

APRIL 1995

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APRIL 1995

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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 94-19.  
(Judge Fauver, February 27, 1995)

Secretary of Labor, MSHA v. Dunkard Mining Company, Docket No. PENN 95-16.  
(Chief Judge Merlin, unpublished Default issued March 13, 1995)

Secretary of Labor, MSHA v. Broken Hill Mining Co., Docket No. KENT 94-1208.  
(Judge Hodgdon, March 10, 1995)

Secretary of Labor, MSHA v. Construction Materials Corp., Docket No.  
YORK 94-73-M. (Chief Judge Merlin, unpublished Default issued January 5, 1995)

Review was not granted in the following cases during the month of April:

Randall Patsy v. Big "B" Mining Company, Docket No. PENN 94-132-D. (Judge  
Feldman, February 24, 1995)

Energy West Mining Company v. Secretary of Labor, MSHA, Docket No.  
WEST 92-819-R. (Judge Manning, March 9, 1995)



## COMMISSION DECISIONS AND ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

April 7, 1995

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. PENN 95-16  
 :  
DUNKARD MINING COMPANY :  
 :

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners.

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On March 13, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Dunkard Mining Company ("Dunkard") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on November 10, 1994, or the judge's Order to Respondent to Show Cause of January 4, 1995. The judge assessed the civil penalties of \$1,949 proposed by the Secretary.

On March 17, 1995, the Commission received a letter from Karl-Hans Rath, Dunkard's general manager, in which Rath states that Dunkard had responded to the Secretary's penalty proposal on December 8, 1994. Dunkard identified its response as Docket No. PENN 95-6, the same docket number that had appeared on the Secretary's penalty proposal.<sup>1</sup> Rath states that Dunkard mailed a copy of its December 8 response to the Commission three days after it received the show cause order. Rath enclosed a copy of that response.

The judge's jurisdiction in this matter terminated when his decision was issued on March 13, 1995. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Dunkard's

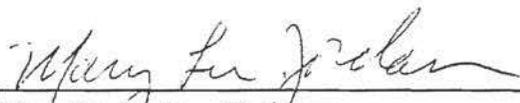
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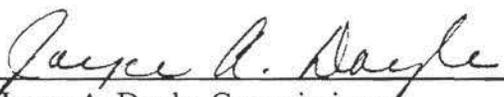
<sup>1</sup> The correct docket number for this case is PENN 95-16.

March 17 letter to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

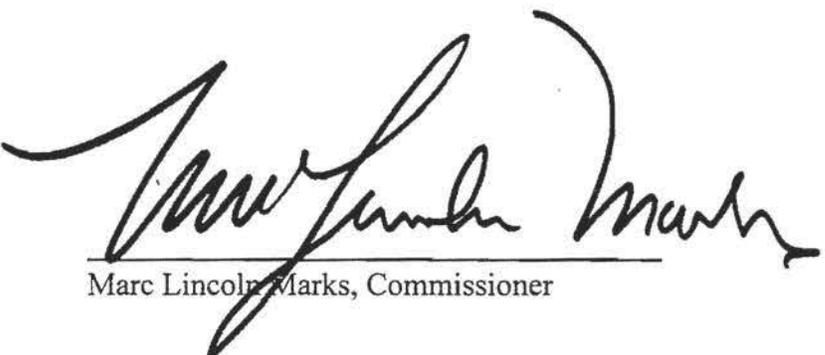
On the basis of the present record, we are unable to evaluate the merits of Dunkard's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.

  
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Mary Lu Jordan, Chairman

  
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Joyce A. Doyle, Commissioner

  
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Arlene Holen, Commissioner

  
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contest and penalty proceedings then pending against Buck Creek as well as all subsequent cases involving Buck Creek.<sup>1</sup>

In granting the Secretary's motion to stay, the judge relied on the Secretary's referral to the United States Attorney for the Southern District of Indiana of numerous violations for possible criminal prosecution of Buck Creek and its officers, and on a letter from the Criminal Division of the Justice Department stating that its criminal investigation could be impaired by civil proceedings before the Commission involving the same evidence and facts. S. Mot. for Stay at 1; September 8 Stay Order at 3.

In that order, the judge stayed proceedings "for ninety days or until such time as the United States Attorney . . . makes a determination regarding prosecution of Buck Creek . . . and any of its officers, whichever first occurs." September 8 Stay Order at 4-5. The judge stated that he would consider lifting the stay on a case-by-case basis "[i]f a subsequent case arises which involves unique circumstances, such as a withdrawal order . . . ." *Id.* at 4 & n. 4. The judge directed the parties to report the status of the criminal proceedings to him monthly. *Id.* at 5.

On November 25, Buck Creek petitioned for interlocutory review of the September 8 Stay Order. The Secretary opposed interlocutory review. On December 7, the stay expired and the Secretary moved for an extension. On January 10, 1995, the judge issued an Order Continuing Stay and Notice of Prehearing Conference ("January 10 Order Continuing Stay"), which provided in part:

When the stay was granted in September, I did not anticipate the unbroken wave of cases which have continued to be filed in this matter. The cases involve citations issued at least as early as July 1993 and proceed, as of the date of this order, through November 1994. It seems conceivable, as argued by counsel for Buck Creek, that not all of these cases are connected or related to the U.S. Attorney's criminal investigation. If that is the case, it may be possible to dispose of some cases . . . .

January 10 Order Continuing Stay at 4.

The judge scheduled a prehearing conference for February 9, 1995, to determine whether and under what conditions the stay should be continued. January 10 Order Continuing Stay at 4. Because the September 8 Stay Order had expired and because the judge's January 10 Order Continuing Stay contemplated a closer examination on a case-by-case basis, the Commission

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<sup>1</sup> The order notes that 11 proceedings had been stayed by orders dated June 30, July 18 and July 22, 1994. September 8 Stay Order at 2 n.1.

denied without prejudice Buck Creek's petition for interlocutory review of the September 8 Stay Order on grounds of mootness. *Buck Creek Coal Inc.*, 17 FMSHRC \_\_\_ (February 8, 1995).

#### B. The February 15 Order Continuing Stay

At the February 9 prehearing conference, the Secretary requested that the stay be continued for another 90 days. Tr. 17, 23. He stated that he was not yet prepared to address lifting the stay because of developments in federal criminal prosecutions against two Buck Creek employees in an unrelated case, as a result of which access to certain material was strictly limited. Tr. 9-10, 14. The Secretary represented to the judge that a forthcoming ruling in the unrelated case would permit examination of those documents and a decision on criminal prosecution within the next 90 days. Tr. 15-18. He further represented that he would not renew his request for a "complete stay" at the end of that period. Tr. 18. The Secretary supported his motion with a letter from an Assistant U.S. Attorney stating that a continued stay would be "beneficial" to the Government's investigation.<sup>2</sup>

On February 15, the judge issued another Order Continuing Stay, which extended the stay until May 16, 1995. February 15 Order Continuing Stay at 5. The order notices a status conference for that date to determine whether and under what conditions the stay would be continued. *Id.* Buck Creek's petition for interlocutory review followed.

## II.

### Disposition

Buck Creek contends that the Secretary has failed to establish "special circumstances" warranting a stay and that there is a strong public interest in the expeditious adjudication of these civil proceedings. Pet. 1 at 4-8.<sup>3</sup> It asserts that *Thunder Basin Coal Co. v. Reich*, 127 L.Ed.2d 29 (1994), requires that civil matters be resolved by the Commission before criminal prosecutions can proceed in district court and urges the Commission to revisit its decision to the contrary in *Southmountain Coal, Inc.*, 16 FMSHRC 504 (March 1994). Pet. 1 at 9-14. Buck Creek argues that, due to the mounting number of stayed citations, the blanket stay has denied it due process. Pet. 2 at 4.

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<sup>2</sup> Letter from Sharon M. Jackson, Assistant United States Attorney, to Thomas A. Mascolino, Deputy Associate Solicitor of Labor, dated February 8, 1995.

<sup>3</sup> In the instant petition, Buck Creek primarily relies on the arguments it made in its petition for interlocutory review of the September 8 Stay Order. References to Buck Creek's earlier and present petitions are in the form "Pet. 1 \_\_\_" and "Pet. 2 \_\_\_," respectively.

The Secretary asserts that the judge did not abuse his discretion in granting the stay. S. Opp'n 2 at 4.<sup>4</sup> He argues that stays of civil proceedings pending the outcome of associated criminal prosecutions are commonplace and warns that the criminal investigation may be impeded if the stay is lifted. S. Opp'n 1 at 3-5. The Secretary argues that *Thunder Basin* has no application to the issue of whether a civil proceeding should be stayed pending parallel criminal investigations. *Id.* at 6-8.

We review the judge's grant of the stay for abuse of discretion. *Scotia Coal Mining Co.*, 2 FMSHRC 633, 636 (March 1980); *see also Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980); *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). We conclude that the judge abused his discretion in continuing the blanket stay on February 15.

A stay of civil proceedings may be appropriate "when the interests of justice seem[] to require such action . . . ." *United States v. Kordel*, 397 U.S. 1, 12 n.27, *quoted in Dresser*, 628 F.2d at 1375. From the precedent in this area, we distill several factors that are appropriate for consideration in determining whether a stay should be granted: (1) the commonality of evidence in the civil and criminal matters (*see Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975), civil proceedings properly stayed if they "churn over the same evidentiary material" as the criminal case); (2) the timing of the stay request (*see Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), imminence of indictment favors limiting scope of discovery or staying proceedings); (3) prejudice to the litigants (*see Peden*, 512 F.2d at 1103-04, failure to show prejudice undercuts claim that stay was improper; *Campbell*, 307 F.2d at 487-88, discovery that prejudices criminal matter may be restricted); (4) the efficient use of agency resources (*see Molinaro*, 889 F.2d at 903, including among stay factors "efficient use of judicial resources" in case involving defendant's request for stay); and (5) the public interest (*see Scotia*, 2 FMSHRC at 635, noting "the public interest in the expeditious resolution of penalty cases").

Our review of the record persuades us that the judge failed to address these factors in his February 15 Order Continuing Stay and that the record does not contain evidence sufficient to support a finding that the criteria for a stay have been met. The Justice Department's assertion that a stay would be "beneficial" to the Government falls short of the demonstration required to support a stay.

We conclude that the first element listed above, commonality of evidence, is a key threshold factor that has not been established on this record. The consolidated dockets now contain more than 500 alleged violations, many characterized as resulting from low or moderate negligence. The Secretary has presented no legal theory on which to conclude that indictments

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<sup>4</sup> The Secretary relies heavily on his opposition to the earlier Buck Creek petition for interlocutory review. References to the Secretary's oppositions to Buck Creek's earlier and present petitions are in the form "S. Opp'n 1 \_\_\_" and "S. Opp'n 2 \_\_\_," respectively.

alleging willful or knowing violations of the Mine Act, if brought, can rest on citations alleging low or moderate negligence. *See* section 110(d) of the Act, 30 U.S.C. §820(d).

We also find the prospective application of the stay to be inappropriate. The record does not support a conclusion that current allegations of violations bear any relationship to the criminal investigation.

In evaluating the harm that may be caused by granting or refusing to grant a stay, the judge is required to balance the litigants' competing interests. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987). Criminal defendants enjoy limited discovery compared with the broad scope of discovery available in civil proceedings. *Compare* Rules 26 through 37, Fed. R. Civ. P., with Rules 15 and 16, Fed. R. Crim. P.; *see also Campbell v. Eastland*, 307 F.2d at 487. When the government moves for a stay, it is generally seeking to prevent the prejudice that can result from a defendant's use of civil discovery to learn the government's strategy and evidence in the criminal matter. *See Campbell*, 307 F.2d at 487. Accordingly, courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable to them in the parallel criminal case. *E.g., United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966), *citing Campbell*.

However, a complete stay of the civil proceeding is by no means the only method by which to avoid prejudice to a related criminal prosecution. The judge has the power to impose limitations on the time and subject matter of discovery, which would permit the civil matter to proceed without harming the criminal case. *See* Commission Procedural Rule 56(d), 29 C.F.R. § 2700.56(d); Milton Pollack, *Parallel Civil and Criminal Proceedings*, Address Before the Transferee Judges' Conference (October 17-19, 1989), *in* 129 F.R.D. 201, 211-12.

In light of our conclusion that the nexus between the civil and criminal matters has not been established, and that measures less drastic than a complete stay are available to prevent prejudice to the government, we need not address the other criteria for determining whether a stay is warranted.<sup>5</sup>

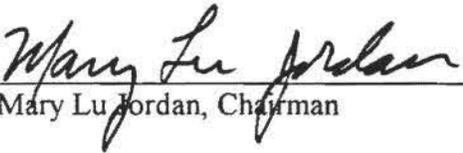
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<sup>5</sup> We reject the operator's argument that *Thunder Basin Coal Co.*, 127 L.Ed.2d 29, requires that Commission proceedings be resolved before criminal proceedings can advance. The Court in *Thunder Basin* held that "[m]ine operators enjoy no corresponding right [to resort to district court in the first instance] but are to complain to the Commission and then to the Court of Appeals." *Thunder Basin*, 127 L.Ed.2d at 39 (footnote omitted). We disagree that the Court's holding establishes a bifurcated enforcement scheme whereby the Commission first adjudicates violations, following which the district court decides whether the violations were willful. In *Southmountain Coal Inc.*, the Commission rejected a similar argument. 16 FMSHRC at 505 n.1. We decline to overturn that holding.

III.

Conclusion

For the foregoing reasons, we vacate the February 15 Order Continuing Stay without prejudice to the imposition by the judge, upon request, of a limited stay covering particular proceedings based on the criteria set forth herein, including the commonality of issues and evidence between the civil and criminal matters. The judge should also consider this commonality of evidence when determining the limits of discovery in order to permit civil proceedings to advance without prejudice to criminal matters.

  
Mary Lu Jordan, Chairman

  
Joyce A. Doyle, Commissioner

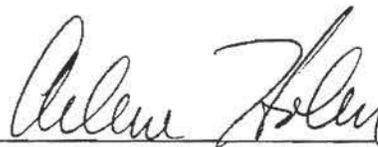
  
Marc Lincoln Marks, Commissioner

Commissioner Holen, dissenting:

I respectfully dissent. I do not agree that the facts in this case establish that Administrative Law Judge T. Todd Hodgdon abused his discretion in granting his Order Continuing Stay of February 15, 1995.

Courts have recognized that the government is entitled to stay civil proceedings pending disposition of a related criminal case. *See Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975). Beginning in June 1994, the judge issued a series of stays of short duration. September 8, 1994 Stay Order at 2 n.1. In July, the Secretary, for the first time, sought a 90-day stay because of an ongoing criminal investigation and the possible interference that Commission proceedings might pose. Motion for a Stay of Civil Proceedings, dated July 29, 1994. The judge, on September 8, issued a stay of 90 days, subject to the operator's showing of unique circumstances in any matter that would lead to consideration to lifting of the stay. September 8 Stay Order at 4 n.4. The judge required the parties to report to him monthly on the status of the criminal proceedings. *Id.* at 5. Following the expiration of the stay in December, the judge, on January 10, 1995, issued a 30-day continuance of the stay. January 10, 1995 Order Continuing Stay and Notice of Prehearing Conference. On February 9, the parties appeared before the judge; the Secretary sought a 90-day stay, based on a request from the U.S. Attorney's office, noting that a complete stay would not be sought at the end of the 90-day period. Tr. 7-10, 37-38 (February 9, 1995 Hearing). I do not conclude that the judge's deliberate approach, issuing two 90-day stays under limited conditions, in response to an overlapping criminal investigation, was abusive.

I agree with the majority that a party seeking a stay bears the burden of showing the need for it. *See slip op.* at 4. I also agree that, in deciding whether to grant a stay, a judge is, in general, required to balance the interests of the parties, *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987), *slip op.* at 5, and should take into account certain factors, which the majority has drawn from legal precedent and has set forth. *See slip op.* at 4 (citations omitted). These factors include the public interest and the efficient use of the Commission's resources. *Id.* In deciding whether to grant a stay in a case such as this, involving potentially related civil and criminal proceedings, a judge must, of course, address specifically the commonality of issues and evidence. *Id.* at 4-5 (citations omitted).



Arlene Holen, Commissioner

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the violations were S&S. 15 FMSHRC 2578 (December 1993) (ALJ). For the reasons that follow, we vacate the judge's decision and remand.

## I.

### Factual and Procedural Background

On December 14, 1992, Darold Gamblin, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Peabody's Martwick Mine, an underground coal mine in Muhlenberg, Kentucky. At the 3 South Panel entries, the inspector observed that the external grounding device to a cathead was not properly connected. 15 FMSHRC at 2578-79. The inspector issued a citation alleging an S&S violation of section 75.701 because he was concerned that, if the insulation of the trailing cable were torn allowing internal parts to contact the casing, the cathead casing could become energized. *Id.* at 2579-80; Tr. 17; Jt. Ex. 1.

Inspector Gamblin also observed two catheads that were attached to cables from continuous miners and connected to a transformer; one was not labeled to identify the equipment whose trailing cable was attached. 15 FMSHRC at 2584. The inspector issued a citation alleging an S&S violation of section 75.601, based on his belief that there was a reasonable likelihood that, if the wrong cathead were connected to the transformer, an injury would result. *Id.* at 2584-85; Jt. Ex. 2.

Peabody conceded both violations but contested the inspector's determination that the violations were S&S. The matter was heard by Judge Amchan.

The judge determined that the only question at issue in evaluating the S&S nature of the violations was whether the Secretary had established a reasonable likelihood of injury resulting from the violations. 15 FMSHRC at 2579, 2585. Attempting to harmonize the test for a "serious" violation under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1988) ("OSHAct"), with the Commission's S&S test, the judge construed *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984) ("*U.S. Steel I*"), as inconsistent with *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981) and *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). *Id.* at 2581-84.

With respect to the violation of section 75.701, the judge determined that, "unless the record indicate[d] that the conditions cited do not pose the hazard to which the standard is directed," injury is reasonably likely in the context of "normal mining conditions" because "sooner or later, at this mine or at another, noncompliance with the standard will result in injury." 15 FMSHRC at 2583. The judge concluded that, because there was no evidence in the record indicating that the cited conditions did not pose the hazards to which the standard was directed, Peabody's violation of section 75.701 was S&S. *Id.*

Applying the same analysis to the violation of section 75.601, the judge found that the violation was S&S "[e]ven if injury [were] likely to occur only once every ten or twenty years." 15 FMSHRC at 2585. The judge also relied on his finding that this violation was factually similar to an S&S violation of section 75.601 in *U.S. Steel Mining Co.*, 6 FMSHRC 1834 (August 1984) ("*U.S. Steel II*"). 15 FMSHRC at 2586.

The Commission directed review sua sponte of the judge's S&S determinations, granted Peabody's petition for review, and allowed amicus curiae participation by twelve organizations.

## II.

### Disposition

Peabody argues that the judge applied an incorrect standard in determining whether its violations of sections 75.701 and 75.601 were S&S and that, in fact, the *Mathies* test had not been modified by *U.S. Steel I*. It states that, in order to prove a violation S&S, the Secretary must prove the existence of a "confluence of factors" necessary for injury to result and that the Secretary failed to do so with respect to its violations. P. Br. at 11-14. Peabody asks the Commission to reverse the judge's S&S determinations or, in the alternative, to remand for application of *Mathies*.<sup>2</sup> The Secretary agrees that the judge's analysis is inconsistent with Commission precedent. He asserts, however, that he met his burden of proving the violations S&S under *Mathies* and that application of *Mathies* by the Commission is appropriate. The Secretary alternatively requests remand for a *Mathies* analysis by the judge. Sec. Br. at 16-17.

The Mine Act sets forth a graduated enforcement scheme, including the designation of violations as S&S (*National Gypsum*, 3 FMSHRC at 828); there is no comparable provision in the less stringent OSHAct. See *Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 894 (5th Cir. 1982). The Commission has determined that a violation is S&S if, based on 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. *National Gypsum*, 3 FMSHRC at 825-26. In *Mathies*, 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.

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<sup>2</sup> The amici filed a joint brief generally supporting Peabody's position.

6 FMSHRC at 3-4. *See also Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

We agree with the parties and the amici that the judge's analysis of whether the violations were S&S was inconsistent with longstanding Commission precedent. The judge erred in looking to the test for a serious violation developed under the OSHAct; that law, unlike the Commission's S&S test, does not require consideration of the likelihood of injury. Under the OSHAct, the Secretary need only prove that an accident could result from a violation and that, if an accident does occur, there would be a substantial probability of serious physical harm; the Secretary need not prove the likelihood of an accident occurring. *East Tex. Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982).

Moreover, the judge misconstrued *U.S. Steel I*. In that case, the Commission, in response to an operator's argument that the seriousness of the violation should be evaluated on the basis of conditions existing at the precise moment of an inspection, recognized that S&S determinations were not limited to conditions existing at the time of citation. 6 FMSHRC at 1574. Rather, the Commission held that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *Id.* The Commission did not suggest, however, that the conditions in other mines or over extended periods were relevant. The judge also erred in concluding that Peabody's violation of section 75.601 was S&S because he could not distinguish the facts of this case from those in *U.S. Steel II*, in which the Commission found a violation of section 75.601 to be S&S.<sup>3</sup> In cases decided under *National Gypsum* and *Mathies*, including *U.S. Steel I*, S&S determinations have been based upon the particular facts surrounding the violation in issue. *E.g., Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988).

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<sup>3</sup> The facts of the two cases are not identical. *U.S. Steel II* involved a "keying system," which was deemed unreliable and which was frequently modified by miners. 6 FMSHRC at 1838.

Our dissenting colleague would affirm the judge's determination that Peabody's violation of section 75.601 was S&S because she finds that substantial evidence supports his decision and because, like the judge, she finds the facts in this case to be similar to those in *U.S. Steel II*. To the extent that she relies on a factual similarity between this case and *U.S. Steel II*, she errs. The Commission's S&S determinations are properly based upon the particular facts of record underlying the violation in issue, not upon facts in other cases.<sup>4</sup>

The judge did not properly apply the Commission's S&S test. Accordingly, we vacate his determinations with respect to the two violations at issue, and remand for application of *Mathies* consistent with Commission precedent. *E.g.*, *Energy West Mining Co.*, 15 FMSHRC 1836, 1839-40 (September 1993).

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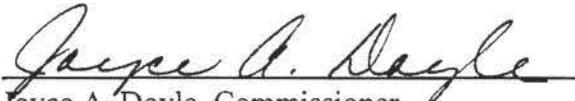
<sup>4</sup> Commissioners Doyle and Holen believe that their dissenting colleague also errs in citing *Texasgulf, Inc.*, 10 FMSHRC at 503-04, and *Michigan Wis. Pipe Line Co. v. F.P.C.*, 520 F.2d 84, 89 (D.C. Cir. 1975), to support her proposition that an S&S determination can rest on the facts of other cases. Slip op. at 8 n.1. The Commission's disposition in *Texasgulf* expressly rested upon the particular facts of record considered under the *Mathies* test. In order to emphasize the factual basis for its determination that the violation at issue *was not* S&S, the Commission compared that result with other cases where it found that violations under factually similar, but not identical, circumstances *were* S&S: *U.S. Steel Mining Co.*, 6 FMSHRC 1866, 1867-69 (August 1984); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1128-31 (August 1985); and *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 677-78 (April 1987). 10 FMSHRC at 503. The Commission's statement in *Texasgulf* that its conclusion was consistent with applicable precedent referred to legal precedent. 10 FMSHRC at 500, 504.

In *Michigan Wis. Pipe Line Co.*, the issue involved application of a pricing "principle" developed in an earlier case. 520 F.2d at 89. The court found that the principle could be applied in subsequent proceedings, *id.*, just as the Commission has applied *Mathies*. Contrary to our dissenting colleague's assertion, the court did not conclude that the agency's decision could be based upon the facts of the earlier case if the cases bore "something more than a modicum of similarity." Slip op. at 8 n.1. Rather, the court found that a prerequisite to the application of the principle was that the case "bear something more than a modicum of similarity to the case from which the principle derives." 520 F.2d at 89. Further, the court criticized the agency for its inappropriate reliance on the earlier case and remanded the matter for analysis of the evidence of record. *Id.* at 90.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand for further analysis consistent with this opinion.

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
Marc Lincoln Marks, Commissioner

Jordan, Chairman, concurring in part and dissenting in part:

I agree with my colleagues that the judge's S&S finding with regard to Peabody's violation of section 75.701 should be vacated and the matter remanded for application of *Mathies*. With regard to Peabody's violation of section 76.601, however, I would affirm the judge's S&S finding.

The judge found that there were two catheads attached to trailing cables from two continuous miners. 15 FMSHRC at 2584. One of the continuous miners had been in the section for "quite a while;" the other machine had been recently rebuilt and was to replace the older equipment. *Id.* at 2585. The catheads plugged the trailing cables into a transformer. *Id.* at 2584. The judge further found that one of the catheads was not marked to indicate the equipment to which its trailing cable was attached. *Id.* The judge accepted that the cathead attached to the trailing cable from the older continuous miner was dirtier than the cathead attached to the rebuilt machine's trailing cable. *Id.* at 2585.

As noted by the judge, the parties' dispute centered around the reasonable likelihood of injury, the third element of the S&S test set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984). 15 FMSHRC at 2585. The MSHA inspector thought that there was a reasonable likelihood that miners would confuse the catheads and energize the wrong piece of equipment, thereby subjecting employees to electric shock or injury from a continuous miner's cutting head. *Id.* In analyzing whether the Secretary had established the third *Mathies* criterion, the judge rejected Peabody's argument that, since one cathead was labeled, miners could rely on a "process of elimination" and therefore would be unlikely to confuse the catheads. *Id.* at 2586. Citing *U.S. Steel Mining Co.*, 6 FMSHRC 1838 n.4 ("*U.S. Steel II*"), the judge concluded that speculation about the future behavior of miners did not negate the Secretary's proof of reasonable likelihood of injury. 15 FMSHRC at 2586.

The judge acknowledged that in *U.S. Steel II*, unlike the present case, the catheads could not be differentiated on the basis of cleanliness. 15 FMSHRC at 2586. However, he declined to distinguish *U.S. Steel II* on that basis, concluding that to do so would require him to "speculate that an employee would in every situation make the logical connection between the appearance of the cathead and its connection to the new or old mining machine." *Id.*

Based on the facts of record, I believe substantial evidence supports the judge's conclusion that the Secretary established that the violation of section 75.601 was reasonably likely to result in injury, and hence that the violation was S&S. I find the judge's conclusion

consistent with the Commission's resolution of the S&S question, based on similar facts, in *U.S. Steel II*.<sup>1</sup> Accordingly, I would affirm rather than remand this issue to the judge.

  
Mary Lu Jordan, Chairman

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<sup>1</sup> Commissioners Doyle and Holen erroneously assert that my views "rest on the facts of other cases." Slip op. at 5 n.4. Like the judge, I rely on the facts of *this* case, and on *precedent* from a prior Commission decision. While S&S determinations should be based on record facts, the Commission also relies on "applicable precedent" in making S&S determinations. *Texasgulf, Inc.*, 10 FMSHRC 498, 503-04 (April 1988); *see also, e.g., Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 678 (April 1987) (citing as precedent *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985)). That the facts of *U.S. Steel II* are not "identical" with those in the present case, slip op. at 4 n.3, is no impediment to reliance on *U.S. Steel II* as precedent here; it is sufficient that the cases bear "something more than a modicum of similarity" to each other. *Michigan Wisconsin Pipe Line Co. v. F.P.C.*, 520 F.2d 84, 89 (D.C. Cir. 1975). I agree with the judge's conclusion that they do.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 26, 1995

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. YORK 94-73-M  
 :  
CONSTRUCTION MATERIALS :  
CORPORATION :

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

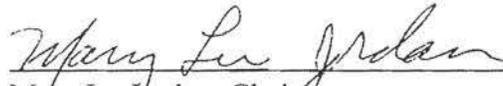
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On January 5, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Construction Materials Corporation ("Construction") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's October 24, 1994, Order to Respondent to Show Cause. The judge assessed civil penalties of \$645.

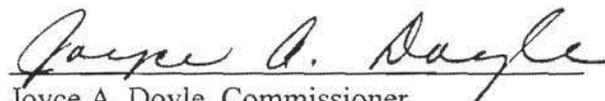
In an April 7, 1995, letter to the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"), received by the Commission on April 17, Construction states that it had responded to MSHA's enforcement actions in two letters addressed to Judge Merlin, dated November 20, 1994, and January 10, 1995. In the November 20 letter, Construction requested reconsideration of the proposed penalty. In the January 10 letter, Construction stated that it had timely responded to the show cause order by its November 20 letter, a copy of which it attached. The Commission received the January 10 letter, and its attachment, on January 17.

The judge's jurisdiction over this case terminated when his default order was issued on January 5, 1995. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Due to clerical oversight, the Commission did not act on the January 10 letter within the statutory period for considering requests for discretionary review. The judge's

default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). On the basis of the present record, we are unable to evaluate the merits of Construction's position. In the interests of justice, we reopen the proceeding, treat Construction's April 7 letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See, e.g., Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (December 1986). We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Joyce A. Doyle, Commissioner

  
\_\_\_\_\_  
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ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 3 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 94-436  
Petitioner : A. C. No. 15-10274-03537  
: :  
v. : Mine No. 1  
MESHACH COAL COMPANY, :  
INCORPORATED, :  
Respondent :

DECISION APPROVING SETTLEMENT  
ORDER TO PAY

Before: Judge Merlin

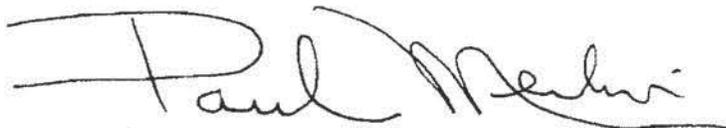
This case is before me pursuant to Commission Order dated December 5, 1994.

On December 7, 1994, I issued an order vacating the default in this case and directing the Solicitor to advise whether there had been a settlement in this matter and if so, to submit the settlement motion. The operator advised in its letter to the Commission seeking relief from the default that a settlement was reached with a representative from MSHA.

The parties have now filed a joint motion to approve settlement for the one violation in this case. A reduction in the penalty from \$2,000 to \$500 is proposed. The citation in this case was issued because the operator failed to take a valid dust sample during a sampling cycle. The basis for the settlement is that the operator is experiencing financial difficulties. In addition, the parties advise that the mine is closed.

I have reviewed the documentation and representations made in this case, and 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 the operator PAY a penalty of \$500 within 30 days of this decision.



Paul Merlin  
Chief Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 4 1995

UNITED STEELWORKERS OF AMERICA ON BEHALF OF LOCAL 5024,	:	COMPENSATION PROCEEDING
	:	
Complainant	:	Docket No. LAKE 94-614-CM
v.	:	White Pine Mine
	:	
COPPER RANGE COMPANY,	:	
Respondent	:	

**SUMMARY DECISION**

Before: Judge Maurer

**STATEMENT OF THE CASE**

This proceeding concerns a complaint filed by the United Steelworkers of America (USWA), Local 5024, against the respondent pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, seeking compensation for its member miners employed at the White Pine Mine who were allegedly idled by a section 103(k) order issued by MSHA Inspector William Carlson at 12:30 p.m., on May 11, 1994. The order, which did not allege that the operator had violated any mandatory safety standards, stated as follows:

A mine fire was detected at 7:05 a.m., EST, in the area of 25/35 beltline (coordinates 23-G, 24-G & 23-H). All personnel have been evacuated from the underground areas in the mine. This order prohibits re-entry into underground areas until all have been checked for mine gases and/or unsafe ground, and other unsafe conditions in the fire area.

The complainant asserts that as a result of this order, the miners on the first shift on May 11, 1994, are entitled to compensation pursuant to the first sentence of section 111 of the Act which states as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift.

Procedurally, this case is presently before me upon cross-motions for summary decision pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. Both parties assure me that there is no genuine issue as to any material fact and that this matter is ripe for summary decision.

### STIPULATIONS

The parties have stipulated to the pertinent facts as follows:

1. At about 7:05 a.m., Security was notified of smoke observed underground in the area of 25 and 35 belt line. An evacuation alarm was immediately sounded by Security for the Northeast Mine.
2. At 7:10 a.m., the evacuation alarm was sounded for the Southwest Mine B Section.
3. At 7:30 a.m., the evacuation alarm was sounded to evacuate all Southwest Mine personnel to the surface. No smoke had been observed in the Southwest section of the mine at that time.
4. At 7:50 a.m., two mine rescue members were dispatched to Southwest Shaft to check for gases.
5. By 8:00 a.m., all personnel had been evacuated and were accounted for. Employees from day shift were either given additional training or were given work to do on the surface.
6. At 8:45 a.m., smoke was observed south of C Section by mine rescue team members.
7. At 8:50 a.m., the Mine Safety and Health Administration ("MSHA") office in Marquette was contacted by telephone and given a report of the information available at that time.
8. At about 11:30 a.m., the Company management made the decision to cease operations until the problem could be corrected. Employees were notified at that time to go home and that they would be notified when they could return to work. All employees received at least four hours of pay pursuant to the Collective Bargaining Agreement for "show-up pay" for May 11, 1994.

9. At 12:30 p.m., on May 11, 1994, MSHA Inspector William Carlson issued a control order pursuant to section 103(k) of the Act. At the time the 103(k) order was issued, all employees had been evacuated from underground, operations suspended, and the employees sent home until further notice. No employees were working in the area affected by the 103(k) order.

### ISSUE

The parties also agree that the only issue to be resolved is whether miners who are voluntarily withdrawn from a working area because of a hazard against which a control order is subsequently written are entitled to pay under section 111 of the Act.

### DISCUSSION, FINDINGS, AND CONCLUSIONS

Both parties rely on Local Union 1261, District 22 UMWA v. Consolidation Coal Co., 11 FMSHRC 1609 (1989), *aff'd sub nom. Local Union 1261 v. FMSHRC*, 917 F.2d 42 (D.C. Cir. 1990). In that case, the primary issue that concerns us here was whether miners are entitled to compensation under the first sentence of section 111 of the Act, ("shift compensation"), when the mine operator has voluntarily closed the mine for safety reasons prior to the issuance of the section 103(k) control order that is later written by MSHA.

As here, once the control order was written, no miner could enter the mine nor could mining activities resume until MSHA modified or terminated the order.

The Commission in Local Union 1261, 11 FMSHRC at 1613-14 held:

The meaning of the first [sentence] of section 111 is clear. If a specified withdrawal order has been issued, "all miners working during the shift when such order was issued who are idled by such order" are entitled to compensation for the remainder of their shift. (Emphasis added). . . . The language is in nowise qualified.

\* \* \* \* \*

Here, the preconditions for entitlement to shift compensation were not met. At the time the order was issued, no miners were working nor had they been since . . . Consol had voluntarily withdrawn all miners in order to guarantee their safety. Therefore, none of those for whom compensation is claimed were "working during the shift when . . . [the] order was issued." . . . We therefore hold that the claimants, not having met these plainly stated prerequisites, were not eligible to be compensated.

The Court of Appeals, on review, held that the Commission's interpretation of the phrase "working during the shift," to mean that miners must be actually working when the control order issues was a reasonable one. Local Union 1261, 917 F.2d at 47.

The Commission, in their decision, further rationalized that:

Apart from the plain wording of the statute, there are also practical considerations. A statute should not be construed in a way that is foreign to common sense or its legislative purpose. Sutherland Statutory Construction §§ 45.09, 45.12 (4th ed. 1985). As discussed, the Mine Act involves a balancing of the interests of mine operators, and miners, with safety being the preeminent concern. Section 2 of the Mine Act specifies at the outset that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner," and section 2(e) adds that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." The Mine Act was not intended to remove from an operator the right to withdraw miners from a mine for safety reasons. While MSHA has the authority to order such withdrawal, it does not have that power exclusively.

\* \* \* \* \*

Thus, apart from the fact that no miners were present in the mine when the MSHA closure order was issued, it is apparent that the safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the Mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here. [Footnote omitted].

The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the

Senate Committee setting forth the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible inhibition of the inspector in the issuance of closure orders." Leg. Hist. at 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners.

#### 11 FMSHRC at 1614-15

It thus would appear that the second section of the Commission's Local Union 1261 case contains the rule of the case as well as the Commission's rationale for so holding. It also appears to be compelling precedent for deciding the instant matter adversely to the complainant.

The USWA, however, relies on Part III of the same case to urge the opposite result. Under Part III, which begins at 11 FMSHRC 1615, the Commission states that they do not disavow earlier precedent which held that:

[A] miner who has been previously withdrawn from a mine can still be "idled" by a subsequently issued withdrawal order in the sense that the miner is barred by the order from returning to work and that miners so idled may be entitled to compensation.

#### 11 FMSHRC at 1615.

But the Commission continued on and also stated that to be entitled to first sentence compensation, miners must also be "working during the shift" when the subject order was issued, and just two pages earlier, the majority had said that meant that miners must actually be working when the order is issued. In the instant case they were not.

The United States Court of Appeals for the D. C. Circuit concluding that the Commission was "less than forthcoming in dealing with [Commission] precedent," pointed out that the Commission's majority had focused on the words "working during the shift" in the first sentence of section 111 and had concluded that these words meant "actually working" when the control order issued, rather than "scheduled to work". Local Union 1261, 917 F.2d at 45.

The court also agreed with the dissenting Commissioners that the majority had departed from the reasoning and result of Peabody Coal Co., 1 FMSHRC 1785 (1979), and had therefore effectively overruled that decision. In the earlier Peabody Coal case, the Commission had expressly rejected the operator's argument that the Mine Act provides first sentence compensation only for miners actually at work when a withdrawal order issues. Local Union 1261, 917 F.2d at 46-47.

In the final analysis, the court noted that the word "working" can indeed mean "on-the-job in the mine," and although they disagreed that the Commission's position was the only permissible interpretation, they did find that "[b]y attributing that meaning to section 111's first prescription, the Commission reasonably maintains that it is advancing the overriding mine safety aim of Congress." Local Union 1261, 917 F.2d at 47.

Accordingly, in my opinion, the stipulated facts of this case, as they relate to first sentence compensation under section 111 of the Mine Act are subject to the controlling precedent of the legal conclusions and the rule of law announced by the majority in Local Union 1261, District 22 UMWA v. Consolidation Coal Company, cited *supra* and affirmed by the D.C. Circuit Court of Appeals. I am bound to follow this clearly applicable Commission precedent.

In view of the foregoing, I conclude and find that the miners are not entitled to shift compensation because of the issuance of the 103(k) order. Accordingly, the respondent's Motion for Summary Decision is **GRANTED**, and the complaint for compensation is **DISMISSED**.



Roy J. Maurer  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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APR 5 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
TANOMA MINING COMPANY, Respondent	:	Docket No. PENN 94-333 A.C. No. 36-06967-03832 Tanoma Mine

**DECISION**

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;  
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for the Respondent.

Before: Judge Koutras

**Statement of the Case**

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking a civil penalty assessment of \$3,000 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.325(b). A hearing was held in Indiana, Pennsylvania, and the parties filed posthearing briefs which I have considered in my adjudication of this matter.

**Issues**

The issues presented in this proceeding are (1) whether the condition or practice cited by the inspector constituted a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial," (3) whether the violation resulted from the respondent's "unwarrantable failure" to comply with the cited standard, and (4) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1, et seq.
3. Mandatory safety standard 30 C.F.R. § 75.325(b).

### Stipulations

The parties stipulated to the following (Exhibit G-8):

1. The Tanoma Mine is owned and operated by the respondent, and it is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. The presiding Administrative Law Judge has jurisdiction over the proceeding pursuant to section 105 of the Act.
3. Section 104(d)(2) "S&S" Order No. 3955721, and its two modifications and termination were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
4. The parties stipulate to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.
5. The alleged violation was abated immediately after issuance of the order.
6. The total annual production of the Tanoma Mine is approximately 600,000 tons of coal, making it a medium-sized mine. The respondent, Tanoma Mining Company, Inc., is considered a small-sized operator.
7. The computer printout (Exhibit G-7), reflecting the respondent's history of violations is an authentic copy and may be admitted as a business record of the mine Safety and Health Administration.
8. Tanoma Mine had a history of 653 assessed violations in the 24-month period from October 12, 1991 to October 12, 1993.
9. The imposition of the proposed civil penalty will have no effect on the respondent's ability to remain in business.

10. There was no intervening clean inspection between Order No. 3955721 and previously issued section 104(d)(1) citations or orders.

11. The check that was part of the permanent stopping line in the first crosscut between L1 and L2 had been taken down by the respondent to facilitate the transportation of coal to the belt feeder.

12. Coal had been mine in L3 during the midnight shift on October 12, 1993 while the check was down.

13. There was not sufficient air movement in the crosscut between L1 and L2 on October 12, 1993 to turn the vanes of the anemometer at the time the MSHA inspector took his reading.

14. There was methane in the amount of 0.1 percent detected in the last open crosscut between L1 and L2 on October 12, 1993.

15. On October 12, 1993, Tanoma Mine was on a 10-day section 103(i) spot inspection program for methane liberation over 500,000 cubic feet per 24-hour period.

#### Discussion

Section 104(d)(2) "S&S" Order No. 3955721, issued at 10:05 a.m., on October 12, 1993, cites an alleged violation of 30 C.F.R. § 75.325(b), and the cited condition or practice is described as follows:

When checked with an approved annometer (sic) the air in the last open crosscut located between L1 and L2 entries could not be measured due to the lack of air. The air in the last open crosscut could not be measured with an annometer (sic) due to the next crosscut outby being open. Evidence in the form of tracks and a discussion with the mine foreman indicate the second crosscut back had been open to accommodate transportation of coal on the previous shift. The section was not producing coal on this shift, and when checked the methane in the last open was 0.1 ch4. This condition was present in the main C, left side section 007. The faces of L1 and L2 entries were in approximately 10 feet.

### Petitioner's Testimony and Evidence

MSHA Inspector Lewis E. Kish testified that he has served in that capacity for 16 years and he described his duties and training, including 8 years of mining experience in private industry (Tr. 17-20). He confirmed that he inspected the mine on October 12, 1993, and issued the violation in question because he found an insufficient amount of air in the last open crosscut in violation of mandatory safety section 75.325(b) (Exhibit G-1, Tr. 21-23). He reviewed a map of the Main C mine area and confirmed that it accurately depicted the development of the section on the day of his inspection (Exhibit G-2; r. 24-25).

Mr. Kish stated that he inspected the faces on the right side of the section and then proceeded to inspect across the faces of the left side and took an air reading in the last open crosscut, and he marked the location between the L1 and L2 entries with a red "X" on the map (Tr. 27). He stated that he used an approved and calibrated hand held anemometer that measures the velocity of air passing through the moveable vanes of the instrument but he obtained no reading because the velocity of air was less than 50 revolutions per minute and the vanes would not turn. He took the measurement at the last cut-through in the line of pillars where permanent stoppings were installed between the intake and return air (Tr. 28).

Mr. Kish stated that he informed foreman Ed Stine, who was with him, that the air movement was not sufficient to turn the anemometer in the last open crosscut, and Mr. Stine stated that he knew there was no air in the last open crosscut because a curtain was down in the next crosscut outby and that this was normal because coal was hauled through the crosscut (Tr. 29).

Mr. Kish stated that he checked for methane at the same location where he made his air test and found one-tenth of one percent (Tr. 30). He then informed Mr. Stine that he would issue an order, and they proceeded to the area where the curtain was down and he marked the location with a black circle on the map (Tr. 30). He observed a check curtain that appeared to have been purposely placed against the left rib and he observed equipment tracks through that crosscut (Tr. 31). He further stated as follows at (Tr. 31-32):

A. Mr. Stine told me that this was a normal procedure for them to run coal through this crosscut, that they had been doing it rather than installing a run through check curtain, which is a curtain installed with slits in it to permit travel of equipment through this area without adversely affecting the ventilation.

Q. Did Mr. Stine indicate to you at all when coal had last been mined or run through there?

A. Yes, he indicated that coal had been run through that shift prior, which would have been on the midnight shift.

Q. The midnight shift of October 12th?

A. Yes.

Mr. Kish stated that the check curtain was reinstalled within 2 to 3 minutes and he took a methane test and found none present, and another check with his anemometer indicated there was sufficient air in excess of 15,000 cfm (Tr. 33). He confirmed that no mining was going on while he was on the section, and that it was a maintenance shift. However, mining would normally again resume on the afternoon second shift (Tr. 34).

Mr. Kish confirmed that he took notes regarding the violation (Exhibit G-3), and that he cited section 75.325(b), because it requires 9,000 cfm of air in the last open crosscut regardless of whether the unit is in production or not. He explained why he believed that his air reading was made in the last open crosscut (Tr. 35-36).

Mr. Kish stated that Mr. Stine did not indicate to him that the location where he checked the air and methane was not in the last open crosscut and the preshift examination book indicated that the preshift examiner made an air reading at the last open crosscut between the L1 and L2 entries, as he did, and recorded 15,120 cfm of air. Since the location of the crosscut was shown as L1 to L2, Mr. Kish assumed that was the correct place to take the air readings (Tr.38).

Mr. Kish stated that he reviewed the preshift and onshift mine examiner reports for October 12, 1993, and the air readings on both reports for the last open crosscut is shown as 15,120 cfm (Exhibits G-5 and G-5). The mine examiner stated that these air readings were taken at crosscuts L1 and L2, and Mr. Kish believed that these air readings were for the last open crosscut "because that's where the last open crosscut is located" and the operator "would have no reason to take an air reading at that location if it was not the last open crosscut" (Tr. 62). He stated that these air readings were taken between 5:00 and 6:00 a.m., and he was of the opinion that the check curtain was down at that time because "once that machine was moved over to the right side, I see no reason why they would have reinstalled it and taken it back down. It doesn't make sense" (Tr. 61-62).

On cross-examination, Mr. Kish referred to the mine map (Exhibit G-2), and stated that for some purposes of the Mine Act, the last open crosscut extends from the R3 entry to the L3 entry, and "that is the line of last open crosscut across, yes" (Tr. 72). For purposes of the definition of "working place area inby the last open crosscut," that entire area would be the last open crosscut (Tr. 72). The cited "last open crosscut" at issue in this case is a

particular location in that area that is given for an air measurement, and on the day the order was issued there were two last open crosscuts for purposes of air measurement in the main C section. The "gist" of the violation is that the last open crosscut on the left side did not have 9,000 cfm of air. In his opinion, the location for the air measurement was the areas between the L1 and L2 entries (Tr. 73).

Mr. Kish stated that if the respondent's use of the check curtain in question to ventilate the main C section was part of its approved ventilation plan there would still be a violation of section 75.325(b) "because a statutory provision cannot be superseded with a plan that will undermine that statutory provision" (Tr. 74). He confirmed that the location of the last open crosscut for air measurement purposes can change when the miner is in the L3 entry, and in that case, the last open crosscut would be between the L2 and L3 entries (Tr. 74).

Mr. Kish confirmed that there are two MMU (mechanized mining units) sections shown on the mine map, and he identified them as the 001 and 007 that coincide with the continuous mining machine. He believed this was the only mine area that had two MMU's. He further stated that other mine sections were ventilated the same as the main C section with a double split of air, but they were continuous haulage sections that loaded on bridge conveyors and did not use shuttle cars (Tr. 77-78).

Mr. Kish stated that he did not know the volume of air passing thru the 6-1/2 x 19 foot cited crosscut area where he took his air reading and he did not check the air direction because he did not have a chemical smoke tester with him. Although he could have checked the air direction by emitting dust from his gloves, he did not do so (Tr. 80). He stated that the L2 entry was a return, and confirmed that the two checks located between the L2 and L3 entries outby the last open cross-cut as shown on the map were in compliance with the ventilation plan (Tr. 82).

Mr. Kish confirmed that there is no requirement that 9,000 cfm's of air be maintained in the entire last open crosscut from R3 to L3, and that the applicable 9,000 cfm pursuant to section 75.325(b), would only be at a specific location in that area (Tr. 89).

On further redirect, Mr. Kish confirmed that regulatory section 75.360(c)(1), states where the location of the last open crosscut is in relation to the taking of an air measurement during the preshift examination. The regulation states that the last open crosscut "is the crosscut in the line pillars containing the permanent stoppings that separate intake air courses and the return air courses." He identified this location as the area marked with an "x" in the yellow area shown on map Exhibit G-2 (Tr. 92).

Mr. Kish testified about alternate methods of ventilating the face areas, and he stated that the air passing through the last open crosscut between L1 and L2 was insufficient, but

he did not know if there was positive air movement (Tr. 93-98). He stated that in the split system of ventilation in use there are two crosscut locations where the air must be measured and where 9,000 cubic feet of air must be maintained (Tr. 99).

On further cross-examination, Mr. Kish identified Exhibit R6, at pgs. 49 and 50, as an MSHA "question and answer" document compiled to clarify and interpret the new November, 1992 ventilation regulations. He stated that the document reflects that the definition of "last open crosscut" for purposes of an air reading was not changed. He confirmed that there was such a definition in the old regulations but did not know where that might have been (Tr. 101-103).

Inspector Kish confirmed that he initially issued the order as a non-"S&S" violation, but modified his finding to "S&S" the following day after having "second thoughts about the circumstances involved." He stated that "in hindsight, I figured that it was S&S, and I also checked with the supervisor to see what his feelings were on it and he agreed with it" (Tr. 40).

Mr. Kish stated that in making his "S&S" determination he considered the fact that the mine was on a 10-day section 103(i) spot inspection cycle for at least 2 years because it liberated 500,000 to a million cubic feet in a 24-hour period, and that production equipment would be passing through the cited area during normal production and he believed this presented an ignition hazard because of the methane accumulation (Tr. 40). He further stated as follows at (Tr. 40-41):

Q. Did you believe that a methane accumulation in the explosive range was reasonably likely?

A. Yes, I did.

Q. Why?

A. Because this air in the last open crosscut, there was a minimal amount of air passing through this area.

\* \* \* \* \*

A. Because of the equipment passing through that area, also.

Q. But my question right now is about the methane accumulation?

A. Okay. The methane accumulation — there was an accumulation of one-tenth of one percent, which was diluted and carried out when we

did re-install the check the next crosscut outby. Therefore, I have to say that an accumulation was possible to continue growing in that area had there not been sufficient ventilation to render a dilutant.

Mr. Kish stated that the mine had a prior methane ignition in 1985. The approximate methane liberation for the C main section at the time of inspection was 18,000, and although 0.1 methane was detected, he believed it was likely that methane would continue to accumulate because "this is a virginal area of the mine, there's nothing mined out around it. So it would be assumable that you would either maintain that or possibly go up in methane" (Tr. 45-46).

Mr. Kish believed that a methane ignition was reasonably likely to occur "if the conditions were left go" because of equipment such as scoops, shuttle cars, roof bolters, and continuous miners normally passed through and operated in the area. The scoops were used as part of the clean-up cycle and when the metal bucket is pressurized against the rock-based mine floor sparks can be created. Other potential ignition sources included the mining machine and shuttle cars used in cleaning up and loading rock, permissibility equipment faults that may occur, and roof sparks generated by the roof bolter bits when drilling into the roof (Tr 47-57). Mr. Kish confirmed that in his experience, he was aware of permissibility problems and violations connected with shuttle cars and scoops (Tr. 55, 58).

Mr. Kish stated that he never examined any of the mining equipment used in the cited area prior to his inspection, but that a week later during an inspection he found permissibility violations on the shuttle car, scoop, and roof bolter. He did not know whether these violations existed during his October 12, 1993, inspection (Tr. 59). He believed that three people were exposed to the cited hazard, and they would likely be the miner operator, helper, and shuttle car operator (Tr. 59-60).

Mr. Kish confirmed that at the time he issued the order he was aware that the mine was on a 103(i) spot inspection cycle and that equipment traveled through to the L1 to L2 areas. When asked if his supervisor told him to modify the order to "S&S" the next day, Mr. Kish responded "not that I'm aware of. I don't recall that" (Tr. 77). He explained his initial non-"S&S" determination as follows at (Tr. 76):

A. Mainly because I wanted to be fair with the company. Basically, I didn't have the time to investigate that — I really didn't know at that time for positively what was really scrambled in my head at that time. If anything, I was more lenient. Like I say, I don't like to wham the company. But then on reviewing it again, it just was too overwhelming for me to let go as a non S&S.

Mr. Kish stated that the explosive range of methane is 5 to 15 percent and that the two MMU's on the cited section were liberating 18,000 cubic feet of methane per 24-hour period (Tr. 48). He confirmed that he cited no equipment permissibility violations on the section at the time of his inspection and he believed that during the course of mining at the L3 face there would not have been any problem with air quantities at the face. The L3 face would have been the face that was mined on October 12, and even if one were to assume that the check curtain was down, there would still be sufficient air to ventilate the L3 working face (Tr. 85).

Mr. Kish did not believe that any mining was taking place on the left side of the section between 5:00 a.m. and 6:00 a.m., or that the air reading at the crosscut between L1 and L2, was over 15,000 cfm's because there was no reason to reinstall or take down the curtain once it was installed, and Mr. Stine told him the curtain was taken down while the area was mined (Tr. 121). Mr. Kish could not state that preshift examiner McGary fabricated the air readings recorded in his report (Tr. 125).

Inspector Kish stated that there were a number of reasons for his unwarrantable failure finding, including previously issued citations for having less than 9,000 cfm of air in a last open crosscut, and foreman Stine's "directness" in telling him that it was "a normal practice" to move the curtain to facilitate coal haulage through the area (Tr. 60). Mr. Kish stated that it was not possible to maintain 9,000 cubic feet of air in the last open crosscut when the air is short cutting through the outby crosscut (Tr. 61).

Mr. Kish confirmed that he was aware of the previously issued citations of section 75.325(b) at the time he issued his order "mainly through conversations with our inspectors out in the field offices and overhearing them talk about them" (Tr. 65). He reviewed MSHA's records for copies of the prior citations after he issued the order (Exhibit G-6).

Mr. Kish confirmed that foreman Stine did not hesitate or in any way try to cover up the fact that the curtain was removed while mining, and that he indicated that this was normal loading procedure on the left side (Tr. 86). Mr. Kish stated that the prior citations were "a large factor" in his unwarrantable failure determination, as well as his belief that Mr. Stine should have been aware that 9,000 cfm's of air was required in the last open crosscut (Tr. 87). Mr. Kish confirmed that his belief in this regard was based on the assumption that the L1 to L2 area was the last open crosscut (Tr. 87). He believed that one prior citation not included among those in Exhibit G-6, was issued on the main C section. He further stated that there is no prohibition against simultaneous preshift and onshift examinations (Tr. 90). He subsequently confirmed that prior Citation No. 3955590, for only 5,832 cfm of air thru the last open crosscut between the belt and track entry was issued on the left side of the C main section, but was subsequently modified to reflect it was issued on the right side (Exhibit G-6; Tr. 100).

In response to bench questions, Mr. Kish stated that based on the 15,120 and 14,320, air readings recorded in the preshift report and examination book the ventilation curtain in question would have had to been up. He confirmed that foreman Stine told him that it was a practice to take the curtain down, and although this purported admission is not recorded in his notes, he reiterated that Mr. Stine stated that it was a practice to take the curtain down to allow the shuttle car to haul through the crosscut (Tr. 109-110).

### Respondent's Testimony and Evidence

Walter McGary testified that he has 20 years of mining experience and has served as a supervisor at the mine for the past 10 years and holds mine examiner and assistant mine examiner's papers. He was the section foreman on the main C section on the third shift from 11:00 a.m., October 11, 1993, to 7:00 a.m., October 12, 1993. He confirmed that the section map (Exhibit G-2), represents the section as he remembered it at that time (Tr. 127).

Mr. McGary explained the mining that was taking place on October 12. After completing mining on L3 left side, the shuttle cars moved to the right side and the roof bolter moved to the left side to bolt the L3 area, and the crew had problems "getting the machines squared around." He returned to the right side to check on a rock that had rolled out of the rib and hit one of the men. While he was being transported out, the roof bolters from the left side informed him that the bolter was stuck and could not be moved. The check curtain was taken down to allow a shuttle car to go in and pull out the bolter, but the shuttle car operator forgot to put the curtain back up, and by the time the bolter was taken out of the area "it was quitting time and we man tripped out" (Tr. 128-130).

Mr. McGary confirmed that the check curtain was down when the L3 entry was being mined, and he stated as follows at (Tr. 131):

Q. And why did you mine with that check out?

A. In order to run two shuttle cars, we run one in the top side and one on the bottom side and we took it down. Once we were done mining, we come back out and we put that check back up to take care of our areas.

Q. Are you permitted to mine in that fashion?

A. I never thought any other way. I was always mining that way. I've mined that way with other Federal inspectors in there with me and there was nothing said about it.

Q. The same way you would be mining on the L3 entry on that particular day?

A. The same way I was mining on the left side, yes.

Mr. McGary stated that the production report for October 12, reflects that he was loading coal in L3 from 2:05 to 3:30 a.m. He left the section at 6:30 a.m., and no one was there when he left. Mr. Stine and Mr. Kish were never in the section during his shift (Exhibit R-2; Tr. 133).

Mr. McGary stated that his preshift report for October 12, 1993, reflects that he measured 15,120 cfm of air "on my last open crosscut which was taken between L1 and L2" (Exhibit R-3, Tr. 134). He took the reading between 5:00 and 6:00 with an anemometer and "the check was up down below" because it is always put back up when mining is finished and when mining and the equipment moved from the left side to the right side, the check curtain goes back up again (Tr. 134). He found no methane at the faces or at the last open crosscut (Tr. 135).

On cross-examination, Mr. McGary explained the location of the bottom and top crosscut routes, and he stated that the top crosscut route from L2 to L1 on map Exhibit G-2, passes through the crosscut where the curtain was down (Tr. 138). He stated that shuttle car operator Andy Scott put the check curtain back up at 3:30 a.m. when the L3 mining was completed and he knew this because his air reading in the last open crosscut showed 15,120 cfm of air. He did not personally see Mr. Scott put the curtain up, but he would not have obtained the air reading if it were down. He confirmed that except for taking the curtain down while mining is taking place, it always remains up so that adequate air readings may be taken in the last open crosscut, L1 to L2 (Tr. 139-140).

Mr. McGary reiterated why the curtain was taken down during his shift, and he explained the route of travel for the shuttle car that went to the L3 area to pull out the roof bolter (Tr. 140-144).

Mr. McGary stated that when he took his air reading at crosscut L1 to L2, as recorded in his preshift report, (Exhibit G-4), he considered that location to be the last open crosscut, and he agreed that 9,000 cfm of air is required to be maintained in the last open crosscut (Tr. 145). He denied that he may have taken his air reading in the crosscut between L2 and L3 because there was equipment in that area (Tr. 145-147).

Mr. McGary stated that he only learned that the violation was a (d)(2) order "a couple of weeks ago," and that the only discussion he had with Mr. Kish was after the violation was issued when he told him that "I didn't think that I did anything wrong." He further stated as follows at (Tr. 148-149):

Q. Do you recall telling Mr. Kish that the mine was going to install run through checks on the section now?

A. No. I told Mr. Kish that the way we run that is so we wouldn't have to operate with run through checks. But after that violation we had to use run through checks or else not run through it after that. But prior to that, we didn't have to use run through checks.

Q. You never brought to Mr. Kish's attention the allegations that the shuttle car operator had put the check back up and then taken it back down; did you?

A. I don't recall. I don't know if I did or I didn't. I honestly couldn't. But I'm telling you that I did so what — would that have any bearing on Mr. Kish?

Q. Thank you, sir. You've answered my question. Thank you.

Mr. McGary stated that shuttle car operator Scott never indicated to him that after the check curtain had been reinstalled he took it down again. He stated that Mr. Scott "told me on the way going out that he forgot to put the check back up" (Tr. 150).

When asked in response to a further question by the petitioner's counsel if he ever informed foreman Stine or anyone else that Mr. Scott forgot to put the check curtain back up, Mr. McGary stated as follows at (Tr. 159):

A. No, I did not. There was so much confusion outside with him being hurt and I was talking to the State inspector at the time and he asking me questions. I never got around to him.

Thomas Nalisnick testified that he has been employed by the respondent for 12 years and has served as its chief mining engineer since 1988. His duties include the submission of ventilation and roof control plans, and the drawing of mine maps and projections. He holds a B.S. degree in mining engineering and is a professional engineer. He is personally involved with the submission of mine plans to MSHA and deals directly with the District Two office in connection with the development and submission of ventilation plans (Tr. 159-161).

Mr. Nalisnick identified Exhibit R-4 as a typical face print that "roughly" shows the mining method used on the main C section on October 12, 1993, and he confirmed that this was part of the approved plan in effect that day (Tr. 163). He believed that the mining of the L3 entry, with the check curtain down one crosscut outby the last open crosscut

between the L1 and L2 entries presented no problem and that the plan permitted mining and ventilating in that fashion (Tr. 163). He agreed that not all of the 15,000 cfm of air would travel up the L2 entry, through the crosscut L2 to L3, and to the working face, and he explained the air direction and mining method (Tr. 164-166). He stated that the mining method was safer because it eliminates the "run through" check curtains while still diluting gases.

Mr. Nalisnick identified Exhibit R-5, as a letter dated December 13, 1993, to him from MSHA District Manager Joseph J. Garcia relating to ventilation drawing Exhibit R-4 (Tr. 167). Mr. Nalisnick stated that he spoke with MSHA's district ventilation representative Zilko on December 8, 1993, and he explained as follows at (Tr. 167-168).

A. Actually, I talked to Mr. Zilko on December 8th. We had our first conversation. He called me up and he was told that we had to reevaluate our main C face ventilation with these check curtains and that. And we discussed it and we both agreed that the best way is the way we have it worded now since the main ventilation is more not typical or there's more variables in the main ventilation. You want to have some flexibility in moving the canvases. You just can't make a plan and say, these canvasses will be right here. It's not practical and I think it's —.

Mr. Nalisnick believed that the mining conducted on the midnight shift on October 12, and the ventilation method used at that time, was in compliance with the ventilation plan and regulations and that the section was being ventilated (Tr. 186).

On cross-examination, Mr. Nalisnick stated that the L2 location on map Exhibit R-1 is a projected return air course and that the designated stoppings are for the purpose of separating the intake from the return. He confirmed that it was necessary to take the check curtain down across the crosscut between L1 and L2 so that a shuttle car would not have to go through a run-through check. He confirmed that the purpose of the typical face ventilation print, Exhibit R-4, is to minimize the need for run-through checks, but he acknowledged that under the type of mining in question there was no need for run-through checks (Tr. 190-192).

Mr. Nalisnick confirmed that L1 and L2 are working places, and that the ventilation method used on the section at the time of the inspection was the safest way of doing it (Tr. 193). Mr. Nalisnick stated as follows with respect to the December 13, 1993, letter from Mr. Garcia (Exhibit R-5; Tr. 194-195):

Q. Looking at the letter that you received on the 13th of December, I point you to the third paragraph. It's a one-sentence paragraph. Would you read that sentence aloud, please?

A. The location of the stopping line is used to determine the quantity of air in the last open crosscut. Reference 30 C.F.R. §§ 75.325(b) and 75.360(c)(1).

Q. And do you happen to know what these two sections of the regulations are, sir?

A. 75.325(b) I know for sure and 360(c)(1) I'm not quite positive on that.

Q. Would it surprise you if I told you that the 75.325(c) points out the need for maintaining — or 325(b), excuse me, points out the need for maintaining 9,000 cfm in the last open crosscut and the 75.360(c)(1) designates where the last open crosscut is and that, in fact, on that map there under 75.360(c)(1) it is between L1 and L2?

A. If you're going by the definition of stopping lines, I would assume that's where the law states its at.

### Petitioner's Arguments

The petitioner argues that the cited section 75.325(b), requires at least 9,000 cubic feet of air per minute at the last open crosscut in any pair or set of developing entries, and that the term "last open crosscut," for purposes of air readings is defined by sections 75.360(c)(1) and 75.362(c)(1), as "the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses."

The petitioner asserts that the location where Inspector Kish took his air reading between the L1 and L2 entries was the last open crosscut and proper location for determining compliance with section 75.325(b). In further support of its argument, the petitioner points out that the respondent's preshift and onshift examination books showed that air readings were taken at that same location by section foreman McGary, that Mr. McGary acknowledged that the last open crosscut between the L1 and L2 entries was the location where 9,000 cubic feet of air per minute was required, and that mine foreman Stine, who was with Mr. Kish during his inspection, never indicated that the area between the L1 and L2 entries was not the prior location for taking an air reading.

## Respondent's Arguments

The respondent argues that the phrase "last open crosscut" has several meanings, and for permissibility purposes, the entire width of the section from the R-3 entry to the L3 entry could be considered the last open crosscut for purposes of defining a working place area in by the last open crosscut. In the instant case, the respondent asserts that it is undisputed that the "last open crosscut" for purposes of taking an air reading pursuant to section 75.325(b), is a point within that line of crosscuts, and that the critical issue is the location of that point in the Main C left side at the time of the inspection on October 12, 1993.

The respondent takes the position that the L1 to L2 crosscut area identified and cited by the inspector is not necessarily the last open crosscut, and that for purposes of an air measurement pursuant to section 75.325(b), the L2 to L3 area can also be the last open crosscut. In support of this argument, the respondent relies on the inspector's acknowledgment that it was possible for the last open crosscut location to change to the area between L2 and L3 when the mining machine is in L3, and that the stopping line as shown in Exhibit G-2, does not always separate the intake air courses from the return air courses.

The respondent argues that Inspector Kish failed to consider the following language in the November 9, 1992, Ventilation Questions and Answers, published by MSHA to interpret section 75.325 (Exhibit R-6): "Section 75.325(b) does not require that previously accepted development systems be abandoned, does not require new or additional ventilation controls, and does not require additional or duplicative locations where 9,000 cfm must be maintained."

The respondent argues that this language clearly grand-fathers all existing, approved ventilation plans that were in effect in August of 1992, when section 75.325, became effective, and that it had a plan provision that became a part of its 1982 plan that was updated in 1989 and is part of its currently approved plan. That provision, which depicts the mining system in place in the Main C section on October 12, 1993, and shows checks directing air to the working faces, states as follows (Exhibit R-4): "The location of these checks may vary, so as to provide positive ventilation to all working places and minimize the need for run through checks, depending on the place being mined."

The respondent maintains that it has always construed this plan provision to permit it to take down the check curtain that was taken down while mining the L3 entry, and that this was obviously the opinion of many other MSHA inspectors who have observed the

section foreman ventilate in this manner while mining the Main C section, and never indicated that taking the curtain down to eliminate the use of a run through check was a violation of the plan or section 75.325(b).

The respondent states that as a result of the order issued in this case, the aforementioned ventilation plan provision and mining procedure was revisited by its Chief Engineer Nalisnick and MSHA district office ventilation representative Zilko, and the plan provision was not changed and is still a part of its approved plan.

The respondent points out that even though foreman Stine and McGary readily admitted that the L3 entry would have been mined with the check removed, the respondent was not cited for violating its plan because taking down the check while mining is the L3 entry was not a plan violation. The respondent further points out that the undisputed result of removing the check is that the majority of the air would move over one crosscut and travel through the L2 to L3 crosscut rather than the L1 to L2 crosscut, and if that crosscut remained the last open crosscut for purposes of an air measurement pursuant to section 75.325(b), it would never be in compliance while mining the L3 entry. The respondent concludes that the proper location for the last open crosscut air reading pursuant to section 75.325(b), while the check is removed, is the L2 to L3 crosscut, and it is undisputed that it had well over the required 9,000 cfm of air at that location.

Relying on the inspector's agreement that the L2 to L3 crosscut can be the last open crosscut, and that the location of the last open crosscut for taking an air reading can change, the respondent argues that if the check is up, the proper air reading location is the L1 to L2 crosscut, and if the check is down, the proper air reading location is the L2 to L3 crosscut. The respondent concedes that its ventilation plan does not permit less than 9,000 cfm in the last open crosscut. However, it believes that its plan does permit the location for an air reading to move, and that MSHA recognized this fact in its previously cited ventilation "questions and answers."

The respondent concludes that since the L2 to L3 area was the last open crosscut while the check curtain was down, and that it had more than the required 9,000 cfm of air, the petitioner has failed to prove a violation of section 75.325(b).

### Findings and Conclusions

#### Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.325(b), which provides as follows:

§ 75.325 Air quantity.

\* \* \* \* \*

(b) In bituminous and lignite mines, the quantity of air reaching the last open crosscut of each set of entries or rooms on each working section and the quantity of air reaching the intake end of a pillar line shall be at least 9,000 cubic feet per minute unless a greater quantity is required to be specified in the approved ventilation plan. This minimum also applies to sections which are not operating but are capable of producing coal by simply energizing the equipment on the section.

In Secretary of Labor v. Peabody Coal Company, 11 FMSHRC 4, (1989), the Commission stated in regard to the term "last open crosscut" that:

Although 'last open crosscut' is not defined in the Mine Act or the Secretary's regulations, the Act and regulations contain repeated references to the term. [Footnote reference omitted.] As noted, a 'crosscut' is a passageway or opening driven across entries for ventilation and haulage purposes. In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine. [Footnote reference omitted.] The last open crosscut "is an area rather than a point or line . . . ." Henry Clay Mining Co., 3 IBMA 360, 361 (1974).

Sections 75.360(c)(1), and 75.362(c)(1) covering preshift and onshift examinations, requires the persons conducting the examination to determine the volume of air at the following areas if anyone is scheduled to work in the areas during the oncoming shift:

(1) In the last open crosscut of each set of entries or rooms on each working section . . . . The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

The evidence establishes that Inspector Kish arrived at the Main C section at approximately 9:00 a.m., on October 12, 1993, and accompanied by mine foreman Edward Stine, started his inspection in the right side, taking air readings between the R2 and R3 entries, and then proceeding to the left side where he continued across the faces until he reached a location that he believed was the last open crosscut between the L1 and L2 entries. He marked the location with a red "X" on a mine sketch of the area (Exhibit T-2), and his inspection notes reflect that he reached that location at 10:05 a.m. (Exhibit G-3).

After reaching the cited crosscut location, Mr. Kish tested for methane with his hand-held methane detector and found 0.1 percent methane. He then took an air reading with an anemometer at that same location and could not get a reading because the anemometer vanes would not turn. Since the anemometer was calibrated to measure a minimum of 50 cubic feet of air per minute, Mr. Kish concluded that the air current was less than that. His inspection notes state that "vanes in anemometer will not turn. No air movement." Under these circumstances, Mr. Kish cited a violation of section 75.325(b), which requires that a minimum of 9,000 cubic feet of air per minute be maintained at the last open crosscut of each set of entries or rooms on each working section and the intake end of a pillar.

Mr. Kish concluded that the cited location was the last open crosscut as described by the regulation because it was the last cut through in the line of pillars where permanent stoppings were installed between the intake and return air (Tr. 28, 35-36). He also relied on the preshift and onshift examination records of examiner Walt McGary who recorded air readings at the L1 and L2 crosscut, and he confirmed that mine foreman Stine did not deny that the cited location was in fact the last open crosscut (Exhibits G-4, G-5; Tr. 36-37). Mr. Kish further confirmed that preshift and onshift air readings are required to be taken at the last open crosscut, and since Mr. McGary noted his readings at the L1 and L2 crosscut, he (Kish) assumed that this was the correct location to take the required air reading (Tr. 38).

Mine foreman Stine did not testify in this case. Mine examiner Walter McGary, who was the third shift section foreman on October 12, 1993, agreed that the mine map sketch (Exhibit G-2), was an accurate representation of the section on that day. He also confirmed his air reading at the "last open crosscut which was taken between L1 and L2" (Tr. 134). He further referred to that location at L1 to L2 as the "last open crosscut" (Tr. 139), and agreed that when he made his air reading he considered that location to be the last open crosscut and that 9,000 cubic feet of air per minute was required at that location (Tr. 144-145).

Respondent's chief mining engineer Thomas Nalisnick confirmed that locations L1 and L2 were working places, and he "assumed" that the cited location between L1 and L2 was the last open crosscut pursuant to section 75.360(c)(1), where 9,000 cubic feet of air per minute must be maintained pursuant to the cited section 75.325(b) (Tr. 194-195).

After careful review and consideration of all of the credible evidence and testimony in this case, including the arguments advanced by the parties in support of their respective positions, I conclude that the petitioner's position is correct and that its credible testimony and evidence supports a violation of section 75.325(b).

As noted earlier, section 75.325(b) requires a mine operator to maintain at least 9,000 cubic feet of air per minute at the last open crosscut of a working section. This minimum amount of air quantity is required even though the section is not operating but is capable of coal production by simply energizing the equipment. In this case, even though the section was not in production at the time of the inspection, it was in a "production-ready" mode within the language of the regulation that clearly applies in this case.

Having viewed Inspector Kish in the course of his testimony, and considering his 16 years of inspector experience and 8 years of experience in the private coal mining sector, including employment as a state certified mine examiner and assistant mine foreman, I find him to be a credible witness with respect to the interpretation and application of the requirements found in section 75.325(b).

It appears to be undisputed in this case that the lack of perceptible air movement at the cited crosscut location was the result of a ventilation curtain located outby being taken down to allow for shuttle cars to move through the crosscut. The curtain was not re-installed at the end of the production shift, but the air was immediately restored by re-hanging the curtain to abate the violation on the ensuing maintenance shift.

The critical issue here is whether or not Inspector Kish took his supporting air reading at the proper crosscut location where 9,000 cfm of air was required to be maintained. For compliance purposes pursuant to section 75.325(b), the definition of the "last open crosscut" location for air readings by the preshift and onshift mine examiners to insure at least 9,000 cfm of air at that location is found in sections 75.360(c)(1) and 75.362(c)(1), which define the term "last open crosscut" as "the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses."

Inspector Kish was most specific in pin-pointing and defining the location of the "last open crosscut" area where he took his air reading and where he believed 9,000 cfm of air was required to be maintained in order to comply with section 75.325(b). I find his testimony to be credible with respect to the line of stoppings between the pillars located between the L-1 and L-2 entries on the left side of the section separating the intake and return air courses, and I conclude that his explanations are in accord with the aforementioned regulatory definition of "last open crosscut" for purposes of compliance with section 75.325(b).

I also find support for Mr. Kish's determination in the testimony of mine examiner McGary, including his examination reports, which support Mr. Kish's location of the L1 and L2 crosscut location, and Mr. Kish's un rebutted testimony that foreman Stine did not object or voice any difference of opinion with respect to the proper place for taking an

air reading. I further find no credible or probative testimony by respondent's engineer Nalisnick that persuades me that Inspector Kish was incorrect in his determination of the critical "last open crosscut" issue in this case.

The respondent's reliance on its ventilation plan as a defense to the violation is rejected. I also reject its "estoppel" theory that numerous MSHA inspectors approved of its method of mining which resulted in the violation in this case. I have, however, considered these arguments in my findings and conclusions regarding the inspector's "unwarrantable failure" finding.

I conclude and find that the evidence adduced by the petitioner in this case supports a violation of section 75.325(b), and the inspector's finding and citation in this regard **IS AFFIRMED**.

#### Significant and Substantial Violation

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

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to be 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 Co., 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). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations.

Inspector Kish initially determined that it was unlikely that the violation would result in an injury or illness, or any lost workdays, and he concluded that the violation was non-"S&S." However, "in hindsight" and after having "second thoughts about the circumstances involved," he modified his finding to "S&S" the next day after consulting with his supervisor who agreed with his re-evaluation.

In making his revised "S&S" determination, Mr. Kish stated that he considered the fact that the mine was on a 10-day 103(i) spot inspection cycle because of methane liberation, and that the equipment passing through the cited area presented an ignition hazard because of methane accumulation. He admitted that he was aware of these facts when he made his initial non-"S&S" finding, and denied that his supervisor ordered him to modify his finding to "S&S." He commented that he was trying to be fair with the respondent, but did not have time to investigate "what was really scrambled in my head at that time." After reflection, he concluded that "it was too overwhelming for me to let go as a non-"S&S."

Confirming the fact that he detected only 0.1 percent methane at the cited crosscut, and that the main C section was liberating an estimated 18,000 cubic feet of methane at the time of his inspection, Mr. Kish pointed out that the methane he detected was diluted and carried out after the check curtain in question was re-installed.

Mr. Kish expressed concern that with the check curtain down during the resumption of mining, there would be insufficient ventilation at the cited crosscut areas to dilute any accumulated methane. Since that location was in a virgin coal area, with little mining around it, he believed that in the normal course of mining, methane would continue to accumulate in the absence of ventilation, and that a methane ignition was reasonably likely because of the potential ignition sources from the scoop, bolter and continuous miner that would be operating in the cited area once normal mining operations were continued. He

believed that an equipment permissibility problem or sparks from the scoop bucket striking the mine floor, or from the roof bolter drilling into the roof, could spark a methane ignition, and that the scoop, miner, and roof bolter operators would be at risk and exposed to a methane explosion hazard.

The petitioner argues that a violation of section 75.325(b) has been established, and that the safety hazard contributed to was a methane accumulation and ignition, and that a methane accumulation in an active working place where potential ignition sources exist present a "measure of danger" to the safety of miners.

The petitioner asserts that there was a reasonable likelihood that methane would have accumulated and become ignited had the condition continued to exist. Conceding that the methane level detected by the inspector was clearly not yet in the explosive range, the petitioner finds it significant that methane was detected in measurable amounts, even though no mining was taking place, and there was no measurable amount of air going through the cited area to dilute the methane which was beginning to accumulate.

The petitioner further points out that the mine was on a 10-day section 103(i) spot inspection cycle because of high methane production levels. The petitioner argues that methane is unpredictable and can be encountered at any time, and that this concerned the inspector because the main C section was "virgin" mining territory where methane can be more unpredictable and more likely. Under the circumstances, the petitioner concludes that continued liberation and accumulation of methane was reasonably likely, and that the respondent's chief engineer, Nalisnick, confirmed the inspector's concerns in this regard (Tr. 192-193).

The petitioner asserts that a continuous miner, roof bolter, shuttle car, and scoop were on the left side of the section, and were the most likely potential ignition sources working or traveling through the face areas because such equipment "can be faulty through defects or problems with permissibility." The petitioner suggests that sparks generated by hot bits of the ripper type mining machine would have ignited any explosive amounts of methane accumulations, particularly in an area where a large rock had fallen and needed to be broken up and removed before further mining could be done at the mouth of the L2 to L3 entries.

The petitioner further asserts that the roof bolting machine also presented a potential ignition source while drilling and it points out that it was located in the last open crosscut between the L2 and L3 entries when the violation was issued and was at the face of the L3 entry at the end of the last shift.

The petitioner believes that the shuttle cars presented potential ignition sources in the event of trailing cable defects and that the scoop buckets which cleaned up the floors could create sparks which would ignite any methane. The petitioner believes that all of the mining equipment on the section could have caused an ignition through a permissibility problem, and states that the inspector had observed permissibility defects in his past experience. Although the inspector did not examine the equipment in question when he issued the violation, he did so at a later time and found permissibility violations on the roof bolter, scoop and a shuttle car.

The petitioner concludes that in the event of a methane ignition, it was reasonably likely that there would have been very serious injuries to the miners on the section resulting from an explosion or fire. Given the unpredictable and constant threat of methane and the fact that there were potential ignition sources in the area, the petitioner further concludes that the likelihood of a methane ignition was reasonable on the day of the inspection, and that in the event of an explosion, serious injuries would have resulted.

The respondent points out that the inspector made an initial finding of non-"S&S," but modified the order to "S&S" the next day after consulting his supervisor. The respondent suggests that the inspector was told by his supervisor to modify the order to "S&S," even though the supervisor had no opportunity to observe and evaluate the conditions. Further, the respondent points out that the facts relied on by the inspector to justify his modification of the order to "S&S" were known to him when he made his initial non-"S&S" finding.

The respondent asserts that there is no evidence that a reasonably serious injury was reasonably likely to occur during the course of normal mining operations. In support of this conclusion, the respondent argues that only 0.1 percent methane was detected in the cited crosscut, which was well below the combustible range of 5 to 15 percent, and that no equipment was operating in the area at that time. The respondent concludes that there was no possibility of methane being ignited by equipment, and that in the context of continued mining operations, there was no reasonable likelihood of methane accumulating to explosive levels and being ignited by equipment.

The respondent points out that the L2 to L3 area was not an area of concern, and that there was sufficient air volume and no detectable methane in that area. The respondent asserts that even though the inspector's anemometer vanes would not turn when he measured the cited crosscut, he did not deny the existence of air movement and chief engineer Nalisnick believed that even with the check curtain down, crosscut L2 to L3 would have more than the minimum amount of air, and the other areas would receive enough air to dilute any methane (Tr. 185-186).

The respondent maintains that the only requirement for air volume in the cited crosscut area would be the amount sufficient to dilute and render harmless any liberated methane, and concludes that the 0.1 percent found by the inspector is ample evidence of this.

The respondent asserts that under normal mining conditions, the check curtain is replaced when mining is completed in the L3 entry, and that this results in the majority of the air being directed again through the L1 to L2 crosscut and results in undetectable levels of methane. The respondent suggests that the inspector observed "a worst case scenario" because the check curtain was left down for as much as five hours after the shuttle car operator forgot to replace it after it was taken down to facilitate the removal of an inoperative roof bolter. Even though the check curtain remained down much longer than normal during mining, the respondent asserts that methane had not accumulated to any levels even approaching explosive ranges, and the facts show that methane was being diluted and carried away, rather than accumulating.

The respondent argues that the inspector's assertion that the mine liberates between 500,000 and one-million cfm of methane in a 24-hour period does not support his S&S finding because the cited main C section only liberated 18,000 cfm in a 24-hour period (Tr. 45), and liberates very little methane as compared to the overall mine.

The respondent believes that the inspector's permissibility violation concerns are based on pure speculation, and it points out that no permissibility violations were cited, and that in the course of continued mining operations, permissibility checks are made on a weekly basis. Further, the respondent states that there is no evidence of any methane ignitions originating at the continuous miner or at any place because of a scoop bucket spark, and it views these events as speculative.

After careful review and consideration of all of the evidence adduced in this case, including the arguments advanced by the parties, I conclude that the petitioner has the better part of the argument and has established by a preponderance of the credible evidence that the violation was significant and substantial (S&S).

I have concluded that a violation of section 75.325(b) has been established. I further conclude and find that the failure by the respondent to maintain the required air ventilation at the cited crosscut location would reasonably likely result in a continued build-up and accumulation of methane were mining to continue on the ensuing shift, and that this condition presented a discrete hazard of a methane ignition, fire or explosion, and exposed at least three miners who would be working at the cited location to these hazards.

Although it is true that the methane level of 0.1 percent detected by the inspector at the cited crosscut was well below the explosive range, I find credible and unrebutted his testimony that the area was a virgin coal area where methane emissions are unpredictable. Without adequate ventilation to remove and/or dilute such methane, and in the presence of potential ignition sources, such as scoops, roof bolters and continuous mining machines operating during the normal mining cycle, I conclude and find it was reasonably likely that a methane ignition, fire, and possibly an explosion, would occur. This is particularly true in this case where it is unrebutted that the respondent routinely took down the check curtain and someone forgot to re-install it before leaving the area at the end of the shift. Since the curtain was left down between shifts, it is just as likely as not that it may not be re-installed before the oncoming shift resumed production, and any accumulation of methane would still be present and would present a potentially serious ignition and explosion hazard.

The respondent's reliance on the fact that the L2 to L3 area was not a problem, and its suggestion that some of the air at that location would somehow find its way to the cited crosscut area and provide adequate ventilation to sweep away any methane from that area is rejected as speculative and unsubstantiated. I also reject the respondent's suggestion that the 0.1 percent methane found by the inspector when he issued the violation proves that there was sufficient air to dilute methane and that the air that was present complied with the requirements of section 75.325(b). It is undisputed that the methane reading by the inspector was taken when no mining was taking place, and I do not find his concern that the lack of the minimum required ventilation would allow the methane to continue to accumulate unabated to be unreasonable.

I further conclude and find that if a methane ignition were to occur and result in a fire or explosion, it would be reasonably likely that the miners working in or around the cited crosscut location would suffer injuries of a reasonably serious nature, including fatal injuries, depending on the severity of those events. Under all of the aforementioned circumstances, I conclude and find that the violation in question was significant and substantial (S&S), and the inspector's finding in this regard **IS AFFIRMED**.

#### Unwarrantable Failure Violation

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

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting

such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

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

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

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

We first determine the ordinary meaning of the phrase 'unwarrantable failure.' 'Unwarrantable' is defined as 'not justifiable' or 'inexcusable.' 'Failure' is defined as 'neglect or an assigned, 'expected, or appropriate action.' Webster's Third New International Dictionary (Unabridged), 2514, 814 (1971) ('Webster's'). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by 'inadvertence,' 'thoughtless,' and 'inattention.' Black's Law Dictionary, 930-11 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. \*\*\*

Although Inspector Kish alluded to "a number of reasons" in support of his unwarrantable failure finding, he admitted that the prior citations were "a large factor" in his determination. He also relied on his belief that foreman Stine should have been aware that 9,000 cfm of air was required in the last open crosscut, and Mr. Stine's candid admission that check curtains are taken down as a normal and routine practice to permit the passage of equipment.

With regard to Mr. Kish's belief that foreman Stine was aware of the requirement for 9,000 cfm of air at the last open crosscut, Mr. Kish qualified his testimony when he stated that his belief was based on the assumption that the L1 and L2 area was in fact the last open crosscut.

With regard to the prior citations relied on by Mr. Kish, he admitted that at the time he issued the order, he had no personal knowledge that they had in fact been issued and was aware of them only through overhearing conversations by other field office inspectors. More importantly, he admitted that he found records of these citations after he issued the order in this case. Further, although Mr. Kish alluded to another prior citation that was issued on the main C section, that citation was not produced and it is not in evidence in this case. Mr. Kish also confirmed that one of the prior citations issued on the left side of the C main section was later modified to cite the right side.

Although the issuance of prior violations of section 75.325(b) may be a relevant factor in any "unwarrantable failure" determination, the weight to be ascribed to these prior events must be based on credible, relevant, and probative facts. In the instant case, it is undisputed that the lack of perceptible air movement at the cited crosscut in question and the failure to maintain the required 9,000 cfm of air at the cited crosscut were the direct result of the taking down of the ventilation check curtain one crosscut outby. However, there is no evidence that the failure to maintain 9,000 cfm in connection with the five prior violations relied on by the petitioner to support the inspector's unwarrantable failure finding involved the deliberate removal of any ventilation check curtains. I take note of the fact that all of these prior violations were issued as section 104(a) citations, with "low" negligence findings in two instances and "moderate" negligence findings in three instances. Further, two of the prior citations were terminated after the existing check curtains were tightened, one was terminated after the existing check curtain was repaired, one was terminated after a new curtain was apparently installed, and there is no indication as to what was done to restore the air with respect to the remaining citation.

The record reflects that the five prior citations were issued in February, March, April, and August 1993. I find it rather inconsistent that none of the inspectors who issued these series of section 104(a) citations did not considered the later ones to constitute "aggravated conduct" based on the issuance of the earlier ones.

Mr. Kish conceded that even if the respondent's use of the check curtain in question to ventilate the main C section was part of its approved ventilation plan, the respondent cannot rely on a plan provision that undermines regulatory section 75.325(b). However, since the requirement for maintaining 9,000 cfm of air at the last open crosscut depends on that precise location at any given time, and given the definitional language found in regulatory sections 75.360(c)(1) and 75.362(c)(1), Inspector Kish's testimony that the location of the last open crosscut can change from circumstance to circumstance, and

MSHA's additional references to regulatory sections 75.333(b)(1) and 75.371(f), in determining the locations for maintaining 9,000 cfm of air, I find merit in the respondent's suggestion that the requirements of section 75.325(b), are less than crystal clear.

I take note of the last sentence of the following explanatory answer stated on page 49 of MSHA's "Ventilation Questions and Answers," November 9, 1992, cited and relied on by the respondent in this case (Exhibit R-6):

Section 75.325(b) does not require that previously accepted development systems be abandoned, does not require new or additional ventilation controls, and does not require additional or duplicative locations where 9,000 cfm must be maintained.

I also take note of the last sentence of the paragraph that follows on page 50, that states as follows:

Where hybrid or unusual room development systems are used or where confusion may exist regarding the examination location, the mine ventilation plan may specify a location under 75.371(f).  
(Emphasis added)

I conclude and find that respondent's simultaneous mining of the left and right areas of the C main section presented a rather unusual mining situation at the time of the inspection. Mr. Kish admitted as much when he confirmed that a split ventilation system was in use, that the cited area was the only mine area where two mechanized mining units were in use, and that the location of the last open crosscut for air measurement purposes can change depending on the location of the continuous miner. Under these circumstances, I conclude and find that the respondent was not unreasonable in believing or relying on MSHA's "Questions and Answer" advise that it need not abandon its previously accepted mine development system and that additional ventilation controls would not be required.

Citing the "reasons" set forth in section IIB, page 7, of her posthearing brief, petitioner's counsel contends, at page 16, that "the respondent was not permitted to remove the ventilation curtain without some other ventilation control." Aside from the apparent recognition that the curtain could possibly be removed under certain conditions, such as additional controls, I find nothing in the cited arguments that constitute any "reasons" alluded to by counsel.

Section foreman McGary confirmed that 9,000 cfm of air was required to be maintained in the last open crosscut. He also readily admitted that the check curtain outby the cited crosscut was taken down to facilitate the passage of equipment, and he explained

that it was taken down in this case by the shuttle care operator when he traveled through the area to remove a roof bolting machine, and that he forgot to re-install it after the bolter was removed and the working shift had ended.

Mr. McGary also confirmed that check curtains were routinely taken down when the shuttle cars were moving through the curtain areas, and they were always re-hung when mining was completed. He found nothing wrong with this practice, and stated that he has always mined in this fashion while in the presence of other inspectors who did not question the practice. He also believed that the mining procedure he was following was proper in that it eliminated the need to use "run-through" check curtains. These types of curtains apparently remain in place while equipment passes through them through openings in the curtain.

Respondent's chief engineer Nalisnick, whose duties included the submission of mine ventilation plans to MSHA, and personal contacts with MSHA's district ventilation personnel, believed that the respondent's approved plan permitted mining with the outby check curtain down one crosscut outby the cited crosscut in this case. He believed the method of mining followed by Mr. McGary was safer because it eliminated the need for "run-through" check curtains, provided more flexibility for the moving of curtains, and was more practical given the variables in the main ventilation system.

With regard to Mr. Nalisnick's understanding that 9,000 cfm of air was required to be maintained at the "last open crosscut" pursuant to section 75.325(b), and as determined by section 75.360(c)(i), Mr. Nalisnick assumed that this is what is required if one considered the definition of stopping lines.

In reply to the petitioner's assertion that the respondent's admission that the check curtain would be down while mining the L entry indicates aggravated conduct or an ignorance of the requirement for 9,000 cfm of air in the last open crosscut, the respondent argues that the inspector did not issue a citation for a plan violation and that he was obliged to do so if he believed that was the case. Respondent suggests that no ventilation plan violation was issued because it was permitted to take the curtain down under its plan. With respect to the petitioner's suggestion that foreman Stine did not know that the regulation required 9,000 cfm of air in the last open crosscut, the respondent maintains that there is no dispute as to the amount of air required, and that the only dispute is to the location where the air is to be measured.

I find nothing in the respondent's ventilation plan (Exhibit R-4) that clearly and directly states that ventilation check curtains may be taken down while mining is in progress. The plan language relied on by the respondent states as follows:

The location of the checks may vary, so as to provide positive ventilation to all working places and minimize the need for run through checks depending on the place being mined.

The petitioner has not rebutted the fact that this plan provision was in effect at the time the violation was issued. In addition, the petitioner has not rebutted Mr. Nalisnick's testimony that he spoke with a MSHA district ventilation representative after the violation was issued and was advised that its use of ventilation check curtains needed to be re-evaluated. Although Mr. Nalisnick conceded that there was no need for run-through check curtains and undercuts the respondent's argument that the taking down of the curtain was to preclude the use of run-through checks, the unrebutted testimony is that the ventilation plan was not changed, and is indeed still in effect.

Although I have concluded that the plan language does not specifically authorize the taking down of check curtains, it does state that the location of check curtains may vary in order to minimize the need for run-through checks, depending on the place being mined. When this plan provision is read together with MSHA's "Question and Answer" advise, I cannot conclude that the respondent's belief that the taking down of the curtain was not prohibited is implausible or incredible.

I further find that the December 13, 1993, letter to Mr. Nalisnick from MSHA's district manager Joseph G. Garcia, which acknowledges in relevant part that "it has come to our attention that there has been a misunderstanding concerning the installation of check curtains" lends support to the respondent's suggestion that it was reasonable for it to conclude that it was authorized to take down the outby check curtain for the stated reasons, and seriously undercuts the petitioner's "aggravated conduct" argument. I take particular note of the fact that while the district manager's letter further stated that a revised plan print statement was necessary to correct the condition to insure that the proper stopping line location be used pursuant to sections 75.325(b) and 75.360(c)(1), there is no evidence that this was done. In the absence of a revised plan provision, the Garcia letter permits the respondent to continue following its approved face ventilation plan.

I conclude and find that the credible evidence in this case supports the respondent's assertion that it had a good faith belief that it was in compliance with the requirements of section 75.325(b), and that a reasonable misunderstanding existed with respect to the proper use of its check curtains. Under the circumstances, and based on the aforementioned findings and conclusions, I cannot conclude that the petitioner has established that the violation was the result of "aggravated conduct" amounting to an unwarrantable failure. Accordingly, the section 104(d)(2) order **IS MODIFIED** to a section 104(a) citation.

Although I have modified the order, it should be clear to the respondent that if it continues to mine with a check curtain down, it again runs the risk of being out of compliance if it results in less than 9,000 cfm of air at the last open crosscut determined by the prevailing facts at any particular point in time. In short, I reject the respondent's reliance on its ventilation plan provision as a defense to the violation of section 75.325(b), since the evidence in this case clearly establishes that it did not maintain 9,000 cfm of air at the cited crosscut location. I have, however, accepted as credible the respondent's reliance on the plan, and MSHA's recognition that there was a misunderstanding concerning the use of check curtains, in mitigation of the respondent's negligence, and supports its argument of no aggravated conduct amounting to an unwarrantable failure.

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

The parties stipulated that the respondent is a small operator and that payment of the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business. I adopt these stipulations as my findings on these issues.

#### History of Prior Violations

MSHA's computer printout for the subject mine for the period October 12, 1991 through October 12, 1993, reflects that the respondent paid civil penalty assessments for 588 violations. For an operator of its size, I cannot conclude that the respondent has a particularly good compliance record, particularly with respect to past ventilation and permissibility violations. I have taken this into account in the penalty assessment that I have made for the violation that has been affirmed.

#### Good Faith Compliance

The record reflects that the required air ventilation was restored within minutes of the issuance of the order after Inspector Kish and foreman Stine re-installed the ventilation curtain that had been taken down, and the order was terminated 15 minutes after it was issued. I conclude and find that the cited condition was rapidly abated by the respondent in good faith.

#### Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the violation that I have affirmed was serious.

Negligence

I conclude and find that the violation of section 75.325(b) was the result of the respondent's failure to exercise reasonable care amounting to a moderate degree of negligence.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$1,600 is reasonable and appropriate in this case.

**ORDER**

In view of the foregoing, **IT IS ORDERED AS FOLLOWS:**

1. Section 104(d)(2) "S&S" Order No. 3955721, October 12, 1993, 30 C.F.R. 75.325(b), **IS MODIFIED** to a section 104(a) "S&S" citation, and as modified, **IT IS AFFIRMED.**
2. The respondent **IS ORDERED** to pay a civil penalty assessment in the amount of \$1,600 for the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor,  
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/lh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 6 1995

SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. KENT 94-908
	:	A.C. No. 15-08293-03578
	:	
v.	:	Docket No. KENT 94-942
	:	A.C. No. 15-08293-03580
R B Coal Company, Respondent	:	
	:	R B No. 4 Mine

## DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Susan C. Lawson, Esq., Harlan, Kentucky, for the Respondent.

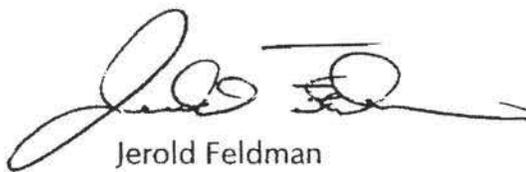
Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petitions in these cases sought to impose a total civil penalty of \$42,320 for the alleged violations of the cited mandatory safety standards.

These matters were called for hearing on March 14, 1995, in Pineville, Kentucky. At the commencement of the hearing, the parties informed me they had reached a settlement. Consequently, the parties moved for my approval of their agreement that results in a significant reduction in total civil penalties from \$42,320 to \$5,690. The settlement terms include vacating Imminent Danger Order No. 4235989 in Docket No. KENT 94-980. The parties' agreement with respect to Docket No. KENT 94-942 includes modification of 104(d)(1) Citation No. 4239646 to a 104(a) citation as well as modification of 104(d)(1) Order Nos. 4239645, 4239654, 4239655 and 4239657 to 104(a) citations. These modifications lower the degree of negligence attributable to the respondent for the cited violations from high to moderate. Finally, the agreement contemplates the removal of the significant and substantial designation from modified 104(a) Citation No. 4239645 and Citation No. 4240176 in Docket No. KENT 94-942.

**ORDER**

I have considered the representations of counsel presented at the hearing in support of the proposed agreement and I conclude that the settlement terms are appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). **Accordingly**, the parties' joint motion for the approval of settlement **IS GRANTED** and **IT IS ORDERED** that the respondent pay a penalty of \$5,690 within 30 days of the date of this order. Upon timely receipt of payment, these cases **ARE DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman  
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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APR 6 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. PENN 94-400
	:	A.C. No. 36-07416-03658
v.	:	
	:	Docket No. PENN 94-259
ENLOW FORK MINING COMPANY, Respondent	:	A.C. No. 36-07416-03651
	:	
	:	Enlow Fork Mine

DECISION

Appearances : Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;  
Elizabeth S. Chamberlin, Esq., Consolidation Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

These cases, consolidated for hearing, are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by Enlow Fork Mining Company (Respondent) of 30 C.F.R. § 75.360(b)(1), 30 C.F.R. § 75.360(b)(c), and 30 C.F.R. § 75.400. Pursuant to notice, the cases were heard in Steubenville, Ohio on January 10, 11 and 12, 1995. Respondent filed a Post Hearing Brief on March 28, 1995. Petitioner filed Proposed Findings of Fact and a Memorandum of Law on March 29, 1995.

Findings of Fact and Discussion

1. Citation No. 3659960 and Order No. 3660021 (Docket No. PENN 94-400).

A. Introduction

1. Testimony of the Inspector

On November 15, 1993, MSHA Inspector Joseph Melvin Hardy inspected the B-3 Longwall Section of the Enlow Fork Mine. The section's tail drive, consisting of a gear box fluid coupler and an electric motor, was located at the tailgate. The tail drive was covered on top and also at the end farthest away from the headgate, and at the side next to the pan

line. The side closest the tailgate and the end next to the shields were not covered. After each pass of the longwall shear, the shields were moved forward one at a time.

Hardy indicated that approximately 9:05 a.m., he observed an accumulation of float coal dust around the legs of the shields, all the flat surfaces of the shields, and on the diagonal lemniscates of shields numbered 148-152, which were the shields closest to the tailgate. Hardy described coal dust that was black in color, and "very dry to the touch" (Tr. 34) on the electrical boxes and control units of shields numbered 148-152. He said that the amount of coal dust was more than normally seen on inspections.

Hardy indicated that he also saw loose coal scattered around the shields, and on the gear case of the fluid coupler, and the drive motor. He also said that there were "heavy accumulations" (Tr. 25) of float coal dust, hydraulic oil and coal, packed in and around the gear case and surrounding areas. Hardy described the coal as saturated with hydraulic gear oil. Hardy said that there was no evidence of water mixed with the oil. He said that the material was loose on the top but packed at the bottom. Hardy said that 90 percent of the housing of the fuel coupler was covered with float dust and oil, and 95 percent of the entire gear box was covered with float dust and oil. He said that there was an accumulation of hydraulic oil under the motor fluid coupler and gear box. He estimated that the area of the accumulation was 4 feet by 10-15 feet. Hardy also observed rags saturated with oil over the top of the fluid coupler. He also indicated that there was coal packed on the floor to a height of 2 1/2 feet. Hardy said that the hydraulic oil is combustible. According to Hardy, the coal being mined was part of the Pittsburgh Seam, which he described as being highly volatile.

Hardy issued a section 104(d)(1) order alleging a violation of 30 C.F.R § 75.400 which provides, as pertinent, as follows: "Coal dust including float coal dust deposited on rockdusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings . . . ."

A preshift examination of the area was performed at 5:06 a.m. on November 15, but none of the conditions testified to by Hardy were noted or reported. In this connection, Hardy issued a section 104(d)(1) citation alleging that an adequate examination had not been performed in violation of 30 C.F.R. § 75.360(b)(3).

## 2. Testimony of Respondent's Witnesses

Timothy C. Ferrell, a shield-man who worked the day shift on November 15, testified that there was a normal amount of dust on the drive, and a normal accumulation of loose coal between the legs of the shields. He indicated that there was oil on the toes of the last three shields. He said that at about 8:30 a.m., he hosed the top of the tail drive, and under the tail drive, and shields numbered 148-152. He said that there was a film of

oil that extended several inches around the torque converter breather which he washed down.

Ferrell indicated that he did not notice any oily rags wedged on top of the hydraulic coupler, or anywhere around the tailpiece. He said that after he washed the various pieces of equipment, he did not see any dust or oil on top of the housing.

Ferrell indicated that when the cover was removed from the drive unit, he observed coal and rock packed on the face and tailgate end of the gear box. He said that the material was "mostly rock" (Tr. 326). He said the material was wet, but not oil soaked.

He indicated that no mining took place between the time he finished washing the equipment at 8:30 a.m., and 9:00 a.m.

Tim Keen, Respondent's Safety Inspector, was with Hardy on November 15. He noted oil on top of water accumulations between the toes of the shields, and a film of oil on the gear case and torque converter. Keen observed some dust in the rear of shields numbered 148-152 between their legs. He said that he saw rock dust on the lemniscates, but no coal dust.

Keen indicated that he did not consider any of the oil or coal that he observed to be a hazard. He indicated that he could not recall seeing any oil soaked rags. He said that when the cover of the tail drive was removed, he saw some coal, and a lot of rock dust between the face plate and the end plate. He said that the material looked wet, but he did not handle it. He did not consider that any of the conditions observed presented any fire or explosion hazard. He indicated that Hardy had pointed out float coal dust mixed with oil in the gear case.

William K. Stewart, was the longwall maintenance coordinator on November 15. In essence, he indicated that he did not see the conditions observed by Hardy.

## B. Discussion

### 1. Violation of 30 C.F.R. § 75.400

I note the conflict in the testimony between Hardy and Respondent's witnesses who were present in the area in question at the time of the inspection on November 15, regarding the existence of the conditions testified to by Hardy. I observed Hardy's testimony and found him to be a credible witness. There is no evidence in the record of any improper motive on the part of Hardy. (See, Texas Industry, Inc., 12 FMSHRC 235 February 1990 (Judge Melick). Importantly, Hardy's testimony finds support in notes taken by him contemporaneously with the inspection (GX-3). In contrast, the testimony of Respondents' witnesses as to conditions observed on the day shift November 15, was

based upon their recollection of conditions they observed more than a year prior to their testimony. None of Respondent witnesses' proffered any contemporaneous written notes to support their testimony.<sup>1</sup> For these reasons, I accept Hardy's testimony and find that on 9:00 a.m., November 15, there existed accumulations of coal dust, loose coal, and oil, that had not been cleaned up. I thus find that Respondent violated Section 75.400, supra.

## 2. Violation of 30 C.F.R. § 75.360

In essence, Hardy opined that it definitely took more than a shift for the material to have become packed on the gear box. He further indicated that the oil under the floor of the gear case was very obvious, and could be seen without bending down. Hardy said that the coal mixed with the oil on the drive motor was visible from the walkway. According to Hardy, loose coal, dust, and oil were visible when he first entered the area at issue, and he did not have to lift anything, or bend down to observe these conditions. He reasoned that these conditions would had been observed, reported, and noted in the preshift examination four hours prior to the time the conditions were cited.

William W. Young, worked the midnight to 8:00 a.m. shift on November 15, 1993. He indicated that he started his preshift examination at the tailgate at 5:00 a.m., and observed a film of oil on the toes of shields numbered 148-152. He indicated that he did not see any float coal dust or loose coal between the shields on the lemniscates. Nor did he see any layer of float coal in that area. According to Young, he did not see any accumulation of oil soaked coal in and around the tailpiece, and did not see material behind the gear box. He indicated that he did not see any oil soaked rags. He indicated that he did not consider "the conditions around the tailpiece to be hazardous" (Tr. 236). He also opined it does not take more than one shift for packed coal to be created.

According to Young, at 3:30 a.m., on November 15, he cleaned the light film of oil that he had observed on the motor drive and gear box with a "degreaser", (Tr. 206) and he also hosed off the motor, tensioning unit, and gear box. In a written statement prepared by Young on November 16, he indicated that at 12:45 a.m., on November 15, he had instructed a shield-man, Terry Pozum, to wash the oil film off the "toes of shields at the tailgate and tailgate drive area". Both Posum and Raymond L. Touvell, another shield-man, who worked primarily at the headgate, testified to having washed shields numbered 148-152 and the tail drive, at various times during the night. Touvell indicated that the last time he was at the tailgate, he did not see any hydraulic fluid covering the floor, and did

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<sup>1</sup>Section Foreman William Young prepared a statement on November 16, 1993, setting forth his actions relating to the cleaning of the area in the midnight shift November 15. It does not set forth in any detail the conditions observed by him on the shift, with the exception of some oil on the bottom mixed with water, and "oil film" on the toes of shields.

not see dry float dust covering the shield plates or the lemniscates. He also indicated that there was no coal dust black in color and hydraulic oil on the gear case, fluid coupler or drive motor. He stated that he also did not observe hydraulic oil on the cover of the drive box, and did not notice material packed in the rear of the gear case.

I find Young's testimony credible, based upon my observations of his demeanor, that he did perform a preshift examination at approximately 5:00 a.m., in the area in question on November 15. In essence, Hardy opined that the conditions that he observed had existed four hours prior at the preshift examination, because the packed accumulations definitely had not occurred in one shift. However, he did not elaborate upon the basis for this conclusion. Coal dust is produced in the areas in question by the normal longwall mining process. The section continued to produce coal subsequent to the preshift examination, but there is no documentary evidence or eyewitness testimony of the number of passes made by the shear between the preshift examination, and 9:00 a.m., when the area was cited by Hardy. Touvell indicated that in general the shear makes six passes over a three hour period, and Young estimated that the shear had made six passes between 5:00 a.m., and the end of the shift. The record does not convincingly establish when the accumulations of oil observed by Hardy occurred. Both the gear case and tensioning unit are equipped with oil breathers which are designed to expel oil if pressure builds up in these items. Oil can be expelled when the equipment is started and stopped. William K. Stewart, the longwall maintenance coordinator, opined that if the belt "is shutting off and on, you could have as much as a gallon (of oil) on top of the unit" (Tr. 361).

Based on this record, I conclude that it has not been established that it was more likely than not that the accumulations observed by Hardy were in existence at the time of Young's preshift examination. I thus find that it has not been established that Young's examination was inadequate. I thus find that it has not been established that Respondent violated Section 75.360(b), supra.

### 3. Unwarrantable Failure

According to Hardy, in essence, the conditions that he observed were obvious and easily seen without even bending down. For the reason set forth above, I have concluded that these conditions were not in existence at the time of the preshift examination. Hardy indicated that he did not see anyone cleaning the accumulations when he made his inspection. On the other hand, Ferrell, who testified later on at the hearing, stated that when Hardy arrived at the tailpiece, "I believe I had a shovel and was cleaning the loose coal out from underneath the drive motor" (Tr. 321). Hardy, who testified on rebuttal, did not contradict this testimony of Ferrell.

Hardy indicated that, prior to the issuance of the citation and order at issue, he had discussed preshift procedures with various management officials. In the same connection, MSHA Supervisory Inspector Robert W. Newhouse, testified that on October 7, 1993, he

discussed with management the basic elements of a preshift examination, and the proper course of action to be taken when it is determined that a hazard exists. He said they also had a discussion about what constitutes a hazard. Newhouse stated that in the first quarter of 1993, he discussed with Mine Management the need to clean accumulations.

Hardy indicated that on October 7, 1993, he met with mine management. He told them that he was not satisfied with the cleanup including the areas in question.

I do not find this testimony not probative of the degree of Respondent's negligence in allowing the specific materials at issue to have accumulated. Within this context, I find that the level of Respondent's was ordinary, and did not reach the level of aggravated conduct. (See, Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987). I thus find that the violation found, herein, was not the result of Respondent's unwarrantable failure.

#### 4. 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 critical element for analysis is whether the evidence establishes that there was a reasonable likelihood of an injury producing event, ie, a fire or explosion contributed to by the violation of Section 75.400, supra. According to Hardy, the materials that had accumulated were combustible. Also, he noted the presence of ignition sources including the bearings on the drive shaft and gear case, and a 4160 volt drive motor connected to the drive case. However, the record does not establish that the physical condition of these or other potential ignition sources would have made the event of ignition reasonably likely to have occurred. The mine does liberate methane. However, there is no evidence that methane was present in an explosive range. Nor is there evidence that liberation of methane in explosive concentrations was reasonably likely to have occurred. According to Hardy, there were rags over the top of the fluid coupler and dry coal dust on electrical boxes. Although these conditions contributed to the possibility of an ignition, there is insufficient evidence to conclude that such an event was reasonably likely to have occurred. Hardy indicated that the gear box was very hot to touch and he could not keep his hand on it. There is no evidence of the specific temperature of the gear case, especially in relation to the flash point and autoignition temperature of the oils at issue. Hardy opined that because the accumulations on the gear box were packed, the cooling effect of air passing over the gear box would be impeded. He concluded that it was reasonably likely that the temperature of the gear box would reach the flash point of the oil issue of 325 degrees, and reach the autoignition temperature of 650 degrees. However, he did not provide any basis for these conclusions.

Stewart indicated that the gear box is cooled internally by water, and that this cooling system runs constantly. He also indicated that he takes the temperature of the gear box, and he has never seen it register a temperature of more than 197 degrees Fahrenheit.

Within the context of the above evidence, I find that it has not been established that a fire or ignition was reasonably likely to have occurred as a consequence of the accumulation of materials noted by Hardy. I thus find that it has not been established that the violation was significant and substantial (See, Mathies, supra; U.S. Steel, supra).

Taking into account the amount of the accumulations found by Hardy, and the presence of shield-men regularly working in the area, I find that should a fire or explosion have occurred, these persons could have suffered serious injuries. I thus find that the gravity of violation was relatively high. I find that a penalty of \$2,000 is appropriate.

II. Section 104(d)(1) Order No. 3660375  
(Docket No. PENN 94-400) and Section 104(a)  
Citation No. 3660374, (Docket No. PENN 94-259).

A. Petitioner's Evidence

In normal operations in the 2N belt entry, a scoop dumps coal on the feeder unit. Coal is then transported to the crusher where is crushed. The coal then is moved to the tailpiece and transported and dumped on the B-6 belt. In all these processes fine coal is created which falls on the belt structures and the floor.

On December 8, 1993, Joseph F. Reid, an MSHA Inspector, inspected the 2N belt feeder outby to the B-6 belt. He indicated that starting at the belt feeder, and extending 200 feet outby, there was an accumulation of dry black coal dust. Reid indicated that there was dry loose coal on the mine floor, and very dry, fine, black float coal dust that was on and around the belt feeder unit. He described a pile of fine float coal dust on the floor that measured 4 feet by 16 feet, and 5 inches deep. Reid also observed a pyramid shaped pile of coal dust that, at the deepest point, was 18 inches deep, and was 2 feet long, and 3 feet wide. He said that the edge of this pile was under the belt, and was 6 inches removed from the belt. Reid also observed coal dust on the cross members of the belt. He said these accumulations were black and very dry. According to Reid, there was coal dust on the belt structure that varied between an eighth of an inch to 2 inches deep. On direct examination he termed some of these materials float coal dust, but on cross examination indicated that the materials were a mixture of float coal and coal dust. Reid indicated that he touched all the areas that he cited and that none of the cited areas were wet "to my recollection". (Tr. 673). He also indicated that he examined the preshift examiner's records which indicated that a preshift examination was made of the area in question between 5 a.m. and 7 a.m., on December 8, and no hazards were noted.

Reid issued an order alleging a violation of Section 75.400 *supra*, and a citation alleging a violation of 30 C.F.R. § 75.360(b)(1).

B. Respondent's Evidence

Donald E. Watson, a safety supervisor, was with Reid during the inspection. Watson testified that he did not find any accumulation of dust on the cross-members and bed-rail of the belt structure that Reid wanted cleaned. He indicated that Reid also wanted an 18-inch pile of float coal dust cleaned. Watson testified that the material was fine coal. He said that only the top was dry, but the bottom was wet. He indicated that he did not observe any float dust in the entry that was "distinctively" black in color. (Tr. 605).

Robert K. Price, the section foreman who was present on December 8, noted the presence of loose coal in front of the feeder, under the feeder, and behind the tail roller. According to Price, he said he did not see any hazardous float dust on the belt. He also indicated that he did not see any dust that was black. He describe the entry as being off-white. Price was asked to describe the thickness of the float dust on top of the feeder. He said "there was just like a haze going across it" (Tr. 625). He indicated that he could see the white color of the feeder through the "haze". He said that in order to abate the violation the float dust on the feeder was hosed off, "and the rest of the stuff was broomed . . . wiped off or hit with a broom real quick" (Tr. 624).

Howard A. McDaniel, was the belt foreman on the shift at issue. He indicated that the belt had been rock dusted on November 17. He described the area as being off-white. According to McDaniel, the bottom of the entry contained rock dust to a depth of 2 to 4 inches. He said that there were only 4 or 5 shovelfuls of material present behind the tailpiece. McDaniel said that he did not see any float dust that was dark in color. He said that he walked the tight side, and did not see any black material. He said that it took about 10 minutes to clean up the spillage material on the walk side.

### C. Discussion

#### 1. Violation of 30 C.F.R. § 75.400

I find the testimony of Respondent's witnesses insufficient to contradict the testimony of Reid that there was a pile of coal dust, 2 feet by 3 feet, approximately 18 inches deep,<sup>2</sup> and another pile on the floor 4 feet by 16 feet, 5 inches deep, and other accumulations, 200 feet outby the tail on the belt structure. I thus find that Respondent violated Section 75.400, *supra*.

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<sup>2</sup>Watson testified that he was standing with Reid "side-by-side" (Tr. 588) when the latter examined the pyramid-shaped pile he cited. Watson indicated that Reid did not measure the pile. Watson was asked whether Reid could have taken various measurements and not have been observed by him. Watson responded by stating that by Reid "was never out of my sight that day". (Tr. 611). It was elicited from Watson that at one point during the inspection he left Reid's presence in order to get the foreman, Robert Price. In response Watson testified that he did not go very far.

Based on my obervation of his demeanor, I find Reid's testimony credible regarding the various measurement, he took of the cited accumulations. I find that the testimony of Watson is insufficient to rebutt Reid's testimony as to measurements actually taken by him.

## 2. Violation of 30 C.F.R. § 75.360(b)(1)

Essentially, Reid opined that an 18 inch pile of coal dust takes 1 to 2 shifts to accumulate, but he did not provide any basis for this opinion. He further opined that the accumulations occurred over more than 1 shift because (1) the materials that had accumulated in various areas were very black, (2) there were "heavy" (Tr. 474) accumulations on the floor, and belt structures, and (3) there was dust on the electric box, and on and around the feeder. He also indicated that the float dust on the belt structures and the side of the feeder unit "was very visible all the way to the B-6 transfer area. (Tr. 464). In essence, it is Petitioner's position that these conditions existed at the time of the preshift examination, and should have been noted by the preshift examiner. There is no conclusive evidence as to how long the conditions noted by Reid had existed. Reid opined that it took more than one shift for the materials to have accumulated, but did not provide any basis for his opinion. In the same fashion, Watson opined that he did not think that the conditions were present "very long" (Tr. 589). He said "It could have been one shuttle car. It could have been two shuttle cars" (Tr. 589). However, he did not provide any basis for that opinion. Price estimated that the conditions had been in existence for 1 to 2 hours, but did not provide any basis for that opinion.

Weaver was asked whether he saw any float coal dust that was black in color. He stated that he did not notice any that was "clear black" (Tr. 534). Weaver stated that he could not recall seeing "black accumulations" (Tr. 548) on the belt structures, but that there may have been areas that were gray. He was asked whether the cross-members of the belt structure had "a dark deposit" on them (Tr. 546), and he answered that there may have been some gray material deposited. Weaver stated that he did not see any of the conditions noted by Reid, and did not feel that there were any hazards present.

Due to the extent of the accumulations observed by Reid, I conclude that it is more likely than not that at least some of them, in the condition observed by Reid, had existed 4 hours earlier during the preshift examination. Since these accumulations were not reported, I find that preshift examination was not adequate, and hence that Respondent did violate Section 75.360(b)(1), supra.

## 3. Unwarrantable Failure

According to Reid, he had previously issued a citation, alleging a violation of Section 75.400 supra, and at that time had discussions with management concerning the hazards of not recording an examination, and the necessity to clean the belts. I accept Reids testimony that the material on the belt structure, and left side of the feeder unit was visible all the way to B-6. I find that Respondent's conduct constituted more than ordinary negligence, and reached the level of aggravated conduct. Accordingly, I find that it has

been established that the violation herein resulted from Respondent's unwarrantable failure. (See Emery, supra).

4. Significant and Substantial

According to Reid, the material that had piled up to 18 inches adjacent to the belt could, with continued operation, continue to grow, and then come in contact with the rollers. This contact could produce friction. However, Watson indicated that belt material used as a guard separated the accumulated coal dust from the rollers. Reid, on rebuttal, did not specifically rebut the positive testimony of Watson. Reid indicated on rebuttal that this guard would not have protected the fine coal from contacting the tail roller. His explanation is as follows:

Q. So where you have this 18-inch pile located, would the guard that is enclosed in blue have protected that 18-inch pile from contacting the tail roller?

A. No.

Q. Why is that?

A. Well, it was at the outby right side of the rubber guarding, which it only extended--

Q. What only extended?

A. The rubber guarding only extended to that point. This pile, which from previous testimony I heard, these piles normally occur on both sides.

Q. When you say the guarding only extends to "that point," what point are you referring to?

A. Where the pile of coal was.

Q. So are you saying that the rubber guarding is extended to the point where the pile of coal was and did not extend behind the pile of coal?

A. No--yes.

Ms. Henry: It's confusing.

Judge Weisberger: The Witness' testimony is not clear. Don't lead him.

Ms. Henry: Yes, you're right.

BY MS. HENRY:

Q. Where this rubber guarding was, the point where this pile of coal fines was, where was it in relationship to the rubber guarding?

A. It was a little past the end, the right end of the rubber guarding.

Q. So when you say it was "a little past" the right end of the rubber guarding, was there rubber guarding behind this coal pile?

A. No. (Tr. 672-673).

I find that this testimony is unclear and cannot be relied upon.

There is no evidence of any frozen rollers. Nor is there any evidence that the belt was not aligned properly, and was rubbing the vertical structures of the belt. Nor is there any evidence that any float coal dust was in suspension. Although the existence of frozen rollers, hot rollers, and friction caused by the belt rubbing against the support legs are all possible, I find that it has not been established that such conditions were reasonably likely to have occurred. I thus find that it has not been established that there was a reasonable likelihood of an injury producing event, i.e., a fire or explosion occurring as a consequence of the accumulation of coal herein. I thus find that it has not been established that the violation was significant and substantial (See, Mathies, supra; U.S. Steel, supra).

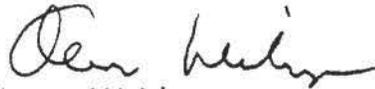
### III. Penalty

I find that since it was possible that as a result of the violations a fire or explosion could have occurred that the violations were of a high level of gravity. I find that a penalty of \$500 is appropriate for Citation No. 3660374 and that a penalty of \$5000 is appropriate for Order No. 3660375.

### IV. Order

It is hereby ORDERED that Citation No. 3569960 be dismissed. It is FURTHER ORDERED that Order No. 3660021 be amended to indicate a violation that was not significant and substantial and not the result of Respondent's unwarrantable failure. It is

further ORDERED that Citation No. 3660374 and Order No. 3660375 be amended to reflect the fact that the violations cited were not significant and substantial. It is further ORDERED that Respondent pay a total civil penalty of \$7,500 within 30 days of this decision.



Avram Weisberger  
Administrative Law Judge

Distribution:

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

Elizabeth S. Chamberlin, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (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

APR 6 1995

UNITED MINE WORKERS OF AMERICA, LOCAL 1531, DIST. 2,	:	COMPENSATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 94-571-C
	:	
JEDDO-HIGHLAND COAL COMPANY,	:	Mine: No. 7 Breaker
Respondent	:	

DECISION APPROVING SETTLEMENT

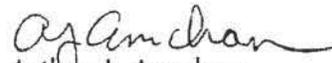
Before: Judge Amchan

This case is before me upon a complaint for compensation filed by the United Mine Workers of America, Local 1531, District 2. Respondent has filed a motion to approve settlement agreement. The terms of the settlement are that Respondent has agreed to pay each of the miners named on the Application for Compensation for the hours listed by each of their names by Complainant, at their regular rate of pay. Payment shall be included in each of the miners' next paychecks.

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with section 111 of the Act.

ORDER

**WHEREFORE IT IS ORDERED** that the motion for approval of settlement is **GRANTED** and Respondent shall pay the compensation agreed upon in the settlement agreement. Upon such payment this case is **DISMISSED**.

  
Arthur J. Amchan  
Administrative Law Judge

Distribution:

Paul F. Rento, United Mine Workers of America, Local 1531, District 2,  
52 Cedar St., Hazelton, PA 18201

David H. Swisher, Esq., P.O. Box 450, Pittston, PA 18640

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

APR 6 1995

SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. SE 94-417-M
	:	A.C. No. 09-00265-05518
	:	
v.	:	Junction City Mine
	:	
BROWN BROTHERS SAND COMPANY, Respondent	:	

## DECISION

Appearances: John A. Black, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;  
Steve Brown, Partner, Brown Brothers Sand Company, Howard, Georgia, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., (the Act). The Secretary's petition seeks to impose a total civil penalty of \$336 for five alleged violations of mandatory safety standards, four of which were designated as nonsignificant and substantial.

This matter was called for hearing on January 31, 1995, in Butler, Georgia, at which time the respondent stipulated that it is a mine operator subject to the jurisdiction of the Act. The Secretary called Mine Safety and Health Administration (MSHA) Inspectors Kenneth Pruitt and Donald L. Collier. The respondent relied upon the testimony of Greg Brown, a partner in the respondent company. The parties' posthearing briefs are of record.

This proceeding involves two citations issued by inspector Pruitt for alleged guarding violations and three citations issued by inspector Collier for alleged electrical violations during their March 22, 1994, inspection of the respondent's Junction City Mine site. The respondent extracts sand at its mine site by spraying a high pressure stream of water against the bank of an open pit causing the sand on the bank to slough off into a sink hole. A pump station transports the sand by pipeline from the sink hole pit onto shaker screens where the sand is separated from waste material such as roots and clay balls. The

waste material is removed by the chalk conveyor belt. The sand falls through the screens into a horizontal tank and is transported through another pipeline to the classifier. The classifier separates the sand according to granule size. The finer sand is used for mortar and the coarser sand is used for concrete. The sand leaves the classifier through a chute and is transported by grade to either of two conveyor stockpile belts. These belts stockpile the mortar and concrete sand.

### **Citation No. 4301221**

During the March 22, 1994, inspection, Pruitt observed that the guard for the head pulley on the concrete sand stacker conveyor belt was not secured in place. The guard had been removed and tied to the V-belt guard. The concrete sand stacker conveyor belt is approximately 134 feet long pitched at a steep angle above the ground. The head pulley is accessed by a walkway the full length of the belt. The head pulley (end of the conveyor belt) has a vertical height of 43 feet above the ground. The walkway is adjacent to the belt rollers the full length of the belt as well as the head pulley at the top of the belt. (See Resp. Ex. 1).

As a result of the unguarded head pulley, Pruitt issued Citation No. 4301221 for an alleged nonsignificant and substantial violation of the mandatory safety standard in section 56.14112(b), 30 C.F.R. § 56.14112(b), which provides:

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. (Emphasis added).

Guarding is intended to prevent the inadvertent contact of fingers or extremities from the pinch points of moving machinery. Guarding is not intended to prevent the intentional contact with moving parts or to protect maintenance personnel that must access the equipment. In this regard the Commission has stated:

[T]he most logical construction of [a guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. (Emphasis added). Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, 2097 (September 1984).

Consistent with the Commission's reasonable possibility of inadvertent contact test in Thompson, the cited mandatory standard in section 56.14112(b) exempts guarding requirements during maintenance. Section 56.14107(b), 30 C.F.R. § 5614107(b), also exempts guarding "where the exposed moving parts are at least seven feet from walking or working surfaces" as there is no exposure to moving parts.

Here, the Secretary asserts there is a violation of the guarding standard because there are no barriers or signs prohibiting employees from walking up the steep 134 foot long walkway to the head pulley at a vertical height of 43 feet above ground. However, it is obvious that the walkway on the subject stacker conveyor depicted in Respondent's Exhibit 1 is used exclusively by personnel maintaining the head pulley and rollers and that other employees would not ordinarily traverse the walkway. This conclusion is based upon the testimony of Greg Brown that the walkway is used by maintenance personnel for periodic greasing of roller bearings and the head pulley and that such maintenance activities can only be performed when the belt is deenergized as such activities require climbing on the belt. (Tr. 47-48). I also credit Brown's testimony that most employees are afraid "to go up there." (Tr.48).

The Secretary asserts that the provision in section 56.14107(b) exempting guarding at locations at least seven feet from walking or working surfaces is inapplicable to the head pulley because the head pulley is within seven feet of the walkway. However, as noted above, the walkway is used by maintenance personnel who must first deenergize the conveyor. Pruitt conceded that if this 43 foot elevation was accessed by ladder, the head pulley would not have to be guarded. (Tr. 35-36). It follows that the guarding exemption should also apply if the operator provides a safe walkway exclusively for maintenance purposes in lieu of the instability of a ladder. Consequently, in view of the Thompson decision, as well as the maintenance and remoteness from working area exceptions to guarding in Part 56, I conclude that the Secretary has failed to establish a violation of the cited mandatory standard. Accordingly, Citation No. 4301221 shall be vacated.

#### **Citation No. 4301222**

The Junction City facility has two shaker screens that were placed in operation approximately two weeks prior to Pruitt's inspection. (Tr. 19, 49; Resp. Ex. 2). The screens are accessed by climbing steps to a platform that is approximately four to six feet wide. The total length of the platform around the perimeter of the screens is approximately 25 feet. (Tr. 52). Brown testified that it is conceivable that someone could traverse the walkway when the screens were operational as the walkway could be used to view the screens' operation. There was an unlocked cable 35 inches above the ground in front of the platform steps. However, this cable could not prevent someone from entering the platform. (Tr. 20, 33, 41, 52).

A V-belt runs between the pulleys on a motor and pulleys to the screens, causing the screens to shake to separate debris from sand. (Tr. 18-20, 55). The shaker screen platform is located next to the V-belt drive. (Tr. 52-54). Pruitt observed that the V-belt drive of the No. 1 shaker screen was not guarded. Consequently, Pruitt cited the respondent for a guarding violation of section 56.14107(a) that, in pertinent part, requires guarding "to protect persons . . . from contacting moving parts that can cause injury." Pruitt concluded that this unguarded belt drive could cause permanently disabling injuries such as amputation of fingers or a hand. (Tr. 21). Such injuries could occur to anyone on the platform who inadvertently contacted the belt drive while observing the operation of the shaker. (Tr. 40, 54-55). However, Pruitt felt injury was unlikely and characterized the violation as nonsignificant and substantial because the platform was routinely accessed by personnel who performed maintenance on a daily basis while the screens were deenergized. (Tr. 49-50).

At the outset, I note that none of the circumstances warranting an exemption of the guarding requirements of the conveyor stacker head pulley in Citation No. 4301221 are present in Citation No. 4301222. Unlike the conveyor walkway constructed for the sole purpose of maintenance and located high above the ground, the shaker platform is easily accessible by climbing a few steps. Moreover, it is constructed around the perimeter of the shaker screens and serves as an observation deck. The unguarded V-belt's proximity to this platform creates the precise hazard, *i.e.*, inadvertent contact with the V-belt drive by non-maintenance persons traversing the platform, that the guarding standard seeks to prevent. Thus, the absence of guarding violates the cited mandatory standard.

Having concluded that guarding was required, I am unconvinced by the respondent's assertion that the cable in front of the steps satisfied the guarding requirement. Even if the cable was an effective method of preventing access to the platform, which it was not, perimeter guarding is not an acceptable alternative to site specific guarding of moving parts. *See, e.g., Moline Consumers Company*, 15 FMSHRC 1954 (September 1993) (ALJ); *Moline Consumers Company*, 12 FMSHRC 1953 (October 1990) (ALJ); *Yaple Creek Sand & Gravel*, 11 FMSHRC 1471 (August 1989) (ALJ).

I am similarly unpersuaded by the respondent's contention that similar cables barring access to shaker screens at other locations at its facility were not cited during previous MSHA inspections. The Commission has held that prior inconsistent enforcement of a safety standard does not constitute a defense to a violation. *See U.S. Steel Mining Company, Inc.*, 15 FMSHRC 1541, 1543 (August 1993) and cases cited therein. Any other interpretation would provide an operator with immunity from the enforcement and abatement requirements of the Act for any hazardous condition that was overlooked during a previous inspection.

Therefore, the cable does not satisfy the guarding requirements of section 56.14107(a) and the respondent has presented no justifiable defense to the cited violation. Accordingly, consistent with the penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), the \$50 civil penalty proposed by the Secretary for nonsignificant and substantial Citation No. 4301222 shall be affirmed.

#### **Citation No. 3606005**

Electrical inspector Donald Collier accompanied Pruitt on the March 22, 1994, inspection. During his inspection, Collier determined the metal frames on the disconnect boxes for the chalk conveyor and for each of the two shaker screens were not grounded. Collier's conclusion was based on his observation of the plant side screen disconnect box that was open and deenergized. Collier observed a missing bonding screw inside the box. A bonding screw connects a terminal mounted in the disconnect box to the frame providing a ground for the box itself. (Tr. 62). Collier used an ohm meter to determine that the metal frames of the two other energized disconnect boxes were also not grounded. (Tr. 61-62, 99-100; Resp. Ex. 3). In addition, Collier found the light switch boxes for the shaker screen tower were not grounded. (Tr. 69-70). As a result of his findings, Collier issued Citation No. 3606005 for violation of section 56.12025, 30 C.F.R. § 56.12025, which requires the grounding of all metal enclosures encasing electrical circuits.

The cited disconnect boxes and light switches are located outdoors, mounted on a plywood panel approximately four and one-half feet off the ground. (Tr. 65; Resp. Ex. 3). The disconnect boxes are used to deenergize and lockout circuits when work is done on the screens or chalk conveyor. (Tr. 63). Collier characterized the violation as significant and substantial because the absence of grounding exposed employees, who disconnected equipment on a daily basis, to electrocution.

Collier's uncontroverted testimony establishes the occurrence of the cited violation. The question of whether this violation is significant and substantial must be resolved based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In this instance, the facts support the citation was properly designated as significant and substantial for it was reasonably likely, if mining operations continued despite the defective grounding conditions, that the electric shock hazard contributed to by the violation would result in an injury of a reasonably serious nature. See Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); Mathies Coal Co., 6 FMSHRC 1 (January 1984); Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). This conclusion is based on the disconnect boxes' 220 volt three phase circuitry, the outdoor location that subjected the boxes and switches to water and dampness, and, the frequency of use of the defectively grounded boxes and switches.

The Secretary initially proposed a civil penalty of \$136 for Citation No. 3606005 based on the respondent's moderate degree of negligence. The Secretary now seeks to increase the civil penalty to \$500 asserting that the respondent's failure to use a licensed electrician to install the switches and boxes constitutes high negligence. However, the Secretary has cited no authority for the proposition that such installations are required to be performed by a licensed electrician. Moreover, the ground wires for the power cables coming into the boxes and the ground wires out to the starter motors were properly installed. (Tr. 98-99). The failure to place a bonding screw in each disconnect box and the failure to connect the grounding wire to the switches are attributable to ordinary negligence, moderate in degree, rather than the high degree of negligence belatedly asserted by the Secretary. Thus, the initial \$136 civil penalty for Citation No. 3606005 shall be affirmed.

#### Citation Nos. 3606006 and 3606007

Collier inspected the respondent's transformer building. The building is constructed with metal walls and a wood floor. It is approximately 10 feet wide by 16 feet long. The building is located approximately 30 feet from the main barge below ground level in the pit. (Tr. 105-108). The building houses two 2300 volt cylindrical transformers approximately three to four feet tall and two and one-half feet in diameter with a metal casing similar to a water heater. (Tr. 76-77, 80; Resp. Ex. 5). There is a power disconnect switch outside the building. There is also a danger sign posted on the building.

Collier observed that the transformer building door was secured by a chain tied in a knot that was not locked. Collier opened the door and determined that, although the power cables into the transformers were grounded, the metal frames housing the transformers were not grounded. Consequently, Collier issued Citation No. 3606006 for a nonsignificant and substantial violation of section 56.12068, 30 C.F.R. § 56.12068, that requires transformer enclosures to be locked to prevent unauthorized entry. Collier also issued Citation No. 3606007 for violation of section 56.12025 that specifies that metal enclosures containing electrical circuits must be grounded. Collier designated these violations as nonsignificant and substantial because he believed it was unlikely that an employee would enter the transformer building while the circuits were energized, and, because a short was unlikely since the transformers were sheltered from the weather. (Tr. 77-78, 83-84, 113).

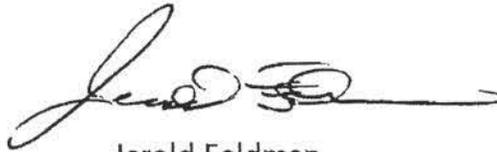
With respect to the fact of occurrence, section 56.12068 prohibits unauthorized entry. Therefore, it is reasonable to conclude that this standard requires locked transformer buildings. Thus, the respondent's chain, which secured the door in a closed unlocked position, could not prevent the entry of an unauthorized individual. Consequently, this condition was properly cited as a violation of section 56.12068. The uncontroverted testimony of Collier establishes that the transformers frames were not grounded as required

by section 56.12025. Consequently, the record establishes a violation of the cited standard in section 56.12025.

However, the likelihood of injury as a result of these violations is remote given the remote location of the transformer building, the danger sign posted on the building, the shut-off switch outside the building, the properly grounded incoming cables, and, the sheltered transformers making a short unlikely. Accordingly, the low gravity of these citations warrants a civil penalty of \$25 for each citation.

**ORDER**

In view of the above, Citation No. 4301221 **IS VACATED**. Citation Nos. 4301222, 3606005, 3606006 and 3606007 **ARE AFFIRMED**. Consequently, **IT IS ORDERED** that the respondent pay a total civil penalty of \$236 in satisfaction of the four affirmed citations in this matter. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of the \$236 payment, Docket No. SE 94-417-M **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

Distribution:

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/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
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APR 6 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-340
Petitioner	:	A.C. No. 05-02820-03621
	:	
v.	:	Docket No. WEST 92-384
	:	A.C. No. 05-02820-03627
WYOMING FUEL COMPANY, n/k/a	:	
BASIN RESOURCES, INC.,	:	Golden Eagle Mine
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-186
Petitioner	:	A.C. No. 05-02820-03657
	:	
v.	:	
	:	Golden Eagle Mine
EARL WHITE, employed by	:	
BASIN RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Charles W. Newcom, Esq., Sherman & Howard, Denver,  
Colorado, for Respondents.

Before: Judge Manning

These cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act") following a remand from the Commission. 16 FMSHRC 1618 (August 1994). The Commission affirmed in part, reversed in part, and remanded in part, the decision of Administrative Law Judge John J. Morris in these cases. The only issue on remand is whether Order No. 3244406 issued to Basin

Resources, Inc. ("Basin Resources")<sup>1</sup> on June 25, 1991, for making unauthorized changes to its ventilation system, constituted a significant and substantial violation of 30 C.F.R. § 75.316 (1991). For the reasons the follow, I conclude that the violation was significant and substantial.

### I. BACKGROUND

On Sunday, June 23, 1991, Basin Resources changed its ventilation system in the Northwest No. 1 longwall section without notifying the Department of Labor's Mine Safety and Health Administration ("MSHA") in advance. MSHA first learned of the ventilation change during a telephone conversation between MSHA Inspector Donald L. Jordan and Golden Eagle Mine General Manager Earl R. White on Monday, June 24, 1995. Inspector Jordan went to the mine early on June 25, and issued an order of withdrawal (Order No. 3244406) alleging a significant and substantial ("S&S") violation of the mine's ventilation plan. He determined that the alleged violation was the result of Basin Resources' unwarrantable failure to comply with the ventilation plan. He charged Basin Resources with a violation section 75.316.<sup>2</sup>

In his decision, Judge Morris affirmed the violation, found that the violation was S&S, but determined that it was not caused by Basin Resources' unwarrantable failure to comply with the safety standard. 15 FMSHRC 1968, 1970-78 (September 1993). On

---

<sup>1</sup> Effective June 1, 1991, KN Energy (Wyoming Fuel Company) sold the Golden Eagle Mine to Enteck, Inc. (Basin Resources, Inc.) (Tr. 205-06).

<sup>2</sup> Section 75.316 provided:

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.... 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.

On November 16, 1992, this safety standard was superseded by 30 C.F.R. § 75.370, which imposes similar requirements.

review, the Commission affirmed the judge's finding that a violation occurred and that the violation was not caused by Basin Resources' unwarrantable failure. 16 FMSHRC at 1619 n. 3. The Commission vacated the judge's conclusion that the violation was S&S and remanded that issue for further analysis consistent with the Commission's decision. 16 FMSHRC at 1626-27. On March 13, 1995, these cases were reassigned to me for an appropriate resolution. I have reviewed the hearing transcript and exhibits and make the following findings of fact based on the evidence.

## II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Earl White became General Manager of the Golden Eagle Mine on June 1, 1992. Between June 1 and June 23, he became concerned that the mine's ventilation system was not diluting and removing methane from the Northwest No. 1 longwall section. Following meetings with his staff on Friday, June 21 and Sunday, June 23, Mr. White decided to make a number of changes to the ventilation system in this longwall section. For purposes of this remand, two major changes in the ventilation system were made: (1) the No. 3 entry on the headgate side was changed from a return to an intake aircourse, and (2) stoppings between the gob and the No. 3 tailgate entry were opened in the Nos. 62 and 63 crosscuts. Mr. White did not confer with or obtain the approval of MSHA before making these changes. As stated above, Inspector Jordan determined that, by making these changes in the ventilation system, Basin Resources violated section 75.316. Judge Morris agreed and the Commission affirmed his decision.

The only issue on remand is whether Basin Resources' violation was S&S. As the Commission stated:

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.

16 FMSHRC at 1625 (citation omitted). The Commission has established a four part S&S test, as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete hazard -- that is, a measure of danger to safety -- contributed to by the violation;

- (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

On remand, there is no dispute that the first element of the Mathies test has been met, an underlying violation of a safety standard. With respect to the second step, the parties disagree. Basin Resources contends that any explosive levels of methane that might have existed in the longwall section on June 25 did not relate back to the violation, because the ventilation system was changed back to the previously approved system soon after the unwarrantable failure order of withdrawal was issued. It states that the changes made to the ventilation system on June 23 no longer existed by the afternoon of June 25. The Secretary contends that Basin Resources did not change the ventilation system back to its former condition and that conditions found by the inspector on the afternoon of June 25 directly relate to the violation.<sup>3</sup>

I find that the Secretary established, by a preponderance of the evidence, that the ventilation system was not changed back to the approved system before the afternoon of June 25. In making this finding I rely on the testimony of Inspector Jordan, Steve Salazar, who was General Mine Foreman, and David Huey, who was Manager of Mine Operations. (Tr. 71, 73, 87, 99, 374-76, 379) They each testified that the ventilation system was not changed back on June 25 to the system set forth in the approved plan. Id. Inspector Jordan's testimony was supported by his contemporaneous notes. (Tr. 374-76, 379; Ex. BR-3). I find that the violation of the ventilation plan contributed to a discrete safety hazard. My findings in this case are not dependent upon the methane measurements taken by Inspector Jordan on the afternoon of June 25. As discussed more fully below, I believe that the violation created a risk of a fire or explosion because of

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<sup>3</sup> During an inspection of the longwall section on the afternoon of June 25, Inspector Jordan detected methane levels of 4% to 5% and more at crosscuts 62 and 63 between the gob and the No. 3 tailgate entry. He issued an imminent danger order and a citation. The Commission vacated the citation on the ground that the Secretary failed to prove that the inspector measured the methane at proper locations. 16 FMSHRC at 1630-31. The imminent danger order was not contested by Basin Resources.

the potential for explosive levels of methane to accumulate in the tailgate entries near the longwall face.<sup>4</sup>

Basin Resources also contends that the Secretary failed to establish the third step of the Mathies S&S test. Basin Resources states that there were no ignition sources because the section was deenergized on June 25. It also states that, although production was resumed on June 24, methane readings show that the highest methane reading obtained on that date was 0.5%. Basin Resources maintains that the changes ultimately approved by MSHA in the ventilation plan were essentially the same as the changes made by Basin Resources on June 23. It contends that the fact that these changes were approved by MSHA establishes that the Secretary failed to prove the third element of the Mathies test. It further states that the high methane readings obtained by the inspector on June 25 were invalid because they were taken at an improper location and that these readings and the imminent danger order issued as a result should not be used to support an S&S finding.

I reject Basin Resources' arguments for a number of reasons. First, in evaluating whether there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury, one must assume continued normal mining operations. U.S. Steel, 7 FMSHRC at 1130. Whether or not the longwall section was energized or high methane readings were found in the two days following the ventilation change does not resolve the issue. The question is whether there was a reasonable likelihood of an injury if Basin Resources' ventilation changes remained in place in the face of continued normal mining operations. I find that the Secretary established that there was such a reasonable likelihood.

The amendment to the ventilation plan approved by MSHA on June 28, 1992, was not the same as the changes implemented by Basin Resources on June 23 in at least one important respect that is relevant here. (Tr. 89-93, 97, 125-27, 279-80; Ex. M-2). The difference relates to the method by which methane in the gob is diluted and removed from the longwall section. After Basin Resources changed the ventilation system on June 23, methane from the gob ("gob gas") traveled through crosscuts 62 and 63 into the tailgate return entries. (Tr. 85-86, 87-88, 91, 123, 175-76; Ex. M-2). As a consequence, the gob gas exited the gob through an area that was about 50 to 100 feet from the tailgate side of the longwall face. (Tr. 54, 95, 106, 123-24, 142, 149, 187;

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<sup>4</sup> I also believe that the dispute whether the ventilation system was changed back on June 25 is largely irrelevant. The issue is whether, assuming continued normal mining operations, the ventilation changes made on June 23rd significantly and substantially contributed to a mine safety hazard.

Ex. M-2). Under MSHA's subsequently approved plan, those crosscuts were closed and a bleeder connector entry, referred to at the hearing as a bleeder tap, was opened up at the back of the gob in crosscut 67. (Tr. 88, 90-91, 105, 126, 149-50, 166, 174-75; Ex. M-2). The plan approved by MSHA on June 28, specifically required Basin Resources to establish "a pressure drop to the back of the gob" so that the gob gas would be directed away from the longwall face to the back of the gob. (Tr. 126-27, 149, 166; Ex. M-2). In addition, an intake air shaft was located at the back of the gob near the bleeder connector at crosscut 67, which would help dilute the methane. (Tr. 88; Exs. M-2, M-8). The difference between the two ventilation systems is significant because the MSHA approved system moved the point where explosive methane is mixed with return air from an area adjacent to the face, where ignition sources are present, to the back of the gob, where ignition sources are not usually present.

Basin Resources' witnesses correctly stated at the hearing that a gob can contain a high level of methane, up to 100% concentration, and that at some location in the mine this methane must be diluted and removed from the mine. The Commission has recognized that explosive mixtures of methane and oxygen may sometimes accumulate in the gob area. Island Creek Coal Co., 15 FMSHRC 339, 347 (March 1993). A hazard is created if explosive methane exists where an ignition source is present. In many underground coal mines using the longwall method, separate bleeder entries are present along the back of each set of longwall panels to remove the gob gas away from active areas of the mine. See, e.g., Island Creek, 15 FMSHRC at 340; VP-5 Mining Co., 15 FMSHRC 1531, 1532 (August 1993). At the Golden Eagle Mine, however, the gob gas is removed through the tailgate entries. Under the ventilation system implemented by Basin Resources on June 23, the point where the gob gas exited the gob and mixed with return air to dilute the methane was near the longwall face. As a consequence, ignition sources were close to this mixing point. Under the plan approved by MSHA on June 28, the mixing point was further away from the face at the back of the gob. I find that the presence of bleeder connectors in proximity to the tailgate side of the longwall face contributed to a safety hazard and that there was a reasonable likelihood that the hazard contributed to would result in an injury, assuming continued normal mining operations. The hazard was a fire or explosion of methane.<sup>5</sup>

I have considered a number of other factors in reaching my conclusion that the violation was S&S. First, the Golden Eagle Mine is a highly gassy mine liberating over one million cubic

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<sup>5</sup> The fourth element of the Mathies S&S test has been met because it is reasonably likely that the injury in question would be of a serious nature.

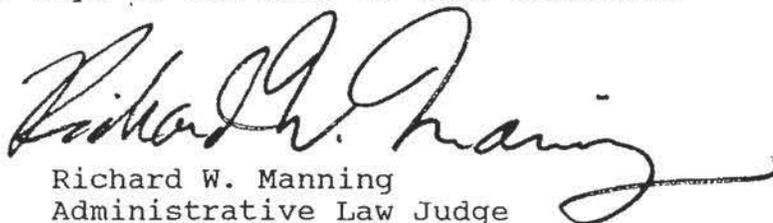
feet of methane during a 24-hour period. (Tr. 25). In fact, the mine liberates more methane than any other underground coal mine in MSHA's District 9. (Tr. 183). Second, this mine experienced a serious methane explosion in the same longwall section several months before the citation was issued. (Tr. 52). MSHA's investigation of the explosion revealed that someone removed a stoppage, which allowed methane to accumulate near the face. (Tr. 142, 184, 199-200). Although the section was not in production at the time of the explosion, the circumstances are similar because, in both cases, stoppages were opened which could allow methane to accumulate near the longwall face. Finally, a major change in a ventilation system will often have unintended adverse effects that are difficult to determine in advance. (Tr. 185-86). One of these unintended effects is the accumulation of methane in "unknown areas," i.e. unanticipated areas of the mine. (Tr. 139-42; 185-86). One of the reasons that the safety standard requires prior approval of significant ventilation changes is to allow MSHA to think about such unintended effects and conduct a thorough investigation "to make sure that there isn't a hazard associated with that change." (Tr. 185-86). By unilaterally making the ventilation change, MSHA was unable to study whether methane might accumulate in areas where ignition sources are present.

### III. CIVIL PENALTY

Judge Morris analyzed the civil penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and determined that a civil penalty of \$300.00 was appropriate for this violation. 15 FMSHRC at 1982.<sup>6</sup> Since I am affirming, in result, Judge Morris's conclusion that the violation was S&S, I adopt his analysis of the penalty criteria and find that a penalty of \$300.00 is appropriate.

### IV. ORDER

Accordingly, I find that the violation described in Order No. 3244406 in WEST 92-384 significantly and substantially contributed to the cause and effect of a coal mine safety hazard. Basin Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$300.00 within 30 days of the date of this decision.

  
Richard W. Manning  
Administrative Law Judge

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<sup>6</sup> In his decision, Judge Morris used an incorrect citation number when referring to this violation.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

**APR 1 1 1995**

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. CENT 93-188-M
	:	A. C. No. 33-00394-05521
	:	
ARKHOLA SAND & GRAVEL, INC. Respondent	:	Muskogee Dredge Mine
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. CENT 94-174-M
	:	A.C. No. 34-00394-05525 A
	:	
	:	Muskogee Dredge Mine
VERNON MCMAHON, Employed by ARKHOLA SAND & GRAVEL, INC., a Division of APAC-ARK, INC., Respondent	:	
	:	
	:	

**DECISION**

Appearances: Jennifer L. Walls, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;  
Hugo Swan, Jr., Esq., McGlinchey Stafford Lang, Fort Smith, Arkansas, for the Respondents.

Before: Judge Feldman

This consolidated civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (the Act). This matter concerns a conveyor belt accident that occurred on January 28, 1993, after the belt was prematurely restarted before a miner who had been performing maintenance could clear the belt. The Secretary, pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), has filed petition for civil penalty against the corporate respondent (Arkhol) seeking to impose a \$1,000 civil penalty for Arkhol's alleged unwarrantable failure to comply with the mandatory safety standard in section 56.12016, 30 C.F.R. § 56.12016. This mandatory safety standard provides:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel.

The Secretary also sought to impose personal liability on Arkhola supervisor Vernon McMahon alleging that he "knowingly authorized, ordered or carried out" the violation of section 56.12016 as contemplated by section 110(c) of the Act, 30 U.S.C. § 820(c). Docket No. Cent 93-188-M had been stayed since November 22, 1993, pending completion of the Secretary's 110(c) investigation involving McMahon.

This matter was heard on February 7, 1995, in Tulsa, Oklahoma at which time Arkhola stipulated that it is a mine operator subject to the jurisdiction of the Act. On March 30, 1995, the Secretary filed a Motion to Withdraw Citation No. 3556635 issued to McMahon. The motion was based on the Secretary's conclusion that the testimony does not adequately reflect that McMahon knew or had reason to know that his subordinate, Tony O'Bannon, would continue to violate Arkhola's lock out procedures shortly after McMahon had admonished O'Bannon for disregarding those procedures. The Secretary's Motion seeking dismissal of the charge against McMahon shall be granted. The parties' post-hearing briefs addressing Citation No. 3556635 issued to Arkhola are of record.

#### Preliminary Findings of Fact

Arkhola operates a sand plant in Muskogee, Oklahoma wherein glass sand, construction sand and blasting sand are extracted from the Arkansas River. The operations include dredging sand from the riverbed and pumping the river sand into pits. Front-end loaders then transport the sand from the pits to a hopper for distribution onto a conveyor. The sand is conveyed into the first dryer (South Dryer) where water is removed. The sand proceeds to other conveyors for further cleaning drying and sorting.

The dryer conveyor operator activates the conveyor with controls in a concrete-block operations shack located in close proximity to the conveyor. The shack has windows on all four sides, one of which looks directly out on the dryer conveyor at the site of the conveyor belt accident. The conveyor controls are directly below the window. The main electrical control panel for the dryer conveyor, which was cited for not being locked out, is located in a building 30 feet from the operations shack. The dryer conveyor belt cannot be seen from this electrical control panel.

Arkhol's Muskogee facility is operated with three shifts. The subject conveyor belt accident occurred on January 28, 1993, during the second shift that begins at 2:00 p.m. and ends at 10 p.m. There are 8 to 12 employees working on this shift at plant locations covering a large geographical area. On the afternoon of the accident, second shift employees Everett Staton and Tommy Duncan were assigned by Shift Foreman Vernon McMahon to a maintenance project in the area of the South Dryer. Staton and Duncan were instructed to contact first shift South Dryer operator Roy Kendry for instructions regarding changing the "skirts" on the South Dryer's conveyor at the point where sand from the hopper falls onto the dryer's conveyor. The skirts guide the sand from the hopper to the conveyor to minimize spillage. Staton and Duncan were to remove and replace the old rubber skirting with new skirting. They were instructed to secure the assistance of Tony O'Bannon, the second shift South Dryer operator.

After the skirting had been replaced, O'Bannon contacted first shift Mechanic Welder Joe McCracken, who had been working on the elevator (a process further up the conveyor line) to ask McCracken if McCracken's repair work was completed to the point where McCracken could unlock the elevator so that sand could be processed through the system to check the skirting. McCracken replied affirmatively and went to unlock the elevator.

McMahon was not present in the area while the skirting was being replaced. However, McMahon arrived after the skirting was changed. McMahon was present when McCracken returned from unlocking the elevator and McMahon heard McCracken ask O'Bannon if O'Bannon had locked out the South Dryer conveyor belt for it was O'Bannon's responsibility, as the dryer conveyor operator, to lock out the belt. O'Bannon had a lock for locking out the conveyor at the electrical control panel and had received training in company lock out procedures.

When O'Bannon replied that he had not locked out the belt, McCracken "blew up." McCracken told O'Bannon, "If you work on the [expletive deleted] again, lock the S. O. B out." (Tr. 154-155). Foreman McMahon was shocked by McCracken's strong language. However, he agreed with McCracken and added his own criticism. McMahon and McCracken testified that McMahon told O'Bannon, "Yes, Tony, if you work on it again, lock it out before anybody works on it." (Tr. 36, 42, 45-46, 155, 157). McMahon believed that McCracken's strong admonishment and his own warning would be sufficient to impress upon O'Bannon the importance of following lock out procedures. (Tr. 52-54, 106).

After the elevator was unlocked, sand was transported through the South Dryer conveyor system. The men determined the new skirts were not properly channeling the sand from the hopper onto the conveyor and the conveyor was again shut down. Although McMahon did not observe O'Bannon lock out the conveyor, he assumed O'Bannon would do so given the earlier incident. There is no evidence O'Bannon did not lock out on this

occasion. McMahon stayed to watch Staton and Duncan remove, cut and reinstall the skirting.

After reinstalling the skirting, the men could not restart the conveyor because an elevator fuse had blown. McCracken replaced the fuse and the conveyor was restarted. McMahon felt the repair was complete and returned to the office to attend to other duties. After McMahon left the area, the men concluded the second installation of the skirting was unsatisfactory. Unknown to McMahon, the men decided to replace the skirting. O'Bannon made the decision not to lockout because, as he admitted in his arbitration hearing, "[I] was just going to run a test that wasn't going to take long and I didn't think there was any need to lock out." (Tr. 186).

After Staton and Duncan once again replaced the skirting, O'Bannon went into the operations shack to restart the conveyor. A few moments later, Staton remembered he had left a tool on the inside of the conveyor belt. As Staton stepped on the belt to retrieve the tool, O'Bannon, without looking out the operations shack window to ensure that the conveyor was clear, activated the conveyor. Staton sustained serious injuries when he was flipped off the dryer conveyor to the ground.

Staton's accident was investigated by Bill Scarbrough, Arkhola's Director of Safety and Industrial Relations. As a result of this investigation, O'Bannon was discharged for "willful negligence" under the plant's union contract. O'Bannon's discharge was sustained in a union arbitration proceeding during which O'Bannon admitted intentionally ignoring the company's lockout procedures and failing to look to see if the conveyor belt was clear before starting it.

Mine Safety and Health Inspector Norman LaValle investigated this incident. As a result of his investigation, on February 17, 1993, LaValle issued 104(a) Citation No. 3556635 citing a violation of section 56.12016 attributable to moderate negligence for Arkhola's failure to lock out the South Dryer conveyor at the time of Staton's injury at 6:10 p.m., on January 28, 1993. The citation was modified to a 104(d)(1) citation charging unwarrantable failure after it was learned in a March 5, 1993, health and Safety conference that McMahon had cautioned O'Bannon shortly before the accident for O'Bannon's failure to lock out the conveyor.

#### Further Findings and Conclusions

Section 104(a) of the Act requires that "[each citation shall be in writing and shall describe with particularity the nature of the violation. . . ." 104(d)(1) Citation No. 3556635 cited the following condition associated with the alleged violation of section 56.12016:

On 1-28-93 at 6:10 pm a lost time injury occurred to a maintenance employee while working on the south dryer raw feed conveyor installing conveyor skirt rubbers. After the job was completed the injured employee was crossing back over the conveyor when the conveyor was inadvertently started by the dryer plant operator. The maintenance man was flipped off the belt and when he landed on the ground he had suffered a fracture to his upper left leg. The distance from the conveyor belt to the ground level is 54 inches. The conveyor is provided with a stop cord device. The conveyor was not tagged and locked out by the employees while performing their jobs. (Emphasis added).

Thus, the January 28, 1993, accident, that purportedly occurred as a result of O'Bannon's failure to lock out the conveyor, was the fundamental reason for issuing Citation No. 3556635 to McMahon and Arkhola. However, at trial, both inspector Lavalle, and, MSHA Charlottesville, Virginia, Field Office Supervisor Dale Robert St. Laurent, conceded that O'Bannon's failure to lock out the conveyor at the main electrical control panel located in a building 30 feet from the operations shack was not a contributing factor in this accident. (Tr. 113-115, 140-142). The site of the accident along the conveyor could not be seen from the main electrical control panel.

Rather, the operations shack, with its controls and windows overlooking the conveyor, is the proper site for determining if the area is clear before restarting the belt. The proximate cause of this accident was O'Bannon's admitted failure to look through the operations shack window to make certain the belt was clear before consciously pushing the button to restart the conveyor. There is no evidence, as LaValle suggests in Citation No. 3556635, that O'Bannon "inadvertently started" the dryer conveyor, or, that the accident was otherwise attributable to O'Bannon's failure to lock out. Another contributing factor was Staton's contributory negligence in climbing on the belt after it was apparent that maintenance was completed and the belt was cleared.

Having erroneously concluded the failure to lock out the conveyor caused the accident, inspector LaValle proceeded to cite the lock out mandatory standard in section 56.12016 which is not the applicable standard in this case. The basic purpose of section 56.12016, which is contained in Subpart K under the heading "electricity," is to protect miners from electrical hazards rather than mechanical hazards. This conclusion is based on Phelps Dodge Corporation v. FMSHRC, 681 F.2d 1189, 1192 (Ninth Cir. 1982), wherein the Court, considering the failure to lock out an electrically powered conveyor belt that carried ore forward for smelting, held the purpose of the lock out provisions of section 56.12016 "is manifestly to prevent the accidental electrocution of mine workers."<sup>1</sup>

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<sup>1</sup> Phelps Dodge involved former section 55.12-16, 30 C.F.R. § 55.12-16, which contained provisions that are identical to those found in section 56.12016.

In Phelps Dodge the Court noted the regulations immediately preceding the subject section set forth procedures to ensure that workers will not be exposed to energized wires. See sections 56.12001 through 56.12014. The Court also noted that the antecedent section to the subject section required that "power circuits be deenergized before work is done" on them. See section 56.12017. Finally, the Court concluded these regulations (Subpart K) "simply do not address the hazards arising from the accidental movement of electrical equipment while mechanical work is being done thereon." Id.

Mandatory standards to prevent hazards associated with the movement of equipment are contained in Subpart M entitled "machinery and equipment." The correct mandatory standard given the circumstances of this case is found in Subpart M in section 56.14201(a), 30 C.F.R. § 56.14201(a), entitled "conveyor start-up warnings." Section 56.14201(a) provides:

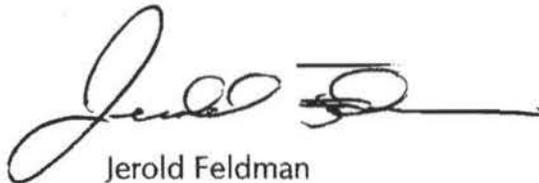
When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

Here, as noted above, O'Bannon admitted in his arbitration proceeding testimony that "he did not look out the [operations shack] window to see where his fellow employees were before he pushed the button to turn on the conveyor belt." (Resp. Ex. 2, p. 5). While O'Bannon's conduct would have provided a basis for Arkhola's liability under the strict liability application of the Act if section 56.14201(a) had been cited, O'Bannon's negligence with respect to not ensuring the belt was clear, absent a showing of inadequate supervision, could not be imputed to Arkhola to establish an unwarrantable failure. Moreover, O'Bannon's negligent act does provide a basis for establishing McMahon's personal liability under section 110(c) of the Act.

In summary, the gravity of a violation is determined by whether there is a likelihood that the hazard contributed to by the violation will result in serious injury. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In this case, it was the violation of section 56.14201(a), rather than cited section 56.12016, that contributed to the conveyor start-up hazard that resulted in Staton's injuries. Consequently, 104(d)(1) Citation No. 3556635, which cited an inapplicable mandatory standard, must be vacated.

**ORDER**

In view of the above, the Secretary's Motion to Withdraw Citation No. 3556635 as it applies to Vernon McMahon **IS GRANTED** and Docket No. CENT 94- 174-M **IS DISMISSED. IT IS FURTHER ORDERED** that 104(d)(1) Citation No. 3556635 as it applies to Arkhola Sand & Gravel Company **IS VACATED** and Docket No. CENT 93-188-M **IS DISMISSED.**

A handwritten signature in black ink, appearing to read "Jerold Feldman", with a horizontal line extending to the right.

Jerold Feldman  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 12 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-97-M
Petitioner	:	A. C. No. 14-00164-05520
v.	:	
	:	Kansas Falls Quarry & Mill
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

## DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado, for the Secretary;  
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, Junction City, Kansas, and Katherine S. Larkin, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Maurer

## STATEMENT OF THE CASE

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.*, charging Walker Stone Company, Inc., with two violations of the regulatory standards found in Part 56, Title 30, Code of Federal Regulations, as the result of an MSHA investigation into the cause of a fatal machinery accident at the respondent's Kansas Falls Quarry & Mill, located at Chapman, Dickinson County, Kansas. The general issues before me are whether the respondent violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, the case was heard at Fort Riley, Kansas, on October 26-27, 1994. At the hearing, Inspectors Roger G. Nowell and Lloyd R. Caldwell testified for the Secretary of Labor. Mr. David S. Walker, the President of Walker Stone Company, Inc., testified for respondent. The parties simultaneously filed briefs on January 9, 1995, which I have duly considered in making the following decision.

## **STIPULATIONS**

At the hearing, the parties entered the following stipulations into the record (Tr. 16, Joint Ex. No. 1):

1. Walker Stone, Inc. is engaged in mining and selling construction aggregates and road building materials.

2. Walker Stone, Inc. is the owner and operator of Kansas Falls Quarry and Mill, MSHA I.D. No. 14-00164.

3. Walker Stone, Inc. 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 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, 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 proposed penalties will not affect respondent's ability to continue in business.

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

9. Walker Stone, Inc. had 54,977 manhours of production in 1992.

10. The certified copy of the MSHA Assessed Violations History (dated March 16, 1994) accurately reflects the history of this mine for the 2 years prior to the date of the citations.

## **THE ACCIDENT**

The accident occurred on June 25, 1993, at the primary crushing plant of the Kansas Falls Quarry and Mill, owned and operated by the Walker Stone Company, Inc.

Dan Robert Boisclair, a general clean-up man and alternate truck driver, with one year of mining experience, was fatally crushed while helping the crusher operator and other employees unclog the primary impact crusher.<sup>1</sup> Because a truck driver had quit the previous day, on June 25, 1993, Boisclair's job was to haul blasted rock from the quarry to the crusher. Work progressed normally throughout the day until approximately 3:00 p.m., when the impact crusher plugged up and stalled the drive motor. As was the established procedure in this circumstance, Roy Brooner, the crusher operator, signaled the truck drivers by turning the green light at the rock bin off and turning the red light on. A red light meant for the truck drivers to stop dumping their trucks' limestone loads into the hopper and to proceed to the crusher to assist the crusher operator in unplugging the crusher. By 3:30 p.m., the men had succeeded in unplugging the crusher and went back to their regular routine.

At approximately 5:00 p.m., barely 30 minutes before quitting time, the crusher jammed again, stalling the diesel drive motor. Brooner again turned the red stoplight on at the rock bin and the truck drivers, including Boisclair, went to assist him, as was the usual practice.

The upper part of the crusher has three access openings; the opening on each side is pinned closed while the crusher is in operation; the other is a hydraulically operated "flop gate," 52 inches wide and 38 inches high. The "flop gate," when down, provides access to the impeller or rotor, which can be gained by crouching or crawling through the "flop gate" opening onto the impeller. The cylindrical impeller or rotor inside the crusher housing contains three metal bars about 3 inches high running horizontally along the impeller drum. When the impeller rotates, it crushes the rocks and/or throws the rocks against the crusher's walls until the rocks break into pieces small enough to exit the crusher.

When the truck drivers arrived at the crusher, the "flop gate" was opened and Boisclair, along with Bill Scott, entered the interior of the crusher. They used a sledge hammer to break up one or two large boulders they found on top of the rotor. Boisclair and Scott thereupon exited the crusher and Brooner, the operator, tried to move the rotor by "jogging" it with the "flop gate" still open.<sup>2</sup> He did this by pressing the start button on the diesel engine with the clutch engaged. But the impeller would not rotate and thus they

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<sup>1</sup>The primary impact crusher is designed to break larger rocks into smaller pieces which can then be processed by the milling operation into a saleable product.

<sup>2</sup>The crusher operator duty station is normally in a small operating house located above the crusher and the diesel engine. When the crusher gets clogged, however, the operator moves down to a location which is right next to the diesel engine so that he can "jog" the engine to determine whether the crusher's impeller is free.

knew the crusher was still clogged. At this point, Scott and Brooner agreed that Scott would go down on the conveyor belt below the impact rotor and see if a rock had gotten caught in the area of the splash pan. Meanwhile, Boisclair, unbeknownst to Brooner, reentered the interior of the crusher. Frank Esterly, another truck driver, was behind Boisclair just inside the "flop gate," but outside the crusher compartment. From this position, Esterly could see Scott as he was working below the rotor. While Scott was cleaning out the exit area of the crusher, Boisclair was on his hands and knees on top of the rotor, cleaning out some small wedged-in rocks on the top side of the crusher with his hunting knife. At some point, Esterly called down and asked Scott if he needed any help. Scott replied that he thought he had removed the problem rock and was about ready to leave. Esterly told Boisclair to hurry and get out of the crusher as Scott was about done below. While Scott was climbing out from below, Boisclair started to turn around on the rotor to exit. As Boisclair was exiting, but not yet out, Brooner, cleared by Scott, but unaware that Boisclair had reentered the crusher, "jogged" the rotor to see if it was free. This time the impeller turned. As it turned, Boisclair's foot was caught by an impeller bar, dragging him partially into the crusher and crushing him between the impeller drum and the wall of the crusher. The cause of death was "massive crushing injuries to the upper and lower torso."

The next day, June 26, 1993, MSHA began its investigation of the accident. Its report was released on August 11, 1993, and is included in this record as Petitioner's Exhibit No. 1.

The two inspectors who subsequently wrote the report, Nowell and Caldwell, concluded that the direct cause of the accident was the failure to ensure that all employees were in a safe location before initiating movement of the crusher. They also found other contributing causes, such as: (1) the failure to provide and use an audible warning device or other effective means to warn employees of impending crusher movement; (2) the failure of the victim to notify the crusher operator of his intention to reenter the crusher compartment; and (3) other unrelated factors that might have caused the employees to hurry the unplugging of the crusher, like the hot weather, the fact that the plug-up occurred just 30 minutes prior to quitting time and paychecks were to be distributed at the end of the shift.

As a result of their accident investigation, Inspector Nowell issued two section 104(a) citations to the operator which are the subject of this proceeding.

## DISCUSSION, FINDINGS, AND CONCLUSIONS

### Citation No. 4337450

Citation No. 4337450, issued on June 28, 1993, alleges a "significant and substantial" ("S&S") violation of the standard at 30 C.F.R. § 56.14105<sup>3</sup> and charges as follows:

All employees were not effectively protected from hazardous motion of the Impact rotor of the Pettibone universal 5165 primary impact crusher. An employee was fatally crushed at approximately 5:20 p.m., on June 25, 1993, when the crusher operator jogged the drive engine starter switch. Five employees had been working to free the rotor from a rock jam and all had exited the crusher interior. The victim reentered the crusher interior without the crusher operators knowledge and was caught between the rotor and stripper bar when the starter was jogged. Procedures for accurate accounting of all employees present during hazardous unplugging operations of the crusher and/or a positive mechanical device to prevent movement of the rotor were not provided.

Respondent's first line of defense against this citation is that no "repair" or "maintenance" work was being performed on the crusher, and therefore this standard is inapplicable to the facts of this case. I agree. The standard speaks to "repairs" to or "maintenance" of the machinery or equipment in question. In this case, the crusher. The respondent's employees were not performing any mechanical, maintenance or repair work on the crusher or making any structural modification to the crusher. The only thing they were actually working on were the rocks, breaking them up with a sledgehammer, and/or otherwise dislodging them from the crusher.

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<sup>3</sup>30 C.F.R. § 56.14105 provides:

Repairs or maintenance on machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

Accordingly, Citation No. 4337450 will be vacated herein. The mandatory standard cited simply does not apply to the facts of this case. In my opinion, that standard was written to apply to repair or maintenance evolutions, as those terms are commonly used and not relatively minor annoyances that arise during the on-line production usage of the machinery or equipment, that do not involve any adjustments, maintenance or repairs to the equipment itself.

Citation No. 4337451

Citation No. 4337451, also issued on June 28, 1993, alleges a "significant and substantial" ("S&S") violation of the standard found at 30 C.F.R. § 56.14200<sup>4</sup> and charges as follows:

An audible warning or other effective means was not being used to warn all employees working on or around the Pettibone universal 5165 primary impact crusher of impending movement. On June 25, 1993, at approximately 5:20 p.m., the crusher rotor was moved by jogging the diesel engine starting switch. The rotor movement fatally crushed an employee, who had reentered the crusher interior without the crusher operator's knowledge. The victim and four other employees had been working to remove large rocks which had jammed or plugged the impact rotor.

Respondent's argument with regard to this citation is that there was no violation of the cited standard because the crusher was being "jogged", not "started", but even if "jogging" is construed to be the same as "starting" in this instance, other effective means were used to warn persons potentially exposed to any hazard.

I disagree on both counts. First of all, the potentially dangerous movement of the crusher is in fact movement of the impeller itself. When the crusher was "jogged", the impeller moved, Danny Boisclair was caught by that impeller and crushed to death. He was without a doubt a person exposed to a hazard from the equipment.

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<sup>4</sup>30 C.F.R. § 56.14200 provides:

Before starting crushers or moving self-propelled mobile equipment, equipment operators shall sound a warning that is audible above the surrounding noise level or use other effective means to warn all persons who could be exposed to a hazard from the equipment.

Secondly, once the cited standard is deemed applicable to the factual situation, the inquiry turns to whether that standard was satisfied by either of the two allowable methods. I find it was not. It is undisputed that there was no audible warning sounded before the crusher was "jogged." That leaves us with the issue of whether other effective means were used to warn persons potentially exposed to any hazard from the equipment. Again, I find that there were not.

The Secretary argues that in order to be effective, the rule should be to the effect that the operator will make certain that all persons are clear before "jogging" the crusher. I agree that would be an ideal means to comply with this standard, but I am aware of the decision in the case of Secretary v. Morgan Corp., 12 FMSHRC 40 (January 1990) (ALJ),<sup>5</sup> wherein Judge Koutras compared the mandatory standard at bar with its predecessor, 30 C.F.R. § 56.9005, and I understand that the standard cited herein, section 56.14200, does not contain language requiring an equipment operator to be certain that all persons are in the clear before starting his equipment. Although the old section 56.9005 did require an equipment operator to determine with some degree of certainty that all persons were in the clear before moving the equipment, I am fully cognizant that this requirement has been deleted from the revised standard and it now only requires that either audible warning be given or other effective means be used to warn persons potentially exposed to a hazard from the equipment.

Respondent urges that the company had policies in effect that employees were not to work in the crusher by themselves and that they were not to work "above" other employees. Respondent maintains that all employees, including Boisclair, were aware of these policies even though these rules were not written down anywhere and there is no direct evidence that Dan Boisclair had ever received these instructions. I find that even if it were so, this is plainly not a sufficiently effective means to warn employees who would be unclogging the crusher that at least some degree of coordination between the crusher operator and the "uncloggers" was required in order to address the hazards attendant to such an operation.

It is clear to me that the violation of the cited standard is proven as charged. Clearly, the violation was also "significant and substantial" and serious. It was a significant contributing cause to a fatal accident.

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<sup>5</sup>The Commission granted Morgan's petition for discretionary review of Judge Koutras' decision in this matter, but while pending on their docket, subsequently approved the parties' settlement of the case and dismissed the proceeding. Secretary v. Morgan Corp., 12 FMSHRC 394 (March 1990).

Respondent also argues that it should not be charged with significant negligence in this instance because the most direct and proximate cause of the accident and Dan Boisclair's death was his own unpredictable conduct in returning to the interior of the crusher unbeknownst to the crusher operator. I agree that Mr. Boisclair was certainly negligent and played a major role in causing his own death. I would also assess a portion of negligence to the crusher operator, who moved the impeller without knowing where Boisclair was even though he knew he was in the area. These two men (Boisclair and Brooner) were rank-and-file employees of the respondent and I am not assigning their negligence to the respondent for purposes of assessing a penalty in this case. Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-65 (August 1982). However, there is plenty of negligence left to go around in this instance. More particularly, I find the respondent was negligent by not having an effective safety policy in place that specifically concerned unplugging the crusher, an operation that reoccurred on a relatively frequent basis and obviously could be hazardous duty for the "unpluggers" who actually enter the interior of the machine. Once inside, they are clearly dependent on the crusher operator to know where they are at all times and to ascertain that they are clear before he moves the crusher's impeller. It is unreasonable for the respondent to have believed that some general knowledge about the crusher and a couple of general rules about working "above" others and working by oneself would be sufficient to avoid the type of accident which in fact occurred.

In summary, the evidence in this record persuades me to conclude that the respondent had no effective means to warn all persons who could be exposed to the hazards of unplugging the crusher. Accordingly, I find the respondent is chargeable with "moderate," or ordinary negligence in this case.

In assessing a civil penalty in this instance, I have also considered the respondent's size, history of violations, and good faith abatement of the violation. Under the circumstances, I find that a civil penalty of \$7500 is appropriate, reasonable, and will satisfy the public interest in this matter.

#### ORDER

Citation No. 4337450 **IS VACATED** and Citation No. 4337451 **IS AFFIRMED**.

The Walker Stone Company, Inc., is **ORDERED** to pay the Secretary of Labor a civil penalty of \$7500 within 30 days of the date of this decision.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 17 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEST 94-510-M  
: A.C. No. 10-01776-05517  
: v. :  
: Plant No. 3  
DEATLEY COMPANY, INC., :  
Respondent :

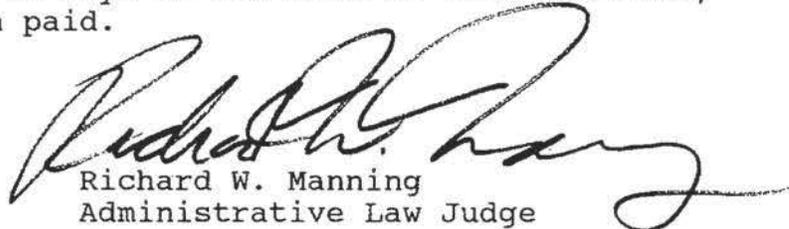
DECISION APPROVING SETTLEMENT

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The parties filed a motion to approve settlement and order payment of the proposed penalty. Respondent has agreed to pay the \$252.00 penalty originally proposed for the single citation.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Accordingly, the motion for approval of settlement is **GRANTED**, and Respondent is **ORDERED TO PAY** the Secretary of Labor the sum of \$252.00 within 30 days of the date of this decision, if it has not already been paid.

  
Richard W. Manning  
Administrative Law Judge

Distribution:

Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Brian DeAtley, Crushing Manager, DEATLEY COMPANY, INC., 3665 Snake River Avenue, P.O. Box 648, Lewiston, ID 83501

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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APR 20 1995

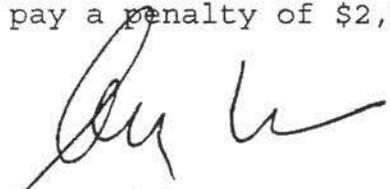
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 94-448  
Petitioner : A. C. No. 36-08191-03527  
v. :  
 : Clutch Run Mine  
DOVERSPIKE BROTHERS COAL CO., :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$3,200 to \$2,200 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$2,200 within 30 days of this order.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

Gayle M. Green, Esq., Office of the Solicitor, U. S. Department of Labor, 14480-Gateway Bldg., 3535 Market Street, Philadelphia, PA 19104

Randall Rearick, General Manager of Mining, Doverspike Brothers Coal Co., Inc., R.D. #4, Box 271, Punxsutawney, PA 15767

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 21 1995

SPRINGFIELD UNDERGROUND, INC., : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. CENT 94-109-RM  
: Citation No. 4321784; 1/11/94  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. CENT 94-110-RM  
ADMINISTRATION (MSHA), : Citation No. 4321786; 1/12/94  
Respondent :  
: Docket No. CENT 94-111-RM  
: Order No. 4321787; 1/12/94  
:  
: Plant No. 1 Mine & Mill  
: Mine ID 23-00094  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 94-131-M  
Petitioner : A. C. No. 23-00094-05543  
v. :  
: Docket No. CENT 94-201-M  
SPRINGFIELD UNDERGROUND, INC., : A. C. No. 23-00094-05546  
Respondent :  
: Plant No. 1 Mine & Mill  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 94-91-M  
Petitioner : A. C. No. 23-00094-05542  
v. :  
: Plant No. 1 Mine & Mill  
GRIESEMER STONE COMPANY, :  
(n/k/a SPRINGFIELD :  
UNDERGROUND, INC.), :  
Respondent :

## DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,  
U. S. Department of Labor, Denver, Colorado, for  
the Secretary;  
Bradley S. Hiles, Esq., Peper, Martin, Jensen,  
Maichel & Hetlage, St. Louis, Missouri, for  
Contestant/Respondent.

Before: Judge Maurer

These consolidated proceedings concern a proposal for assessment of civil penalty filed by the Secretary of Labor (Secretary), against the mine operator (Springfield Underground, Inc., hereinafter referred to as Springfield), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a combined civil penalty of \$2,772, for four alleged violations of the mandatory safety standard found at 30 C.F.R. § 57.3200.<sup>1</sup> The various issues presented in the civil penalty cases include the fact of violation, and if so found, whether the violation(s) were "significant and substantial", whether some of the violation(s) were "unwarrantable failures", and the appropriate civil penalty assessments to be made for the violations, should any be found. The contest cases filed by Springfield challenge the legality and propriety of the cited violations.

Pursuant to notice, the cases were heard at Springfield, Missouri, on January 4-5, 1995. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

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<sup>1</sup>30 C.F.R. § 57.3200 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.

### STIPULATIONS

The parties agreed to the following (Tr. 14-17):

1. Springfield is engaged in mining and selling of crushed and broken limestone in the United States, and its mining operations affect interstate commerce.

2. Springfield is the owner and operator of Plant No. 1 Mine & Mill, MSHA ID No. 23-00094.

3. Springfield 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 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, but not for the truthfulness or relevancy of any statements asserted therein.

6. The proposed penalty will not affect respondent's ability to continue in business.

7. The operator demonstrated good faith in abating the violation(s).

8. Springfield is a small mine operator with 78,118 hours of production in 1992.

### The "Loose Ground" Issue

As a general matter central to all four of the violations alleged by the Secretary in these cases, I note that the terms "hazardous ground conditions" and "loose ground" or "loose material" are not specifically defined in the regulations.

"Loose" is defined as "not rigidly fastened or securely attached." Webster's Third World New International Dictionary (Unabridged) 1335 (1966). The term "loose ground" is defined as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough. . . . As used by miners, rock that must be barred down to make an underground workplace safe. . . ." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms 658 (1968). In Amax Chemical Company, 8 FMSHRC 1146, 1148 (August 1986), the Commission interpreted the term "loose ground" to refer "generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling."

For the operator's employees who testified concerning the terminology, their working definition of "loose ground" was "any material that would fall on its own." The operator's position at trial and in their post-trial brief would add to that definition "any material that could be 'barred down' using a hand scaling bar."

For the MSHA inspector who testified on behalf of the Secretary, the paramount factor he used to determine "loose ground" was more or less a hindsight test. If the material, once tentatively identified as "loose," could be brought down by any means necessary, then that demonstrated it was "loose."

In a somewhat related case involving the roof in an underground potash mine, Amax Chemical Corp., *supra*, 8 FMSHRC at 1149, the Commission stated that a variety of factors should be considered in determining whether loose ground is present, including but not limited to the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, "popping" and "snapping" sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas. In this case, however, as a practical matter the Secretary's evidence was largely limited to the results of a visual inspection of the cited areas and the subsequent scaling operations. The inspector admitted he did not consider the operating experience of the mine with respect to loose ground, the presence or absence of sloughed material, or popping or snapping sounds in the ground. He also admittedly is not familiar with the rock formation of the mine.

With that general outline in mind, I proceed to the individual matters at bar.

### DISCUSSION, FINDINGS, AND CONCLUSIONS

#### I. Docket No. CENT 94-91-M

Citation No. 4111868 was issued by MSHA Inspector Michael R. Roderman on October 13, 1993 under section 104(a) of the Mine Act, and alleges a violation of the mandatory safety standard found at 30 C.F.R. § 57.3200. The condition or practice cited by the inspector is described as follows:

The operator of the Tamrock Drill was observed drilling in a heading in the underground mine area known as the "Southwest Corner." There were large pieces of loose material on the rib directly behind and to the left of the driller. A person could not safely walk around the drill without being exposed to possible "fall of ground." The back height in this area is about 30 feet high. The fall of the amount of rock observed from these heights could easily result in death. The drill was immediately removed from the area, and scaling started.

On the day in question, Inspector Roderman, accompanied by Mr. Tony Brasier, the Safety Director and Mining Engineer for Springfield, observed what he felt to be loose material approximately 20 feet high on a rib in the "Southwest Corner." He described this as large pieces of loose material directly behind and to the left of an area where drilling was taking place. He later observed that this loose material was brought down "quite easily," but does not recall what method was used to bring it down. He testified that the mine used both hand scaling and a mechanical scaler with a hydraulically operated tooth.

In fact, it was brought down by the Gradall 880 mechanical scaler, and according to the employee who actually performed the scaling activity, none too easily.

The Gradall 880 is a large machine weighing 26 1/2 tons and having a reach of 42 feet in the air. The cab of the Gradall sits more than 6 feet high and the operator's eye-level is approximately 10 or 11 feet off the floor. The Gradall 880 also has powerful lighting, with six high intensity lights, plus a spotlight for the operator. The machine is capable of illuminating any rock surface it faces. The lights are evenly distributed from low running lights, to lights on the top and sides of the cab attached to the boom, which can reach to the top of the mine. The Gradall has a single telescopic arm, or boom, with a large tooth on the end. Through the use of a joy stick, the Gradall operator may manipulate the large tooth in the same directions and with the same motions as a person moves his hand. The tooth is capable of delivering enormous force -- 16,000 pounds of curling force. In addition, the boom can deliver up to 19,000 pounds of force when it attacks a rock face. The Gradall is capable of excavating rock with tons of force and enormous leverage.

Mr. Shannon Davis, the employee who operates the Gradall 880, and performed the scaling activity which the inspector witnessed, very credibly testified to the effect that the material in question was not "loose." He is an hourly employee of the company, a member of the Operating Engineers Union, and an experienced scaler. Mr. Davis testified that when he initially positioned his scaler in front of the rib in question, he did not observe any loose ground. He did bring material down from the wall, but only after exerting "full power" with the mechanical scaler. He brought down "a very small rock that was basically excavated off the wall." By his account, the mechanical scaler actually broke the rock away from the other stone on the rib. He also opined that that rock could not have been brought down by hand scaling nor would it have fallen on its own.

This version of events was corroborated by Mr. Brasier. He testified that although material was brought down by the Gradall scaler, it had to be pounded and scraped down. He described the machine as "shaking violently. . . . [y]ou could see the machine sit there and shake and take a lot of abuse."

Based on the preponderance of evidence available on this point of contention, I conclude that the material was not "loose." The testimony of Mr. Davis was very significant on this point. If the material has to be pried off the rib with thousands of pounds of mechanical force, it is not "loose." Accordingly, I find no hazardous ground conditions existed as alleged in Citation No. 4111868 and it will therefore be vacated herein.

## II. Docket Nos. CENT 94-109-RM and CENT 94-131-M

Citation No. 4321784 was also issued by Inspector Roderman under section 104(a) of the Act on January 11, 1994. It alleges a violation of 30 C.F.R. § 57.3200, and states as follows:

Loose material was observed on the left pillar in "Knob Tunnel" area at Grid 375-550. The mechanical scaler had earlier scaled the face in this area, but had not checked for loose on the pillars before reaching the face. The amount of loose that was scaled down (approximately 2 loader buckets full) and the ease with which it came down indicate that someone could have easily been fatally injured in this area. The driller was the next scheduled person to enter this area after the loader cleaned up the debris.

According to Inspector Roderman, this loose was 25-30 feet above the floor level and filled approximately two full front loader buckets after it was scaled down.

Once again, however, there is a serious difference of opinion concerning the threshold issue of whether the material was "loose" in the first place.

Shannon Davis was again the Gradall operator who scaled the pillar at the inspector's direction. He testified that the material he brought down was "broken" off the pillar by the Gradall. He started with a rock that stuck out from the top of the pillar and, at Mr. Brasier's direction, used the full power of the Gradall to bring it down.

An experienced scaler with the hand bar as well, Mr. Davis opined that the rock could not have been brought down by hand; nor would the vibrations from nearby scaling or drilling have caused the rock to fall. After bringing down the rock at the top, Mr. Davis "hit" the pillar repeatedly with the Gradall tooth, breaking off more rock.

Another discrepancy with this citation involves the amount of rock excavated off the pillar by the Gradall. Inspector Roderman recorded the volume on the citation as "two loader buckets full." Shannon Davis, as it turned out, also operated the loader which picked up the scaled-down stone. He testified that the volume was only about one-third of one bucket, a difference of several tons in volume from Inspector Roderman's estimate. Tony Brasier's recollection supported Mr. Davis.

The Secretary bears the burden of proving these violations by a preponderance of the evidence and in this instance it just is not here. Once again, I made the critical credibility choice in favor of Mr. Davis and find that the material brought down by the Gradall was not "loose," does not constitute a hazardous ground condition under the standard cited, and is therefore not a violation of that standard. Determining material is "loose" based on the fact that it can be brought down by such tremendous force goes well beyond what can reasonably be contemplated by the standard at bar. Accordingly, Citation No. 4321784 will be vacated herein.

III. Docket No. CENT 94-110-RM (Citation No. 4321786 assessed in Docket No. CENT 94-201-M)

Citation No. 4321786 was issued by Inspector Roderman on January 12, 1994, under section 104(d)(1) of the Act. Like the others, this citation alleges a violation of 30 C.F.R. § 57.3200. The condition or practice alleged by the inspector is as follows:

Loose material was observed on the ribs and pillars in the "Skinny Pillar" area of the mine. A front-end loader and two haul trucks were mucking a heading in this area. The trucks were traveling directly by large amounts of loose. The loose measured about 3 foot diameter to about 6 foot by 12 foot by 1 foot thick, in some locations. Even though all persons observed were in their vehicles, if a fall of ground did occur, they could still be seriously

injured. It was determined that the company did not take all steps necessary to prevent this occurrence, as they did not insure that the area was properly checked for loose after blasting and prior to mucking. This is an unwarrantable failure.

The inspector testified that numerous factors might cause what he considered to be loose material to fall, including vibrations from equipment or equipment bumping against the ribs or pillars.

The scaling in this instance was done by hand, with scaling bars in a highlift to reach the affected area. The inspector was not present. However, the hand scalers abating the citation admittedly brought down several "fist-size" pieces of loose material. This is considerably less than the inspector described but is still sufficient to create a "hazard to persons" and violate the cited standard. Employees were working in the area and were exposed to the hazard presented by this "loose."

The inspector also marked the citation "significant and substantial" ("S&S").

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 violation of the cited standard has been proven to my satisfaction. Furthermore, I find that if the condition were left unabated, continued vibrations from further blasting could adversely effect the status of the loose material. It would likely continue to deteriorate over time. The rock, which was already loose, was not going to get any tighter over time; it would only get looser. Assuming no one corrected the condition, it would eventually fall, and I concur with the inspector that a fist-size rock falling from overhead would be reasonably likely to cause a serious injury to a person or persons below. I therefore find that the violation was "S&S" and serious.

The Secretary also argues that the violation was the result of Springfield's unwarrantable failure to comply with the standard at bar.

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, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993).

The evidence does not support any "indifference, willful intent or serious lack of reasonable care" on the part of the operator with regard to the "loose material" in the "Skinny Pillar" area.

First, I found the previously issued citations (October 13, 1993 and January 11, 1994) citing "loose ground" as a hazardous ground condition were not violations. Therefore, these previous citations cannot serve as a basis for the Secretary's contention that respondent was "indifferent" (i.e., that respondent was aware of the violative conditions yet failed to correct them).

Secondly, Inspector Roderman testified that the mine foreman, Mr. Vandenburg, had inspected the area the morning the citation was written but failed to correct obvious "loose." However, the operator provided credible testimony that the scalers could not readily identify the "loose" and questioned whether they were even in the correct area. I find that there is at least a good faith, honest difference of opinion concerning what constitutes loose material. I do not believe it was as "obvious" as the inspector thinks it was. In this particular instance I am giving the inspector the benefit of the doubt in a close factual case that the material was in fact "loose" and apt to fall. I also find that the operator is chargeable with but ordinary or moderate negligence in this instance.

Therefore, I conclude that the violation of the cited standard due to the presence of "loose" in the "Skinny Pillar" area was not an unwarrantable failure, and the section (d)(1) citation will be modified to an "S&S" citation issued under section 104(a) of the Mine Act.

After considering the statutory criteria contained in section 110(i) of the Act, I assess a civil penalty of \$100 for the violation found herein.

IV. Docket No. CENT 94-111-RM (Order No. 4321787 assessed in Docket No. CENT 94-201-M)

Section 104(d)(1) Order No. 4321787 was issued on January 12, 1994, by Inspector Roderman, and alleges a violation of the mandatory standard found at 30 C.F.R. § 57.3200. The condition or practice alleged by the inspector is as follows:

Loose material was observed on the ribs and pillars in the "Sump Run" area of the mine. A front-end loader and two haul trucks were mucking a heading in this area. The mucking crew had been sent to this area after the area they had been in earlier had been "shut down" due to loose in that area also. Management was notified of the loose problem in the mine and the need to change the current mining cycle to include scaling prior to mucking commencing. The loose that was observed in this area varied in size and was from about 10 feet above ground level near the back (about 30 feet) and although all persons were in their vehicles, they still could be seriously injured. This is an unwarrantable failure.

The hazard alleged in this Order is that of a "serious injury" from the fall of loose material onto cabs of a front-end loader and two haul trucks. According to Inspector Roderman's testimony, the mine employee exposed to the greatest risk was the loader operator who, by the inspector's account, was parked under a large rock perched 30 feet high on a pillar "gaped open so seriously, I am not even sure how it was hanging there."

Respondent's witnesses agree that the large rock in question was there and that it came down "easily." Shannon Davis used the Gradall to bring down the rock. By his account, he used "full

throttle" and "basically dragged it off" of a ledge. Tony Brasier recalled that Mr. Davis used the Gradall to break the rock in two before taking it off the ledge. Davis and Brasier also opined that the size and weight of the rock was such that normal vibrations throughout the mine would not have caused it to fall. Whether or not this particular rock was "loose," there remains a question of whether it created a present hazard to persons in the affected area. I will discuss that issue later in this decision.

At the inspector's immediate direction, Davis proceeded to scale other pillars in the vicinity. He moved the Gradall to at least 16 other locations, on the various sides of six other pillars. By the account of witnesses Brasier, Vandenburg, and Davis, Inspector Roderman would direct the Gradall operator to scale a pillar by shining his (Roderman's) mining light on that pillar. When the scaling was done to Inspector Roderman's satisfaction, he would flash his light into the operator's cab as a signal to move on to another area. Mr. Davis testified that he did not observe any loose material in this area and opined that he would not have wasted his time scaling these pillars. Mr. Brasier testified that referring to one of these pillars, the inspector had claimed there was loose and directed it to be scaled down. When Mr. Davis proceeded to scale it with the Gradall and nothing would come down despite Davis' best efforts, the inspector said: "That's tight. Lets go somewhere else." Mine Foreman Marty Vandenburg likewise did not see any loose. He did see a few rocks come down that Davis was able to break loose with the Gradall, but in his opinion, they were not loose to begin with.

It occurs to me that this particular inspector may just have an overly acute sense of what material is "loose." If he is consistently the only one who thinks a rock is loose while everyone else does not think so and the rock ultimately has to be pried off the rib or pillar (essentially excavated) with thousands of pounds of force, I agree that perhaps it was not "loose" in the first place.

Basically, Inspector Roderman's determination of whether material is "loose" seems to depend on whether or not the Gradall can bring the material down. I do not believe that is a reasonable interpretation of the standard.

To prove a violation under 30 C.F.R. § 57.3200, the Secretary must prove two things: (1) a hazardous ground condition existed in an area, and (2) a person could be expected to work or travel through the area affected by the hazardous ground condition.

With regard to the second item of proof as it relates to the larger rock scaled down first by Mr. Davis in the "Sump Run" area, the preponderance of evidence is to the effect that the loader identified by the inspector as being parked directly under the rock, in fact could not gain access to the pillar in question because shot rock littered the ground surrounding the pillar. Mr. Davis opined that neither the loader or a haul truck could have driven underneath that rock while the scattered stone (shot rock) was on the floor. Mr. Brasier's testimony and computer assisted drawing of the area supports Davis' opinion.

Based on the foregoing facts and circumstances, I conclude that there were no ground conditions in the "Sump Run" area of the mine that created a hazard to persons unless and until the shot rock was cleaned up. The cited standard protects only against presently existing hazardous conditions, not possible future hazardous conditions. Hence, I find no violation of the cited standard and Order No. 4321787 will be vacated herein.

#### ORDER

On the basis of the foregoing findings and conclusions, **IT IS ORDERED THAT:**

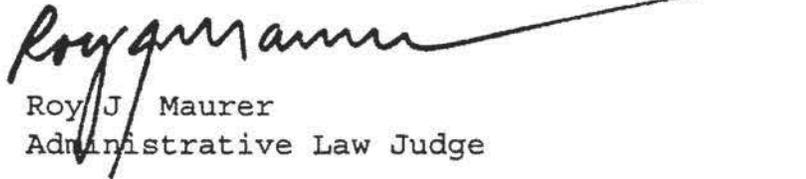
1. Section 104(a) "S&S" Citation No. 4111868, October 13, 1993, citing an alleged violation of 30 C.F.R. § 57.3200, **IS VACATED.**

2. Section 104(a) "S&S" Citation No. 4321784, January 11, 1994, citing an alleged violation of 30 C.F.R. § 57.3200, **IS VACATED.**

3. Section 104(d)(1) Citation No. 4321786, January 12, 1994, citing an alleged violation of 30 C.F.R. § 57.3200, **IS MODIFIED** to an "S&S" citation issued under section 104(a) of the Mine Act.

4. Section 104(d)(1) Order No. 4321787, January 12, 1994, citing an alleged violation of 30 C.F.R. § 57.3200, **IS VACATED.**

5. Respondent pay the Secretary of Labor \$100 as a civil penalty within 30 days of this Decision.

  
Roy J. Maurer  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 21 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 94-969-D  
on behalf of GARIS MARTIN, : MSHA Case No. PIKE CD 94-10  
Complainant :  
v. : Road Creek Mine No. 1  
: :  
BRANHAM & BAKER COAL COMPANY, :  
Respondent :

**DECISION APPROVING SETTLEMENT**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee  
for the Complainant;  
Tony Opegard, Esq., Lexington, Kentucky on  
behalf of Garis Martin and William K. Doran, Esq.,  
Washington, D.C. for the Respondent.

Before: Judge Melick

This case is before me upon a Complaint of Discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing the parties filed a motion to approve a settlement agreement and to dismiss the case. The individual Complainant, Garis Martin, consented to the agreement on the record. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable.

**WHEREFORE**, upon the acknowledged receipt of the agreed settlement amounts, the motion for approval of settlement is **GRANTED**. It is further **ORDERED** that, if it has not already done so, Respondent pay a civil penalty of \$1.00 within 30 days of this order. This nominal civil penalty is in recognition of conflicting views of the evidence, the vagaries of the trial

process and that the monetary award to the Complainant in this case is a disincentive in itself against future violations of Section 105(c).



Gary Melick  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 21 1995

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : CIVIL PENALTY PROCEEDING  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. KENT 94-1225  
v. : A.C. No. 15-17296-03512S  
: Mine: #5  
COUGAR COAL COMPANY, :  
Respondent :

DECISION

Appearances: Mark Malecki, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Link Chapman, Safety Director, Cougar Coal  
Company, Lovely, Kentucky, for Respondent.

Before: Judge Amchan

In the wake of at least two recent underground explosions attributed to miner smoking, MSHA performed numerous simultaneous inspections to determine the effectiveness of its efforts to prevent such tragedies. On May 19, 1994, the agency conducted a "smoking sweep" at 175 mines.

MSHA determined that to insure maximum effectiveness of these inspections, it was necessary to maintain as much secrecy as possible regarding the smoking sweep. Instructions to local MSHA offices were sent out after working hours on May 18, 1994, so that personnel performing these inspections did not know about their task until they arrived at work on the morning of May 19.

The inspectors were instructed to tell operator personnel above ground that underground personnel were not to be informed that MSHA representatives were at the site. Inspectors were also instructed not to tell operator personnel the purpose of the inspection or the reasons for their request for secrecy (Tr. 42).

The agency teams consisted of three people, two inspectors who travelled underground and another person who stayed above ground to monitor communications between operator personnel above ground and those below. Secrecy was intended to prevent miners from having an opportunity to dispose of or hide smoking materials before the arrival of the inspectors at the miners' underground work areas.

Of the 175 mines visited in this smoking sweep, the desired element of surprise was achieved at all but five (Tr. 22). Smoking materials were found at 17 of the 170 mines at which secrecy was maintained. No such items were found at the five mines where underground miners had some degree of forewarning as to the inspectors' presence (Tr. 22).

Respondent's No. 5 mine in Johnson County, Kentucky, was one of the 175 mines visited during the sweep. The inspection team at this mine included Coal Mine Inspectors Danny Tackett and Charles Moore, and Education and Training Specialist Wanda Vanhose. Upon their arrival at the mine, the MSHA inspection team met Respondent's superintendent, James Osborn, and his son, John Osborn, who worked above ground.

Mr. Tackett's account of what transpired is as follows:

... we advised Mr. Osborn that we were going underground and we requested that he not inform his people underground that we were there and coming underground (Tr. 40).

\* \* \* \* \*

I asked him not to notify the underground employees that we were there and coming underground. And Mr. Osborn stated that it was Company Policy that they notify the underground personnel before anyone went underground.

I suggested that he call Mr. Chapman, [the] safety director, or some of the other management personnel, and discuss that with them prior to letting them know that we were coming in. (Tr. 41-42).

A few minutes later Section Foreman Mike Castle called Osborn from underground and asked that he restore power to a high-voltage cable that Respondent had been having trouble with that morning. Osborn told Castle he could not restore power because there were three federal inspectors in his office who were ready to come underground (Tr. 43). Although he said nothing about it at the time, Osborn later stated that he was concerned with the inspectors' safety (Tr. 59-60, 76).

Inspectors Tackett and Moore proceeded underground to the working section. It took them 20 minutes to reach the working section. During that period there were several phone calls between Superintendent Osborn and Respondent's personnel underground, during which Osborn inquired whether the MSHA inspectors had reached the section (Tr. 77).

When the inspectors arrived at the section, production activities were not underway. Tackett and Moore asked Foreman Castle to assemble all the miners and conduct a body search and a search of their lunch buckets for smoking materials. Castle did so and found nothing (Tr. 46-47). The inspectors searched the continuous mining machine, the roof bolting machine and the shuttle car and also found no smoking materials (Tr.58)<sup>1</sup>.

MSHA issued Respondent Citation No. 4517561 alleging that it violated § 103(a) of the Act in notifying the underground employees of the inspectors' presence after being asked not to do so. Cougar's negligence was characterized as "reckless disregard" and a \$8,250 civil penalty was proposed for this alleged violation.

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<sup>1</sup>During this inspection Tackett and Moore were only looking for violations of regulations relating to smoking and smoking materials (Tr. 59). However, if they had observed other types of violations, which they did not, they would have cited Respondent for them (Tr. 59).

The Secretary contends that by notifying its underground employees of the inspector's presence, Respondent effectively denied him the right of entry into a coal mine granted by § 103(a). Section 103(a) provides that authorized representatives of the Secretary shall make frequent inspections and investigations in coal or other mines for several purposes, including compliance with mandatory health and safety standards.

This provision also states that the Secretary shall have a right of entry to, upon, or through any coal or other mine for the purpose of making any inspection or investigation under the Act. The Secretary argues, and I agree, that this "right of entry" is broader than merely giving the Secretary a right to physically enter the mine. It includes the right to use any investigatory technique reasonably related to the discovery of violations, so long as it is employed within reasonable limits and in a reasonable manner. See Donovan v. Enterprise Foundry, Inc., 751 F.2d 30 (1st Cir. 1984).

MSHA's request or demand that surface personnel not alert underground personnel to the inspectors' presence in the smoking sweep investigations was a reasonable investigative technique which the agency was entitled to employ<sup>2</sup>. The prohibition against smoking and smoking materials underground and the requirement that operators develop programs to insure that smoking materials not be carried underground was enacted by Congress as part of the 1969 Coal Act, 30 U.S.C. § 877(c). MSHA's regulatory prohibitions at 30 C.F.R. §§ 75.1702 and 75.1702-1 simply track the statutory requirements.

The legislative history of the 1969 Act noted that Bureau of Mines' records indicated that there had been 28 actual and nine possible gas ignitions or explosions that were caused by smoking materials between 1952 and 1968. As a result of these

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<sup>2</sup>I deem it unimportant that Inspector Tackett's testimony indicates that he requested, rather than demanded, that Osborn not alert underground personnel to MSHA's presence. In the context of an MSHA inspection, regardless of the words chosen, a reasonably prudent operator should deem such a "request" to also be a demand.

incidents, 38 miners were injured and 13 were killed, Section by Section Analysis accompanying Senate Report 91-411, 91st Cong. 1st Session, Legislative History of 1969 Coal Act at 51.

It was obviously very important to Congress that the government be able to take effective measures to prevent smoking-related ignitions and explosions. In light of the congressional purpose and the recent fatal explosions which MSHA believes are smoking-related, its insistence on secrecy until it arrived at the working sections was reasonable.

MSHA's right of entry includes the right to be free from interference from the mine operator that would frustrate its legitimate objectives. United States Steel Corporation, 6 FMSHRC 1423 (June 1984), Calvin Black Enterprises, 7 FMSHRC 1151 (August 1985). Thus, in United States Steel Corporation, the Commission affirmed a citation alleging a violation of § 103 of the Act when the operator refused to provide transportation to an inspector which effectively prevented him from inspecting an accident scene.

Similarly, in Calvin Black Enterprises, the Commission affirmed a citation issued for violation of § 103(a) when an operator refused to allow an inspection without advance written permission. Although Black involves operator conduct directly in conflict with the Act's prohibition against providing advance notice of an inspection, I conclude that it also violates § 103(a) to interfere with MSHA's use of any reasonable inspection technique.

In summary, when Superintendent Osborn informed his underground foreman of the inspectors' presence on May 19, 1994, Respondent violated § 103(a) of the Act. Although Osborn may have had subjective reasons for not complying with the inspectors' request, I view these reasons as being relevant to size of the civil penalty to be assessed, rather than to the question of whether the superintendent's conduct violated the Act.

Mr. Osborn may have had some concerns about the inspectors' safety. These concerns do not, however, excuse his failure to comply with the inspectors' request. Moreover, there is nothing

in the record to indicate that he explained his concerns to the inspectors prior to informing his foreman of the inspectors' presence (Tr. 59-60, 76).

From an objective standpoint, or that of a reasonably prudent person in Mr. Osborn's situation, his concerns do not appear to have been legitimate. There was a possibility that the inspectors could have been injured by the high-voltage cable when power to it was being restored. However, there were several feasible means of preventing such injury other than informing his underground foreman of the inspectors' presence.

Obvious alternatives would be to ask the inspectors to delay their trip underground until he restored power or to discuss with the inspectors a route that would avoid or minimize exposure to the cable (Tr. 94). Finally, Osborn conceded that he could have left the power off until the inspectors reached the working section (Tr. 87).

Although Respondent also cites its company policy that the section foreman must be informed before any person enters a section, a company policy does not take precedence over MSHA's statutory right of entry. In Calvin Black Enterprises, the operator could not circumvent the prohibition against advance notice by instituting an inconsistent company policy. Similarly, Respondent is not entitled to rely on a company policy to prevent MSHA from employing a reasonable investigatory technique that is encompassed in its right of entry. Moreover, Superintendent Osborn conceded that his understanding of the company policy was that it did not apply to MSHA inspectors (Tr. 91).

#### Assessment of a Civil Penalty

MSHA proposed a civil penalty of \$8,250 in this case. After considering the penalty assessment criteria in § 110(i) of the Act, I conclude that this proposal is too high and that a civil penalty of \$1,000 is appropriate given the facts of this case.

The evidence regarding the operator's history of previous violations is of little value in assessing a penalty. Exhibit P-7 indicates that Respondent has been cited for 30 violations between September 1992 and May 19, 1994. Nothing in this record indicates the significance of this record.

Respondent has apparently never been cited for an inadequate search program for smoking materials. Thus, I find Respondent's prior violation history largely irrelevant to the size of the penalty.

The size of Respondent's business is similarly of marginal value at arriving at an appropriate penalty. Exhibit 8 indicates that Respondent produced 269,706 tons of coal in the last year for which MSHA has data. However, Beech Fork Mining Company, which controls Respondent, produced over 1,800,000 tons (Exh-8, Tr. 23). According to Table II of 30 C.F.R. § 100.3, MSHA considers Beech Fork a medium sized operator.

There is nothing in the record that suggests the \$8,250 proposed penalty would jeopardize Respondent's ability to stay in business. Similarly, the good faith rapid abatement penalty factor is irrelevant to this case. Once Mr. Osborn informed his foreman of the inspector's presence, the benefit of surprise in conducting the inspection was permanently lost.

It is difficult to assess the gravity of the violation because there is no way of knowing whether anyone had smoking materials they were able to dispose of in the 20 minutes it took the inspectors to reach the working section. There is no indication that Respondent's smoking search program was inadequate, or that anyone had ever been caught with smoking materials (Tr. 55, 83-84). However, it is always possible that a miner had such items with him underground on May 19, 1994. Given this uncertainty, I conclude gravity to be largely irrelevant in arriving at an appropriate civil penalty.

The penalty factor most relevant in assessing this penalty is Respondent's negligence, or intent, in interfering with the Secretary's right of entry. Mr. Osborn obviously did not have a specific intent to frustrate the search for smoking materials since he did not know that was the purpose of the inspectors' visit (Tr. 42, 87).

Even though the inspectors observed no violations during their trip to the working section and back (Tr. 59), forewarning of the inspectors' presence may be useful in avoiding citations for certain types of violations. It is impossible to know whether this occurred to or motivated Mr. Osborn. In any event,

I do not impute any improper intent to the superintendent. It is also important to keep in mind that Osborn did not initiate the call to Foreman Castle and that he did need to respond to Castle's request for power (Tr. 43-44).

Given his discussion with the inspectors prior to receiving Mr. Castle's call and lack of objectively good reasons for not honoring their request, I believe Mr. Osborn was moderately negligent in advising Castle of the MSHA's presence at the mine. I believe his negligence, given the circumstances, warrants a civil penalty of \$1,000.

ORDER

Citation No. 4517561 is affirmed and a civil penalty of \$1,000 is assessed. This penalty shall be paid within 30 days of this decision.



Arthur J. Amchan  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 24 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 94-126-M  
Petitioner : A.C. No. 11-02742-05516  
v. :  
 : Lacon Plant  
MIDWEST MATERIAL CORPORATION, :  
Respondent :

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois,  
for Petitioner;  
Paul Williams, President, Midwest Materials  
Company, Naperville, Illinois, Pro Se, for  
Respondent

Before: Judge Amchan

Summary

On the morning of May 27, 1993, Thomas Reaska, a miner employed by Respondent, Midwest Materials Company, died in an accident in Lacon, Illinois. Part of a crane boom on which he was working dropped on him. The Mine Safety and Health Administration (MSHA) conducted an investigation of the accident and issued Citation No. 4101896, pursuant to section 104(d)(1) of the Act. MSHA proposed a \$20,000 civil penalty for the alleged violation. As discussed below, I affirm a section 104(a) citation and assess a \$1,500 civil penalty.

Events Leading Up to the Accident

In April, 1993, Respondent, took control of a sand and gravel processing facility next to Route 26 in Lacon, Illinois (Tr. 59, 243-44). Midwest Material processed some material at

this plant to have a stockpile available for customers (Tr. 131, 243-44, 285-86). On May 27, 1993, Respondent was preparing to move the plant across Route 26, to a site near the river bed from which it extracted sand and gravel (Tr. 272-73, 280-81).

To disassemble and move the plant, Respondent planned to use an American 599C mobile crawler crane (Tr. 41). A 20-foot section had to be added to the crane boom to accomplish this task (Tr. 41). Richard Walsh, Respondent's on-site superintendent, instructed Edward Schumacher, a working foreman, and Mr. Reaska to extend the length of the boom (Tr. 280-81, 294-95). Both men had done this job before (Tr. 67-68, 75-77).

Schumacher and Reaska had worked for Respondent only a few weeks (Tr. 38-39). They had previously been employed for many years by Midwest Sand & Gravel Company, a firm unrelated to Respondent (Tr. 39, 70, 75). Midwest Sand & Gravel was owned by Jerry Henry, who sold the sand and gravel plant to Respondent (Tr. 57, 62). After the sale, Henry acted as a consultant to Respondent at the Lacon site (Tr. 57, 111-15, 261-64).

On the morning of May 27, Mr. Schumacher got into the cab of the crane and lowered its boom. The normal procedure for this task is to lower the boom to the ground. However, Reaska signaled Schumacher to stop when the boom was approximately five feet off the ground (Tr. 42).

The suspension lines running from the top of the cab to the end of the boom are normally relaxed and attached to the first section of the boom (the section closest to the cab). A device on the suspension lines, the cradle, secures them to the boom. After that attachment is made the pins connecting the first and second sections of the boom are driven out of their holes and the sections separate. The first section is safely supported by the crane's suspension lines and the crane is backed away from the dismantled sections. Additional sections can then be added (Tr. 43-48, Exh. G-1).

On May 27, 1993, the suspension lines were not relaxed and attached to the first section of the boom. Schumacher went to his truck, nearby the crane, to get a cable come-along. The come-along is normally used to pull the cradle down to the boom.

While Schumacher was at his truck, Reaska started driving the pins out between the first and second sections of the boom (Tr. 49).

Jerry Henry drove up and started talking to Schumacher. It is not clear whether they discussed the crane extension or only other matters (Tr. 49-51). Henry was not present to supervise this operation. His presence at the time of the accident was purely fortuitous (Tr. 106-07, 115, 294-95). After a minute or two Schumacher and Henry approached the crane. Reaska knocked a pin out of its hole and the boom pivoted and dropped on top of him. Henry was knocked down by the boom but was not seriously injured. Reaska died at the scene (Tr. 51-54).

#### The citation

This accident was investigated by MSHA Inspector Jerry Spruell, who issued Citation No. 4101896 on May 28, 1993. The citation alleged a violation of 30 C.F.R. § 56.14211(a). This standard provides that persons shall not work on top of, under, or from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally<sup>1</sup>.

There is no dispute that Mr. Reaska worked under a section of the American crane boom when it was in a raised position and neither blocked nor mechanically secured. Furthermore, Respondent concedes that this was not the proper way to perform the boom extension (Tr. 298-99). I conclude that a violation of the regulation occurred. The issue in this case is the extent to which Respondent should be held responsible for this violation.

Spruell concluded that Respondent's negligence was "high" and that the violation was due to its "unwarrantable failure" to comply with the regulation because Mr. Schumacher, a working

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<sup>1</sup>Section 56.14211(b) prohibits working under raised **components** of mobile equipment. Although this subsection appears to fit the instant situation better than subsection (a), I regard the distinction as unimportant in deciding this case.

foreman, was present when the violation occurred (Tr. 146-150). Respondent challenges Schumacher's status as a supervisor because he was an hourly, rather than a salaried employee (Tr. 56).

I conclude this fact is irrelevant because Superintendent Walsh designated Schumacher to be the foreman in charge of the pit and the boom extension process (Tr. 284). Since Respondent had entrusted supervisory responsibilities to Schumacher, his negligence is imputed to Respondent both for purposes of determining whether the violation was due to Respondent's "unwarrantable failure" to comply with the Act, and for determining an appropriate civil penalty, Rochester-Pittsburgh Coal Co., 13 FMSHRC 189 (February 1991).

MSHA's determination that Respondent was highly negligent and that its violation was an "unwarrantable failure" was based on its assessment of Schumacher's negligence only. The agency does not regard the conduct of Superintendent Walsh or any other company supervisor negligent (Tr. 204). I concur in that conclusion.

Schumacher and Reaska had both worked in the sand and gravel business for 15-20 years, primarily for Jerry Henry and Midwest Sand and Gravel Company (Tr. 70, 75). Both had extended crane booms in their employment with Mr. Henry and were knowledgeable about this procedure (Tr. 75-77, 286-88).

Walsh did not review with Schumacher and Reaska the proper procedures for extending a boom (Tr. 291). He relied completely on their experience and expertise in getting this task done properly and safely.

I am unable to conclude that Superintendent Walsh had an obligation to review boom extension procedures with Schumacher and Reaska. It is not clear that extending the boom was inherently hazardous. The boom should have been lowered to the ground before separation of the sections commenced and it was not unreasonable for Walsh to assume this would be done.

Furthermore, Respondent was not cited for failure to comply with MSHA's regulations regarding the training of newly employed experienced miners, or miners assigned to a task in which they have no previous experience, 30 C.F.R. §§ 48.26 and 48.27. The

record does not indicate that these regulations were violated in the instant matter.

Mr. Schumacher's negligence is imputable to Respondent, but I cannot conclude that his conduct was sufficiently aggravated to rise to the level of "unwarrantable failure," Emery Mining Corp., 9 FMSHRC 1991, 2001 (December 1987); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991).

Schumacher knew the boom had not been lowered to the ground and he was aware that the suspension lines had not been hooked to the first section of the boom. However, his conduct is better described as "thoughtless" or "inattentive," rather than "inexcusable or aggravated," Emery, supra, at page 2001. In so finding, I note that although the hazard is obvious in retrospect, it existed only briefly before the accident. This case is thus distinguishable from situations in which an operator allows an obvious hazard to persist for a significant period of time.

There is nothing that suggests that Reaska and Schumacher erred because they were under pressure to dismantle the crane quickly, or that Respondent gained any sort of production advantage from doing this task improperly. Rather, the evidence indicates that two competent, experienced miners who knew how to do this job properly did it improperly for inexplicable reasons (Tr. 74-75, 299). I, therefore, find that this record does not establish that Respondent's violation of the regulation was due to an unwarrantable failure and I affirm Citation No. 4101896 as a violation of section 104(a) of the Act.

#### Other contentions of Respondent

Respondent contends that it is not properly charged with the instant violation because the site of the accident was not on its property and because the crane was 750 to 1,000 feet from the sand and gravel wash plant (Tr. 243-44). I reject both these arguments.

Sand and gravel had been washed and graded at a location contiguous to the accident site a week to ten days earlier (Tr. 243). The accident site did not cease to be a mine as that term is defined in section 3(h)(1) of the Act simply

because processing had not taken place for few days. Moreover, the crane itself was part of the mine because the statutory definition includes equipment used in, or to be used in, the milling of minerals, 30 U.S.C. § 802(h)(1).

In section 3(h) of the Act, Congress delegated to the Secretary of Labor some degree of discretion in making determinations of whether worksites are subject to the Mine Safety Act or the Occupational Safety and Health Act. All worksites in the private sector are subject to one statute or the other.

The Secretary exercised his discretion in a 1983 interagency agreement between MSHA and OSHA, BNA Occupational Safety and Health Reporter, paragraph 21:7071. This agreement is entitled to deference from the Commission, Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984).

Appendix A of the Interagency Agreement sets forth specific areas of MSHA authority. It provides:

Following is list with general definitions of milling processes for which MSHA has authority to regulate subject to paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, **sizing**, concentrating, **washing**, drying... (emphasis added)

As the crane was to be used to move milling equipment, I conclude that it was part of a mine within the meaning of the Act, See, W. J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994).

The fact that the mine site did not belong to Respondent is also irrelevant. The Act defines an operator as "any owner, lessee, **or other person who operates, controls, or supervises** a coal or other mine or any independent contractor performing services or construction at such mine (emphasis added)." 30 U.S.C. § 802(c)(d). As the site was clearly under the control of Respondent, it was an operator within the meaning of the Act, and subject to citation for violations at this location.

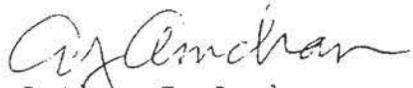
### Civil Penalty Assessment

Applying the criteria for assessing civil penalties set forth in section 110(i) of the Act, I conclude that \$1,500, rather than the proposed \$20,000 is appropriate for this violation. Obviously, the gravity of the violation was quite high in that it resulted in Mr. Reaska's death<sup>2</sup>. While the negligence of both Mr. Reaska and Foreman Schumacher was considerable, it does not warrant a higher penalty than \$1,500.

The violation was terminated by the accident, but Respondent apparently acted in good faith in taking steps to prevent a recurrence. There is no indication of a prior history of MSHA violations for Midwest Materials in the record. There is also no indication of the size of the company, and I assume, in the absence of evidence to the contrary, that a \$1,500 penalty or even one of \$20,000 would not jeopardize Respondent's ability to stay in business.

### ORDER

Citation No. 4101896 is affirmed as a significant and substantial violation of section 104(a) of the Act and a \$1,500 civil penalty is assessed. This penalty shall be paid within 30 days of this decision.



Arthur J. Amchan  
Administrative Law Judge

---

<sup>2</sup>I also conclude that the violation so obviously meets the criteria for a "significant and substantial" violation set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984) that an extended discussion of this issue is unnecessary.

Distribution:

Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department  
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(Certified Mail)

Paul Williams, President, Midwest Material Co., Box 63,  
Suite 103B, Naperville, IL 60566 (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

APR 24 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 94-71-M  
Petitioner : A. C. No. 30-00073-05501 SA7  
v. :  
 : Independent Cement Corp.  
CARL B. THOMAS CONSTRUCTION :  
CORPORATION, :  
Respondent :

DECISION

Appearances: Mark Malecki, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, Virginia, and  
Roger McClintock, Mine Safety and Health  
Administration, Cranberry Twp., Pennsylvania, for  
the Petitioner;  
David M. Thomas, Vice President, Carl B. Thomas  
Construction Corporation, Keene, New Hampshire,  
for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Proposal for Assessment  
of Civil Penalty filed by the Secretary of Labor (Petitioner)  
alleging a violation by Carl B. Thomas Construction (Respondent)  
of 30 C.F.R. § 56.5003. Pursuant to notice the case was heard in  
Schenectady, New York, on March 1, 1995.

Findings of Fact and Discussion

I. Violation of Section 56.5003. supra

On January 26, 1994, Respondent was involved in drilling  
holes at the Independent Cement Corporation Mine, a limestone  
surface operation. Michael Gonos Jr., an MSHA Inspector,  
observed the drilling operation for approximately 15 minutes. He  
said that one driller was drilling holes on a horizontal surface.  
The holes were approximately 6 inches in diameter. According to

Gonos, during the 15 minute time span that he observed the operation, whenever the drill operated, dust "continually" (Tr. 92) came out of the hole for approximately 2 1/2 minutes. He said that there were real dry thick particles around the hole being drilled. Also there was airborne dust and dust on the side of the face of the highwall, and on the ground 30 to 35 feet below the highwall. He also noted a "good quantity of dust" (Tr. 46) on the drill operator's clothing, beard, and mustache. He said that the driller was not wearing any respiratory protection. Further, according to Gonos, the holes that were being drilled were not "collared" or drilled wet. He noted that a water hose in the area was not connected. He did not note the presence of any other dust control measures. Gonos termed the material being drilled as non-water-soluble.

Gonos issued a citation alleging a violation of 30 C.F.R. § 56.5003, which as pertinent, provides as follows: "[h]oles shall be collared and drilled wet, or other efficient dust control measures shall be used when drilling non-water-soluble material." <sup>1/</sup>

Steven Cristo, who was Respondent's foreman at the site and the driller operator on January 26, 1994, testified that all the water sources were frozen. He said that on January 26, he was using a filter mask. He indicated that when the drill was in operation, he was at the controls which were located at the far side of the driller in relation to the holes being drilled.

Respondent has not impeached or contradicted the testimony of Gonos that the material was non-water-soluble, and that the holes were not collared and drilled wet. Respondent argues that, in essence, because, as testified to by Gonos, the drill operator was upwind from the holes being drilled, the dust was removed and diluted by the wind. In this connection, Respondent relies upon the first sentence of 30 C.F.R. section 56.5005 which provides as follows: "Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air."

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<sup>1/</sup>Section 56.5003 supra does not appear in the current Code of Federal Regulations, Part 30, but was in effect on January 26, 1994.

I find Respondent's position to be without merit. Clearly, with continued mining operations, the wind could have shifted at any time, placing the drill operator downwind of the drilling operation. Further, more importantly, I find that Section 56.5003, supra, is not to be read in conjunction with Section 56.5005, supra. The latter appears intended to control, generally employee exposure to harmful contaminants. In contrast, Section 56.5003, supra, applies specifically to the limited situation of drilling non-water-soluble material, as in the instant case. The evidence is not controverted that the holes to be drilled were not collared and drilled wet. There is no evidence that there were other efficient dust control measures being used similar in effect to collaring and drilling wet. I also reject Respondent's arguments that there was no violation of Section 56.5003, supra, because there is no evidence of miner exposure to harmful levels of dust. In this connection, I note that the testing of materials mined at the site that were obtained on January 26, 1994, indicated the presence of silica (See Exhibit P-6). More importantly, a violation under Section 56.5003, supra, is not predicated upon exposure to any harmful materials. For all these reasons, I find, that Respondent did violate Section 56.5003, supra.

## II. Penalty

According to Gonos, when he was at the mine on January 25, 1994, the day prior to the date he issued the citation at issue, two drills were in operation. He observed dust being produced, and drilling taking place without a collar.

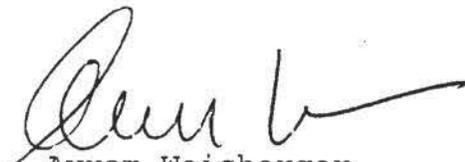
Gonos met with Cristo and the other driller and explained to them that they were in violation of a mandatory standard, and told them that they needed water for the operation. According to Gonos, Cristo explained to him that he had added 6 gallons of antifreeze to the water supply tank, but that the water still remained frozen. Gonos said that he explained to him that he could use some other chemical or could add more antifreeze to thaw the water. According to Gonos, Cristo told him that he "would take care of it" (Tr. 59). Cristo, who was the foreman at the site, and in charge of drilling operations, did not impeach or contradict Gonos' testimony regarding this conversation. Cristo said that he did not see Gonos on the site on January 26. However, he did not impeach or contradict Gonos' testimony that

drilling was being performed on January 26, without a collar, dust was being produced, and no dust control measures were being used.

The violation of Section 56.5003, supra, resulted from Christo's drilling on January 26, without the dust control measures specified in Section 56.3003, supra, in spite of having been told by Gonos the day before that such an act constitutes a violation. I thus find that there was high negligence on Respondent's part. Although Respondent had not been cited before for a violation of Section 56.5003, supra, and the gravity of the violation does not appear to be high, taking into account the level of Respondent's negligence, I find that a penalty of \$1,000 is appropriate for this violation.

III. Order

It is ORDERED that Respondent pay a penalty of \$1000 within 30 days of this decision.



Avram Weisberger  
Administrative Law Judge

Distribution:

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Mr. David M. Thomas, Vice President, Carl B. Thomas Construction Corporation, Drilling and Blasting Specialist, Box 407, Keene, NH 03431 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 27 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 93-63
Petitioner	:	A.C. No. 15-17081-03507
v.	:	
	:	Docket No. KENT 93-259
SUNNY RIDGE MINING COMPANY,	:	A.C. No. 15-17081-03511
Respondent	:	
	:	Docket No. KENT 93-863
	:	A.C. No. 15-17081-03513
	:	
	:	No. 9 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 94-453
Petitioner	:	A.C. No. 15-17081-03516A
v.	:	
	:	No. 9 Mine
MR. MITCH POTTER,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 94-454
Petitioner	:	A.C. No. 15-17081-03517A
v.	:	
	:	No. 9 Mine
MR. TRACY DAMRON	:	
Respondent	:	

## DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Reed D. Anderson, Esq., Harris & Anderson,  
Pikeville, Kentucky, for Respondent.

Before: Judge Fauver

These are civil penalty cases under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for alleged violations of mine safety standards. Two of the charges were settled at the hearing and the rest were heard on the merits.

After the hearing, the exhibits were lost by the Post Office. The parties were requested to furnish copies of their exhibits where possible. Those received from the parties have been assembled in a replacement exhibit folder.

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. Respondent Sunny Ridge Mining Company, Inc., a Kentucky corporation, is a medium-sized mine operator, producing coal for sale in or substantially affecting interstate commerce.

2. At all relevant times, Respondent Tracy Damron was foreman of the No. 9 Mine and Respondent Mitch Potter was president of Sunny Ridge Mining Company, Inc.

### Citation No. 4020202

3. This § 104(d)(1) citation was issued by Inspector Butch Cure on August 5, 1992, charging a violation of 30 C.F.R. § 77.405(b), which provides:

(b) No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

4. Mine No. 9, a surface coal mine, used a makeshift method to change flat rear tires on its coal dump trucks. A wooden crib was stacked close to the rear of the truck on the side that had the flat tire. The hydraulic truck bed was then raised, tilting its front end upward and lowering its back end on the crib. Further pressure to raise the truck bed exerted downward pressure on the crib and this pressure caused the rear axle and wheel to elevate. This method is illustrated in Gov't. Exh. No. 4. A miner would remove the lug nuts and take off the wheel to change the tire. To remove the wheel, the miner would put his back to the wheel (which weighed 250 to 300 pounds) and grasp it from behind his back to pull it from the lug bolts onto his back and then "walk it" to the ground. After changing the tire, the miner would use his back to lift the wheel back onto the lug bolts. He would then face the wheel and tighten the lug nuts. All of these steps were performed while the truck bed and axle were elevated. Chocks or blocks were not used to prevent the truck bed or axle from falling while the wheel was being changed.

5. On the day in question, the cited truck was loaded with 30 tons of coal when the hydraulic truck bed was raised to lift the left rear axle to change a flat tire. Chocks or blocks were not used to prevent a falling accident.

6. When Inspector Cure first noticed the truck, he was some distance away and saw a group of men standing around the truck with Foreman Tracy Damron. The truck bed was not elevated at that time. He went to the truck to talk to the foreman about other equipment. He observed that a crib was stacked behind the truck but the truck bed was not raised. The truck bed was loaded. The inspector left for another part of the mine. Later, from a distance he saw the loaded truck bed was elevated and he drove toward the truck to see what was happening. As he came closer, he saw the bed was resting on the crib, a left rear wheel was raised, and a miner was reaching in to handle the lug nuts on the wheel. There was no jack under the axle. As the inspector approached, some of the men walked away and Foreman Damron quickly had the truck bed and wheel lowered. He then got a 20-

ton jack to try to lift the axle and wheel. It would not lift them. The inspector issued the citation to the foreman.

**Order No. 4020210**

7. This § 104(d)(1) order, issued on August 18, 1992, charges a violation of 30 C.F.R. § 77.1001, which provides:

Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

8. Inspector Butch Cure observed loose rocks and boulders on the spoil side of the highwall in the No. 3 1/2 pit. The highwall was about 25 feet high, 200 feet long. Four pieces of equipment were operating beneath the spoil bank.

**Citation No. 4020074**

9. This § 104(a) citation, issued on January 27, 1993, charges a violation of 30 C.F.R. § 77.410, which requires a backup alarm on mobile equipment such as front-end loaders, forklifts, tractors, graders, and certain trucks.

10. At the hearing the parties moved to settle this charge by lowering negligence from moderate to low and reducing the penalty from \$431 to \$350. The settlement was approved.

**Citation No. 4228207**

11. This § 104(a) citation, issued on February 10, 1993, charges a violation of 30 C.F.R. § 77.1007(b), which provides:

(b) Equipment defects affecting safety shall be corrected before the equipment is used.

12. At the hearing the parties moved to settle this charge by lowering negligence from moderate to low and reducing the penalty from \$431 to \$350. The settlement was approved.

Order No. 4020075

13. This § 104(d)(2) order, issued on January 27, 1993, charges a violation of 30 C.F.R. § 77.1001.

14. Inspector Billy Damron observed loose materials, including blasted rock, dirt and uprooted trees, on the highwall of the No. 2 pit. The highwall was about 65 feet high. A bulldozer was operating beneath the highwall.

Order No. 4020076

15. This § 104(d)(2) order, issued on January 27, 1993, charges a violation of 30 C.F.R. § 77.1001.

16. Inspector Billy Damron observed loose rocks and loose boulders on the face and top of the highwall in the No. 1 pit. The highwall was 90 to 100 feet high. He also observed a loose boulder, loose rocks, and dirt on the spoil bank side, which was about 60 feet high. Men and equipment were operating in the pit. The inspector observed fresh tire tracks indicating that the end loader was operating parallel to the spoil bank. He also observed footprints near the bottom of the spoil bank.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Citation No. 4020202

Section 77.405(b) provides that "No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

The operator allowed a miner to work on a wheel under the raised bed of a 15-ton coal dump truck, loaded with 30 tons of coal, without blocking the raised truck bed and axle.

When Inspector Cure first saw the truck, in front of a truck shop, a group of miners were standing around the truck with their foreman, Respondent Tracy Damron. The inspector approached the truck to talk to the foreman about other equipment he wanted to inspect. He noticed that the truck was loaded and a crib was stacked behind the truck. However, the truck bed was not elevated. He left the shop area to inspect other vehicles.

Later, from a distance he noticed that the loaded truck bed was raised. He drove to the truck shop to see what was happening. As he approached, he saw the hydraulic bed was elevated to press on the crib and the left rear wheel was raised. A miner was reaching in to handle the lug nuts on the elevated wheel. Some of the men scattered as the inspector approached. The foreman quickly stopped the work on the wheel, had the truck bed and wheel lowered, and then got a 20-ton jack to try to raise the rear axle and wheel. It would not lift the axle. The inspector issued Citation No. 4020202 to Foreman Damron.

Foreman Damron testified there were two 20-ton jacks under the axle when the inspector saw the raised truck bed and a miner working on the wheel. I do not accept this testimony. I find that there was no jack under the axle when the inspector saw a miner handling the lug nuts when the truck bed and wheel were raised.

The president of the company, Respondent Mitch Potter, testified concerning the company's practice of changing rear tires on coal trucks. He was not present during Inspector Cure's inspection. Mr. Potter testified that the company practice was to stack a wooden crib behind the truck, raise the truck bed to press on the crib to relieve pressure on the wheel, and use two jacks to lift the axle on the side of the flat tire. He did not know what practice or conditions were observed by Inspector Cure on the day in question.

Contrary to the practice contended by Mr. Potter, Inspector Cure observed that the hydraulic truck bed and left rear wheel were raised without using a jack. A miner was handling the lug nuts when the inspector observed the raised bed and wheel.

The miner was working "under . . . machinery or equipment" within the meaning of the regulation because the wheel he was working on was under the elevated truck bed and truck frame. If the truck bed fell the wheel may have been jarred loose and fallen on him, the truck frame may have struck him, or the tire may have crushed a foot. If he was handling the lug nuts when the truck bed fell he may have received severe hand injuries.

The violation was "significant and substantial" in that it was reasonable likely to result in serious injury if this

practice of shortcutting safety devices continued in normal mining operations. Mathies Coal Co., 6 FMSHRC 1 (1984).

Because the truck was not designed to lift a wheel in the manner used by the mine operator, and jacks were available and designed for that purpose, the operator was highly negligent in shortcutting safety devices and endangering a miner. The violation was therefore "unwarrantable" within the meaning of § 104(d)(1) of the Act. Rochester & Pittsburgh Coal Co., 13 FMSHRC 189 (1991).

In addition to citing the corporation, the Secretary charged Tracy Damron individually under § 110(c) of the Act, which provides in part:

Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

Section 3(c) of the Act defines "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine." Foreman Damron was an agent of the corporation.

The Commission has interpreted the term "knowingly" in § 110(c) as follows:

Knowingly, as used in the Act does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence [citation omitted]. We believe this interpretation is consistent with both the statutory language and the remedial nature of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that

gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Secretary v. Kenny Richardson, 3 FMSHRC 8,16 (1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

Foreman Damron was present while the tire was being changed in an unsafe manner in violation of 30 C.F.R. § 77.405(b). As the inspector approached the truck, some men scattered and the foreman quickly had the truck bed and wheel lowered. He then got a 20-ton jack and attempted unsuccessfully to raise the rear wheel. The foreman's effort to cover up his method of changing a tire is strong evidence of his knowledge of a violation. I find that Foreman Damron "knowingly authorized, ordered, or carried out" the violation alleged in Citation No. 4020202, within the meaning of § 110(c) of the Act. I find that he was highly negligent.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a penalty of \$5,000 is appropriate for the corporation and a penalty of \$2,500 is appropriate for Foreman Tracy Damron, for the violation cited in Citation No. 4020202.

**Order No. 4020210**

This order was issued under § 104(d)(1) of the Act, charging a violation of 30 C.F.R. § 77.1001.

On August 18, 1992, Inspector Butch Cure observed loose and unconsolidated material in the form of large and small rocks and boulders on the spoil side of the highwall in No. 3 1/2 pit. The highwall was about 25 feet high and 200 feet long.

The inspector testified that the loose material presented a hazard to the drivers of four pieces of equipment operating below the spoil bank.

Mr. Ed Brown, an engineer, testified for the operator regarding the likelihood of injury from rocks falling on the end loader operating beneath the spoil bank. He found the risk of

injury to be remote if the end loader operated at a perpendicular angle to the spoil bank but increased as the angle approached a position parallel to the spoil bank.

I find that there was a reasonable likelihood that the loose material on the spoil bank would slough or roll off striking equipment or miners and causing serious injuries. The violation was thus significant and substantial.

The operator had been cited for a violation of the same standard on the same highwall less than two weeks before this violation. The same foreman, Tracy Damron, was in charge on both occasions. Upon issuing the prior citation, Inspector Cure spoke to Foreman Damron about the hazards of loose material on the highwall. I find that the foreman's disregard of the hazards on August 18, 1992, was serious and shows aggravated conduct beyond ordinary negligence. I therefore find that the violation was "unwarrantable" within the meaning of § 104(d)(1) of the Act.

The Secretary also charged Foreman Damron with individual liability for this violation, under § 110(c) of the Act.

Foreman Damron was aware of the hazardous conditions because he conducted a daily examination of the work site before Inspector Cure arrived. I find that the foreman knowingly authorized, ordered, or carried out the violation cited in Order No. 4020210, within the meaning of § 110(c) of the Act.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a penalty of \$8,000 is appropriate for the corporation and a penalty of \$3,000 is appropriate for Foreman Tracy Damron for the violation cited in Order No. 4020210.

**Order No. 4020075**

This order was issued under § 104(d)(2) of the Act, charging a violation of 30 C.F.R. § 77.1001.

On January 27, 1993, Inspector Billy Damron observed loose and unconsolidated material in the form of blasted rock, dirt and trees on the highwall and spoil bank in No. 2 pit. The highwall

was about 65 feet high. The inspector observed a bulldozer operating beneath the highwall.

The operator had been issued 17 charges of violations of the same standard within about six months, and had been issued two charges for violating the same standard during the last inspection. The same foreman, Tracy Damron, was in charge on the previous inspection and the day that Order No. 4020075 was issued. I find that Foreman Damron's disregard of hazardous, loose materials on the highwall and spoil bank shows aggravated conduct beyond ordinary negligence. The violation on January 27, 1993, was therefore unwarrantable. The violation was reasonably likely to result in serious injury, and therefore was significant and substantial.

In addition to charging the corporation, the Secretary charged Foreman Tracy Damron individually under § 110(c).

Foreman Damron was in charge and conducted a daily examination of the pit before the inspection. I find that he knew about the hazardous conditions. For the reasons discussed as to other violations of § 77.1001 by Foreman Damron, above, I find that Foreman Damron knowingly authorized, ordered, or carried out the violation on January 27, 1993, within the meaning of § 110(c).

Considering all of the criteria for civil penalties in § 110(i), I find that a penalty of \$10,000 is appropriate for the corporation and a penalty of \$4,000 is appropriate for Foreman Tracy Damron for the violation cited in Order No. 4020075.

Order No. 4020076

This § 104(d)(2) order was issued on the same day as Order No. 4020075.

Inspector Billy Damron observed loose, hazardous material in the form of rocks and boulders on the face and top of a highwall in No. 1 pit. The highwall was about 90 to 100 feet high. He observed a front-end loader and coal trucks operating beneath the highwall.

Inspector Damron also observed a large boulder and loose rocks and dirt on the spoil bank side, about 60 feet high. The inspector observed fresh tire tracks indicating the end loader was operating parallel to the spoil bank. He also observed miners working in the pit and footprints near the bottom of the spoil bank.

The corporation had been issued two charges of violating the same standard in the previous inspection and the same foreman, Tracy Damron, was in charge on both inspections.

I find that Foreman Damron's disregard of the hazards discovered by the inspector shows aggravated conduct beyond ordinary negligence. The violation was therefore unwarrantable within the meaning of § 104(d) of the Act.

The violation was reasonably likely to result in serious injury, and therefore was significant and substantial.

The Secretary charged Foreman Damron individually under § 110(c). He was in charge on January 27, 1993, and he had conducted a daily examination of the pit before the inspector arrived. Foreman Damron was also the foreman in charge when two citations were issued for violations of the same standard during the previous inspection within six months of the date when Order No. 4040076 was issued. I find that Foreman Damron knowingly authorized, ordered, or carried out the violation cited in Order No. 4020076 within the meaning of § 110(c).

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a penalty of \$10,000 is appropriate for the corporation and a penalty of \$4,000 is appropriate for Foreman Tracy Damron for the violation cited in Order No. 4020076.

#### Section 110(c) Charges Against Mitch Potter

The Secretary also charged Mitch Potter, president of the corporation, with individual liability under § 110(c) concerning the violations cited in Order Nos. 4020075 and 4020076.

Mr. Potter supervised the day-to-day operations of the corporation. He was present at Mine No. 9 on January 27, 1993,

and was aware of the conditions of the highwalls involved in the two orders before the inspection. Also, Mr. Potter was aware of previous citations issued by Inspector Cure for similar violations of the same standard. I find that Mr. Potter was in a position to prevent the violations found on January 27, 1993, but failed to take action to do so. I find that he knowingly authorized, ordered, or carried out the violations charged in Order Nos. 4020075 and 4020076, within the meaning of § 110(c).

Considering all of the criteria for civil penalties in § 110(i), I find that a civil penalty of \$6,000 against Mr. Potter is appropriate for the violation charged in Order No. 4020075 and a civil penalty of \$6,000 against Mr. Potter is appropriate for the violation charged in Order No. 4020076.

#### CONCLUSIONS OF LAW

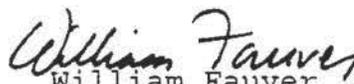
1. The judge has jurisdiction.
2. Respondent Sunny Ridge Mining Co., Inc., violated the safety standards as alleged in Citation Nos. 4020202, 4228207 and 4020074, and in Order Nos. 4020210, 4020075, and 4020076.
3. Respondent Tracy Damron knowingly authorized, ordered, or carried out the violations alleged in Citation No. 4020202, and in Order Nos. 4020210, 4020075, and 4020076 within the meaning § 110(c) of the Act.
4. Respondent Mitch Potter knowingly authorized, ordered, or carried out the violations alleged in Order Nos. 4020075 and 4020076 within the meaning of § 110(c) of the Act.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent Sunny Ridge Mining Co., Inc., shall pay civil penalties of \$33,700 within 30 days of the date of this Decision.
2. Respondent Tracy Damron shall pay civil penalties of \$13,500 within 30 days of the date of this Decision.

3. Respondent Mitch Potter shall pay civil penalties of \$12,000 within 30 days of the date of this Decision.

  
William Fauver  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 27 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-236-M  
Petitioner : A.C. No. 45-03086-05507  
v. :  
 : Docket No. WEST 94-265-M  
GOOD CONSTRUCTION, : A.C. No. 45-03086-05508  
Respondent :  
 : Mine: Good Portable Crusher

DECISION

Before: Judge Amchan

These cases are before me upon a stipulated record. They involve three non-significant and substantial citations issued to Respondent on November 4, 1993, about which there is no material factual dispute. Citation No. 4128396 was issued because the manually-operated horn on Respondent's Dresser front-end loader did not work when tested (Agreed Statement of Facts, No. IV). There is no indication as to how long the horn was not working prior to the issuance of the citation (Ibid.)

The violation was cited as a violation of 30 C.F.R. § 56.14132(a). The cited regulation requires that "[m]anually operated horns or other audible warning devices provided as a safety feature shall be maintained in functional condition." A \$50 civil penalty was proposed for this alleged violation.

Respondent's primary contention is that the cited regulation must be read in conjunction with § 56.14100(b), which provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent creation of a hazard to persons." Thus, Respondent argues that unless the Secretary can show that it failed to correct the defective horn in a timely manner, the instant citation should be vacated.

I reject Respondent's contention. Section 56.14132(a) imposes upon an operator a duty to keep a vehicle horn or other audible warning equipment in working condition. This duty imposes obligations that are to some extent different from the obligation to timely correct defects. It may require, for example, preventative maintenance. An inoperative horn could form the basis in some situations for citation under both regulations, if the horn did not work and the operator also failed to fix it in a timely manner.

Underlying Respondent's argument is the concept that an inoperative horn by itself cannot establish a violation. Good Construction suggests that a citation is valid only if the horn was inoperative due to an act or omission on its part. However, under the Mine Safety and Health Act an operator is liable for a violation regardless of fault. For example, in El Paso Rock Quarries, Inc., 3 FMSHRC 35, at 38-39, 2 BNA MSHC 1132 at 1135 (January 1981), the Commission reversed a judge who vacated a citation for the absence of a reverse signal alarm on the grounds that the Secretary failed to establish that the operator knew or should have known that a reverse signal alarm was inoperative. I find this decision indistinguishable from the instant case and therefore affirm Citation No. 4128396.

While the fault of the operator is irrelevant to the validity of the citation, it is relevant to the assessment of a civil penalty. As the record herein is silent as to the negligence of Respondent, I assess a \$25 civil penalty after considering the penalty criteria in section 110(i) of the Act. I would assess an even lower penalty if the record demonstrated an absence of fault on the part of Respondent. Such a situation, for example, would be one in which the operator established that the horn was working properly when that day's pre-shift examination was performed.

#### The Parking Brake

Citation No. 4128397 was issued pursuant to 30 C.F.R. § 56.14101(a)(2) because the parking brake on the same front-end loader was not able to hold its typical load on the maximum grade it travels (Agreed Statement of Facts, page 2, para. 6). I assume, for the purposes of this decision, that the parking

brake on this loader met its manufacturer's specifications, and that it was capable of holding its typical load on level ground (Affidavit of Alan Good, page 3).

Respondent's challenge to this citation and the \$50 proposed penalty is essentially an attack on the wisdom of the standard's requirements. This is outside the jurisdiction of the Review Commission. Section 56.14101(a)(2) was promulgated as the result of notice and comment rulemaking on August 25, 1988, 53 Fed. Reg. 32522. Exclusive jurisdiction of challenges to its validity must be made to an appropriate court of appeals, within 60 days of promulgation, Section 101(d) of the Act, 30 U.S.C. § 811(d).

The preamble to the final rule indicates that comments were in fact received on the proposal that was promulgated as section 56.14102(a)(2). At 53 Fed. Reg. 32505, column one, MSHA discussed comments asking the agency to limit this requirement to testing up to a maximum grade of 15 percent. This discussion establishes that MSHA gave serious considerations to objections concerning the proposal. It also demonstrates why the undersigned should not evaluate the wisdom of the regulation when he does not have before him the rulemaking record that led to the promulgation of the standard.

As Respondent admittedly violated the standard, I affirm the citation and assess the \$50 penalty proposed. Respondent certainly had the capability to test the parking brake to see whether it complied with section 56.14101(a)(2) before the citation was issued. Its failure to do so warrants a penalty of this magnitude<sup>1</sup>.

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<sup>1</sup>The standard does not require or encourage, as Respondent suggests, that an operator get out of his vehicle while testing the parking brake. I also reject Respondent's contention that the standard is unconstitutionally vague because its requirements are different depending on the terrain on which a vehicle travels and the manner in which it is used. I find the regulation provides an operator with sufficient notice of what constitutes compliance, Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990).

### The Part 50 Reports

Citation No. 4128400 was issued because Respondent did not have copies of the reports that it is required to submit to MSHA pursuant to sections 50.20 and 50.30 at the quarry site where the instant inspection took place. These records were kept at Respondent's business office in Toledo, Washington, and MSHA inspectors had reviewed these reports at that location previously (Affidavit of Pam Good, page 1)<sup>2</sup>.

The cited regulation, 30 C.F.R. § 50.40(b), requires that these reports be kept at the office closest to the mine. Respondent argues that there was no office at the quarry and that it complied with the regulation by maintaining these records at its business office. I conclude that the terms of this regulation must be read in conjunction with Section 109(a) of the Act. That provision states that, "[a]t each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine."

Thus, I find that Respondent was required to maintain an office at the quarry site and to maintain the part 50 records at that location. Previously, I reached the same conclusion in Mechanicsville Concrete, 16 FMSHRC 1444, 1448-9 (ALJ July 1994). As noted in that case, there is a Commission judge's decision, Sierra Aggregate Company, 9 FMSHRC 426, 430 (ALJ March 1987), which reaches the opposite conclusion.

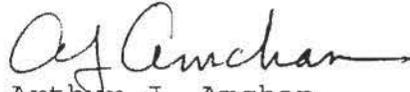
MSHA proposed a \$100 civil penalty for this violation, characterizing Respondent's negligence as "high." Respondent had the reports, which indicates no intent to conceal information. Moreover, the wording of the standard is very confusing and other MSHA inspectors apparently reviewed the company's reports at the business office. I conclude therefore that Respondent's negligence was very low. As a result I assess a \$10 civil penalty after consideration of all six factors in section 110(i) of the Act.

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<sup>2</sup>For purposes of this decision, I am assuming that the factual matters in Respondent's affidavits are established.

ORDER

Citation Nos. 41288396, 4128397 and 4128400 are affirmed. Respondent shall pay the \$85 assessed civil penalties within 30 days of this decision.



Arthur J. Amchan  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 28 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-704-D
ON BEHALF OF KENNETH H.	:	
HANNAH, PHILIP J. PAYNE	:	
AND FLOYD MEZO,	:	MSHA Case No. VINC CD 94-07
Complainant	:	Rend Lake Mine
v.	:	I.D. No. 11-00601
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for the Complainant;  
David J. Hardy, Esq., Jackson & Kelly, 1600 Laidley Tower, Charleston, West Virginia for the Respondent.

Before: Judge Melick

These cases are before me upon the Complaint by the Secretary of Labor on behalf of Kenneth H. Hannah, Philip J. Payne, and Floyd Mezo, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., the "Mine Act", alleging that the Consolidation Coal Company (Consol) suspended these miners in violation of Section 105(c)(1) of the Act.<sup>1</sup> In particular, in the Secretary's Complaint before this Commission, as in their initial Complaint filed with the Mine Safety and Health Administration (MSHA), it is alleged that "[o]n April 13, 1994, we were suspended with the intent to discharge by Consolidation Coal Company, Rend Lake Mine, after [sic] exercised our statutory protected right to refuse to work under conditions that we in good faith felt to be

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<sup>1</sup> The Complainants were initially suspended with intent to discharge, however, by decision of an arbitrator on April 25, 1994, they were reinstated without backpay. The Complainants here seek back pay for the 12 days they were suspended (Joint Exhibit No. 1).

unsafe regarding energizing power underground following an unplanned mine fan stoppage on April 9, 1994."<sup>2</sup>

While the Mine Act grants miners the right to complain of a safety or health danger or violation, it does not expressly grant the right to refuse to work under such circumstances. However, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger and this right is now well established. See *Secretary on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 510-21 (1984) *aff'd*, 780 F.2d (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (1990). Moreover, a miner exercising such a work refusal is not required to prove that a hazard actually existed. *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC at 812. In order to be protected, work refusals need only be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; see also *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). However, the complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (1983). A good faith belief "simply means an honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving fraud or other forms of deception." *Id.*

The critical issue in these cases is whether the individual Complainants, at the time they refused the direct work orders of Mine Superintendent Joseph Wetzell, Maintenance Supervisor John Moore (and in the case of Hannah the additional work order of Foreman Gary Phelps) on April 10, 1994, (after being advised that State Mine Inspector Bill Sanders had, in effect, addressed their safety concerns) entertained a good faith, reasonable belief in a hazardous condition justifying their continued work refusal. The Complainants case in this regard was articulately stated at hearing by Kenneth Hannah. Hannah continues to work for Consol at the Rend Lake Mine as a surface electrician. He was also working in that capacity on April 10, 1994. He has no underground mining experience. Hannah was called at home in the

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<sup>2</sup> In his post-hearing brief, the Secretary for the first time presents the additional complaint that Hannah's protected rights were also interfered with when he was purportedly threatened with removal from the Mine Safety Committee. While this new theory of discrimination could perhaps have been joined by a timely amended complaint pursuant to Rule 15, FED.R.CIV P., no such amendment has been filed. In any event, amending the complaint at this late stage would be prejudicial to Respondent, denying it the opportunity to present evidence on this new issue and to argue and brief the issue. See 3 *Moore's Federal Practice* ¶ 15.08[4].

early morning hours of April 10 to restore power to the mine. He had previously worked on the 4:00 p.m. to 12:00 midnight shift on April 9 when power was lost and the ventilating fans shut down.

Hannah was aware that the third of three fans came back on at 12:20 a.m. on the 10th. On the latter date at around 11:00 a.m., as he was entering the wash house, Complainants Payne and Mezo asked Hannah, as a member of the mine safety committee, to represent them in a meeting with mine management about the fan stoppage. They were concerned because pre-shift examiners told them that an inspection of the secondary escapeways had not been properly performed after the stoppage. They also told Hannah about a prior meeting concerning this matter with Maintenance Supervisor John Moore.

Hannah testified that, in preparation for meeting with Moore, he first talked with several of the mine examiners, namely Gary Cook, Wesley Dickey and Gary Richardson. According to Hannah, they reported that the mine should have been checked in its entirety, including the secondary escapeways, before re-energizing the mine.<sup>3</sup> The Complainants then met again with Moore. Hannah explained what he had been told by the examiners and asked Moore if he knew whether the examination was proper. Moore responded that he did not know since he was not experienced in production. Hannah admitted that he too did not know the answer since he was a "surface" man.

Moore then indicated that he would call someone with the necessary experience, naming Assistant Mine Superintendent Rick Harris. Moore also called for the mine examiners to come into his office. Three of the examiners then entered the office and mine examiner Dickey opined that the mine had not been properly examined following the fan stoppage since the secondary escapeways had not yet been examined. Moore completed his phone call with Harris and reported to the Complainants that, according to Harris, the mine examination had been "done right". Hannah reportedly then told Moore that the mine examiners disagreed and that they needed to get the "proper people" out to the mine to make sure that it was safe. According to Hannah, he then read from provisions of the Labor-Management Contract (The National Bituminous Coal Wage Agreement of 1993) to the effect that, if

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<sup>3</sup> It is not disputed that several of the mine examiners, including Dickey, had been informed after a fan stoppage several weeks before this incident that state mine inspector Sanders had ruled that an inspection of the secondary escapeways was not required as a result of a fan stoppage. This determination was apparently never challenged although there were procedures available to do so. There is no evidence, however, that any of the Complainants were aware of this ruling at the time they exercised their work refusal.

there was disagreement between the miners and management and that if it involved state or federal law, that the appropriate officials were to be contacted. Hannah maintains that he then told Moore that the "state man", presumably a state mine inspector, should be called immediately and that Moore refused to call him. Hannah further maintains that he then told Moore to get the "state man" on the phone and that he could talk to him himself but that Moore refused and told the Complainants to go back to the wash house.

According to Hannah, Moore later appeared at the wash house and reported that the "state man" said it was okay to return to work. Hannah maintains that he then told Moore that the Complainants themselves had to call the "state man" and that Moore refused the request. The Complainants then invoked their "safety rights". Hannah maintains that he, in fact, asked Moore if he could call and talk to state mine inspector Sanders and Moore refused and refused to call Sanders himself. Hannah testified that he did not thereafter call Inspector Sanders himself because he believed that he was forbidden to use the telephones without permission.

Hannah testified that Phelps, his foreman, thereafter directed him to put power in the mine and Hannah refused, noting that there were mine examiners underground at the time. Phelps then gave Hannah a direct order to turn on the power and Hannah refused, stating that with two mine examiners underground he would not take the chance of an explosion. Hannah maintains that he then said he was again exercising his individual rights because, if there were an electrical fault with methane present, he could trigger an explosion that would kill or maim the examiners underground.

According to Hannah, Moore then also gave him a direct order to turn on the power and Hannah again refused with the same explanation. Hannah maintains that he had other work to do and Moore then told him to return to that other work. Hannah was later called to Superintendent Wetzel's office where Wetzel was attempting to ascertain from Payne and Mezo the law they were claiming was broken. Hannah intervened, advising Wetzel that they were in fear of creating an explosion and killing themselves and others.

Hannah then returned to his regular duties but was called later to a meeting. State Inspector Sanders was present. Hannah asked Sanders whether the mine in its entirety was required to be examined following a power outage and fan stoppage. Sanders explained that escapeways need be examined only once every 24 hours and did not need to be re-examined after a power outage for that reason alone. Sanders further stated that it would be safe to turn on the power. Apparently satisfied by Sanders that it was neither a violation nor a hazard Hannah then told the

Complainants to turn on the power and return to work. According to Hannah, Superintendent Wetzel then told the Complainants the matter was not over and that they were subject to discipline and the removal of Hannah as safety committeeman.

Complainant Floyd Mezo also volunteered to work on the morning of April 10, 1994, because of the fan outage. His orders from foreman Johnny Moore were to turn the power back on. He and Complainant Payne were waiting in the wash room when some of the pre-shift examiners returned from underground. He overheard their conversation that they had not inspected the escapeways. Mezo testified that he and Payne then went to Moore's office reporting this apparent problem. Moore indicated that he was not a mine examiner and did not know whether the exam was adequate. He agreed, however, to find out. Moore then telephoned someone and Mezo and Payne returned to the wash house. Mezo then asked safety committeeman Hannah to represent them in further meetings. Mezo maintains that Hannah thereafter did all of the talking for the Complainants and that he never said another word. Mezo maintains that, during the meeting with Moore, Hannah had asked for Moore to call the state mine inspector and that Moore refused several times to allow Hannah to use the phone himself.

Mezo recalled, however, that Moore, at the second meeting, said that they had, in fact, called the "state" and the "state" said their procedures were "okay". Significantly, Mezo acknowledged that there were telephones available outside of Moore's office and in the communications room. Moreover, Mezo admitted that he made no effort to use those phones. Furthermore, he was unaware of any rule that would prevent him from using the phones. Mezo also observed that Hannah did, in fact, later use a telephone at the mine to contact another safety man. Following the meeting with state inspector Sanders, Hannah told Mezo and Payne to go back to work.

Complainant Philip Payne, an underground mechanic with 15 years experience, testified that he too was called back to the mine on April 10 to help restore the power. He confirms Mezo's testimony in significant respects. Payne also recalls that Hannah, in fact, used a mine telephone to call a UMWA representative. Payne maintained that neither he nor Mezo had access to a telephone but, as a matter of fact, did not even think of using it. He believed that the telephones were not to be used without permission. He further maintains that, since he did not believe he had the authority to use the phone, he did not call the state inspector himself.

From the credible testimony of Foreman Moore, however, it is apparent that the Complainants were mistaken as to when Moore declined to call State Mine Inspector Sanders. Moore testified that he did not, at either of the two meetings in his office, refuse to call State Inspector Sanders nor did he refuse to allow

any of the Complainants to use the telephone to call Sanders. Indeed, Moore testified that he was never asked at these meetings to call any inspector nor was he ever asked permission to use the telephone. Furthermore, he was not aware of any rule barring the use of the telephone. According to Moore, it was only after the second meeting in his office, when Hannah had already insisted that the state inspector be present at the mine, after the Complainants had already refused to work and after Moore had called Mine Superintendent Wetzel to come to the mine, that the Complainants asked him to call the state inspector apparently to have him come to the mine. Moore declined to do so at this point in time since Wetzel was then on his way to the mine site. Moore testified that such a decision would then have been up to Wetzel.

Donald Niblet, Communications Coordinator at the Rend Lake Mine, testified that around 12:30 in the afternoon on April 10 Hannah asked to use the telephone. Niblet testified that he furnished Hannah the telephone number of UMWA official Oxnard and that Hannah thereafter used the telephone himself. According to Niblet, Hannah never stated that he had permission to use the phone. Niblet also testified that miners do not, as a practice, ask permission before using the mine telephone and so far as Niblet knew it was not necessary to have permission to use the phone. Niblet observed that Hannah dialed the telephone himself and that he, Niblet, stepped outside while Hannah made his call.

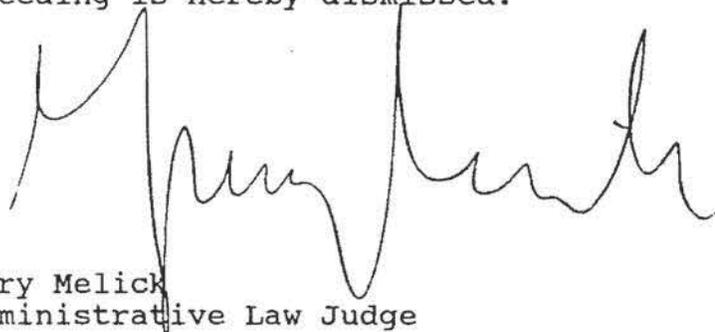
Tom Samples, a maintenance supervisor, overheard the conversation in Moore's office and heard Moore later advise the Complainants that Mr. Phares had contacted State Inspector Sanders. He recalled that the Complainants nevertheless insisted that the state inspector appear at the mine in person and inform them personally. Samples did not hear any of the Complainants ask Moore to call the state inspector nor did they ask to use the telephone. Samples observed that, as Hannah came out of Moore's office, he said he needed to use a telephone and Samples advised him that there was a phone in the corner. Samples testified that he then stepped aside to give Hannah privacy but that he did not see him actually use the phone.

Within the framework of the credible evidence, I indeed must conclude that when the Complainants were advised by Moore, in particular, and later by Wetzel that State Inspector Sanders had, in fact, been contacted regarding their concerns (about re-energizing the mine following a fan stoppage without a specific examination of the secondary escapeways) and had concluded that there was no safety hazard and that the procedures were legally permissible, their work refusal could no longer be considered reasonable or in good faith. Clearly, if the Complainants did not believe in the statements of mine officials regarding their conversations with State Inspector Sanders, it was incumbent on

them to call Sanders themselves.<sup>4</sup> I find Consol's witnesses to be the more credible on this issue and conclude that any of the Complainant's could have used the available telephones at any time, that there was no policy prohibiting the use of the phones for this purpose and that Hannah himself used the telephone in calling another union official without any specific permission to do so, thus directly discrediting his own testimony. The Complainants' failure to either accept the reported statements of Sanders or verify those statements by calling Sanders themselves and their continued refusal to work without Sanders' physical presence was unreasonable. Their continued refusal to return to work could not thereafter be considered to be based upon a good faith, reasonable belief in a hazard. This conclusion is reinforced by the fact that when State Inspector Sanders later arrived at the mine his opinion was the same as reported by mine officials and that the Complainants then accepted Sanders conclusions and returned to work. Accordingly, their continued work refusal was not protected and their suspension by Consol for that continued work refusal must stand.

ORDER

This discrimination proceeding is hereby dismissed.



Gary Melick  
Administrative Law Judge

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/jff

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<sup>4</sup> By obtaining this information from the state mine inspector Consol had thereby fulfilled its obligation to address the perceived danger that had been communicated by the Complainants. See *Braithwaite v. Tri-Star mining*, 15 FMSHRC 2460 (1993).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 28 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING.  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 95-1-M  
Petitioner : A.C. No. 28-00539-05519  
v. :  
: Mine: Pinewald  
NEW JERSEY PULVERIZING COMPANY, :  
Respondent :

**DECISION**

Appearances: James A. Magenheimer, Esq., Office of the  
Solicitor, U.S. Department of Labor, New York,  
New York for Petitioner;  
Martin E. Tanzer, President, New Jersey  
Pulverizing Company, Syosset, New York on behalf  
of 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 the New Jersey Pulverizing Company (NJ Pulverizing) with one violation of the mandatory standard at 30 C.F.R. § 56.11001 and seeking a "special assessment" civil penalty of \$8,000 for that violation. The Secretary alleges that the violation was serious, contributed to the cause of a fatal fall-of-person accident and resulted from the operator's high degree of negligence. The general issue is whether NJ Pulverizing violated the mandatory standard as charged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The citation at bar, No. 4087298, issued February 9, 1994, alleges a "significant and substantial" violation and charges as follows:

A fatal accident occurred at this operation on January 11, 1994, in that a laborer fell 8 feet from a flatbed trailer and died January 12, 1994. The victim had finished loading the trailer with pallets of bagged material and was in the process of covering the pallets with a plastic tarp cover when he apparently slipped or tripped and fell approximately 8 feet to the asphalt. There was no safe means provided to protect the victim from falling from the

trailer when he was installing the cover on the pallets. Along with the termination of this citation the company shall institute an effective safety program that will provide and ensure safe access for the employees.

The cited standard, under Subpart J of the Secretary's regulations captioned "Travelways", provides that "[s]afe means of access shall be provided and maintained to all working places."

The alleged practices giving rise to the instant citation were described as the purported acts of the deceased, Robert Rand, in climbing onto a flatbed trailer by utilizing either a forklift or the rear bumper as a means of access and by climbing onto pallets of sand bags loaded on the trailer (Tr. 63).<sup>1</sup> For the following reasons, however, I find that the Secretary has failed to sustain his burden of proving that the deceased actually engaged in such activities at the time alleged or that, even if he had engaged in such activities, that such activities were a causative factor in his death.

According to the undisputed testimony of the Secretary's witness and the deceased's former co-worker, William Stackhouse, III, he had last seen Mr. Rand before his fatal injuries around noon or 12:30 p.m. on January 11, 1994, as Rand was loading a pallet of sand bags with a forklift onto a flatbed trailer at the Bayville, New Jersey plant. Five to ten minutes later, as Stackhouse was taking a pallet outside the plant, he saw Rand's body lying on the ground two to three feet from a different and empty flatbed trailer. This empty trailer was located 15 feet from the trailer which Stackhouse had earlier seen Rand loading with a forklift. As confirmed by Stackhouse, Rand's body was, therefore, actually located 13 feet from the trailer he had been loading with the forklift. Stackhouse also observed that the loaded trailer had been partially covered with a tarpaulin.

Stackhouse testified that it was his own personal practice -- a practice he had never seen Rand follow -- in placing tarpaulins over loaded trailers to first gain access to the flatbed deck by stepping two feet onto the forklift which he would park adjacent to the trailer and then by stepping another two feet onto the deck of the flatbed itself. Alternatively he would use the rear bumper of the flatbed as a two-foot step onto the flatbed deck. Stackhouse further testified that once on the deck of the flatbed he either stepped or crawled onto the bags of sand product piled on top of the pallets some three to four feet

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<sup>1</sup> According to the Secretary, Rand should have been using a stepladder or portable platform to gain access to the trailer bed and to the top of the sand bags (Tr. 118-119).

above the flatbed deck in order to pull the tarpaulin over the material. Stackhouse testified that he personally never used a ladder or a raised platform to perform such tasks.

A special investigator for the Mine Safety and Health Administration (MSHA), Larry Brendle, testified that he began his investigation of this incident on January 13, 1994, two days after it had occurred. The scene had by then been completely altered with both trailers removed and apparently neither the location of the trailers at the time of the cited incident nor the position of the deceased's body had been marked. According to Brendle, no autopsy was performed on the deceased and his body was cremated. The Certificate of Death notes the cause of death as "massive subdural hematoma" caused when "patient fell and hit his head".<sup>2</sup> Brendle understood these injuries were located on the back of the head below the hairline. Brendle acknowledged that he only surmised that Rand had fallen from the top of the bags. When it was noted that the deceased's body had been discovered on the ground 13 feet from the loaded trailer from which Brendle had assumed the victim had fallen, he conceded that, indeed, "we will never know how it happened." Brendle further acknowledged that the injuries to the recessed portion below the hairline on the back of the deceased's head would not be consistent with a falling injury.

Under the circumstances, I find that the Secretary has not sustained his burden of proving his theory set forth in his Accident Investigation Report (Government Exhibit C-1) and in the citation that the deceased had fallen from the top of one of the pallets on the loaded trailer thereby causing fatal head injuries.<sup>3</sup> While evidence that a tarpaulin had partially covered the pallets on the loaded trailer, suggests that someone may have climbed onto the trailer or climbed on top of the pallets, there is insufficient evidence that the deceased had done this or that it was performed in the manner the Secretary has suggested. Indeed, based on the undisputed evidence presented through the testimony of the Secretary's own witness, William Stackhouse, that the body was found 13 feet from the loaded trailer and the description of the deceased's injuries by Special Investigator Brendle, it is quite possible that the

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<sup>2</sup> A subdural hematoma is a massive blood clot beneath the dura mater (the outermost membrane of the brain and spinal cord) that causes neurologic symptoms by pressure on the brain. *Dorland's Medical Dictionary*, 21st edition, W.B. Saunders Company.

<sup>3</sup> I also note that both Stackhouse and Brendle further agree that the drawing purportedly depicting the incident on page two of the Accident Investigation Report was not accurate.

deceased's head injuries were not even sustained as the result of a fall. Accordingly, while it is recognized that the Secretary may establish a violation by inference and circumstantial evidence, any such inference must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Secretary v. Garden Creek Pocahontas* 11 FMSHRC 2148 (1989). In this case the gaps between the existing facts and conclusions to be inferred are too large. The citation must, accordingly, be vacated.

Even assuming, *arguendo*, that the Secretary had met his burden of proving that the deceased had, in fact, fallen while gaining access to the pallets of sand on the loaded trailer, the Secretary has nevertheless failed to demonstrate that the cited standard could be constitutionally applied to the circumstances. In order to pass constitutional muster, a broad standard such as 30 C.F.R. § 56.11001 must be interpreted in light of a "reasonably prudent person" test so that the adequacy of the means of access at issue must be measured against the standard of whether a reasonably prudent person familiar with this industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard now alleged by the Secretary. *Secretary v. Alabama By-Products Corporation* 4 FMSHRC 2128 (1982); *Secretary v. Dolese Brothers Company* 16 FMSHRC 689 (1994).

In this regard the only Secretarial witness to testify on this issue, Special Investigator Brendle, acknowledged that he was not familiar with the industry practices in connection with safety measures taken when spreading tarpaulins on trailer beds. In fact, he knew of no operators in this industry who ever used a tarpaulin to cover its bags of sand or mixed cement-sand product. In his experience, they relied only on plastic blister wrap for protection.

On the other hand, NJ Pulverizing President Martin Tanzer<sup>4</sup> testified that after conferring with colleagues in the industry he found that the majority loaded their trucks in the same way he did. Some used a platform at the rear of the truck but the sides would still be exposed. It is significant, moreover, that even the Secretary did not require the use of any type of portable platform or stepladder to abate this alleged violation and has not since this incident cited this operator for

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<sup>4</sup> Tanzer is a well-qualified expert in the industry. He has been in the business since 1958 and he has been active in trade groups, having been President of the National Industrial Sand Association and the International Packaged Concrete Manufacturer's Association and on the Board of Directors of the National Aggregates Association.

failure to use such a platform or stepladder even though it has not done so.

Indeed, according to Tanzer, MSHA never told him before or after this incident that "we're doing anything wrong".

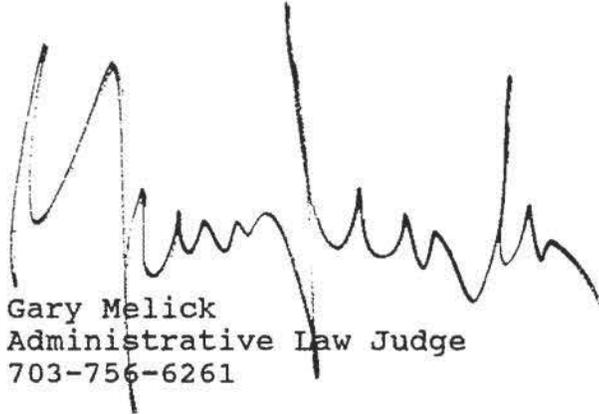
The citation was abated on May 9, 1994, in the following manner:

The company has instituted an intensive training program. Two persons are required when loading and men are required to wear helmets while working on the trailers. This citation is terminated as the inspector indicates the company is complying with the District requirement for compliance.

Within the above framework, I find that the Secretary, in any event, has failed to demonstrate how the cited standard could be constitutionally applied to the alleged facts. For this additional reason, the citation must be vacated.

**ORDER**

Citation No. 4087298 is hereby vacated and this civil penalty proceeding dismissed.



Gary Melick  
Administrative Law Judge  
703-756-6261

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ADMINISTRATIVE LAW JUDGE ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 6, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-10-D
on behalf of	:	
ROBBIE A SMITH,	:	Centralia Coal Mine
Complainant	:	
	:	Mine I.D. 45-00416
v.	:	
	:	
CENTRALIA MINING CO., INC.,	:	
Respondent	:	

**ORDER GRANTING MOTION TO WITHDRAW REPRESENTATION**

On April 5, 1995, the Secretary of Labor filed a motion in this case entitled "Complainant Secretary of Labor's Notice of Intent to Discontinue Participation in Proceedings and Motion to Restyle Caption." In the motion, counsel for the Secretary states that the Secretary's attorneys believe that "they cannot provide representation satisfactory to Mr. Smith." The motion goes on to state that "the Secretary is of the opinion that he cannot obtain the relief and remedies requested by Mr. Smith." The motion continues, as follows:

Mr. Smith has not been cooperative with representatives of the Secretary of Labor during discovery in this matter and has resisted providing information to representatives of the Secretary during this proceeding. Mr. Smith has strenuously and repeatedly indicated dissatisfaction with the Secretary's representation in this matter. The Secretary's attorneys assert that the merits of Mr. Smith's complaint are not the basis for this action.

Counsel for the Secretary states that "it is the Secretary's intention to discontinue acting on Mr. Smith's behalf in this matter. Counsel states that he has advised Mr. Smith that, as a party to this proceeding, "he may appear, retain his own counsel and present evidence on his own behalf." The Secretary requests that "the case be restyled to show that Mr. Smith is proceeding

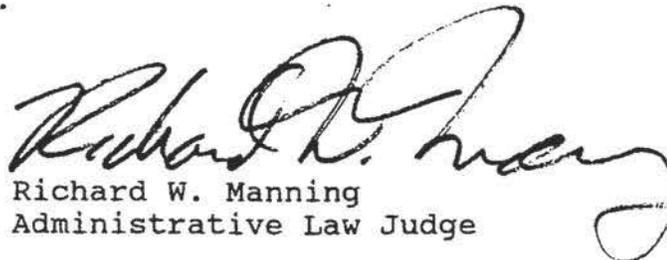
on his own behalf under section 105(c)(3)" of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). The Secretary believes that since Mr. Smith is already a party to this proceeding, he need not file a new complaint alleging the same violation of section 105(c).

Both the Secretary of Labor and Mr. Smith are parties in this proceeding. 29 C.F.R. § 2700.4(a). The Secretary has indicated that he no longer wishes to represent Mr. Smith in this matter. He states that the basis for his withdrawal of representation is not the merits of the discrimination complaint, but the fact that Mr. Smith is unwilling to cooperate with counsel for the Secretary.

In a conference call, counsel for Centralia stated that he has no objection to the Secretary's motion. In a letter to counsel for Centralia dated April 4, Mr. Smith stated that counsel for the Secretary has removed himself from the case for "obvious reasons." He further stated that he has "little love for attorneys" and that he will "proceed with this case on [his] own behalf." He disputes, however, the Secretary's claim that he has been "uncooperative."

I do not have the authority to convert this case to a section 105(c)(3) proceeding, as requested by the Secretary. Section 105(c)(3) provides that if "the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right ... to file an action on his own behalf before the Commission...." 30 U.S.C. § 815(c)(3). The Secretary has not made such a determination. See, John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327, 1337-38 (August 1987), rev'd on other grounds, Gilbert v. FMSHRC, 866 F.2d 1433, 1441-43 (D.C. Cir. 1989).

Nevertheless, it would be unfair to Mr. Smith to dismiss this case simply because the Secretary no longer wishes to represent him. As stated above, Mr. Smith is already a party to this section 105(c)(2) proceeding. 29 C.F.R. § 2700.4(a). Accordingly, this case will proceed as a section 105(c)(2) proceeding and the Secretary will no longer be representing Mr. Smith. Mr. Smith may retain his own private counsel or may proceed on his own. The caption will be restyled to reflect the fact that the Secretary is no longer Mr. Smith's representative and is, therefore, no longer a party to this proceeding. The Secretary's motion is **GRANTED**.

  
Richard W. Manning  
Administrative Law Judge

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 13, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 95-124  
Petitioner : A. C. No. 11-00877-04078  
 :  
v. : Wabash Mine  
AMAX COAL COMPANY, :  
Respondent :

DECISION DISAPPROVING SETTLEMENT  
ORDER TO VACATE  
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement for one of the two violations in this case and moves to vacate the other violation.

The Solicitor moves to vacate Citation No. 4056757 due to insufficient evidence. The Solicitor's motion is granted.

With respect to the remaining violation the Solicitor propose a reduction in the penalty. Citation No. 4267053 was issued for a violation of 30 C.F.R. § 48.7(a) on the ground that task training provided to miners for a new underground piece of equipment was inadequate. The inspector stated on the citation that the inadequate training contributed to the personal injury of a newly task trained miner. The Solicitor represents that the degree of gravity is a matter of dispute between the parties. The Solicitor advises that MSHA believes a high degree of gravity is present, but that the operator contends gravity is less because adequate training was given and the injury in question was caused by the miner not following instructions. The Solicitor agrees to reduce the penalty from \$1,500 to \$800.

I cannot approve the settlement motion as submitted. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act.

30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The Solicitor has merely set forth the difference of opinion between the parties with respect to gravity. He has not said whether he agrees with the operator's position or whether he anticipates difficulties in sustaining MSHA's position on gravity. Because of the way the Solicitor's motion reads, a hearing appears necessary to resolve questions such as the adequacy of the operator's training and the culpability of the miner. When the Solicitor seeks to have the original penalty almost cut in half, he must do more than say that a matter is in dispute. He must provide information sufficient for me to act under section 110(i) because I can only approve a settlement justifiable under the six criteria of that section.

In addition, there is a discrepancy in the citation as written. As already noted, the inspector stated on the citation that the violation resulted in an injury. However, in determining the degree of gravity on the citation he checked off that an injury was highly likely instead of that it had occurred. The Solicitor should clarify whether this violation resulted in an injury.

In light of the foregoing, it is ORDERED Citation No. 4056757 be VACATED.

It is further ORDERED that the motion for approval of settlement for Citation No. 4267053 be DENIED.

It is further ORDERED that within 30 days of the date of this order the Solicitor submit appropriate information to support his settlement motion for Citation No. 4267053. Otherwise, this case will be set for hearing.



Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 24 1995

BERWIND NATURAL RESOURCES, CORP., : CONTEST PROCEEDINGS  
KENTUCKY BERWIND LAND COMPANY, :  
KYBER COAL COMPANY, : Docket No. KENT 94-574-R  
JESSE BRANCH COAL COMPANY, : through KENT 94-797-R  
Contestants : and  
v. : KENT 94-862-R  
:  
SECRETARY OF LABOR : AA & W Coals, Inc.  
MINE SAFETY AND HEALTH : Elmo No. 5 Mine  
ADMINISTRATION (MSHA), :  
Respondent : Mine I.D. No. 15-16856

ORDER  
and  
NOTICE OF HEARING

These contest proceedings are filed pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. § 815. They involve 225 citations and orders issued for alleged violations of various mandatory health and safety standards. The citations and orders arise out of an explosion that occurred at the Elmo No. 5 mine of AA&W Coals, Inc. (AA&W), on November 30, 1993. The explosion took the life of James Lyons, an inside laborer.

Following an investigation of the accident, the Secretary of Labor's Safety and Health Administration (MSHA) issued the contested citations and orders to AA&W, Kyber Coal Co. (Kyber), Jesse Branch Coal Company (Jesse Branch), Berwind Land Company and Berwind Natural Resources Corporation (Berwind) (collectively, the Contestants). Subsequently and upon the unopposed motion of the Secretary, Kentucky Berwind Land Company (Kentucky Berwind) was substituted as a party for Berwind Land Company (Order Substituting Parties (January 20, 1995)).

AA&W operated the Elmo No. 5 mine pursuant to a contract with Kyber. Kyber, Jesse Branch, and Kentucky Berwind are subsidiaries of Berwind. The Secretary contends that all of the entitles are jointly and severally liable as operators of the

mine. AA&W does not dispute the Secretary's jurisdiction. However, the others maintain they are not operators within the meaning of the Act and that they should not have been cited for the alleged violations.

The proceedings were effectively bifurcated so that the status of the Contestants could be resolved prior to addressing the individual merits of the enforcement actions. Extensive discovery was conducted (See Order Granting Secretary's Motion To Conduct Discovery and Adopting Schedule for Resolution of Contestants' Status as "Operators" (September 1, 1994)). The parties then filed joint stipulations of fact and cross motions for summary decision. For the reasons that follow, the Secretary's motion is **DENIED**; the Contestants' motion is **GRANTED IN PART** and the proceedings are **NOTICED** for hearing.

#### SUMMARY DECISION

Under the Commission's rules, a motion for summary decision shall be granted only if the entire record shows (1) no genuine issue as to any material fact, and (2) the moving party is entitled to summary decision as a matter of law (29 C.P.R. § 2700.67). Summary decision is only authorized "upon proper showings of the lack of a genuine, triable issue of material fact," (Celotex Corp. v. Catrett, 477 U.S. 317,327 (1986)). If some material facts are disputed or are incomplete, a hearing is necessary, but the hearing may be limited to the disputed or incomplete issues (29 C.P.R. § 2700.67(d)).

#### STIPULATED FACTS

There are 302 stipulations (Joint Stipulations of Fact (JSF) (December 28, 1994)). From these stipulations, it is possible to summarize the general factual background of the case as it relates to the issue of liability.

#### AA&W

AA&W is a corporation chartered in Kentucky. The corporation is closely held by Jim and Harold Akers, the company's president and vice president. The brothers are the sole shareholders (JSF 3-7). AA&W operates several mines, in which it extracts coal owned and/or leased by others (JSF 10).

In the past, AA&W has operated various mines pursuant to contracts with Kyber and Jesse Branch. The Elmo No. 5 mine was one of those mines (JSF 20). At the Elmo No. 5 mine, AA&W employed approximately 20 miners who produced between 180,00 and 200,00 tons of coal per year (JSF 16, 18).

#### KYBER

Kyber is a corporation chartered in Kentucky (JSF 22). Its officers consist of a board chairman, president, vice president, vice president of operations, vice president of engineering, treasurer, assistant treasurer, secretary, and controller (JSF 23). Kyber's name is an amalgam of "Kentucky" and "Berwind" (JSF 25).

Kyber leases land and coal reserves from Kentucky Berwind and contracts out the mining of the coal. Kyber owns a preparation plant. Almost all coal mined by Kyber's contractors is blended, sized and washed at the plant. The coal then is sold by Kyber's sales agent, Berwind Coal Sales, Inc., a wholly owned subsidiary of Berwind (JSF 22, 31).

#### JESSE BRANCH

Jesse Branch is a corporation chartered in Kentucky (JSF 23,34). Jesse Branch has the same officers as Kyber and the same people serve in the same offices in both corporations, including the mutual president of Jesse Branch and Kyber, Jimmy Walker (JSF 23,34).

Like Kyber, Jesse Branch leases land and coal reserves from Kentucky Berwind and contracts with others to mine the coal it leases. Jesse Branch also owns a preparation plant, and almost all coal mined by Jesse Branch's contractors is blended, sized and washed at the plant. The coal is then sold (JSF 32-34). Jesse Branch never has extracted coal (JSF 36).

#### RELATIONSHIP BETWEEN KYBER AND JESSE BRANCH

The companies share a president, Jimmy Walter; a vice president of operations, Steve Looney; a vice president, Randolph Scott; and a controller, Bob Bond. In the past, the companies also have shared the same treasurers and assistant

treasurers (JSF 23, 34). Each of these people performs duties on behalf of the two companies and as agreed to between the companies (JSF 39).

The companies share one office (JSF 40). It was at this common office that AA&W obtained its weekly "ticket," listing the amount of coal received by Kyber during the week. AA&W was paid by Kyber based on its production as listed on the "ticket" (JSF 49).

Jesse Branch provided map drafting and surveying services to AA&W. Kyber paid Jesse Branch for the services in a fee based on the tons of coal produced by AA&W (JSF 41).

Occasionally, coal produced at Kyber contract mines is processed at the Jesse Branch preparation plant (JSF 42). Also, occasionally Jesse Branch and Kyber use each others equipment (JSF 48).

Kyber's secretarial tasks sometimes are performed by Jesse Branch's employees. A Jesse Branch employee monitors the amount of coal received by both companies from their contract mines and arranges for its transportation to the companies' preparation plants (JSF 47, 48).

Kyber, Jesse Branch, and the vast majority of other Berwind-related companies, are members of the same employee pension plan. This arrangement is common to many corporate groups (JSF 46).

#### KENTUCKY BERWIND

Kentucky Berwind is a Kentucky corporation. It is a wholly owned subsidiary of Berwind (JSF 50, 51). Its principal place of business is Charleston, West Virginia, but it maintains an office in Kentucky. Kentucky Berwind owns approximately 90,000 acres of coal reserves in Pike County, Kentucky, some of which is leased to Kyber (JSF 50-53).

The chairman of the board of Kentucky Berwind also is the chairman of the board of Kyber and Jesse Branch. The vice president of Kentucky Berwind is the vice president of Kyber and Jesse Branch. Those serving as treasurer, assistant treasurer, secretary and controller of Kentucky Berwind serve in the same capacities for Kyber and Jesse Branch (JSF 23, 34, 55).

Steve Dale, chief mine inspector and lands manager of Kentucky Berwind, supervises two other company mine inspectors, Richard Belcher and Bryan Belcher (JSF 56, 57).

#### BERWIND

Berwind is a holding company incorporated in Delaware and located in Philadelphia, Pennsylvania. Berwind is the sole share holder of Kyber, Jesse Branch and Kentucky Berwind (JSF 58, 63). Berwind's business as a holding company is to oversee the operations of its subsidiaries. Berwind is involved also in decisions that affect the general direction of business of its subsidiaries, and Berwind, as sole shareholder, has the power unilaterally to replace the officers of its subsidiaries (JSF 64, 66).

C.G. Berwind, Jr. is chairman of the board of Berwind. Thomas Falkie is president of Berwind and chairman of the board of Kyber, Jesse Branch and Kentucky Berwind. Berwind's vice president is also vice president of the three subsidiaries. Berwind's chief financial officers acted in the same capacity for Kyber, Jesse Branch and Kentucky Berwind. Its assistant secretary acted as secretary for the three subsidiaries and its controller acted as controller for Kentucky Berwind (JSF 23, 34, 54, 60).

Berwind's board approved the election of Jimmy Walter as president of Kyber and Jesse Branch. Walker hired Steve Looney as vice president of operations for Kyber and Jesse Branch. Falkie, president of Berwind, was aware of Walker's decision to hire Looney and approved "in general terms" (JSF 67). Bob Bond, the controller of Kyber and Jesse Branch, also was hired by Walker, and Berwind's board approved (Id.). The president of Kyber and Jesse Branch and the president of Kentucky Berwind report to Berwind's president (Falkie) (JSF 69).

Berwind's three subsidiaries are required to submit financial statements to Berwind. These statements are reviewed by Berwind's vice president and chief financial officer and are used to project Berwind's cash flow (JSF 70-72). The financial officer also receives production reports from Kyber and Jesse Branch to determine whether projected revenues will be met (JSF 73).

Falkie and Richard Rivers, Berwind's vice president, who is also vice president of Kyber, Jesse Branch and Kentucky Berwind, monitor Kentucky Berwind's lease-holding activities and are aware generally of the economic performance, personnel, coal sales and coal quality of Kyber and Jesse Branch (JSF 75). Falkie receives monthly reports from Kyber and Jesse Branch regarding coal production at each mine in which contract mining is conducted. At times, Falkie also receives daily reports on the amount of coal processed at Kyber's and Jesse Branch's preparation plants (JSF 76, 77). In addition, Berwind's board receives reports from Kyber and Jesse Branch that summarize the production of the subsidiaries' individual contract operators (JSF 78).

#### THE MINE

Coal production began at the Elmo No. 5 mine in May 1990, after Jim Akers submitted Form 2000-7 to MSHA listing AA&W as the "operator" (JSF 79, 80-82).

Mining was conducted by cutting machines, drilling machines and explosives. Because the mine was relatively new, most of the mining was advance mining, which was done on 60 foot and 40 foot centers. (Usually, the main entries were driven on 60 foot centers and rooms off the entries were driven on 40 foot centers (JSF 84, 85)).

#### THE LEASE

In 1984 Kentucky Berwind orally leased to Kyber its right to mine the area where the Elmo No. 5 mine eventually was located. In return, Kyber paid rent and royalties to Kentucky Berwind (JSF 88, 89). In April 1991, Kentucky Berwind and Kyber entered into a written lease (JSF 89, Exh. B).

#### THE KYBER-AA&W CONTRACT

A contract between Kyber and AA&W was executed in the spring of 1990 (JSF 93, Exh. C).

Walker, president of Kyber and Jesse Branch, and Looney, vice president for operations of the two companies, selected AA&W to operate the mine. Walker advised Falkie, Berwind's president, of the choice. Although Falkie, as board chairman of Kyber and

Jesse Branch, has the power to disapprove contracts between the subsidiaries and their contract operators, he never has done so (JSF 95, 97-98.) However, Falkie and/or Richard Rivers, vice president of Berwind, Kyber and Jesse Branch once inquired whether AA&W had the ability, skill and safety record to conform to Berwind's corporate policy that contractors mine in a safe manner and in accordance with MSHA and state regulations (JSF 96, 98, 99, 102).

The contract between Kyber and AA&W was of the same type used by Kyber for all entitles mining its coal; with the possible exception of the clauses regarding the quantities of coal to be mined and the penalties to be associated with poor coal quality (JSF 100). The contract was first developed and used by Jesse Branch and was based on contracts in general use throughout the mining industry (JSF 101).

Under the contract, Kyber paid AA&W a variable price for each ton of coal mined and deposited in the stockpile outside the mine. When demand for coal was great, Kyber requested that AA&W increase production to meet the demands of Kyber's customers, but it was up to AA&W to determine if it would comply with the request. When demand was low, AA&W either reduced production or maintained production and stockpiled the additional coal (JSF 105-106, 109).

#### PERMITS AND LICENSES

Prior to opening the Elmo No. 5 mine, Kyber obtained some of the state and federal environmental permits necessary to conduct mining and paid some of the permit fees (JSF 110-111). The contract required AA&W to obtain all necessary permits that had not been obtained by Kyber and to post all necessary bonds (JSF 112). For example, AA&W obtained and paid for the state mining license and posted the state bond (JSF 114).

#### MINE PLANS, PROGRAMS AND TRAINING

AA&W developed and submitted to MSHA all plans required under the Mine Act (e.g., fan stoppage plan, miner training plans, self contained self rescuer plan, smoke search plan, fire fighting plan, emergency evacuation plan, ventilation plan and roof control plan). AA&W also developed and implemented the

respirable dust and noise sampling programs required under the Act. AA&W provided required training to its miners (JSF 115-116, 118).

#### TAX PAYMENTS

Pursuant to the contract, AA&W paid all state and federal income taxes, social security taxes and unemployment compensation payments associated with AA&W employees (JSF 119). Kyber paid state severance taxes, federal black lung excise taxes, and state and federal reclamation taxes. Kyber paid the taxes with money it owed to and withheld from AA&W (JSF 120-122).

#### PREPARATION OF MINE SITE

Kyber determined the location of portals to the mine and contracted with a third party to prepare the area for their development and for the development of a stockpile area (JSF 123-127). Kyber also contracted with a third party to build a haulage road to serve the mine and developed drainage ponds for mine "run off" (JSF 129-131).

#### MINERS' EMPLOYMENT, PAY AND INSURANCE

AA&W hired, fired, disciplined, trained, supervised and directed its employees who worked at the mine. Pursuant to its contract with Kyber, AA&W paid the employees. AA&W also paid for workers' compensation, black lung and liability insurance (JSF 132-135).

#### MINING EQUIPMENT, MACHINERY AND SUPPLIES

Pursuant to the contract, AA&W furnished and maintained all equipment, machinery, tools, materials, etc., needed and used in the production of coal in the mine, except on very limited occasions when it borrowed surface equipment owned by Kyber or Jesse Branch for a day or two. AA&W also provided equipment, machinery and structures used to stockpile and sort coal after it was brought to the surface (JSF 136, 139). AA&W independently purchased and obtained all supplies used to mine coal at the mine (JSF 140).

It was understood that the mine would produce stoker coal. At one time the Akers brothers discussed with Jimmy Walker,

president of Kyber and Jesse Branch, and with Sever Looney, vice president of operations of Kyber and Jesse Branch, the possibility of using a continuous mining machine at the mine. Walker and Looney expressed doubt that such a machine could be used to produce coal that could be processed as stoker coal at the Kyber preparation plant and AA&W did not get the machine (JSF 137-138).

#### ELECTRICAL POWER AND SYSTEMS

Kentucky Power Company billed Kyber for all electric power supplied at the mine. Kyber deducted the amount due from the payments it made to AA&W for the coal AA&W mined. Kyber also deducted from its payments to AA&W the cost of an electrical substation at the mine, a substation Kyber purchased and had installed (JSF 142-143). AA&W maintained the substation (JSF 145).

AA&W obtained and installed the cables that transported electricity from the substation into the mine and AA&W installed and maintained the electrical systems inside the mine (JSF 144). AA&W performed all of the electrical examinations and kept at the mine all electrical records required by Part 75 of the regulations. There is no evidence that any of the Contestants ever inspected the records (JSF 146-147).

AA&W was responsible for charting the mine's electrical systems on mine maps (JSF 148).

#### MINE SURVEYING AND MAP PREPARATION

AA&W paid Jesse Branch a production-based fee to perform surveying and map drafting for the mine (JSF 149, 151). The maps were certified by Randolph Scott, vice president of engineering for Kyber and Jesse Branch (JSF 155).

Every six months AA&W submitted maps to MSHA showing projections for future mining, as required by Part 75 of the regulations. AA&W also submitted to MSHA maps regarding the mine's electrical systems (JSF 149-150).

AA&W requested that Jesse Branch employees survey and set spads in the mine. On average, surveying and spad setting were

conducted on a weekly basis. Surveying and spad setting were necessary to allow mining consistent with mine projections. The employees of Jesse Branch who did the spad setting and surveying also recorded the height of coal seams and entry-ways. They noted the locations of pillars and centers on which mining was conducted, stopping lines, conveyor belt lines and roof falls. This information was placed in a "field book" kept in the offices of Jesse Branch. The same employees of Jesse Branch also noted the location of gas wells that would intersect the mine, locations which were indicated on the maps (JSF 160-164, 166-167).

#### VENTILATION

AA&W was responsible for developing, implementing and submitting a mine ventilation plan to MSHA as required by Part 75 of the regulations. The ventilation regulations also require that maps showing the ventilation at the mine be submitted to MSHA every six months. Jesse Branch produced the maps based on information from AA&W (JSF 168-169).

AA&W determined the type and amount of ventilation at the mine, consistent with Part 75 of the regulations and the Act. AA&W obtained and maintained the fan used to ventilate the mine. AA&W was free to change or modify ventilation so long as the changes were within the perimeters of the plan approved by MSHA. AA&W performed all examinations and kept all records required by the ventilation portion of the regulations. AA&W maintained the records of ventilation examinations at the mine and the records were available for review by MSHA and the Contestants. There is no evidence the Contestants ever reviewed them (JSF 170-174).

#### ROOF SUPPORT

AA&W was responsible for developing, implementing and submitting to MSHA a mine roof control plan as required by Part 75 of the regulations. Jesse Branch prepared the diagrams in the plans that illustrated the pillaring methods used during retreat mining. The diagrams were drafted from information provided by AA&W. Jesse Branch added no information or specifications of its own (JSF 175).

AA&W determined the type of roof support used in the mine (JSF 176).

## MINING PRODUCTIONS AND DIRECTIONS

In accordance with its lease obligations, Kyber was responsible for assuring that coal reserves were mined to the greatest extent possible, consistent with mining conditions, relevant laws and regulations. Kyber's contract with AA&W stated that mining was to be conducted, "in accordance with mining ... projections prepared by [Kyber's] engineers." As noted, surveying and map drafting services utilizing projections prepared in consultation with AA&W were provided to AA&W by Kyber through Jesse Branch's employees (JSF 177-178). Once projections were established and agreed upon by AA&W and Kyber, modifications could be made only by joint agreement (JSF 179).

Kyber, using a coal reserve study carried out years ago by Kentucky Berwind, developed a coal reserve map that indicated the location of coal reserves Kyber expected AA&W to recover.

AA&W and Kyber jointly developed the initial mining projections for the mine, and they developed subsequent projections on an "as needed" basis as mining progressed. The projections were incorporated by Jesse Branch onto the mine maps.

AA&W was required by contract to follow the projections and, generally, did follow them. When AA&W believed it could not mine to the full extent of the projections -- for example, when the coal seam became too thick and it was economical or unsafe to continue -- AA&W initiated discussions with Kyber. Kyber interpreted the contract to allow it to reject AA&W's request to mine less than projected, unless mining conditions made it unsafe to continue (JSF 180-187).

If proposed changes to the mining projections were acceptable to AA&W and Kyber, Jesse Branch drafted a revised mine map showing the modified projections. AA&W then submitted the map to state and federal regulatory agencies (JSF 189).

When Kyber agreed with a decision by AA&W that mining projections should not be followed fully, Kyber notified Kentucky Berwind and asked Kentucky Berwind to conduct an inspection of the area in order to protect Kyber from liability for wasting coal reserves (JSF 188).

The contract contained penalties for low quality coal and on some occasions AA&W contacted Kyber in an attempt to have the penalties waived if it was mining in an area where the ash content of the coal was unusually high (JSF 195). In such situations, Kyber visited the mine to determine the cause for poor coal quality. In some cases Kyber contacted Kentucky Berwind and gained input from Kentucky Berwind as to whether it wanted mining to continue. Kyber and AA&W then determined the best course of action (JSF 193).

#### EXTRACTION OF COAL

AA&W was required by the contract to conduct mining in compliance with all relevant safety laws and regulations. AA&W determined the manner in which coal was mined. (The coal was undercut and blasted.) AA&W determined how retreat mining was conducted, i.e., how the pillars were selected and cut (JSF 197, 200).

AA&W and Kyber jointly agreed that mining could be conducted on 40 foot centers in certain areas (JSF 198). AA&W notified Jesse Branch regarding areas where retreat mining had been conducted so that Jesse Branch could update the mine maps (JSF 199).

#### TRANSPORTATION OF COAL

Pursuant to its contract AA&W delivered all of the coal extracted from the mine to Kyber. AA&W provided the equipment, machinery, tools, supplies, etc., needed for getting the coal from inside the mine to the stockpile outside. Once outside, the coal was loaded onto trucks by a front-end loader owned by AA&W. The loader was operated by drivers of independent trucking companies who contracted with Kyber to haul the coal to Kyber's preparation plant. AA&W paid a set amount for each ton of coal transported from the mine to the preparation plant. Kyber occasionally visited the mine to determine whether the trucking companies were operating in compliance with the contracts (JSF 210-205).

#### INSPECTIONS

AA&W representatives participated in MSHA inspections and in the subsequent conferences. AA&W decided whether to challenge

the validity of violations issued by the inspectors. AA&W determined the manner in which the violations should be abated. AA&W paid all civil penalties assessed under the Mine Act (JSF 206-208).

Jesse Branch inspected the drainage ponds on the mine site pursuant to state regulations. Jesse Branch submitted information derived from its inspections to the state and to Kyber on a quarterly basis. AA&W did not participate in these inspections. Jesse Branch or Kyber paid all penalties associated with violations cited by the state and they were responsible for correcting any violations (JSF 206211).

#### VISITS AND INSPECTIONS BY CONTESTANTS

Kyber's employees visited the mine infrequently to check on the height and quality of the coal seam. These visits were made in accordance with the provision in Kyber's lease with Kentucky Berwind that Kyber make sure coal reserves were mined to the greatest extent possible and to negate Kyber's exposure to treble damages under state law for wasting coal reserves. In addition, Kyber's employees occasionally visited the mine at the request of AA&W (JSF 212, 213). Kyber's employees had the right to go onto mine property at will, although generally they first notified AA&W (JSF 214).

Jesse Branch's employees visited the mine on a weekly basis to survey and set spads (JSF 215).

Kentucky Berwind's mine inspectors visited the mine quarterly to protect Kentucky Berwind's rights as the legal owner of the coal and its interests pursuant to the lease. Kentucky Berwind's inspectors performed the same type of inspection at all mines where its leased coal was mined. Kentucky Berwind used the reports of the visits to track mining operations at each mine. The reports determined whether a lost coal penalty should be assessed against a lessee for a failure to recover the requisite quantity of coal. The reports were used also to calculate the tonnage of coal mined, the tonnage remaining to be mined and the areas yet to be mined (JSF 216-217).

Kentucky Berwind could contact Kyber if it believed coal was not mined effectively at a particular mine, but it never did with respect to the Elmo No. 5 mine (JSF 219).

When Kentucky Berwind's inspectors visited the Elmo No. 5 mine, they obtained a copy of the current mine map from AA&W, requested information concerning the type of mining conducted, the type of haulage used, the average daily and monthly production, the average coal quality, etc. The information was incorporated into their inspection reports (JSF 222).

The Kentucky Berwind inspectors usually traveled with representatives of AA&W. The inspectors first visually examined surface areas of the mine. Once underground, the inspectors measured the coal seam in order to calculate an average coal seam height and to confirm appropriate royalties were paid (JSF 222).

Kentucky Berwind inspectors conducted inspections at the mine two times in 1990, seven times in 1991, two times in 1992 and five times in 1993 (JSF 222-226).

#### PROCESSING AND SALE OF COAL

Kyber's preparation plant was designed to produce stoker coal which was sold at the plant. On occasion, Kyber contacted AA&W when Kyber felt the amount of rock in the coal was excessive. (JSF 230-231). Berwind Coal Sales, Inc. located consumers and negotiated contracts with consumers for the sale of the coal. Kyber compensated Berwind for the services provided by Berwind Coal Sales, Inc. (JSF 232-233).

#### KENTUCKY BERWIND'S RELATIONSHIP TO THE MINE

Kentucky Berwind never funded any of AA&W's mining operations. Neither loans nor advances of money were made by Kentucky Berwind to AA&W or to its officers and directors for operations at the mine. Kentucky Berwind did not pay any debts for AA&W nor did it pay wages, benefits or bonuses to any AA&W employees (JSF 237-241).

Kentucky Berwind did not provide or sell supplies, machinery or tools to the mine. It did not require AA&W to obtain approval for the purchase, lease or use of mining machinery or equipment. It did not own any of the equipment used by AA&W (JSF 242-245).

Kyber annually provided Kentucky Berwind with current mine maps and on a monthly basis provided Kentucky Berwind with reports of the amount of coal mined (JSF 256). Kentucky Berwind received monthly royalties from Kyber for the coal (JSF 257).

Kentucky Berwind had no labor management issues or activities connected with AA&W (JSF 246-248). It did not share directors or officers or offices with AA&W (JSF 249-250). The only Kentucky Berwind employees who worked in the mine were those who quarterly entered the mine, or who entered upon request, to examine the workings in order to insure coal was being recovered properly and to check seam heights and tonnages to confirm royalties (JSF 252-254).

Steve Dale, Kentucky Berwind's chief mine inspector and manager of lands, was required to protect the surface interests of Kentucky Berwind by preventing unauthorized encroachment on mine property and the theft of timber and other surface property (JSF 258).

#### BERWIND'S RELATIONSHIP TO THE MINE

Berwind never provided funding, loans or advances to AA&W. In addition, Berwind never loaned money to any of AA&W's officers, directors or employees, or paid any of the company's wages, benefits, bonuses or debts (JSF 259-263).

Berwind did not provide any supplies, materials, machinery, or tools to AA&W for use at the mine. AA&W was not required to obtain Berwind's approval before it obtained machinery or equipment (JSF 264-266).

Berwind had no role in labor management relations connected with AA&W. It did not hire, fire or discipline AA&W employees. It did not supervise or train them. It did not exchange employees with AA&W and it did not share directors, officers or shareholders. Berwind employees did not work underground at the mine (JSF 268-271, 274).

Berwind had no input into the development of the specific contract between Kyber and AA&W. It received no production reports or financial reports from AA&W. It provided no financial analysis or advice to AA&W (JSF 275, 277-278).

Kyber mailed monthly reports to Berwind listing the projected tonnage and the amount of coal actually mined for all Kyber contract mines, including the Elmo No. 5 mine. The reports contained small maps of areas of contract mines that had been mined (JSF 281). Kyber also delivered monthly financial reports to Berwind specifying the money generated by mining operations involving Kyber's leased reserves (JSF 282).

Berwind reviewed the budgets submitted by its subsidiaries. If the Berwind board approved the budgets, Berwind allocated capital to each subsidiary as necessary to meet the subsidiary's budget. Expenditures by subsidiaries that were beyond those set forth in the budgets were subject to approval by Berwind (JSF 281-283).

Neither Jesse Branch nor Kyber are profitable. Berwind provides funds to them for their operating expenses and capital expenditures. Significant capital expenditures, such as the purchase of coal preparation plants and expenditures for face-up work to open new mines, are approved by Berwind (JSF 284). In this regard, Berwind approved the expenditure of funds by Kyber to do the face-up work to open the Elmo No. 5 mine (JSF 286).

Kyber is one of 21 coal lessees of Kentucky Berwind in Pike County, Kentucky. Berwind never has received a dividend as a shareholder of Kyber. However, Kentucky Berwind pays dividends to Berwind out of its earnings, which are attributable in part to royalties received from its lessees, including those paid by Kyber on coal mined at the Elmo No. 5 mine (JSF 287-288). Berwind also receives a management fee from its subsidiaries for legal, financial and administrative services (JSF 289).

#### SITUATION WITH CORVETTE MINING

Corvette Mining Company (Corvette) operated a surface mine located above the Elmo No. 5 mine. Corvette was a contract operator for a Kentucky Berwind lessee (not one of the Contestants). Kentucky Berwind was the legal owner of the coal mined by Corvette. Kentucky Berwind's mine inspectors examined Corvette's mining operations for the same reasons they examined the Elmo No. 5 mine (JSF 291-292).

On April 8, 1993, at approximately 6:00 p.m., a controlled blast at the Corvette mine apparently caused a roof fall in the Elmo No. 5 mine. AA&W notified Kyber and Kyber notified Kentucky Berwind. Following additional roof fall problems associated with blasting by Corvette, Kentucky Berwind employees visited the Elmo No. 5 mine to examine the affected areas of the roof (JSF 294-295).

Jesse Branch employees used topographical maps and Elmo No. 5 mine maps to determine the geographic relationship of the Corvette mine to the Elmo No. 5 mine. The information was given to Kentucky Berwind and the company was able to coordinate the location of the surface blasting to the sections that had been mined in the Elmo No. 5 mine (JSF 294-296).

On April 12, 1993, Steve Dale, Kentucky Berwind's chief mine inspector and land manager, and Richard and Bryan Belcher, Kentucky Berwind's mine inspectors who were supervised by Dale, went to the Corvette mine and to the Elmo No. 5 mine. They met with a Corvette official, with Jim Akers of AA&W and with an official of the state (JSF 297). Also, Dale observed the roof conditions that apparently were the results of the blasting (JSF 298).

On April 12, 1993, MSHA issued to Corvette an imminent danger closure order requiring that blasting cease at the Corvette mine until a plan or method was established to prevent harm to miners underground. Also, on April 12, 1993, AA&W received an MSHA citation for a roof control violation which resulted from a roof fall caused by the blasting (JSF 299-300).

Jimmy Walker, president of Jesse Branch, and Steve Looney, vice president of operations of Jesse Branch, suggested that Corvette move its blasting operations 500 feet away from the location it had been using. Steve Dale showed Corvette where the operations could be moved (JSF 301).

PARTIES' ARGUMENTS

THE SECRETARY

The Secretary starts with the following proposition:

[E]ach of the four Contestants, in conjunction with AA&W Coals, was intimately involved in the operation of the Elmo mine. Thus, each must be considered an "operator" of the Elmo mine. As "operator" of the Elmo mine, each of them is jointly and severally liable for violations of the Mine Act committed at the Elmo mine.

(Sec. Mot. 5)

The Secretary continues:

[Berwind], [Kentucky Berwind], [Kyber] and [Jesse Branch] may choose to use AA&W Coals as the conduit for removing minerals owned by [Kentucky Berwind] for the benefit of [Berwind], [Kentucky Berwind], [Kyber] and [Jesse Branch]; however, they cannot completely divorce themselves from the risks and responsibilities that Congress has apportioned to those who engage in mining.

(Sec. Mot. 5)

The Secretary states that the Act recognizes there can be multiple "operators" at a single mine and that each such operator has a duty to assure compliance, even if one such "operator" is in a better position to prevent violations (Sec. Mot. 7).

Under the statutory definition of "operator," a Contestant must be considered an operator if it "operated," "controlled," or "supervised" the Elmo No. 5 mine, either directly or indirectly. Moreover, the "power" to control or supervise brings a Contestant under the Mine Act regardless of whether the power is exercised. Were this not so, entities having the legal authority to exercise control over a mine would be encouraged to refrain from exercising that power in order to evade responsibility under the Act (Sec. Mem. 13).

The Secretary catalogues in great detail how each of the Contestants exercised the control and supervision necessary to make each an operator and how each had the authority to do so (Sec. Mem. 15-52).

Finally, the Secretary asserts that holding the Contestants liable as operators will provide an incentive to improve health and safety by encouraging "[l]arge and well-funded entities who profit from coal production ... to recognize the need for becoming involved in the health and safety aspects of mining, as well as simply being involved in those production aspects that affect their profits" (Sec. Mem 53). Such entities will gain additional incentives to assure that the control they have over the manner in which coal is mined (e.g., direction of mining and methods of mining) results in the safe and healthful operation of the mine (Sec. Mem 53-54).

#### THE CONTESTANTS

The Contestants maintain they did not control or supervise the mine. They assert that the statutory words "operates, controls or supervises" must be understood in the context of the purpose of the Act -- to require that working conditions and practices in a mine be maintained to protect the health and safety of the miners. In the Contestant's view, it is the entity that manages the mining process, directs the workforce and owns the equipment used in that process that has the ability to establish and maintain safe and healthful working conditions. It is therefore the "hands on entity" that should bear the responsibility for compliance (Conts. Mot. 9).

According to the Contestants, the courts and the Commission always have maintained and interpreted the Mine Act (and its predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et. seq. (1976) (amended 1977) (1969 Coal Act or Coal Act)) in this way. An entity never has been held liable as an operator unless the entity is or has been the production operator responsible for running the mine or an independent contractor performing construction or services at the mine for the production operator. Even though in W-P Coal Co., 16 FMSHRC 533 (July 1994), the Commission held liable W-P, a company that had contracted with another company to mine leased coal, W-P had been the on-site operator and under its contract shared effective control over the mine in the form of

participating in MSHA inspections, providing loans to the contract operator and leasing mining equipment to the contract operator (Conts. Mot. 12).

Moreover, the Contestants assert that the operator's control over mining operations and ability to direct the workforce lie at the heart of the Act's strict liability scheme. None of the contestants had the kind of involvement in and authority over the working conditions of the mine to justify imposing that liability (Conts. Mot. 14).

#### RESOLUTION OF THE MOTIONS FOR SUMMARY DECISION

Resolution of the motions depends upon the meaning of the statutory definition of "operator". Once the meaning is understood, the question of whether undisputed material facts establish that any or all of the Contestants are liable can be answered.

#### THE CONTESTANTS AS OPERATORS

##### THE ACT

Analysis of the meaning of "operator" begins with the words of the statutory definition and with the assumption that the Act's drafters carefully chose the words to mean what they say. Section 3(d) defines an "operator" as, "[a]ny owner, lessee, or other person who operates, controls or supervises a ... mine or any independent contractor performing services or construction work at such mine" (30 U.S.C. § 802(d)). The clause, "who operates, controls, or supervises a coal or other mine" describes and qualifies each noun in the preceding phrase "any owner, lessee, or other person". The definition requires "owners, lessees or other persons" to participate in and/or have authority over the operation, control or supervision of a mine (See Elliot Coal Mining Company, Inc. v. Director, Officer of Workers' Compensation, 17 F.3d 616, 629-630 (3d Cir. 1994)). Accordingly, and as the parties recognize, it is not correct to read the Act to make owners or lessees operators in of themselves.

This understanding of the statutory definition of "operator" supports and strengthens the Act's purpose. Section 2(e) provides 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)). Throughout the Act, the entity charged with compliance is the "operator" (See, e.g. § 814(a), § 815(a), § 820(a)). In this context, it makes no sense to place responsibility on an entity who has not participated in creating the conditions in the mine or who has no actual authority over those conditions. On the other hand, placing liability on an entity who has participated or who has such authority provides a spur to compliance.

The Secretary correctly points out that when the 1969 Coal Act was drafted, the Senate committee report stated that the definition of "operator" was designed to "include any individual, organization, or agency, whether owner, lessee or otherwise, that operates, controls, or supervises a coal mine, either directly or indirectly" (Sec. Mot. 7-8, citing to S. Rep. No. 411, 91st Cong., 1st Sess. 44 (1969), reprinted in, Legislative History of the Federal Coal Mine Health and Safety Act of 1969, 170; See also Sec. Response Br. 7-8). This statement was not disavowed when the Mine Act was drafted and I conclude that an operator's control or supervision may be either "direct" or "indirect."

However, analysis can not end here, for more than direct or indirect control or supervision is required. As the courts long have recognized, under both the Coal Act and the Mine Act, an "operator" must "call the shots" at a mine regarding its day-to-day operation, control, or supervision, or have the authority to do so, (See National Industrial Sand Ass'n v. Marshall, 601 F.2d 698, 701 (3d Cir. 1979 ("Designation ... as operators ... requires substantial participation in the running of the mine" (emphasis in original))).

Indeed, the Secretary's regulations implementing the Act reflect this view of control and supervision, in that they require specific acts by those who are substantially participating in the running of the mine -- acts such as taking dust samples, submitting mine plans, maintaining mine equipment, training miners, etc. There are no regulations requiring entities connected with the mine, but not actively and substantially involved in its production and management to engage in such acts, and it would be an incongruous dichotomy to hold such entities responsible when they have no responsibilities.

I conclude, therefore, that in order to establish that an entity is an "operator" subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of the mine, or had the authority to do so.

This means that in a contract mining situation, an entity that leases or owns mineral rights subjects itself to liability if it substantially participates in making decisions with respect to how the mineral is mined and how the mine is staffed and run, or if it retains the authority substantially to participate in the making of such decisions. Since the burden is on the Secretary to prove substantial participation in decision making and/or the retention of decision making authority, it is not enough for the Secretary to establish interlocking corporate relationships between entities and the normal business transactions attendant thereto when these transactions fall short of what the Act requires.

Since forms of control, operation and supervision vary from case to case, the question of whether an entity is an "operator" under Section 3(d) of the Act must be resolved on a case-by-case basis.

In this regard the Commission has provided guidance. In W-P Coal Company, 16 FMSRHC 1407, 1411 (July 1994), the Commission gauged a lessee's involvement with its contract operator by looking to specific indicia of operator status -- characteristics such as involvement in the mine's engineering, financial, production, personnel and safety affairs. Echoing the court's requirement that a cited entity exhibit "substantial participation in the running of the mine" (National Industrial Sand, 601 F.2d at 701), the Commission determined that the lessee's "substantial" and "considerable" involvement warranted the Secretary proceeding against it (W-P Coal Company, 16 FMSHRC at 1411, n.3.). (Put another way, the Commission's decision recognized implicitly that an entity's involvement in the day-to-day operation of a mine could be so infrequent or minimal, i.e., so insubstantial or inconsiderable, that operator status would not result.)

## THE CONTESTANTS AS OPERATORS

Analysis of the Contestants' status as "operators" takes place against a backdrop of agreement by the parties that AA&W exercised on its own most of the aspects of control and supervision at the mine. AA&W hired, fired, disciplined, trained, supervised, directed and paid its employees (JSF 132-135). AA&W developed and submitted all of the plans required under the Act and instituted all of the measures necessary to comply with dust and noise sampling programs (JSF 116, 118). For all practical purposes, AA&W furnished and maintained all of the equipment, machinery, tools and materials used in the mine, as well as all of the machinery, equipment and structures for stockpiling coal on the surface (JSF 136-140). AA&W participated in all MSHA inspections and conferences. AA&W decided to contest violations. AA&W decided how to abate violations. AA&W paid the civil penalties assessed for violations (JSF 206-208). Finally, although Kyber could request that AA&W increase production, AA&W ultimately determined whether it would comply with such a request (JSF 105). The debate between the parties is whether the Contestants' involvement in what was left was sufficient to make them operators.

### KYBER

#### Control and Supervision Through The Contract

The Secretary states that Kyber's contract with AA&W "provided [Kyber] with the right to control and supervise the central facets of the mining operation and involved Kyber in activities that were vital to the operation of the mine" (Sec. Mot. 15). He also asserts that Kyber "initiated, consulted and fostered the relationship with AA&W Coals, which was necessary for mining to commence and continue at the Elmo No. 5 mine" (Id. at 25).

If the Secretary is asserting that contract mining invariably places an entity such as Kyber in the position of being an "operator," I reject the proposition. Rather, as I have stated, the Secretary must establish that the owner of the mineral rights or the owner's lessee is participating substantially in the actual day-to-day operation of the mine, or has reserved that authority to itself, and this must be determined by assessing the specific indicia of involvement.

Contract provisions are but once piece of evidence of how the parties viewed their relationship. More important than the provisions is how the parties actually carried out the contract and related to one another.

#### Control and Supervision Through Involvement in Engineering

The parties stipulated that the mining projections were prepared by Kyber's engineers in accordance with the contract. They also stipulated that under its lease with Kentucky Berwind, Kyber was responsible for assuring that coal reserves were mined to the greatest extent possible (JSF 177-178). Finally, they agreed that once the projections were established, modifications were made only upon the joint consultation and determination of Kyber and AA&W (JSF 179).

I cannot determine from the stipulated facts whether or not Kyber used the projections substantially to control day-to-day mining. Testimony is needed concerning the reason for the projections and the general uses of the projections. Testimony also is needed regarding Kyber's and AA&W's understanding of the impact of the projections on mining, as well as specific instances when the projections were changed, the circumstances leading to those changes, and results with respect to mining that flowed from the changes.

It is possible that the purpose for the projections and their associated quality requirements was for Kyber to insure that the coal mined was the coal it had leased and that the coal met the quality standards of its customers. It is also possible that Kyber went beyond these purposes and used the projections and quality requirements as a means to dictate to AA&W that mining be done in a certain area or in a certain way. In this regard, I note that the stipulations state that on several occasions AA&W changed the direction it was mining because Kyber determined that coal mined did not meet its specifications (JSF 194).

In addition to the projections, Kyber was responsible for certain activities on mine property prior to the commencement of mining; doing face-up work, determining the location of portals, preparing an on-site storage area and contracting the building of haulage roads serving the mine (JSF 123-127, 130). Kyber also purchased the electric substation and had it installed (JSF 142).

The Secretary argues that when it acted in these capacities, Kyber was involving itself in the operation of the mine (Sec. Mem. 16-17).

I find this irrelevant to the issue at hand. The question is whether the Contestants actually were operators of the mine on November 30, 1993. Even if Kyber was acting as an operator of the mine when the activities took place, all of them occurred before the mine opened and AA&W became the on-site operator and they do not make Kyber an operator for the purposes of these proceedings.

In addition, the Secretary notes that Kyber obtained state and federal environmental permits and updated them as required (Sec. Mem. 17, See JSF 110-111, 113). While I assume that the permits were required for AA&W to initiate and continue mining, there is no indication in the stipulated facts and supporting record that Kyber ever used the obtaining, updating or renewing of the permits as a means to control the day-to-day operation of the mine. I consequently conclude that Kyber's acquisition and updating of the permits is not indicative of its status as an operator.

#### Control and Supervision Through Involvement in Finance

The Secretary notes that Kyber paid the mine permit fees and argues that Kyber arranged for the money necessary to fulfill the bonding requirement associated with AA&W's state license (Sec. Mem. 17-18). (Although the latter assertion is contradicted by JSF 114, for the purpose of this order, I will assume the assertion is true (See Sec. Mem. n. 16.)) As with the acquisition and renewal of the state and federal permits, there is no suggestion in the stipulations or supporting record that Kyber used the process of obtaining the permits as a means to control the day-to-day operation of the mine. Nor is there any indication that Kyber used bond money for this purpose. This being the case, I cannot conclude that paying for the permits and posting a required bond is an indication of the control of day-to-day operations that is required by the Act.

The Secretary also argues that another indication of Kyber's control of mining operations was its payment of certain federal and state taxes (Sec. Mem. 17-18). The stipulations specify the taxes that were paid. The stipulations also indicate that Kyber

was reimbursed through deductions from the price per ton of coal paid to AA&W (JSF 120-122). In other words, Kyber withheld AA&W's money to pay the taxes. As with the permits and the posting of a mining bond, the upfront payment of taxes lacks critical characteristics of operator status. Not only was Kyber paid back, but there is no indication that Kyber ever used this business arrangement to control the day-to-day operation of the mine.

#### Control and Supervision Through Involvement in Production

The Secretary argues that under the contract, Kyber had direct authority to control production at the mine (Sec. Mem. 22). The contract required AA&W to be capable of producing a minimum of 5,000 tons of coal per month and allowed Kyber to notify AA&W that it would accept less (JSF Exh. C-2). AA&W could not sell coal to any entity other than Kyber (JSF 201, Exh C-1). In addition, the Secretary points out that there were times when Kyber needed more coal than AA&W normally produced and that at those times Kyber requested that AA&W have its employees work additional hours to meet the demands of Kyber's customers (JSF 105-106).

It is not clear from the stipulations and supporting record whether or not Kyber exercised control over the day-to-day operations of the mine through the provisions in the contract relating to production. It might be that Kyber regularly demanded that AA&W produce a certain amount of coal and work (or not work) a certain schedule to meet its demands. On the other hand, it might be that Kyber made requests of AA&W and that AA&W was free to deny them and in fact did deny them. Certainly, JSF 105 suggests this could have been the case ("AA&W ultimately determined whether it would comply with [Kyber's] request [that AA&W increase production].") In other words, it is relevant to know how the parties interpreted the cited contract provisions and how the parties actually implemented the provisions.

The Secretary also argues that Kyber exercised control over the manner in which coal was mined because AA&W selected machinery it used to extract coal "based upon ... [its] understanding that [Kyber] wanted coal to be mined by conventional mining methods" (Sec. Mem. 23). I do not find this argument to be persuasive. While it is true that the machinery used to extract coal was consistent with the production and

processing of stoker coal (JSF 137-138), this was a reflection of the type of coal Kyber wanted to market and of AA&W's and Kyber's contractual agreements. Of far greater importance is the parties' stipulation that except on very limited occasions, AA&W furnished and maintained all equipment, machinery tools and materials at its mine (JSF 136). It is clear to me that AA&W substantially controlled the day-to-day operation of the mine in this regard.

#### Control and Supervision Through Involvement in Employment

The Secretary argues that Kyber personally supervised mining through the inspections it conducted at the mine (Sec. Mem. 24). The stipulations state that Kyber's employees visited the mine, either at the request of AA&W or on their own initiative. The visits were necessary to examine the height and quality of the coal seam, to make sure that the coal reserves were mined to the greatest extent possible, as required by Kyber's lease, and to negate the exposure to treble damages that Kyber might incur under state law for the waste of coal reserves (JSF 212-213). There is no indication that during the visits Kyber personnel were involved in the supervision and direction of AA&W personnel as they carried out their day-to-day tasks. Nor is there any indication Kyber personnel had the authority to exercise such supervision and control. Rather, as the parties agreed, it was AA&W who hired, fired, disciplined, trained, supervised and directed the miners (JSF 134).

The occasional presence of Kyber personnel to ascertain that its leased coal was being mined to the greatest extent possible and to protect itself from possible damages was logical, given Kyber's obligations under its lease. It stretches the Act beyond reason to consider the visits an indicium of statutory control.

#### JESSE BRANCH

The Secretary argues that not only was Jesse Branch an operator in its own right through its control and supervision of the mine, he also asserts that Jesse Branch's actions furthered Kyber's interests, were attributable to Kyber, and were yet another indication of Kyber's status as an operator (Sec. Mem. 26-27). The fundamental question, however, is whether

Jesse Branch exercised the control and supervision that is indicative of operator status. If not, it is irrelevant whether Jesse Branch acted on Kyber's behalf.

#### Control and Supervision Through Involvement in Engineering

Jesse Branch drafted mine maps, conducted surveying and set spads at the mine. AA&W paid Kyber for these services and Kyber, in turn, paid Jesse Branch (JSF 149-152). Jesse Branch only performed these engineering series at mines operated pursuant to a mining contract with Kyber or Jesse Branch (JSF 153). Surveying and spad setting, which were done at AA&W's request, were necessary to allow mining consistent with mine projections and the Act (JSF 161).

The Secretary argues that surveying and spad setting were "critical to the operation of the mine" (Sec. Mem. 30). Although there is a sense in which this is true, I do not find the nature of surveying and spad setting to be, ipso facto, an indication of substantial control over the day-to-day operation of the mine. Mines must be developed faithful to their boundaries and projections. To accomplish this, surveying and spad setting are a necessity. Frequently, on-site operators lack in-house capacity for the tasks. Consequently, they contract for the services. There is nothing that is unusual about such arrangements. There is no indication in the stipulated facts or the record that in providing the services Jesse Branch was acting so as to control the day-to-day operation of the mine, or that it had the authority to exercise such control.

The Secretary also views the preparation of mine maps by Jesse Branch as an indication of control (Sec. Mem 30-31). The maps, which showed mine projections, were used by AA&W to comply with MSHA regulations and AA&W submitted them to the agency for this purpose (JSF 158-159).

As with surveying and spad setting, I do not find map preparation to be an indication that Jesse Branch substantially controlled the day-to-day operation of the mine or had the authority to do so. Few operators employ workers who have map drafting expertise. Thus, the contracting of map making is common. The stipulated facts indicate the purpose of the maps was compliance with federal regulations. There is no indication in the stipulations or the supporting record that in providing

maps for AA&W, Jesse Branch was acting so as to substantially control the day-to-day operation of the mine, or that it had the authority to exercise such control.

The same is true of Jesse Branch's quarterly inspection of drainage ponds on the surface of the mine (JSF 209). The Secretary argues that these inspections "assur[ed] compliance with state environmental regulations on the mine surface" (Sec. Mem. 27). However, again I find no indication in the stipulations and record that in conducting the quarterly inspections Jesse Branch was controlling the day-to-day operation of the mine. Quarterly inspection of surface drainage ponds for compliance with state environmental regulations is simply too remote from statutory control and supervision and too infrequent to vest Jesse Branch with operator status.

Finally, I draw no inference of operator status from the fact that the same people served as officers of Kyber and Jesse Branch, that the two companies occasionally used equipment owned by one another and that they shared office space (Sec. Mem. 27-28). The question is whether Jesse Branch substantially participated in or had authority to participate in the control or supervision of the day-to-day operation of the mine, and I conclude that it did not.

#### KENTUCKY BERWIND

The Secretary asserts that Kentucky Berwind had the authority to exercise control and supervision over mining and was an operator, even if it did not choose to exercise that control and supervision (Sec. Mem 35). Kentucky Berwind owned the mineral rights at the mine, and, according to the Secretary, ownership is a powerful indicium of statutory control (Id). More important, the lease was crafted in such a way that Kentucky Berwind retained significant control over the manner in which mining was conducted (Sec. Mem 37-38).

Because I view the Act as requiring an entity either directly or indirectly to participate substantially in the control or supervision of the day-to-day operation of a mine or to have the authority to do so, I do not find that ownership or leasing of mineral rights, is in and of itself, a characteristic of statutory control. It depends on what is done with the rights.

Here, Kentucky Berwind leased the rights to Kyber. As the Secretary notes, the lease had numerous provisions regarding Kyber's responsibilities to Kentucky Berwind. Kyber had to submit coal samples to Kentucky Berwind for quality analysis; Kyber had to maintain coal production records; Kyber had to make sure mining was conducted in a workman-like manner and in conformity with state and federal law; Kyber had to make sure mining was done with modern and efficient methods; and Kyber had to allow Kentucky Berwind's inspectors on the premises to ascertain the condition of the mine and the amount of coal removed (Sec. Mem. 37-38, citing JSF Exh. B). These provisions singularly and together are a far cry from what the law requires for operator status -- substantial participation in the daily operation, control or supervision of the mine. Rather, they are provisions one would expect the owner of the mineral rights to include to protect its interests.

The Secretary also cites as evidence of control the report forms completed by Kentucky Berwind's inspectors (Sec. Mem. 40-41). According to the Secretary, they demonstrate that the inspectors "oversaw numerous aspects of the mining process" (Sec. Mem. 40). While they may demonstrate that Kentucky Berwind's inspectors saw numerous aspects of the mining process as they traveled the mine both on the surface and underground, they do not indicate that the inspectors supervised that process. The information Kentucky Berwind sought from its inspectors was no different from that which any owner of mineral rights would want to know (for example, the percentage of coal the contract operator could be expected to remove, the average production per shift and per month, and the ash content of the coal mined (See JSF, Exh. D)). More important, there is no linkage of the information to substantiate participation by Kentucky Berwind in the day-to-day operation of the mine or authority to participate.

Further, the Secretary references the fact that Kentucky Berwind had a say, along with Kyber, in approving changes in mining directions and in authorizing AA&W to refrain from mining in certain areas of the mine (Sec. Mem. 42). It is not clear to me from the stipulations what role Kentucky Berwind played when AA&W wanted to deviate from the mining projections. When a variance from the projections would leave coal that had been projected for recovery, Kentucky Berwind was asked by Kyber to inspect the area and, presumably, to approve the deviation so that Kyber would not be liable for wasting coal reserves

(JSF 188). Kentucky Berwind also was notified by Kyber when an area slated to be mined was removed from the projection and, on at least one occasion, Kentucky Berwind notified Kyber that an area did not have to be mined to comply with the lease (JSF 191-192).

The stipulations do not indicate what happened if Kentucky Berwind did not agree to a deviation; and, if such a situation ever occurred. I cannot determine from the stipulated facts whether or not Kentucky Berwind could and/or did use its involvement with the projections to dictate the areas AA&W would mine and how AA&W would mine them. In my opinion, testimony is needed to illuminate Kentucky Berwind's role with regard to the projections and how and when it exercised that role.

The Secretary cites as a further indication of Kentucky Berwind's control the fact that if Kentucky Berwind's inspectors determined Kyber was not complying with the lease, Kentucky Berwind could terminate the lease, penalize Kyber for lost coal reserves and order mining to cease immediately if the reserves were being damaged or if mining was conducted in violation of the law (Sec. Mem. 41, citing JSF Exh. B 23-25). In my view, these provisions of the lease are consistent with the protection of Kentucky Berwind's property interests in the mineral rights. While they afford Kentucky Berwind control over its rights to the coal, they do not allow it to participate substantially in the actual day-to-day operation of the mine or give it the authority to do so. To hold otherwise would be to make Kentucky Berwind effectively liable because it controlled the mineral rights, a proposition I have rejected previously.

Finally, the Secretary asserts that Kentucky Berwind's actions with regard to the Corvette incident show how it involved itself in the operation of the mine when necessary, (Sec. Mem 42-44). I also reject this argument. The parties agreed that Kentucky Berwind employees went to the Elmo No. 5 mine after the Corvette blast damaged the mine roof (JSF 295). They agreed that the damage to the roof was the result of the blast (JSF 298). They agreed that a Kentucky Berwind employee showed Corvette where to move its blasting operations, presumably to avoid further damage to the Elmo No. 5 mine roof (JSF 301).

While all of this may show that Kentucky Berwind was "involved" with the operation at the mine, it does not establish that Kentucky Berwind substantially participated in the control or supervision over the day-to-day mining operations at the Elmo No. 5 mine. There is no indication that Kentucky Berwind ordered AA&W to change anything with regard to its daily operations as a result of the Corvette incident. Moreover, it was only natural that Kentucky Berwind, as the owner of the coal reserves mined by both AA&W and Corvette, would have an interest in trying to assist both operators so that they did not interfere with one another's operations. That interest and Kentucky Berwind's resulting role in the incident do not equate to statutory control and supervision.

#### BERWIND

The Secretary hinges his assertion of Berwind's liability upon the theory that Berwind and its wholly owned subsidiaries coordinated their activities to collectively operate the mine (Sec. Mem. 45). Therefore, they were a single unit that operated the mine with "common control" to "achieve [a] common business purpose" (Sec. Id. 46). The fundamental problem with the Secretary's argument is that the undisputed material facts do not establish that Berwind had substantial control, common or otherwise, over the day-to-day operation of the mine, substantially participated in the mine's supervision, or had the authority to do so.

In fact, contacts between Berwind and AA&W were very limited. The Secretary notes that Richard Rivers, Berwind's vice president, was involved in developing the contract from which the agreement between AA&W and Kyber was derived; that Thomas Falkie, Berwind's president, had the authority to disapprove mining contracts with prospective contract operators and was advised when AA&W was selected as the on-site operator; and that Berwind received weekly reports of production at the mine and information regarding specific issues concerning the mine, including AA&W's one-time interest in a continuous mining machine and the Corvette situation (Sec. Mem. 50-52; citing JSF 95-97, 281).

Assuming that all of this is true, it is a long way from substantial participation in the control and supervision of

day-to-day mining operations that is contemplated by the Act. For this reason, were I to grant the Secretary's motion and hold Berwind liable, I would be ruling effectively that Berwind was an operator by nature of its corporate structure and corporate relationship to the other Contestants. Not only would such a holding fall outside the letter of Section 3(d), there is no need for it.

As the Contestants point out, when a separate legal entity is used to protect fraud or subvert public policy, the corporate veil may be pierced and corporations, or even the individuals who control the corporations, may be held liable (See generally U.S. v. Bangor Buta Operations v. Bangor & A.R. Co., 417 U.S. 702, 713 (1974); See also United States v. WRW Corp., 778 F. Supp. 919, 922 (E.D. Ky. 1991, aff'd, 989 F.2d 138 (6th Cir. 1993)). Thus, had the Contestants in fact manipulated their corporate structure to avoid legal responsibilities for health and safety violations at the mine and had real day-to-day decision making authority lain with the Contestants, the Secretary would have had an effective remedy (Conts. Reply Br. 39-40).

There has been no showing that the Contestants planned to benefit from their corporate structure while effectively directing the day-to-day operations at the mine. Nor can I conclude that failing to regard them as operators will defeat the policy underlying the Act -- the protection of the health and safety of the nation's miners. Indeed, the failure of the Secretary to cite any of the Contestants as operators until after the explosion of November 30, 1993, suggests exactly the opposite.

#### RULING ON THE MOTIONS

I cannot find the undisputed material facts establish that Kyber and Kentucky Berwind substantially participated in the control or supervision of the day-to-day operations of the mine or had the authority to do so. Nor can I find such facts establish they did not so participate. Additional evidence is needed about the mining projections and the relationships between AA&W, Kyber and Kentucky Berwind as they relate to the projections and to the day-to-day operations at the mine. Additional information also is needed regarding the

interpretation and implementation of the provisions in the Kyber-AA&W contract that relate to production. Therefore, the motions for summary decision of both the Secretary and the Contestants are **DENIED** with regard to Kyber and Kentucky Berwind.

On the other hand, the undisputed material facts establish that Jesse Branch and Berwind did not substantially participate in the control or supervision of the day-to-day operations of the mine or have the authority to do so. Therefore, the Secretary's motion for summary decision is **DENIED** with regard to Jesse Branch and Berwind and the Contestants' motion is **GRANTED**.

#### NOTICE OF HEARING

The parties are advised that these matters will be called for hearing in Pikeville, Kentucky, or at another mutually acceptable site of the parties preference, at 8:30 a.m. on May 23, 1995. At the hearing, the parties should be prepared to offer evidence regarding the particular issues specified above.

*David F. Barbour*

David F. Barbour  
Administrative Law Judge

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