 98	\$ 98	

³ At trial, the Secretary cited Consolidation Coal Company, 12 FMSHRC 2643 (December 1990) for the proposition that a violation resulting in the loss of power of a trolley car constitutes a significant and substantial violation. Although Judge Weisberger did conclude in that contest proceeding that a disabled trolley creates a hazard, he did not address the issue of significant and substantial. Therefore, the Consolidation case is not dispositive of this issue. It is, however, dispositive of the issue of fact of occurrence. In Consolidation, in contesting an alleged violation of Section 75.511, the respondent argued that a stalled trolley car constitutes a hazard justifying the replacement of a fuse by a non-qualified electrician. Thus, I find that the respondent is collaterally estopped from its attempt at trial to deny that loss of power of a trolley creates a discrete safety hazard. (See Tr. 169-183).

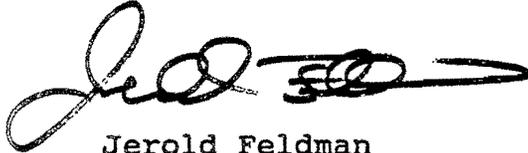
3313118 ³	\$157	\$105	*
3715582	\$213	\$128	*
3716295	\$213	\$128	*
3716298	\$213	\$213	
3715583	\$213	\$128	*
3715584	\$213	\$128	*
<u>Docket No. WEVA 92-1016</u>			
3108483	\$267	\$267	
<u>Docket No. WEVA 92-1017</u>			
3108778	\$309	\$ 50	*
3108881	\$ 50	\$ 50	
<u>Docket No. WEVA 92-1065</u>			
3108775	\$206	\$206	
<u>Docket No. WEVA 92-1095</u>			
3108892	\$267	\$ 50	*
3108895 ⁴	\$1,500	\$267	
3108433	\$267	\$267	

³ As reflected in this decision, the significant and substantial designation has been deleted from this citation.

⁴ The parties' motion to modify this citation from a 104(d)(2) order to 104(a) citation was granted on the record. The significant and substantial designation for the underlying violation remains in effect.

ORDER

ACCORDINGLY the citations as noted in the settlement motion as well as Citation No. 3313118 addressed in this decision ARE HEREBY AFFIRMED. Consequently, the respondent IS ORDERED TO PAY a total civil penalty in the amount of \$2915 in satisfaction of the violations in issue. Payment is to be made within (30) days of the date of this decision, and upon receipt of payment of this matter IS DISMISSED.



Jerold Feldman
Administrative Law Judge

Distribution:

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

Daniel E. Rogers, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 29 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1025
Petitioner	:	A.C. No. 46-03374-03732
v.	:	
	:	Maple Meadow Mine
MAPLE MEADOW MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of \$4,200, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.400, as stated in a section 104(a) significant and substantial (S&S) Citation No. 3731402, issued on April 14, 1992.

The respondent filed a timely answer and contest, and the case was scheduled for hearing in Charleston, West Virginia, on March 17, 1993. However, the parties agreed to settle the matter, and the petitioner has filed a motion pursuant to Commission rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement. The respondent has agreed to pay a penalty assessment of \$2,000, in settlement of the violation.

In support of the proposed settlement, the petitioner has submitted information pertaining to the six statutory civil penalty assessment criteria found in section 110(i) of the Act, a discussion of the violation in question, and a reasonable justification for the reduction of the initial proposed penalty.

The petitioner states that the citation was issued because of accumulations of loose coal and coal dust in various locations inby the section dumping point and along the pillar lines in crosscuts in the area. The inspector found a moderate degree of negligence on the part of the respondent, and because of the extent of the accumulations he determined that it was highly likely that a fatality would occur.

Although the respondent does not contest the fact of violation, it disputes that the conditions were highly likely to cause a fatality because there was no mining being conducted in the area at the time, there was no measurable amount of methane in the area that the time or for the preceding twenty-four hours, there were no adverse roof conditions which could lead to friction or cause an ignition, and the area had been rock dusted. Under the circumstances, the petitioner believes that the evidence at trial may not establish that the violation was highly likely to cause a fatality, and it proposes to settle the violation upon the entry of an order which modifies the gravity finding of "highly likely" to "reasonably likely". Petitioner concludes that the payment of \$2,000, to settle the violation will serve to effect the intent and purpose of the Act.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

IT IS ORDERED THAT:

1. The contested section 104(a) "S&S" Citation No. 3731402, April 14, 1992, citing a violation of 30 C.F.R. § 75.400, is modified to reflect a gravity finding of "Reasonably likely", and as modified, IT IS AFFIRMED.
2. The respondent shall pay a civil penalty assessment of \$2,000, in satisfaction of the violation. Payment is to be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203
(Certified Mail)

David J. Hardy, Esq., Jackson & Kelly, P.O. Box 553, Charleston,
WV 25322 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1993

NOLICHUCKEY SAND COMPANY, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 92-361-RM
: Citation/Order No. 4088642;
SECRETARY OF LABOR, : 6/16/92
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Tusculum Plant
Respondent :
: Mine ID 40-03054
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-397-M
Petitioner : A. C. No. 40-03054-05501
v. :
: Tusculum Plant
NOLICHUCKEY SAND COMPANY, INC., :
Respondent :

DECISION

Appearances: Tom Bewley, President, Nolichuckey Sand Company, Inc., Greeneville, Tennessee, for Contestant/Respondent;
W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor.

Before: Judge Maurer

At issue in this consolidated contest and civil penalty proceeding are the validity of an order issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, (the "Act") and a citation alleging a violation of 30 C.F.R. § 56.15020. Pursuant to notice, a hearing was held in Greeneville, Tennessee on December 10, 1992.

Subsequent to the hearing, my office was notified by the court reporter that all the hearing exhibits were "lost in the mail." An effort has been made to reconstruct the record by soliciting duplicate copies of the exhibits from the parties. This, however, has not been entirely successful. We have managed to obtain copies of all the government's trial exhibits, save Government Exhibit No. 2. And another copy of the respondent's only exhibit, a video tape, is likewise unavailable. This sorry state of the record is unfortunate, but at this point, I intend to proceed to judgment based on what I have before me.

Section 107(a)/104(a) Order/Citation No. 4088642, issued on June 16, 1992, by MSHA Inspector Dana Haynes, cites an alleged imminent danger as well as an alleged violation of the mandatory safety standard found at 30 C.F.R. § 56.15020,¹ and the cited condition or practice states as follows:

An employee had traversed the river from the dredge to the shore without wearing an approved personal floatation device (life jacket). The jon boat used to access the dredge was moored at the dredge and a hazard of falling into the water at that transition point was apparent. Life jackets were available and the employees had been instructed to wear them. The lead man was not aware of the failure to wear the jacket until this witnessing. The employee was instructed not to return to the dredge until another life jacket was found and worn.

In a nutshell, the inspector observed one of the operator's employees, one Mr. Reed, get into a 14-foot long flat-bottom jon boat that was tied up to a sand dredge out in the Nolichuckey River and motor ashore. It is undisputed that this employee did not have a life jacket or life belt on his person, nor were either available to him in the boat at the time.

I agree with the Secretary that any time you are transiting into or out of the boat to or from the dredge or when you are underway in the boat on the river there is at least "some" danger present both of falling into the water and from falling into the water.

The preponderance of the evidence relating to the depth of the river over the approximately 100-150 feet that the employee traversed that day from the dredge to the riverbank is that it was 3 feet deep, and that is my finding on that point.

I also find and conclude that the evidence in the record is sufficient to prove up a simple violation that the employee, Mr. Reed, made the trip from the dredge to the shore without benefit of a life jacket or life belt. Moreover, it is not hard to imagine a possible scenario where the boat would rock, the employee could fall out, hit his head, lose consciousness and drown, even in 3 feet of water. I therefore find a violation of the cited standard stands proven.

^{1/} 30 C.F.R. § 15020 provides: Life jackets or belts shall be worn where there is danger from falling into water.

The tougher issues concerning "imminent danger" and "significant and substantial" findings are more problematical for the Secretary.

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), the Commission noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission also adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164 quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

In Utah Power & Light Co., 13 FMSHRC 1617, 1627 (October 1991), the Commission reaffirmed that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. However, the Commission held in this case that there must be some degree of imminence to support an imminent danger order and noted that the word "imminent" is defined as "ready to take place[;] near at hand[;] impending ...[;] hanging threateningly over one's head[;] menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission held that an inspector abuses his discretion, in the sense of making a decision that is not in accordance with law, if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

In the instant case, when the inspector issued the imminent danger order, Mr. Reed was at that time standing on dry land. The danger, to the extent it had previously existed, was past. It was no longer imminent. It was not impending, and pursuant to

the rationale enunciated in Utah Power and Light, supra, cannot justify the issuance of an imminent danger order. Accordingly, the order portion of Order/Citation No. 4088642 will be vacated herein.

Also without merit is the Secretary's position that the subject violation is "significant and substantial."

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

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

must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The first element of the Mathies test is satisfied. There was a violation proven. The second element is likewise satisfied in that should something untoward have happened to Mr. Reed to cause him to become incapacitated, the absence of the required life-saving equipment would have presented a discrete safety hazard. The fourth element is also satisfied because the injury if it occurred would be reasonably likely to be serious. However, it is the third prong of the Mathies test, a reasonable likelihood that the hazard contributed to will result in a injury, where the Secretary fails to meet his burden of proof. Since the water was only 3 feet deep over the route traversed by Reed that day, simply falling into the water would not be sufficient to cause Reed any particular injury. A serious injury, such as a drowning, as argued by the Secretary, would require that Reed be incapacitated and unable to help himself, and while I have earlier in this decision found that to be a possibility, it would be quite a stretch of the record evidence to raise that "possibility" to the level of a "reasonable likelihood." That being the case, I cannot find that the Secretary has proven that there was a reasonable likelihood that the hazard would result in an injury. Accordingly, I am going to delete the inspector's S&S finding.

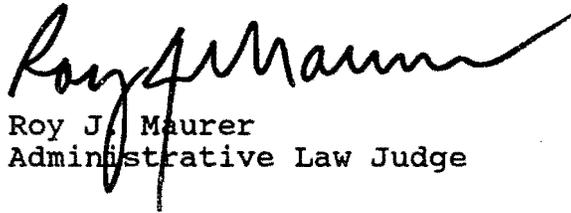
Taking into account all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a penalty of \$50 for the violation in question is reasonable and appropriate and it will be so ordered.

ORDER

It is **ORDERED** that the findings of "imminent danger" and "significant and substantial" for Order/Citation No. 4088642 be **VACATED**.

It is further **ORDERED** that Order/Citation No. 4088642 be **AFFIRMED** as a non S&S section 104(a) citation.

It is further ORDERED that Nolichuckey Sand Company, Inc. pay a penalty of \$50 within 30 days of this order.



Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Tom Bewley, President, Nolichuckey Sand Company, Inc.,
Route 9, Box 290, Greeneville, TN 37743 (Certified Mail)

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

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 31 1993

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

v.

PEABODY COAL COMPANY,
Respondent

: CIVIL PENALTY PROCEEDING
:
:
: Docket No. KENT 92-651
: A.C. No. 15-08357-03702
:
:
: Camp No. 11
:
:
:

DECISION

Appearances: William F. Taylor, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for the Petitioner;
David R. Joest, Esq., Peabody Coal Company,
Henderson, Kentucky, for the Respondent.

Before: Judge Feldman

The captioned proceeding is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801. et seq., (the Act). This case was scheduled for hearing in Owensboro, Kentucky on March 3, 1993. This matter concerns a 104(g)(1) and a 107(a) order and four 104(a) citations that were issued as a result of an investigation of a fatal accident that occurred in the respondent's Camp 11 Mine on February 26, 1991. The total assessed penalty proposed by the Secretary was \$57,000.

At the commencement of the hearing, the parties moved to settle the orders and citations in issue for a total penalty of \$28,500. The motion was supported by the testimony of Mine Safety and Health Administration (MSHA) Conference Officer Robert Phillips and Sam Spears, an electrician employed by the respondent. These individuals described the accident and provided information concerning the results of MSHA's subsequent investigation. As noted below, the parties' settlement motion was granted on the record.

BACKGROUND

This case involves fatal injuries sustained by Raymond Brown during the course of his remote control operation of a Simmons-Rand scoop. This scoop is used to remove loose coal that has fallen between the ribs after continuous miner operations. (Tr. 42). The scoop can be operated manually from the control deck. In the alternative, the scoop can be operated remotely by means of a hand held joystick. (Tr. 16,39). The advantage of operating in the remote control mode is that it allows the scoop to operate under unsupported roof before roof bolting occurs, without exposing the scoop operator to danger. (Tr. 43-44). Remote control of a scoop is a relatively new technological development in the mining industry. (Tr. 23).

The mechanical operation of the scoop's braking system is dependent upon whether it is being operated in the manual or remote control mode. If the scoop is operated in the manual mode, the operator controls the scoop from the operator's deck. To stop the scoop, the operator uses a foot pedal that is located on the floor of the deck. Operation of the foot pedal applies pressure to the service brakes. (Tr. 37-38).

Remote operation of the scoop is accomplished by the operator holding a remote station joystick while positioned behind the scoop. Movement of the scoop is achieved by holding down the plunger on the joystick. To apply the service brakes in the remote mode of operation, the operator must release the joystick. This activates the hydraulic function of the service brake system by sending oil through a flow control valve. The oil is then transported through a pressure intensifier which creates the hydraulic pressure that activates the service brakes and stops the scoop. (Tr. 37-39).

On February 26, 1991, Raymond Brown, an individual with approximately 15 years of mining experience, was operating a scoop by remote control in the crosscut between the No. 3 and No. 4 entries to provide a clean working area for the roof bolting machine operator. At approximately, 1:30 p.m., the continuous miner had completed a 34 four foot cut in the No. 3 entry and had moved to the No. 2 entry. Roof bolting was completed in the crosscut between the No. 3 and No. 4 entries. Brown was in the process of cleaning the No. 3 working face by remotely controlling the scoop. The roof bolter was parked in a crosscut adjacent from the area where Brown was cleaning the face. As the scoop retreated from the face, the service brake failed to engage pinning Brown between the rear of the scoop and the front of the roof bolter. A roof bolter operator who witnessed the accident de-energized the scoop with the panic bar located in the deck of the scoop. Brown sustained fatal chest injuries and expired shortly after being brought to the surface.

An MSHA investigation conducted at the scene cited an inoperative service brake as a result of a closed hydraulic flow valve as the proximate cause of this fatal accident. However, the investigation revealed that it was not until after the accident that Simmons-Rand, the manufacturer of the scoop, informed the respondent of the function of the flow valve and the importance of it being kept in the open position. In this regard, Sam Sears, the chief electrician at the respondent's Camp 11 Mine, testified that the existence or maintenance of a flow control valve is not noted in the Simmons-Rand scoop service manual. (Tr. 40). As a result of this accident, MSHA Conference Officer Robert Phillips testified that a nationwide alert was issued to all mine operators warning of the potential flow valve problem and requiring appropriate training for operators of such scoops in the remote control mode. (Tr. 30-32, GOV. Ex.7).

As noted above, as a result of this accident and the subsequent investigation, three citations and an imminent danger order were issued for alleged violations concerning the scoop's braking system. In addition, the respondent received a 104(g) order and a citation for allegedly failing to provide adequate task training for remote scoop operators.

Citation No. 3550636 and imminent danger Order No. 3550634 were issued for violation of the mandatory safety standard contained in section 75.1725(a)¹ as a result of the closed flow control valve which disabled the remote operation of the service brake system.² At the hearing, the parties moved to settle this citation and order indicating that the respondent has agreed to pay the \$15,000 proposed assessed penalty.

Citation Nos. 3550635 and 3550637 were issued for defects in the scoop's emergency parking brake and for worn disc brake pads on the scoop's service brakes. The proposed assessment for each of these citations was \$9,000. At the hearing, the parties agreed to settle each citation for \$6,550. The reduction in the

¹ This mandatory safety standard requires that mobile equipment must be maintained in a safe operating condition or be removed from service immediately.

² The subject scoop was repaired on February 6 and again on the day prior to the accident on February 25, 1991, for brake problems associated with manual operation. At those times, the brakes were checked and determined to be operating properly in the manual mode. The brakes were not checked in the remote operational mode. The flow control valve is located under a panel and is not easily accessible. The investigation failed to establish when or why the control valve was closed. (Tr. 49-53). The flow control valve was ultimately removed to prevent a reoccurrence of brake failure. (Tr. 41).

proposed assessments was supported by the fact that the investigation ultimately determined that the condition of the scoop's parking brake and service brake did not contribute to Mr. Brown's death. (Tr.66-67,69).

Citation No. 3550565 and Order No. 3550566 were issued as a result of the respondent's failure to provide adequate task training as required by Section 48.7(a)(3). The citation was issued with respect to the training provided to Raymond Brown and the 104(g)(1) order was issued in connection with the training provided to Gary Woods.³ The penalty initially proposed for each of these alleged violations was \$12,000. At trial, the parties moved to reduce the proposed assessment to \$200 for each violation. This substantial reduction in penalties was supported by the testimony of Mr. Phillips indicating that the operator had no advance knowledge of the existence or significance of the flow control valve. Therefore, Phillips opined that even extensive training could not have prevented Mr. Brown's death. (Tr. 23-24). Although the investigation revealed that additional emphasis should have been placed on remote control training, counsel for the Secretary characterized the training provided as "substantially adequate" quantifying the training as a 9 on a scale of 1 to 10. (Tr. 16).

In view of the above, I accepted the parties' settlement agreement as proffered on the record because it is consistent with the criteria set forth in section 110(i) of the Act. By way of summary, the respondent has agreed to pay an assessed penalty of \$15,000 for Citation No. 3550636 and Imminent Danger Order No. 3550634; \$6,550 for Citation No. 3550635; \$6,550 for Citation No. 3550637; \$200 for Citation No. 3550565; and \$200 for Order No. 3550566. The settlement incorporates the gravity and negligence findings charged in these citations and orders.

ORDER

Accordingly, the citations and orders noted above **ARE HEREBY AFFIRMED**. Consequently, the respondent **IS ORDERED TO PAY** a total civil penalty in the amount of \$28,500 in satisfaction of the violations in issue. Payment is to be made within 30 days of the date of this decision, and, upon receipt of payment, this matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge
703-756-5233

³ This order also cited Michael Grigg as not receiving adequate training. However, reference to Grigg was deleted when it was determined that Grigg was not a scoop operator. (Tr. 16).

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 11, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-259-M
Petitioner	:	A. C. No. 24-01467-05565
	:	
v.	:	Troy Unit
ASARCO INCORPORATED,	:	
Respondent	:	

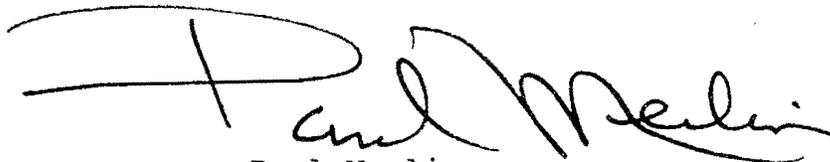
ORDER OF CONTINUANCE

The above-captioned case is a petition for assessment of a civil penalty filed by the Secretary of Labor against Asarco Inc.

The operator has now filed its answer. It has also filed a motion to consolidate this case with the corresponding notice of contest which is presently pending before the Commission in Docket No. WEST 92-624-RM.

Since the penalty aspect of this matter has not been heard or adjudicated at the trial level, consolidation with the contest now on appeal would not be appropriate. The Commission has consistently held that where, on appeal, it decides certain issues but the amount of penalty remains to be determined, the matter must be remanded to the administrative law judge for that purpose. Gatliff Coal Co., Inc., 14 FMSHRC 1982, 1989-90 (Dec. 1992); Mar-Land Industrial Contractor, Inc., 14 FMSHRC 754, 760 (May 1992); Mettiki Coal Corp., 13 FMSHRC 760, 773 (May 1991); Rochester & Pittsburgh Coal, 13 FMSHRC 189, 199 (Feb. 1991). Also, the Commission always has refused to consider on appeal issues that have not been raised at the trial level. Shamrock Coal Company, Inc., 14 FMSHRC 1300, 1302-1304 (August 1992); Shamrock Coal Company, Inc., 14 FMSHRC 1306, 1312-1314 (August 1992); Beech Fork Processing Inc., 14 FMSHRC 1316, 1319-1321 (August 1992). Therefore, the operator's motion to consolidate here cannot be granted. The proper procedure is to put this case on stay pending the Commission's decision on the notice of contest.

Accordingly, it is ORDERED that the operator's motion to consolidate be DENIED, that this case be STAYED until issuance of the Commission's decision in WEST 92-624-RM, and that the parties ADVISE the undersigned when the Commission's decision is issued.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Robert Murphy, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Tana M. Adde, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

Henry Chajet, Esq., Nancy Boudrot, Esq., Jackson & Kelly, Suite 400, 2401 Pennsylvania Avenue, NW., Washington, DC 20037 (Certified Mail)

Mr. Douglas Miller, Miner's Representative, Asarco Inc., Box 868, Troy, MT 59935 (Certified Mail)

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