

AUGUST 1997

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AUGUST 1997

There were no cases filed in which review was granted or denied.



## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 6, 1997

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

v.

FAITH COAL COMPANY

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Docket No. SE 91-97, etc.

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

**DECISION**

BY: Jordan, Chairman; and Marks, Commissioner

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Faith Coal Company ("Faith") violated 30 C.F.R. § 75.202(a) by failing to properly support the roof in an area where a person or persons worked or traveled; whether a citation alleging that Faith improperly operated a scoop loader with an inoperative methane monitor was properly vacated on the ground that the citation alleged a violation of the wrong standard and was never amended to allege a violation of the correct standard; whether Faith violated 30 C.F.R. § 75.220 by failing to comply with a supplemental requirement of its roof control plan to set cribs prior to splitting a pillar; whether Faith's violation of section 75.220, involving cuts of excessive length and a crosscut driven into an area of unsupported roof, was the result of its unwarrantable failure to comply with its roof control plan; and whether Faith violated 30 C.F.R. § 75.203(b) by failing to use sightlines to control the direction of mining. Administrative Law Judge David Barbour concluded that the Secretary of Labor had not established a violation of section 75.203(b); that Faith had committed a violation of section 75.202(a); and that Faith had committed two significant and substantial ("S&S") violations of section 75.220, one of which was also unwarrantable. 17 FMSHRC 1146, 1155-56, 1190-91, 1195-97, 1202 (July 1995) (ALJ). The judge also vacated the citation involving the inoperable methane monitor on the ground that it alleged a violation of the wrong standard. *Id.* at 1183, 1224. The Commission granted cross-

petitions for discretionary review filed by the Secretary and Faith challenging these determinations.<sup>1</sup> For the reasons that follow, we affirm in part, reverse in part, and remand.

I.

Citation No. 3396045

A. Facts and Procedural Background

Faith formerly operated the No. 15 Mine, an underground coal mine in Sequatchie County, Tennessee. 17 FMSHRC at 1148-49; Gov't Ex. 4 at 1. On March 2, 1992, Inspector Clyde Layne from the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected an entry at the No. 15 Mine that was being cleaned for the installation of a belt conveyor. 17 FMSHRC at 1154. Layne observed an area of roof where the spacing of roof bolts exceeded the 5-foot limit specified in Faith's roof control plan. *Id.* Several roof bolts were placed as far as 9 feet apart. *Id.*<sup>2</sup> Although the area had a low ceiling, and thus could only be traveled by crawling, Layne observed tracks on the floor indicating that people had traveled through the area. *Id.* Layne issued a citation alleging a violation of section 75.202(a).<sup>3</sup> *Id.*; Tr. III at 568-69; Jt. Ex. 16.<sup>4</sup>

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<sup>1</sup> In its petition for discretionary review, Faith also raised an issue with respect to a recommendation for settlement suggested by the judge concerning a reduction in the amount of penalties assessed against it. 17 FMSHRC at 1207; F. Pet. at 1-5. The judge's suggestion, which was gratuitous and not binding, was rejected by counsel for the Secretary as a basis for settlement. Accordingly, this issue is not before us and we decline to address it.

<sup>2</sup> These roof bolts had been installed by a previous operator of the mine. 17 FMSHRC at 1154. When Faith took over the operation of the mine, this area had been "gobbed out," making travel through it impossible. *Id.* Faith later cleared away the gob material, making the area passable. *Id.*

<sup>3</sup> Section 75.202(a) provides:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs . . . .

<sup>4</sup> The hearing in these consolidated cases was conducted on May 23-26, 1994, and on August 9-10, 1994. The following references are used to refer to the transcripts from the designated hearing dates: "Tr. I" — May 23; "Tr. II" — May 24; "Tr. III" — May 25; "Tr. IV" — May 26; "Tr. V" — August 9; "Tr. VI" — August 10.

The judge concluded that the Secretary had established a violation of section 75.202(a) by demonstrating that the roof was not properly supported in an area of the mine where a person or persons worked or traveled. 17 FMSHRC at 1155-56. The judge relied upon admissions by Lonnie Stockwell, Faith's owner, that he traveled through the area and that the roof bolts in the area were not spaced as required by Faith's approved roof control plan. *Id.*

B. Disposition

Faith contends that the judge erred in finding a violation of section 75.202(a) because Stockwell only traveled into the affected area on one occasion in order to comply with applicable MSHA preshift requirements. F. Br. II at 8-9.<sup>5</sup> The Secretary argues that the judge's finding of a section 75.202(a) violation is supported by substantial evidence. S. Br. II at 18-19.<sup>6</sup>

We conclude that the judge's factual findings are supported by substantial evidence,<sup>7</sup> and affirm his conclusion that Faith violated section 75.202(a). It is undisputed that the spacing of the roof bolts in this area of the mine exceeded the five foot limit specified in Faith's roof control plan. Therefore, the dispositive issue is whether persons worked or traveled in the area. Stockwell testified that he crawled through this area on at least one occasion, when Faith began rehabilitating the entry. 17 FMSHRC at 1155. Even assuming that, as Stockwell suggested, he was the only person to travel through this area, this admission is sufficient to establish a violation. The fact that Stockwell may have traveled through the area in order to comply with preshift inspection requirements does not create a basis for an exemption from the requirements of section 75.202(a).

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<sup>5</sup> "F. Br." refers to Faith's brief concerning issues raised in the Secretary's petition for discretionary review, which was received by the Commission on February 1, 1996. "F. Br. II" refers to the brief filed by Faith on July 27, 1996, in response to the Secretary's brief dated June 17, 1996. Faith had previously designated its petition as its brief on review. Faith is represented in this proceeding by its owner, Lonnie Stockwell, without the assistance of counsel.

<sup>6</sup> "S. Br." refers to the brief filed by the Secretary on October 18, 1995, involving issues raised in her petition for discretionary review. "S. Br. II" refers to the brief filed by the Secretary on June 17, 1996, concerning issues raised by Faith in its petition.

<sup>7</sup> The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

## II.

### Citation No. 3202337

#### A. Factual and Procedural Background

On June 7, 1993, MSHA Inspector Johnny McDaniel observed that a scoop loader loading coal at the No. 15 Mine did not appear to have an operative methane monitor. 17 FMSHRC at 1182; Tr. II 412-14. When McDaniel tested the monitor with the test button, the loader did not deenergize, confirming that the monitor was not operating properly. 17 FMSHRC at 1182; Tr. II 413. Faith owner Stockwell later arrived on the scene and explained to McDaniel that the monitor had been “jumped out,” meaning that the monitor’s shut-off mechanism had been bypassed electronically to allow the loader to operate regardless of whether methane was present. 17 FMSHRC at 1182.

McDaniel issued a citation alleging that Faith used a scoop loader without a functioning methane monitor to load coal, in violation of 30 C.F.R. § 75.313. *Id.* at 1181-82; Tr. II at 411-12; Jt. Ex. 62. This citation alleged a violation of the wrong standard, however, since section 75.313, which had previously applied to methane monitors (*see* 30 C.F.R. § 75.313 (1991)), had been amended in November 1992 to apply to mine fan stoppages when persons are underground. At that time, MSHA renumbered the methane monitor provision as 30 C.F.R. § 75.342(a).<sup>8</sup> This error in citing an inapplicable standard was not addressed at the hearing, and was perpetuated in the Secretary’s post-hearing brief to the judge. *See* S. Post-Trial Br. at 145.

The judge vacated this citation on the ground that it alleged a violation of the wrong standard, and was never modified to allege a violation of the correct standard. 17 FMSHRC at 1183. The judge found that the Secretary had not established a violation of section 75.313, the mine fan stoppage standard referred to in the citation. *Id.* Noting that the citation was based upon an allegedly inoperable methane monitor on the loader, which falls within the coverage of section 75.342(a)(4),<sup>9</sup> the judge found the citation defective because it did not allege a violation

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<sup>8</sup> This change occurred in connection with the reorganization of Subpart D of the Secretary’s Part 75 regulations, dealing with ventilation issues, which took effect in November 1992 (delayed from August 1992). *See* 57 Fed. Reg. 34,683 (1992); 57 Fed. Reg. 20,868 (1992).

<sup>9</sup> Section 75.342(a) provides in relevant part:

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

of the proper standard. *Id.* The judge vacated the citation based upon the “axiom of due process that a respondent must be advised correctly of the standard it is alleged to have violated.” *Id.*

B. Disposition

The Secretary asserts the judge erred because the record establishes that Faith had actual notice of the violative conduct and standard alleged and therefore it was not prejudiced. S. Br. at 17-21. The Secretary further asserts that Faith in effect conceded this violation when Stockwell testified that he deliberately “jumped out” the methane monitor on the scoop loader to permit the machine to operate. *Id.* at 18, 20-21.

Faith contends that the citation was properly vacated by the judge because it alleged a violation of the wrong standard, and the Secretary failed to amend the citation to cite the correct standard. F. Br. at 16-17. Faith also contends that its use of a scoop loader with an inoperable methane monitor did not violate section 75.342(a) because it was not using the scoop loader to load coal at the time the citation was issued. *Id.* at 16-20.

There is no question that the Secretary erred by failing to move to amend the citation to charge a violation of the correct standard either at trial or in a post hearing submission. We expect the Secretary and her counsel not only to know the content of regulations promulgated and enforced by the Department of Labor, but to submit only the most careful and accurate pleadings in litigation before this Commission. Here, the Secretary’s error is particularly egregious in light of the fact that renumbering of the regulation addressing methane monitors was announced in a final rule over *two and a half years* before the Secretary’s post-hearing brief was filed on December 7, 1994, a brief which, as noted above, perpetuated the error of citing an inapplicable standard. *See* 57 Fed. Reg. 20,868 (May 15, 1992 publication of final rule amending Part 75, Subpart D); *see also* 57 Fed Reg. 34,683, 34,684 (August 6 notice announcing delay of effective date of final rule from August 16 until November 16, 1992 “to ensure that mine operators can effectively plan and implement the necessary changes”).

The first indication in the record that anyone was aware of the Secretary’s error appears in the judge’s decision. When he discovered the Secretary’s error, the judge should have issued an order directing the Secretary to show cause why the citation should not be amended to conform to the evidence and charge a violation of the applicable standard. This would have afforded Faith the opportunity to show legally recognizable prejudice. More importantly, it probably would have resolved this question at an earlier stage of these proceedings, and thus, would have avoided the need for further proceedings and delay.

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

The judge's failure to make this inquiry, however, does not require that we remand to correct this particular error. Instead, we conclude that Faith suffered no prejudice because the company fully understood the gravamen of the violation charged and knowingly litigated the citation on that basis, and we further conclude that the judge erred by vacating the citation on the basis of the Secretary's pleading error.

This result is in accord with Rule 15(b) of the Federal Rules of Civil Procedure, which provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies.<sup>10</sup> Here the record demonstrates that Stockwell, who represented Faith during most of the hearing, understood the nature of the violation charged and litigated the case on that basis. *See* Tr. II 412-28. Indeed, at the hearing, Stockwell sought to develop a defense — that the loader was not used to load coal while the methane monitor was not functioning — that is consistent with the language of section 75.342(a), the applicable standard. Tr. II 425-26. There is no indication in the record that Stockwell thought the citation related to mine fan stoppages, the subject of the amended version of section 75.313. Accordingly, we reverse the judge's decision to vacate this citation on procedural grounds, and remand for a determination of whether Faith's operation of the loader violated section 75.342(a)(4).

### III.

#### Citation No. 3024814

##### A. Factual and Procedural Background

On March 17, 1993, during an inspection of the mine, MSHA Inspector Layne visited a crosscut on the right side of the belt line where five miners were working. 17 FMSHRC at 1186. Immediately adjacent to the crosscut, the beltline had been driven through a pillar, splitting the pillar, even though cribs had not previously been installed in that area as required by Faith's roof control plan.<sup>11</sup> *Id.* at 1186-87. Stockwell told Layne that cribs were not installed in the area because, if they had been, there would not have been enough room to haul gob material and

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<sup>10</sup> We have previously applied the provisions of Rule 15 in resolving issues relating to the amendment of citations. *See Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-90 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *see also* 29 C.F.R. § 2700.1(b) (providing that the Federal Rules of Civil Procedure shall apply "so far as practicable" on procedural questions not governed by the Commission's procedural rules or the Mine Act). Specifically, we have recognized Rule 15(b)'s "emphasis upon the parties understanding that the unpleaded claim is, in fact, being litigated" in determining whether a posthearing amendment of a citation is warranted. *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986).

<sup>11</sup> The roof control plan provides that cribs are to be set no more than 5 feet apart and that, "where practical," cribs must be set before splitting the pillar. *Id.* at 1187.

equipment through the area. *Id.* at 1187. Layne issued a citation to Faith alleging an S&S violation of section 75.220<sup>12</sup> for not complying with the requirement of the roof control plan that cribs be installed before splitting the pillar. *Id.* at 1186-87; Tr. VI 207-08; Jt. Ex. 51.

At the hearing, counsel for the Secretary moved to apply the doctrine of res judicata to establish this and two other alleged violations (Citation No. 3202244 and Order No. 3202245, discussed *infra*), and to bar Faith from raising any related defenses, based upon a decision issued by U.S. Magistrate Judge John Y. Powers of the U.S. District Court for the Eastern District of Tennessee in September 1993 in a probation revocation proceeding involving Stockwell. 17 FMSHRC at 1188-89. This proceeding was the byproduct of an earlier criminal case resolved in June 1992 in which Stockwell pled guilty to two counts of violating the Mine Act, and was sentenced to three years' probation and assessed a \$1,500 fine. *Id.* at 1188 (citing *United States v. Lonnie Ray Stockwell*, No. 92-074M (E.D. Tenn. June 24, 1992)). As a condition of his probation, Stockwell was ordered to refrain from any "serious unwarrantable" violations of the Act pertaining to roof support and ventilation. 17 FMSHRC at 1188.

In May 1993, Stockwell was ordered to show cause why his probation should not be revoked. *Id.*; Tr. V at 22. The order was supported by a report from Stockwell's probation officer stating that Stockwell had been cited for several unwarrantable violations. 17 FMSHRC at 1188. The report identified eight such violations, including this and two other alleged violations involved in this proceeding. *Id.*; Tr. V 22-25. Magistrate Powers held a probation revocation hearing at which MSHA inspectors testified. 17 FMSHRC at 1188. Following the hearing, the magistrate issued a memorandum and order which states:

Having heard all of the witnesses and argument[s] of counsel . . . it is concluded and the [magistrate] finds serious life threatening violations of the [Mine Act] including but not limited to the conduct of mining well beyond the 12-foot limit beyond roof support were committed or caused to be committed by the defendant in late 1992 and early 1993 in . . . Faith Coal Company Mine # 15 . . . .

*Id.* at 1188-89 (quoting *United States v. Lonnie Ray Stockwell*, No. CR-1-92-33, slip op. at 3 (E.D. Tenn. Sept. 16, 1993)). As a result, the magistrate revoked Stockwell's probation and sentenced him to six months in prison. 17 FMSHRC at 1189. Subsequently, the judge denied Stockwell's motion for a new trial, and no further appeal was taken. *Id.*

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<sup>12</sup> Section 75.220 provides in part:

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine.

At the hearing, the Secretary's counsel argued that the magistrate's decision in the probation revocation proceeding amounted to a finding that Faith had committed the three violations at issue here. Tr. V 35. In a bench ruling, the judge denied the Secretary's *res judicata* motion, concluding that he could not determine from the memorandum and order that the magistrate had made a finding that the three alleged violations had occurred as charged. 17 FMSHRC at 1189. The judge also noted that the magistrate had apparently taken no evidence and made no findings with respect to negligence and gravity — factors relevant in determining whether the violation was unwarrantable or S&S. *Id.* at 1190.

In his decision, the judge reaffirmed his bench ruling denying the Secretary's *res judicata* motion for the reasons he had provided at the hearing. *Id.* at 1189-90. The judge explained that, for the *res judicata* doctrine to apply, the issues for which preclusion is sought must be identical to the issues decided in the first action, in this case the probation revocation proceeding. *Id.* at 1190.

The judge then concluded that Faith had committed an S&S violation of section 75.220 by failing to comply with the requirement of its roof control plan that cribs be set, where practical, prior to splitting a pillar. *Id.* at 1190-91. The judge rejected Stockwell's testimony that it was not practical for Faith to install cribs in this crosscut area because there would not have been sufficient clearance to use the area as a passageway for hauling gob and the crosscut could not have been used as an escapeway. *Id.* at 1190. The judge noted that Faith could have used other available areas to dump the gob and thereby avoided travel through this area and that, contrary to Faith's contention, the crosscut could have been part of a valid escapeway even if cribs had been installed. *Id.*

#### B. Disposition

Faith asserts that the judge's finding of a section 75.220 violation is not supported by substantial evidence because the record indicates that it did install cribs in the last open crosscut as required by the roof control plan and that additional roof support was not necessary in the area of the split pillar referred to in the citation. F. Br. II at 4-5. Faith also contends that the judge properly denied the Secretary's motion to apply the *res judicata* doctrine to establish this and two other alleged violations based upon the results of the probation revocation proceeding because the issues presented and decided in that proceeding were not the same as those involved here. *Id.* at 5-7.

The Secretary argues that substantial evidence supports the judge's finding that Faith violated section 75.220 because the testimony of Inspector Layne establishes that Faith failed to install the cribs required by its roof control plan before mining through the pillar in the last open crosscut in the area. S. Br. II at 17-18. The Secretary also contends that the judge erred by refusing to give *res judicata* effect to the probation revocation determination because in that proceeding the District Court decided identical issues relating to this alleged violation. *Id.* at 13-17.

1. Res Judicata

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or those in privity with them, based upon the same claim. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 986-87 (June 1982). Res judicata also prevents litigation of all grounds for, or defenses to, claims that were previously available to the parties, even if they were not actually asserted in a prior proceeding. *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Bradley*, 4 FMSHRC at 987. The crucial question is whether the claims involved in the two actions are identical; if not, res judicata is inapplicable. *Id.*; *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs*, 583 F.2d 1273, 1278 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). The party asserting the doctrine must prove all the elements necessary to establish it. *Bradley*, 4 FMSHRC at 986.

As the judge noted, there was no indication in the magistrate's memorandum and order that his decision was based upon a finding that the three alleged violations had occurred as charged. 17 FMSHRC at 1189. Given the eight alleged violations that the magistrate was asked to consider in that proceeding, there is no basis for concluding that his reference to "serious life threatening violations" necessarily referred to any of the three alleged violations at issue here. Indeed, given the generality and brevity of the probation revocation decision, it is impossible to draw any conclusions regarding the magistrate's findings with respect to these three alleged violations. *See Bradley*, 4 FMSHRC at 989 (declining to apply res judicata doctrine based upon decision of state safety board that was "extremely brief and conclusory" and "contain[ed] no findings of fact, credibility resolutions, or explanations for the conclusions reached"). In addition, as the judge explained, even if the magistrate in the criminal proceeding had expressly found that these three violations did occur, he did not consider or make any findings with respect to negligence and gravity. 17 FMSHRC at 1190. Accordingly, the judge correctly concluded

that the res judicata doctrine did not apply, and we affirm his denial of the Secretary's motion to apply the doctrine to establish this and two other alleged violations.<sup>13</sup>

## 2. Violation

We conclude that substantial evidence supports the judge's finding that Faith failed to install cribs in the crosscut area as required under its roof control plan, and therefore affirm his finding of a section 75.220 violation. The credited testimony of Inspector Layne establishes that Faith did not install cribs before splitting a pillar in the crosscut area in question. Therefore, as the judge noted, the only remaining question is whether it was practical to install cribs in this area. 17 FMSHRC at 1190. The judge's finding that it was practical to do so, despite Faith's arguments to the contrary, is supported by substantial evidence.

Faith's argument that it had, in fact, installed cribs in the last open crosscut as required by its roof control plan is not supported by the record, and based upon a mischaracterization of Layne's testimony. Contrary to Faith's assertion (F. Br. II at 4-5), Layne did *not* testify that

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<sup>13</sup> After detailing the basis for their conclusion that the federal magistrate's ruling should not have res judicata effect in this case (a conclusion with which we agree), our colleagues then voice their disapproval of the testimony given by the MSHA inspectors in a probation proceeding before the magistrate "to the extent that the Secretary's actions . . . had the effect of circumventing an ongoing Commission proceeding." Slip op. 19. We find this charge to be without merit.

Although the record in this case does not indicate whether the MSHA inspectors were subpoenaed to testify, or whether they volunteered their testimony, the record does indicate that they testified before the magistrate and apparently detailed why they took enforcement action and presumably why they concluded that violations occurred. Tr. V 26-27, 31-33, 40, 43, 48, 62. The presiding magistrate, who is "free to consider many factors in granting or revoking probation" (*United States v. Miller*, 797 F.2d 336, 339 n.4 (6th Cir. 1986)), apparently considered their testimony to be relevant. Thus, it is clear from his action in revoking Mr. Stockwell's probation that the magistrate did not require a Commission adjudication and finding of violation in order to make his judgment. The idea that this lawful MSHA participation in a criminal proceeding amounts to an attempt by the Secretary to "circumvent[] an ongoing Commission proceeding," is troubling to us because we find this charge to be unsupported and unfounded.

In any event, the probation revocation proceeding is a matter over which the Commission has no jurisdiction, and thus our colleagues' objections to actions at that hearing are not relevant to the instant case. In addition, we emphasize that the testimony and participation of the inspectors before the magistrate have had absolutely no impact upon this proceeding.

Accordingly, we take strong exception to our colleagues' criticism of the Secretary's actions at the probation revocation hearing.

there were cribs in the last open crosscut; rather, he testified that cribs were installed in other nearby areas of the mine. *See* Tr. VI 269-70. Layne's direct testimony, which was properly credited by the judge, establishes that when he inspected the area in question he found that cribs had not been installed as required by Faith's roof control plan. Tr. VI 215-23.

#### IV.

#### Citation No. 3202244

##### A. Factual and Procedural Background

On March 17, 1993, while conducting an inspection in the vicinity of Survey Station No. 114, MSHA Inspector Larry Anderson observed two working places that had been driven in excess of the 10-foot limit established by Faith's roof control plan.<sup>14</sup> 17 FMSHRC at 1192. One place had been driven 24 feet beyond roof supports; the other place had been driven 27½ feet beyond roof supports. *Id.* In the same area, Anderson observed a neck that had been driven 23 feet in by roof supports. *Id.* at 1193. The surfaces of the coal ribs in these areas were jagged, leading Anderson to conclude that they had been cut with conventional equipment, instead of a continuous miner. *Id.* at 1192-93. In an adjacent entry, Anderson observed an area where a crosscut had been driven into an unsupported area, also in apparent violation of Faith's roof control plan.<sup>15</sup> *Id.* at 1193. This unsupported area was estimated by Anderson to be about 20 feet wide and 30 feet long. *Id.* Based on these observations, Anderson issued a citation to Faith alleging an S&S and unwarrantable violation of section 75.220. *Id.* at 1191-92; Tr. VI 295; Jt. Ex. 54.

After finding that Faith had violated section 75.220 (17 FMSHRC at 1195-96), the judge concluded that this violation was the result of Faith's unwarrantable failure to comply with its roof control plan. *Id.* at 1196-97.<sup>16</sup> The judge found that the violation had existed for several months, in an air intake course subject to daily inspection, and concluded that, given the generally unstable nature of the roof in the area, Faith had failed to meet a "high standard of care to ensure that the roof was supported adequately." *Id.* at 1197.

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<sup>14</sup> Faith's roof control plan provided that when coal was cut with conventional equipment, the cut could not exceed 10 feet in length. 17 FMSHRC at 1192.

<sup>15</sup> The roof control plan required that openings creating an intersection be permanently supported, or that at least one row of temporary supports be installed before any work or travel was permitted in the intersection. *Id.* at 1193.

<sup>16</sup> The judge also concluded that this violation was S&S. *Id.* at 1196. Faith does not challenge this finding. F. Br. II at 10, 12.

## B. Disposition

Faith contends that the judge erred in finding that this violation was the result of unwarrantable failure because it was neither intentional nor the result of a reckless disregard for the safety of miners. F. Br. II at 11-14. Faith argues that Stockwell, its owner, was not aware of the violation until it was brought to his attention by Inspector Anderson, that it subsequently took immediate action to abate the violation, and that the area with insufficient support was not as large as that estimated by Anderson. *Id.* Faith also asserts that the judge properly determined that the doctrine of res judicata was not applicable because the Secretary failed to establish that the probation revocation proceeding involved the same issues as those relating to this violation. *Id.* at 15.

The Secretary argues that substantial evidence supports the judge's finding that this violation was the result of Faith's unwarrantable failure, relying on Faith's admission that miners traveled and worked under unsupported roof and evidence that the roof was in poor condition, that Faith failed to take the condition of the roof into account, that the areas at issue were in an air course that had to be examined on a daily basis, and that the violation had existed for several months prior to the issuance of this citation. S. Br. II at 21-22, 23-25. In addition, the Secretary argues that the judge erred by refusing to grant res judicata effect to the decision in the probation revocation proceeding with respect to the unwarrantable failure issue. *Id.* at 20-21, 22-23.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

We conclude that substantial evidence supports the judge's findings, and affirm his determination that this section 75.220 violation was the result of Faith's unwarrantable failure to comply with requirements of its roof control plan. Based on Inspector Anderson's credited testimony that the shale roof in the area was scaling and in poor condition, and that water made parts of the roof subject to sudden, unanticipated falls, the judge reasonably concluded that Faith was chargeable with a high degree of care to ensure that the roof was supported adequately, which it failed to meet. 17 FMSHRC at 1196-97. As the judge observed, "[e]xposing miners to unsupported roof under such conditions was equivalent to requiring them to play Russian roulette." *Id.* at 1196. We have previously relied upon the high degree of danger posed by roof control plan violations as a basis for finding unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (August 1994) (allowing work under unsupported roof was result of unwarrantable failure where installation of temporary roof supports, as required under

roof control plan, was “necessary for safe mining practice”); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where “roof conditions were highly dangerous”); *Youghioghery & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (temporary roof support violation resulted from unwarrantable failure where prior history of roof falls “placed [operator] on notice that heightened scrutiny to assure compliance with its roof control plan was vital”). See also *Lion Mining Co.*, 18 FMSHRC 695, 700-02 (May 1996) (vacating judge’s finding that roof control plan violation was not unwarrantable).

In addition, the violations should have been obvious to Faith because they occurred in areas of an air intake course that had to be examined on a daily basis. See *Quinland*, 10 FMSHRC at 708-09 (obvious nature of lack of proper roof support); *Youghioghery & Ohio Coal Co.*, 9 FMSHRC at 2010-11 (finding of unwarrantable failure where preshift examinations had been conducted but the roof control violations were not reported); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (February 1991) (violations not reported following preshift examinations). As in *Quinland* and *Youghioghery*, because Faith was on notice of poor roof conditions, its failure to comply with its roof control plan is indicative of a “serious lack of reasonable care.” See 10 FMSHRC at 708-09; 9 FMSHRC at 2011. The unwarrantable failure finding is also supported by the duration of the violation, which was found by the judge to have existed for several months. 17 FMSHRC at 1197. See *Quinland*, 10 FMSHRC at 709 (poor roof conditions associated with section 75.200 violation had existed “for a considerable length of time”).

Given the judge’s finding that this violation had existed for several months, in an area of the mine subject to daily inspections, the record does not support Faith’s assertion that it was not aware of the violative conditions until it received a citation from Inspector Anderson. In addition, the mere fact that the violative conduct may not have been intentional does not preclude an unwarrantability finding. It is well established that intentional and deliberate conduct is not a condition precedent to a determination of unwarrantable failure. See *Emery*, 9 FMSHRC at 2003-04; *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).<sup>17</sup>

## V.

### Order No. 3202245

#### A. Factual and Procedural Background

In reviewing a map of the No. 15 Mine, MSHA Inspector Anderson noticed irregular variations in pillar sizes. 17 FMSHRC at 1198. Accordingly, during his inspection of the mine on March 17, 1993, Anderson examined the areas that appeared irregular on the map, checked

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<sup>17</sup> We also conclude that the judge properly denied the Secretary’s motion to apply the res judicata doctrine to establish the unwarrantability of this violation based upon the decision in the probation revocation proceeding, for the reasons discussed *supra*, pp. 9-10.

pillar sizes and shapes, and inspected entries to determine whether they were straight. *Id.* Based on his observations, Anderson concluded that Faith had been mining without the use of sightlines<sup>18</sup> for between 30 and 60 days. 17 FMSHRC at 1198-99. He therefore issued an order to Faith alleging a violation of section 75.203(a), which was amended at hearing to allege a violation of section 75.203(b).<sup>19</sup> *Id.* at 1197-98, 1200-01; Tr. VI 405; Jt. Ex. 55.

The judge concluded that the Secretary had failed to prove that sightlines were not used to control mining direction at the mine, and therefore vacated this order. 17 FMSHRC at 1201-02, 1223.<sup>20</sup> The judge found that Inspector Anderson had no first-hand knowledge of whether or not sightlines were used because he did not observe any surveying or mining being conducted at the mine. *Id.* at 1201. The judge also found that the evidence offered by the Secretary to support this violation, consisting primarily of Anderson's testimony concerning the depiction of irregularly shaped entries and pillars on the mine map, was not convincing. *Id.* at 1201-02. The judge noted that the Secretary had not offered any evidence that spads used to establish sightlines were not in place, or testimony from miners that it was common practice not to follow sightlines at the mine. *Id.* at 1202. Instead, the judge credited Stockwell's testimony that he intentionally deviated from projections in certain instances because of adverse roof conditions, and that even in such areas Faith had used sightlines. *Id.* at 1201-02. In crediting Stockwell's testimony on this point, the judge explained that the record was replete with testimony concerning adverse roof conditions and that even Inspector Anderson admitted that the deviations observed could have been the result of roof problems. *Id.* at 1202.

#### B. Disposition

The Secretary contends that the judge erred in refusing to give res judicata effect to the decision of Magistrate Powers in the probation revocation proceeding, which she contends amounted to a finding that Faith had mined without the use of sightlines. S. Br. at 10-14. The Secretary also contends that the judge erred in concluding that substantial evidence did not establish a section 75.203(b) violation because that determination was based primarily upon his decision to credit Stockwell's self-serving testimony that the deviations were intentional and

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<sup>18</sup> Sightlines are a method of keeping on the correct mining course through the use of spads set in accordance with projections established by the operator on a mine site map. Tr. VI at 406-10.

<sup>19</sup> Section 75.203(b) provides:

A sight line or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, crosscuts and pillar splits.

<sup>20</sup> At certain points in his decision, the judge inadvertently referred to this order as Order No. 3203325. *Id.* at 1197, 1223.

made in response to adverse roof conditions. *Id.* at 10, 14-16. The Secretary contends that this credibility resolution is erroneous and should be overturned, because the judge provided no explanation for his determination and Stockwell was otherwise shown to be a noncredible witness. *Id.* at 14-16.

Faith contends that substantial evidence supports the judge's finding that it did not violate section 75.203(b) because Stockwell's credible testimony established that it followed sightlines to control mining direction, except where deviations were necessary because of adverse roof conditions. F. Br. at 5-12. Faith also contends that the judge properly denied the Secretary's request to apply the *res judicata* doctrine to establish this alleged violation because there is no indication that the probation revocation proceeding involved issues identical to those presented here. *Id.* at 6, 8-11.

The Commission has long held that a judge's credibility determinations are entitled to great weight and may not be lightly overturned. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981). We have recognized that since the judge has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alterations Citations*, 17 FMSHRC 1815, 1878 (November 1995), *appeal docketed, Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Accordingly, "as a general rule [we] are bound by the credibility choices of the [judge], even if [we] 'might have made different findings had the matter been before [us] . . . de novo.'" *Ona*, 729 F.2d at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (citations omitted).

We conclude that the judge's decision to credit Stockwell's testimony regarding the use of sightlines is adequately explained and does not constitute an abuse of discretion. In explaining his decision to credit Stockwell, the judge indicated that Stockwell's testimony was supported by considerable record evidence of adverse roof conditions, and noted that even Inspector Anderson admitted that the deviations could have been caused by roof problems. 17 FMSHRC at 1202. The judge also noted that the Secretary did not attempt to rebut Stockwell's testimony by offering evidence that the required spads were not in place, or testimony from miners that it was common practice at the mine not to follow sightlines. *Id.*<sup>21</sup>

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<sup>21</sup> Contrary to the Secretary's suggestion (S. Br. at 16 n.8), the judge's decision to credit Stockwell on this point was not based on this ground alone; rather, it was one of several reasons mentioned by the judge as a basis for this credibility determination. Moreover, it was not improper, as the Secretary contends, for the judge to rely on the failure to produce relevant evidence both in evaluating the strength of the Secretary's case and in deciding whether to credit Stockwell's conflicting explanation of the presence of certain irregularities. Nor was the judge

In addition, the fact that Stockwell's testimony may have been less than fully credible with respect to other matters does not, in itself, provide a basis for disturbing the judge's decision to credit him on this point. We have previously recognized that it is not uncommon, and certainly not reversible error, for the trier of fact to find a witness to be credible on some, but not other, matters. In *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981), the Commission explained:

We do not subscribe to a "false in one, false in everything" rule of testimonial evidence, and such rules are not applied inflexibly in any event. . . . If the remainder of a questionable witness' testimony is corroborated by other credible evidence . . . or is otherwise inherently believable, the judge is not foreclosed from accepting it.

*Id.* at 813 (citations omitted).

The Secretary has failed to offer any evidence that warrants the "extraordinary step" of reversing the judge's decision to credit Stockwell's explanation that the deviations from projections were made intentionally in response to adverse roof conditions and not indicative of a failure to follow sightlines. *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (November 1986). Accordingly, we conclude that the judge's credibility-based determination that Faith did in fact utilize sightlines is supported by substantial evidence, and affirm his finding that the Secretary failed to establish a violation of section 75.203(b).<sup>22</sup>

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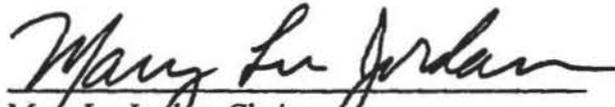
required, as the Secretary asserts, to engage in a detailed analysis of Stockwell's demeanor on the witness stand.

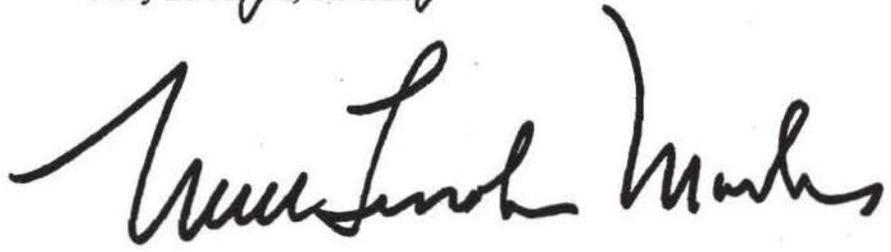
<sup>22</sup> We also conclude that the judge properly denied the Secretary's motion to apply the *res judicata* doctrine to establish this violation based upon the decision in the probation revocation proceeding, for the reasons discussed *supra*, pp. 9-10.

VI.

Conclusion

For the foregoing reasons, we affirm the judge's findings with respect to each of the alleged violations of sections 75.202(a), 75.220, and 75.203(b) set forth in Citation Nos. 3396045, 3024814, 3202244, and Order No. 3202245. We also affirm his determination that the doctrine of res judicata was not applicable as a basis for establishing the violations alleged in Citation Nos. 3024814 and 3202244 and Order No. 3202245. We reverse the judge's decision to vacate the violation alleged in Citation No. 3202337, concerning the use of a scoop loader without an operative methane monitor, and remand for a determination of whether Faith violated section 75.342(a)(4).

  
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Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Marc Lincoln Marks, Commissioner

Commissioners Riley and Verheggen, concurring:

We agree with our colleagues' decision. We write separately to offer an additional rationale as to why the judge properly denied the Secretary's motion to establish that the violations alleged in Citation Nos. 3024814 and 3202244 and Order No. 3202245 occurred as charged by application of the doctrine of res judicata based on the magistrate's decision in Stockwell's probation revocation proceeding. See, slip op. at 9-10, 13 n.17, and 16 n.22.

As pointed out by our colleagues, notwithstanding the Secretary's assertion that the issues addressed by the U.S. District Court were identical to those addressed in these proceedings, the Secretary failed to prove that the magistrate based his decision upon a finding that the alleged violations occurred as charged. We also note that the Secretary, who carries the burden of proving all the elements necessary to establish res judicata (*Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 986 (June 1982)), made no effort to prove that the requisite privity existed between Stockwell and Faith. See *Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (res judicata applies only to a second suit involving the same parties or those in privity with them); *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) ("Privity exists when there is 'substantial identity' between parties, that is, when there is sufficient commonality of interest.") (citation omitted).

We write separately, however, to highlight an even more fundamental basis upon which to reject the Secretary's attempt to assert res judicata in these proceedings. We find that, in the first instance, a federal magistrate lacks the subject matter jurisdiction to make a finding of a civil violation of the Mine Act. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) the Supreme Court held that "the Commission and the courts of appeals have *exclusive jurisdiction* over challenges to agency enforcement proceedings" brought under the Mine Act. *Id.* at 208 (emphasis added). To the extent that the federal magistrate's revocation of Stockwell's probation was grounded upon his determination that civil violations of the Mine Act occurred, he had no such authority. Congress has vested this authority *exclusively* in the Commission and the courts of appeals. Thus, until proven by the Secretary before the Commission, the citations and order were mere *allegations* of violations. Only after a final adjudication before the Commission, with a finding of a violation, could the citations and order have been presented to the magistrate as evidence of civil violations of the Mine Act.

We also note that although the Secretary argued in her post-hearing brief that the magistrate specifically affirmed Order No. 3202245 (S. Post-Trial Br. at 129-30), Judge Barbour reached the opposite result and vacated the order, a decision which we affirm today. This apparent difference in the results reached by the magistrate and the Commission highlights the critical importance of the Commission guarding its jurisdiction over civil proceedings under the Mine Act, in which our agency can bring its expertise to bear on statutory and regulatory questions arising under the Act. *Thunder Basin*, 510 U.S. at 214-15.

We also write separately to voice our concern that at the time the probation revocation hearing was taking place before the federal magistrate during mid-September 1993, the citations and order were at issue before a Commission judge, and as such were *allegations* that the Mine Act was violated.<sup>23</sup> It appears from the record, however, that Stockwell's probation officer, with the assistance of MSHA inspectors, represented to the magistrate that violations of the Mine Act as alleged in the citations and order did in fact occur. Tr. V 22-25, 45-49. That the Secretary then argued before Judge Barbour that the violations had been proven before the magistrate, an argument she has raised on appeal, demonstrates that she believes that the probation revocation proceeding was an acceptable substitute for an adjudication of the citations and order before the Commission. The Secretary has erred, however, by insisting that the federal magistrate had the power to render moot a Commission proceeding. To the extent that the Secretary's actions in this regard had the effect of circumventing an ongoing Commission proceeding, we disapprove.

Accordingly, we conclude that the show cause hearing before a federal magistrate on the narrow question of whether Stockwell's probation should have been revoked was not, and could not have been under *Thunder Basin*, a substitute for a proper determination on the merits of the Secretary's allegations under the Mine Act, with appropriate review by the Commission and a court of appeals.



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

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<sup>23</sup> Specifically, while the probation revocation hearing was taking place, the question of whether to enter a default judgment against Faith in these proceedings came before the judge. Tr. V 29-30.

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it had resulted from JWR's unwarrantable failure to comply with the standard.<sup>3</sup> 16 FMSHRC 1511 (July 1994) (ALJ). Accordingly, the judge modified the order issued under section 104(d)(2) of the Act to a citation under section 104(a). *Id.* at 1514. In reaching his negative S&S and unwarrantable determinations, the judge declined to consider nearby trash materials located in the inactive workings of the mine because they did not violate the terms of section 75.400. *Id.* at 1512-14. The Secretary petitioned the Commission to review the S&S and unwarrantable determinations. A divided Commission affirmed the judge's decision. 18 FMSHRC 508 (April 1996).

Subsequently, the Secretary filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On May 2, 1997, the court issued its decision, affirming in part and reversing and remanding in part the decision of the Commission. *Secretary of Labor v. FMSHRC*, 111 F.3d 913 (D.C. Cir. 1997). The court affirmed the Commission's determination that the section 77.400 violation was not S&S and rejected the Secretary's argument that, in considering whether the violation was S&S, the Commission should take account of the seriousness of the nearby non-violative accumulation. *Id.* at 917-18. Relying on the language of section 104(d)(1), the court determined that "Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards" from the S&S determination. *Id.* at 917.

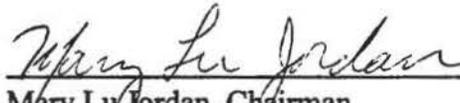
However, the court determined that section 104(d)(1) was ambiguous on the question whether the non-violative accumulation could be considered for the unwarrantable determination. *Id.* at 919-20. The court noted that, when the Mine Act is ambiguous on a point in question, a court is required to apply the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and defer to a reasonable interpretation of the Secretary. 111 F.3d at 914-15, 919-20. The court found the Secretary's interpretation, allowing consideration of conditions that do not violate health and safety standards in the determination of unwarrantable failure, to be a reasonable construction of the Mine Act. *Id.* at 919-20. Accordingly, the court remanded the case to the Commission to consider the non-violative trash accumulations when addressing whether "the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." *Id.* at 920. On July 22, 1997, the court issued its mandate.

Pursuant to the court's order, we vacate the judge's unwarrantable determination and remand to the judge to consider the non-violative accumulations in the inactive area of the mine.

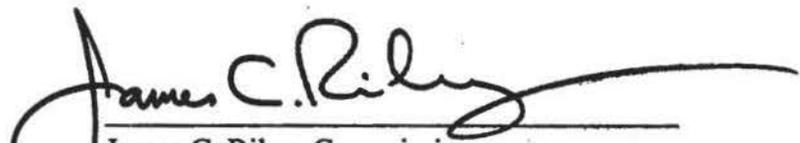
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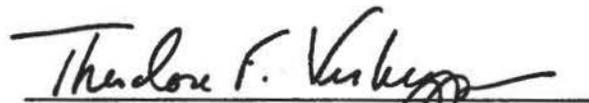
<sup>3</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . ."

The judge is to consider these accumulations, which his decision refers to as "massive" (16 FMSHRC at 1513), in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Midwest Material Co.*, 19 FMSHRC 30, 34 (January 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (January 1997). If the judge determines that the violation is unwarrantable, he shall modify the citation accordingly and reassess the civil penalty.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

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August 18, 1997

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

v.

PEABODY COAL COMPANY

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:  
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Docket No. KENT 93-369

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), involves a dispute between the Secretary of Labor and Peabody Coal Company ("Peabody") regarding whether Peabody's violation of 30 C.F.R. § 75.601<sup>1</sup> was significant and substantial ("S&S").<sup>2</sup> In an earlier decision, Administrative Law Judge Arthur Amchan determined that the violation was S&S. 15 FMSHRC 2578, 2584-86 (December 1993) (ALJ). The Commission subsequently vacated that decision and remanded for further analysis, concluding that the judge failed to apply the Commission's S&S test in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) consistent with Commission precedent. 17 FMSHRC 508, 510-12 (April 1995) ("*Peabody I*"). On remand, the judge determined that the violation was not S&S.<sup>3</sup> 17 FMSHRC 811, 813-15 (May 1995) (ALJ). For

<sup>1</sup> Section 75.601 provides in part:

Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

<sup>2</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

<sup>3</sup> The judge also found that a violation of 30 C.F.R. § 75.701 by Peabody was not S&S. 17 FMSHRC at 813. The Secretary did not seek review of that determination. PDR at 2 n.1.

the reasons that follow, we reverse and remand.

## I.

### Factual and Procedural Background

The background facts in this proceeding are fully set forth in *Peabody I*, 17 FMSHRC at 509, and are summarized here. 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. 17 FMSHRC at 811. At the 3 South Panel entries, the inspector observed two disconnecting devices, or "catheads," which were plugged into a transformer. *Id.* at 813. Both catheads were attached to trailing cables leading to continuous miners located at the face, a distance of approximately 250 to 300 feet. Tr. 38. One of the continuous miners, which had been rebuilt and returned to service, was being exchanged for the other miner. Tr. 89. Only one of the catheads was labeled to indicate the equipment to which its cable was attached. Tr. 42. The inspector believed that, if the wrong cathead were plugged into the transformer, a miner could get electrocuted or crushed if he were working on or near the mistakenly energized continuous miner. Tr. 40-41. Accordingly, Inspector Gamblin issued a citation to Peabody alleging an S&S violation of section 75.601.

Peabody conceded the violation but disputed the inspector's characterization of the violation as S&S. Tr. 7. The matter proceeded to hearing before Judge Amchan.

In his initial decision, the judge found that the violation was S&S. 15 FMSHRC at 2584-86. In reaching his determination, the judge attempted to harmonize the test for a "serious" violation under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1994) ("OSHAct") with the Commission's S&S test under *Mathies*, 6 FMSHRC at 3-4. *Id.* at 2581-84. In addition, the judge found Peabody's violation to be indistinguishable in any significant respect from the operator's S&S violation of section 75.601 in *U.S. Steel Mining Co.*, 6 FMSHRC 1834 (August 1984) ("*U.S. Steel II*"). *Id.* at 2586.

The Commission granted Peabody's petition for discretionary review of the judge's determination. A majority of the Commission concluded that the judge departed from applicable Commission precedent in attempting to harmonize the Commission's S&S test with the test for a serious violation under the OSHAct. 17 FMSHRC at 510-11. The Commission also determined that the judge erred in concluding that the violation was S&S because he could not distinguish the facts of this case from those in *U.S. Steel II*. *Id.* at 511. It explained that S&S determinations have been based upon the particular facts surrounding the violation in issue. *Id.* Accordingly, the Commission vacated the judge's decision and remanded for further analysis. *Id.* at 512. Chairman Jordan, dissenting in part, voted to affirm the judge's S&S determination. *Id.* at 514-15. She concluded that the judge's decision was supported by substantial evidence. *Id.* at 514. In addition, the Chairman found the judge's conclusion consistent with the Commission's resolution of the S&S question in *U.S. Steel II*. *Id.* at 514-15.

In his decision on remand, the judge determined that Peabody's violation of section 75.601 was not S&S. 17 FMSHRC at 813-15. He reasoned that there was not a reasonable likelihood of injury resulting from the violation because the older continuous miner would only be in the same location as the rebuilt miner for 2 or 3 days, and a person could tell by process of elimination which cathead belonged to the rebuilt miner. *Id.* at 814-15. The judge also relied upon evidence that it was company practice for employees, prior to disconnecting a cathead, to trace its trailing cable to the transformer and for an employee performing work on a miner to lock out power to the machine himself. *Id.* Accordingly, the judge assessed a penalty of \$50 rather than the proposed penalty of \$189 that he had assessed in his initial decision. *Id.* at 815.

The Commission granted the Secretary's subsequent petition for discretionary review, challenging the judge's determination.

## II.

### Disposition

The Secretary argues that the judge's determination that Peabody's violation of section 75.601 was not S&S is inconsistent with the purpose of the standard and is not supported by substantial evidence. PDR at 4-5.<sup>4</sup> She maintains that the purpose of section 75.601 is to prevent miners from being forced to use a process of elimination to identify the correct cathead to connect or disconnect. *Id.* at 6. The Secretary contends that, without proper labeling, the wrong cathead could be plugged into the transformer, resulting in a reasonable likelihood of injury to miners working on or near mistakenly energized equipment. *Id.* at 7-8. Finally, she argues that the Commission found a similar violation to be S&S in *U.S. Steel II*. *Id.* at 9-10. Accordingly, the Secretary requests that the Commission reverse the judge's determination and remand for the reassessment of a civil penalty. *Id.* at 10-11.

Peabody responds that the judge correctly determined that the violation was not S&S. P. Br. at 7. It argues that injury was not reasonably likely to result from its failure to label one of the catheads because the continuous miners would be in the same site for a brief period of time, the catheads were distinguishable in that one was cleaner and one was labeled, and activation of the lights on the continuous miners would reveal whether the correct cathead had been connected. *Id.* at 3-5. Peabody also asserts that the likelihood of injury was eliminated by its lock-out policy and the practice at the mine to trace trailing cables to the transformer before connecting or disconnecting catheads. *Id.* at 5-6.

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. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

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<sup>4</sup> Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated his petition for discretionary review as his brief.

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.

*Id.* at 3-4 (footnote omitted). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

At issue is the third *Mathies* element. We conclude that substantial evidence does not support the judge's determination that injury was not reasonably like to result from Peabody's violation.<sup>5</sup>

First, contrary to the judge's finding, evidence that both continuous miners would be in the same site for 2 to 3 days increased, rather than decreased, the likelihood that injury would result from Peabody's failure to label one of the miners' catheads. Under normal conditions, only one continuous miner is usually used in a section of the mine. Tr. 89. At the time of the inspection, circumstances were unusual in that there were two continuous miners in one section. Tr. 42. The catheads of the trailing cables of both continuous miners were plugged into the same transformer and energized.<sup>6</sup> Tr. 42, 46-47. Inspector Gamblin testified that, under such circumstances, a miner instructed to turn the power off of the equipment would not know which cathead to disconnect. Tr. 61. He stated that a person working on the equipment might assume that the correct miner had been turned off when it had not. Tr. 62. The inspector explained that a person working on the mistakenly energized equipment's electrical components or cable could be electrocuted, and a miner working on the cutting head could be crushed. Tr. 40-41.

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

<sup>6</sup> In order to energize equipment, the cathead must be plugged into the receptacle at the transformer, and the breaker for that receptacle must be turned on. Tr. 66.

In addition, the return to service of a rebuilt continuous miner is the type of work that would likely require miners to connect or disconnect the equipment's cathead. Inspector Gamblin testified that miners would handle catheads if they had problems with the equipment or if they needed to disconnect power in order to do mechanical or electrical work. Tr. 45. He stated that installation of a continuous miner involves primarily electrical work and that "they w[ere] having trouble with the miners electrically and they had been back and forth to the power station." Tr. 34, 45. Bob Epley, the chief engineer at the mine, testified that when a rebuilt miner is exchanged for an older miner, the older miner is not removed until it is determined that "all [of] the bugs" have been worked out of the rebuilt miner. Tr. 103.

Furthermore, although Peabody had a policy requiring a person performing work on equipment to lock out power to the equipment himself, that policy did not apply to trouble-shooting. Tr. 110-11. Even if a lock were placed in the receptacle, however, the cathead connected to the equipment requiring work could still be plugged into the other receptacle at the transformer. Tr. 62-63, 75-77. Both catheads for the continuous miners were interchangeable and could be plugged into either receptacle. Tr. 46. Thus, even if the lock-out policy were followed, a continuous miner could still be mistakenly energized.

Moreover, the judge erred in finding that there was not a reasonable likelihood of injury because miners could use a process of elimination to distinguish between the catheads. In *U.S. Steel II*, the Commission, concluding that injury was reasonably likely to result from an operator's violation of section 75.601, rejected the operator's argument that because only one of two catheads was unmarked, a person would know the identity of the cables through a process of elimination. 6 FMSHRC at 1838. The Commission explained that "relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior.'" 6 FMSHRC at 1838 n.4 (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)). See also *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether violation is S&S). Here, although the cathead for the rebuilt miner was cleaner than the other cathead, the area around the transformer was "pitch dark" and the only light provided was by cap lamps. Tr. 43. In addition, although one cathead was marked, there is no evidence as to what the label actually read and whether it distinguished between the two continuous miners. Epley testified that the practice at the mine was to use reflective tape with the "name of the piece of machinery on it. Like a miner, it would be marked with a white reflector tape and ['miner'] wrote on it." Tr. 111-12. Thus, a person at the transformer might not know that the labeled cathead was connected to the older miner rather than the rebuilt miner.

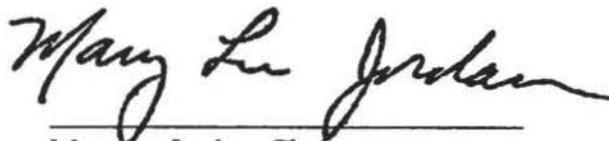
Similarly, injury was not sufficiently reduced by Peabody's practice requiring miners to trace a trailing cable from the equipment to the transformer before disconnecting it. As the inspector testified, miners handle catheads when there are problems with the equipment. Tr. 44-45; PDR at 6. Here, if such problems arose, a miner would have to trace approximately 250 to 300 feet of trailing cable to the transformer before he could verify that he was disconnecting the correct continuous miner. Tr. 38.

Finally, we find unpersuasive Peabody's argument that injury was not reasonably likely because the continuous miners were equipped with lights that are activated only when the miner was plugged into the transformer, making it apparent whether the correct machine had been energized. P. Br. at 4-5. As the Commission has previously recognized, the purpose of the standard's labeling requirement is to "prevent accidental energization of equipment in the first instance." *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1143 (September 1988). In any event, Inspector Gamblin testified that the lights on the continuous miner would not burn, even though the miner was energized at the transformer, if a breaker on the continuous miner had been turned off or if the equipment's methane monitor had deactivated the lights. Tr. 63-64.

### III.

#### Conclusion

For the foregoing reasons, we reverse the judge's determination that Peabody's violation of section 75.601 was not S&S. We remand to the Chief Administrative Law Judge for reassignment and the reassessment of a civil penalty consistent with this opinion.<sup>7</sup>



Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

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<sup>7</sup> Judge Amchan has transferred to another agency.

Commissioner Marks, concurring:

For the same reasons expressed in my concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), wherein I suggested that the *Mathies* test be eliminated, I concur, in result, with my colleagues' conclusion that the violation is S&S. I further note that, since the issuance of *U.S. Steel*, I have repeatedly extended, to operators and the government, the opportunity to challenge the flawed *Mathies* test (particularly the third element) in cases pending before the Commission. However, to date, there has been no response.

A handwritten signature in black ink, appearing to read "Marc Lincoln Marks". The signature is written in a cursive, flowing style with a large initial "M".

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Marc Lincoln Marks, Commissioner

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**ADMINISTRATIVE LAW JUDGE DECISIONS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3993/FAX 303-844-5268

AUG 6 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-298
Petitioner	:	A.C. No. 05-03505-03619
	:	
v.	:	
	:	Deserado Mine
WESTERN FUELS-UTAH, INC.,	:	
(BLUE MOUNTAIN ENERGY, INC.,	:	
Successor Operator),	:	
Respondent	:	

**DECISION ON REMAND**  
**DECISION APPROVING SETTLEMENT**

Before: Judge Cetti

This case is before me upon remand by the Commission for further findings and analysis consistent with its June 3, 1997, Decision Docket No. WEST 93-298, 18 FMSHRC \_\_\_ June 1997. In its decision, the Commission affirmed the findings and orders with respect to Citation Nos. 3587228, 3587229 and Order No. 3587231 and remanded for further consideration the findings and orders with respect to the slippage and sequence switch violations (section 75.1102) alleged in Citation No. 3587226 and the section 75.1101-16(a) violation alleged in Citation No. 3587227.

On July 16, 1997, Timothy M. Biddle of Crowell & Moring L.L.P. filed a Notice of Change of Operator and a Notice of Appearance. The parties state that Western Fuels-Utah, Inc., the operator at the time the citations were issued and at the time the case was tried, sold the mine to Blue Mountain Energy, Inc. and that this successor operator will pay the fines.

The parties after conferring, reached an amicable settlement of the disputed issues and on July 25, 1997, filed a Motion to Approve the Settlement Agreement and dismiss the case. The proffered settlement is consistent with the Commission's Decision and provides for a modest reduction of the MSHA proposed penalties for the remanded Citation Nos. 3587226 and 3587227 as follows:

<u>Citation No.</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3587226	75.1102	\$1,019.00	\$ 750.00
3587227	75.1101-16(a)	1,019.00	750.00
3587228	75.1101-14(a)	724.00	Vacated
3587229	75.1101-15(d)	4,000.00	<u>4,000.00</u>
		TOTAL	\$5,500.00

It has been recognized that settlements are favored as a way of avoiding protracted and expensive litigation. Core-Vent Corp. v. Implant Innovations, Inc., 53 F. 3d 1252, 1259 (Fed Cir. 1995). In this case, upon consideration of the entire record, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

**WHEREFORE**, the motion for approval of settlement is **GRANTED**, and it is **ORDERED THAT THE SUCCESSOR OPERATOR, BLUE MOUNTAIN ENERGY, INC., PAY** a penalty of \$5,500.00 to the Secretary of Labor within 40 days of this order. Upon receipt of payment, this case is dismissed.

  
August F. Cetti  
Administrative Law Judge

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/sh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280

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**AUG 11 1997**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-80
Petitioner	:	A.C. No. 05-02820-03775
	:	
v.	:	Docket No. WEST 96-126
	:	A.C. No. 05-02820-03779
	:	
BASIN RESOURCES, INC.,	:	Docket No. WEST 96-127
Respondent	:	A.C. No. 05-02820-03780
	:	
	:	Golden Eagle Mine

**DECISION**

Appearances: Kristi L. Floyd, Esq. and Edward Falkowski, Esq., Office of the Solicitor, and Ned Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for Petitioner; Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Inc. ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820. The petitions allege 45 violations of the Secretary's safety and health regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and Basin Resources filed a post-hearing brief.

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

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Roof and Rib Support

#### 1. Order No. 4058110

On August 16, 1995, MSHA Inspector Earl Simmons issued a section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.220(a)(1). In the order, the inspector alleged that Basin Resources failed to follow its roof control plan. The order alleges that there was 24 feet of unsupported roof between the last row of roof bolts and the face in the No. 2 right entry crosscut of the 011-0 MMU in the 3<sup>rd</sup> North section. The order alleges that the foreman was aware that the cut was too deep, but did not correct the condition or notify the crew. He determined that the violation was significant and substantial ("S&S") and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$9,000 for the alleged violation. The mine's roof control plan provides for a maximum cut of 20 feet. (Ex. G-2).

Inspector Simmons testified that the condition was serious because of the history of roof falls at the mine and the fact that water was running from the area, indicating that cracks were present in the roof. (Tr. 12). He believed that the condition had existed for about three hours. He determined that the violation was the result of Basin Resources' unwarrantable failure because the foreman was aware of the condition but "took no action to protect the men" who would be entering the area to bolt the roof. (Tr. 14). The inspector believed that the foreman had a duty to warn the bolters of the deep cut so that they could take extra precautions. The deep cut was made on the previous shift. (Tr. 20).

Basin Resources does not contest the fact of violation, but contends that the violation was neither S&S nor the result of its unwarrantable failure. It contends that the record does not support an inference that the 24-foot deep cut made a roof fall reasonably likely. In addition, it argues that the fact that the area was dangered off made it unlikely that anyone would enter the area, except the roof-bolting crew, who would be protected by the ATRS system on the bolting machine. Basin Resources contends that the violation was not caused by its unwarrantable failure because the inspector's allegation is based on two invalid assumptions: that the foreman had definite knowledge that there was a deep cut and that the crew would enter the area of the deep cut without having been warned that there had been a deep cut.

The deep cut had been made on the previous shift and there is no evidence as to how or why it occurred. When David Oxford, the section foreman on the swing shift, observed the area, he thought that the area looked deep, but was not sure if it was a deep cut, or if part of the roof had fallen. (Tr. 529-30). There is no question that the area was dangered off. The three-member crew and the equipment in the section were in a different area. Mr. Oxford testified that he did not immediately tell the crew about the cited condition because he was not certain that it was deep and the crew was working in an area a great distance away. (Tr. 533). He stated that he was going to tell the miners about the possible deep cut when the crew traveled to the area to begin work there. (Tr. 534). He stated he would not have left the section, as feared by the

inspector, without first talking to the crew about the No. 2 entry. (Tr. 535). I credit Mr. Oxford's testimony.

I find that the Secretary did not establish the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is important in this case: whether it was reasonably likely that the hazard contributed to would result in an injury. This element does not require the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury is reasonably likely. The hazard is falling roof. It is not clear if any of the previous roof falls in the mine occurred because of deep cuts. The affected area was dangered off. The deep cut would only pose a hazard if the roof-bolting crew entered the area without being told that the cut was deep or if they failed to notice that the cut was deep. While it is possible that the roof bolting crew could enter the cited area without Mr. Oxford's knowledge, such an event was unlikely. In addition, it is likely that the crew would have noticed the deep cut once they arrived in the area. I find that the Secretary failed to establish the third element of the *Mathies* S&S test.

I find that the Secretary did not establish that the violation was the result of Basin Resources' unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

The inspector was concerned because the oncoming foreman failed to warn the crew about the condition. (Tr. 25-26, 35). The foreman's actions did not demonstrate aggravated conduct. He was aware that the area looked deep and that extra precautions would have to be taken. The only way to correct the violation was to have the area roof bolted. The bolting machine and his crew were working elsewhere. The bolting crew was not scheduled to enter the area with the deep cut until later in the shift. The foreman's failure to immediately warn the roof bolters did not demonstrate reckless disregard, indifference, or even a serious lack of reasonable care. The record shows that he frequently communicated with the members of his crew and there is no indication that he would have ignored the deep cut when it came time for the roof bolters to enter the area. The order is modified to a section 104(a) citation.

## 2. Citation No. 3298166

On October 26, 1995, Inspector Mike Stanton issued a citation alleging a violation of section 75.202(a). In the citation, the inspector alleges that the roadway in the five left section contained cracked and broken ribs that created a hazard. The citation also states that the roof was loose near the intersection of the No. 19 crosscut and near the face areas of the Nos. 1 through 3 entries. Finally, the citation states that the ribs and roof in all three entries and crosscuts off the No. 2 entry were spalling. Inspector Stanton determined that the violation was S&S. The Secretary proposes a penalty of \$2,800 for the alleged violation. Section 202(a) provides, in part,

that roof and ribs of "areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls" of the roof or ribs.

Inspector Jeffrey Fleshman, who accompanied Inspector Stanton, testified that the cited area was taking weight and some of the ribs were cracking open on the corners and sloughing off. (Tr. 330). He stated that a rib fell at the intersection of the No. 19 crosscut and the No. 2 entry while the inspectors were in the area. (Tr. 331; Ex. G-12). He stated that preshift examiners were exposed to the hazard of this particular rib. (Tr. 333). He testified that Basin Resources had been cutting into the roof and floor in this area, which put weight on the ribs. (Tr. 335). He determined that ribs were loose based on a visual examination. (Tr. 343). Inspector Stanton testified that the roof and ribs were loose in the areas that he inspected. (Tr. 350; Ex. G-12). It appeared to him that the roof was "settling down" and putting pressure on the ribs. (Tr. 352).

Basin Resources contests the violation for two basic reasons. First, it contends that the area was subject to a section 103(k) order following a fatal accident that occurred the day before and that its employees had not been allowed into the area to maintain the ribs and roof while the order was in place. Second, it argues that the evidence shows that the ribs and roof were not loose.

The evidence indicates that only a portion of the area cited by Inspector Stanton was covered by a section 103(k) order. (Tr. 332; Ex. G-12). Entry No. 2 was blocked-off in by Crosscut No. 19. *Id.* Most of the areas cited by the inspector were outby that area. Miners were required to be in the area to check for methane and to perform other functions. The Secretary established that at least some of the areas cited by Inspector Stanton were loose. I credit the testimony of Basin Resources' witnesses that some of the cited areas could not be easily barred down. Nevertheless, I find that some of the areas cited were loose. Indeed, one section of the rib in the No. 2 entry outby crosscut No.19 fell during the inspection. I find that the Secretary established an S&S violation of section 75.202(a).

### 3. Citation No. 4057725

On October 31, 1995, Inspector Melvin Shiveley issued a citation alleging a violation of section 75.202(a). In the citation, the inspector alleges that the mine roof in entry No. 4, east mains, was not adequately supported or controlled in that rib cutters were present on both sides of the entry for a distance of about 80 feet. He alleges that the mine roof in the area was taking weight. Inspector Shiveley determined that the violation was S&S. The Secretary proposes a penalty of \$1,400 for the alleged violation.

Inspector Shiveley testified that a rib cutter is a deep crack in the roof adjacent to the rib where material has fallen out. (Tr. 166). He measured the cited cutters and some were 20 to 24 inches deep while others were 8 to 12 inches deep. *Id.* The cutters were in the belt entry and were about 80 feet long. He stated that loose material was present in the cutters. (Tr. 167, 174). He believes that the presence of roof cutters indicates that additional support is required. (Tr. 170). He testified that the area was roof-bolted but that J-channels were not present. (Tr. 172).

Basin Resources contends that the cited area was fully supported with J-channels. In addition, it maintains the cutters were caused by floor heave, rather than roof support problems. Kay Hallows, the former safety director for the mine, testified that the primary cause of rib cutters at the mine is floor heave, which pushes the soft coal pillar into the overburden. (Tr. 473). He testified that if the roof were taking weight in the area, the roof would have been sagging in the middle of the entry. *Id.* Jim Peterson, a former safety inspector with Basin Resources, was present when the citation was issued. He testified that he examined the roof in the area for signs of stress. (Tr. 510-11). He stated that he did not observe any indications that the roof was taking weight in the area. The roof-bolt plates did not show signs of stress, for example. *Id.* He further testified that the area did not need additional roof support, because the area was fully roof-bolted and J-channels were present in the area. (Tr. 510, 512; Ex. R-O). He also felt that the cutters did not represent a slippage of the roof, but were caused by the fact that the pillars were cutting into the roof as a result of floor heave and a change in atmospheric conditions. (Tr. 511, 518).

Inspector Shiveley testified that loose material was present in the cutters. (Tr. 174). Mr. Peterson testified that there was some fallen material in the area that varied between a quarter of an inch to a few inches in diameter. (Tr. 517). I credit the testimony that loose material was present in the cutters that could fall on miners in the area. I credit the testimony of Messrs. Hallows and Peterson, however, that the roof itself was not in danger of falling. Accordingly, I affirm the citation but find that it was not S&S. I find that the evidence establishes there was loose material in the roof, but that it was not reasonably likely that, if any material fell, it would seriously injure anyone. I credit Basin Resources' evidence that the roof and ribs were generally stable, but I find that additional support was necessary to protect miners in the area.

#### 4. Citation No. 4057961

On November 8, 1995, Inspector Simmons issued a citation alleging a violation of section 75.220(a)(1). In the citation, the inspector alleged that Basin Resources failed to follow its roof-control plan. It states that the No. 3 entry crosscut of the 011-0 MMU was cut to exceed the 20-foot maximum width set forth in the plan. The area was 21½ feet wide at one end and 23½ feet wide at the other end. The area was about 15 feet long. The citation alleges that additional support was not provided in the wide areas and that there was unsupported roof inby the cited area. He determined that the violation was S&S. The Secretary proposes a penalty of \$1,400 for the alleged violation.

Inspector Simmons testified that the area of the wide cut was supported with roof bolts. (Tr. 109, 116). The widest area was 23½ feet wide. (Tr. 110; Ex. G-7A). The roof in the area inby this wide area was not supported because it had just been cut. *Id.* He also testified that water was running from the roof in the wide area. He believed that the violation was S&S because the water would weaken the roof and, without supplemental support, the roof was reasonably likely to fall and injure a miner. (Tr. 111-12, 117). He determined that the unsupported area adjacent to the face contributed to the hazard. He testified that a roof-bolting machine was parked in the area. (Tr. 112).

The roof-control plan provides that where an entry is wider than 20 feet, roof bolts and supplemental support must be installed. (Tr. 116). Mr. Hallows testified that supporting the roof in an area where the continuous mining machine operator accidentally cut the entry too wide is a two-step process. First, the wide area must be roof bolted. (Tr. 468). Second, timbers or other supplementary supports must be put into place. *Id.* He stated that it is not safe to carry out step two before step one is completed. (Tr. 469). This testimony was supported by Mr. Peterson. (Tr. 521-22). He testified that the mine had completed step one when the inspector issued the citation and that the area would have been timbered in the near future. (Tr. 522; Ex. R-R). Basin Resources contends that the inspector improperly wrote the citation in the middle of the mining cycle.

I find that the Secretary established a violation. Roof bolts had been installed in the wide area, but supplemental supports had not. I find that the Secretary did not establish the third element of the Commission's S&S test. I credit the evidence presented by Basin Resources that timbers were going to be installed in the area. Although the condition presented a hazard, it was not reasonably likely that the hazard would result in a serious injury, assuming continued mining operations. Supplemental support would have been installed in the normal course of mining. In addition, the area adjacent to the face would have been bolted.

5. Citation Nos. 4057722 and 4057672

Citation No. 4057722, issued by Inspector Shiveley on October 25, 1995, alleges an S&S violation of section 75.202(a). Citation No. 4057672, issued by Inspector Simmons on November 2, 1995, alleges a non-S&S violation of section 75.212. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

**B. Ventilation**

1. Order No. 4057482

On May 2, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.323(c)(1). In the order, the inspector alleged that effective changes or adjustments were not made to the ventilation system to reduce methane concentrations in the four left section, No. 3 return entry to less than one percent. He obtained methane reading of 1.4% and 1.2% in that entry. He determined that the violation was S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$9,000 for the alleged violation. Section 323(c)(1) provides, in part, that when 1.0% or more methane is present in a return air split between the last working place on a working section and where that split of air meets another split of air, "changes or adjustments shall be made at once to the ventilation system to reduce the concentration of methane in the return air to less than 1%."

Inspector Fleshman used a hand-held methane detector. Bottle samples indicated methane levels of 1.2%. (Tr. 225; Ex. G-8). Inspector Fleshman determined that there was a violation based on a number of factors. He reviewed the weekly examination books. These records indicated that the cited area had been experiencing levels of methane over one percent "off and on for a few weeks." (Tr. 227). Methane readings of up to 1.3% were recorded in the weekly examination book during the previous month. (Tr. 228; Ex. G-9). He testified that he issued the order because Basin Resources was not making "adequate changes to eliminate [the methane]." (Tr. 228). The inspector believed that the company was not doing enough to correct the problem. *Id.* He determined that the violation was the result of the operator's unwarrantable failure because of the history of methane in the area and the failure of the operator to reduce the level of methane. (Tr. 232-35). Basin Resources contends that it was making changes in the ventilation in an attempt to reduce the level below one percent and that it did not violate section 75.323(c)(1).

It is clear that the discovery of methane at a level of 1.0 percent or more in a split of air returning from a working section does not establish a violation of the safety standard. The essence of a violation is the failure to make changes or adjustments to reduce the concentration of methane in the return air to below one percent. *See Jim Walter Resources*, 9 FMSHRC 533, 534 (March 1987)(ALJ). In order to understand this case, it is important to put the facts in context. The area cited was in an entry that was being developed for a longwall section. The methane readings were taken at the outby end of the entry some 4,000 feet from the working section. (Tr. 239; Ex. R-C2 map). In fact, the location where the inspector took his methane readings was 50 inby the area where the split exited the 4 left section. (Tr. 239-40). At all pertinent times, the methane levels in the area just outby the working section were below one percent. (Tr. 239).

In the weeks preceding May 2, the methane level in the returns varied considerably. Readings ranged between 0.3% and 1.3%. (Ex. R-G). Inspector Fleshman took the methane readings set forth in the order on May 1 at about 7:25 p.m. (Tr. 252; Ex. R-C2 p.3). Basin Resources immediately began taking steps to reduce the methane below one percent. (Tr.253). At about 8:00 p.m., Basin Resources installed a partial curtain "in the belt entry to try to take air off the belt entry and direct it down the return." (Tr. 253; Ex. R-C2 p.3). Another reading was taken at about 9:00 p.m., which showed that the methane was still too high. During the next hour, Basin Resources made changes at the third north regulator in an attempt to reduce the level of methane. (*Id.* at 254). This change redirected about 8,600 cfm of air. At about 11:35 p.m., the mine made another air change at this regulator to reduce the level of methane in the entries.

At about 2:10 a.m. on May 2, the inspector took another methane reading in the return. The hand held methane detector showed a methane reading of 1.2% while bottle sample showed 1.04% methane. (Tr. 256; Ex. R-C2 p.3). At that time, Inspector Fleshman issued a non-S&S citation under section 104(a) of the Mine Act for the alleged violation that included a high negligence finding. Shortly thereafter, the mine made adjustments to a curtain in the face area. At about 3:30 a.m., readings of about .8% and .9% methane were taken by Dave Pagnotta, the shift supervisor. (Tr. 413-14; Ex. R-C2 pp. 2-3). It appears that Inspector Fleshman was advised

of these readings before he left the mine. *Id.* Later on May 2, other adjustments were made to the third north No. 1 entry regulator and the third left intake. (Tr. ; Ex. R-C2 p.3). Readings between .7% and .8% were obtained after these changes were made. At about 4:10 p.m. on May 2, Inspector Fleshman called to advise the mine that he was modifying the citation to a section 104(d)(2) order with S&S findings. (Tr. 260). Inspector Fleshman testified that he modified the citation at the direction of his field office supervisor, Larry Ramey. (Tr. 250). The inspector testified that he told the general mine foreman, Derrel Curtis, that he disagreed with the modification. *Id.* Derrel Curtis confirmed this conversation. (Tr. 379-80).

Inspector Fleshman testified that the reason why he issued the citation was because the changes that were made at the mine between 7:25 p.m. on May 1 and 2:10 a.m. on May 2 "were not effective in reducing the methane." (Tr. 260). He believed that the quantity of air being directed to the return entry to dilute the methane did not increase with these changes with the result that the concentration of methane did not decrease. (Tr. 262). He felt that the initial changes made were temporary expedients rather than permanent changes. (Tr. 268). He believed that the methane problem was caused by a short circuit in the ventilation system. (Tr. 270). Inspector Fleshman interprets the safety standard to mean that if an operator is given a reasonable time to make changes and the changes it makes "are not satisfactory to reduce the methane, [an inspector has] no choice but to issue the citation." (Tr. 263). In this instance he believed that five hours was a reasonable time to comply with the standard. *Id.* He does not dispute that mine officials were acting in good faith to comply with the standard when making the changes. (Tr. 264, 266-67).

I find that the Secretary did not establish a violation of the standard. It is clear that Basin Resources started making changes and adjustments to the ventilation system in the 4 left returns to try to reduce the concentration of methane as soon as the high reading was reported. Derrel Curtis testified that the company made extensive adjustments to the ventilation system to reduce the methane on the day the citation was written. (Tr. 387). Although Inspector Fleshman believed that the methane problem was caused by a short circuit in the ventilation system, he agreed that the company was making good faith attempts to bring down the concentration of methane. He issued the citation at 2:10 a.m. on May 2 because the company's attempts were not successful. There may come a point when a mine operator has exhausted its options or has been given sufficient time to reduce the level of methane. But in this case, the evidence shows that Basin Resources was proceeding as quickly as it could to make effective changes in the ventilation system. There is no allegation that it was not paying sufficient attention to the problem or that it had not devoted sufficient resources to it. Accordingly, the order is vacated.

## 2. Order No. 4057464

On June 13, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.370(a)(1). In the order, the inspector alleged that the ventilation plan was not being followed in that several ventilation devices were not being maintained in a manner to serve their intended purpose. The order states that a 2½ foot square man door was blocked open in the 3 north section, No. 3 entry, between crosscuts 49 and 50, which allowed 48,431 cfm

of intake air to be short-circuited into the return. In addition, the order alleges that the stopping in the same entry between crosscut Nos. 53 and 54 was blown out. He determined that the violation was not S&S but was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$6,500 for the alleged violation.

Basin Resources does not contest the fact of violation, but contends that the violation was not the result of its unwarrantable failure. Inspector Fleshman testified that he considered the violation to be unwarrantable because the mine had a history of methane problems, the stopping had been blown out for "quite some time," the date-board indicated that the area had been examined by the weekly examiner, and the examiner told the inspector that the stopping had been blown out for a long time. (Tr. 289-91, 294; Ex. G-10B). The inspector believes that the short circuit created by this violation was responsible for the methane problems in the return described in Order No. 4057482 above. (Tr. 302). He stated that about 48,000 cfm of air was coursing through the stopping. (Tr. 298). He testified that he talked about the blown-out stopping with Ed Dominguez, the UMWA fireboss, who advised him that the condition had existed for several months. (Tr. 294, 297, 302). The inspector said that he became upset with Mr. Dominguez because he had not taken any steps to correct the problem or report it to management. *Id.*

Mr. Hallows spoke with Mr. Dominguez the day after the order was issued. Mr. Dominguez told Mr. Hallows that he did not understand why the inspector issued the order. (Tr. 437). He told Hallows that, except for some minor leakage, the stopping was intact the day before the order was issued. (Tr. 437-38). Mr. Dominguez, who is no longer employed by Basin Resources, testified that he was a UMWA fire boss with 20 years of underground coal mining experience. He was on the UMWA safety committee. He testified that he examined the area the day before the citation was issued and the stopping was intact. (Tr. 482-83). He denied that he told the inspector that the condition had existed for several months. (Tr. 486). On rebuttal, Inspector Fleshman stated that he had several conversations with Mr. Dominguez on June 13 and that he may have misunderstood what Mr. Dominguez was trying to tell him. (Tr. 568-70).

The principal reason for Inspector Fleshman's unwarrantable failure finding is the length of time that the condition existed with the knowledge of the fire boss. I credit the testimony of Mr. Dominguez that the condition had not existed for as long a period of time as the inspector believed. Accordingly, I vacate the inspector's unwarrantable failure determination, and affirm the violation as a section 104(a) citation.

### 3. Order No. 4057466

On June 15, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.370(a)(1). In the order, the inspector alleged that the ventilation plan was not being followed because the third north roadway, entry No. 5, between crosscut Nos. 49 and 57, was extremely dry and dusty. He determined that the violation was not S&S but was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$6,500 for the alleged violation.

The provision of the ventilation plan that Inspector Fleshman contends was violated provides that dust on haulage ways "shall be controlled by water wetting or calcium/magnesium chloride applications or other dust suppressants as needed to maintain respirable dust on intake at or below 1.0 mg/m<sup>3</sup>." (Tr. 312; Ex. G-11). He stated that dusty roadways present three hazards: (1) a risk of a fire or explosion, (2) reduced visibility, (3) respirable dust. (Tr. 312-13). The inspector testified that the air velocity in the area was high and one could see suspended dust whenever a vehicle passed. (Tr. 314). He said the condition was obvious and the operator's negligence was high. He testified that the area dries out so quickly that the entry requires a continuous application of water. (Tr. 315). He stated that he did not mark the order as S&S because he did not take a sample of the dust to see if respirable dust exceeded 1.0 mg/m<sup>3</sup>. *Id.* He determined that the violation was unwarrantable because the roadway had been cited many times. (Tr. 316). Inspector Fleshman was advised that the road had been watered earlier that shift. (Tr. 317-18).

The cited provision of the ventilation control plan is unambiguous. Dust on roadways must be controlled "to maintain respirable dust on intake at or below 1.0 mg/m<sup>3</sup>." (Ex. G-11). The Secretary did not establish that respirable dust was greater than 1.0 mg/m<sup>3</sup>. Accordingly, the Secretary did not meet its burden of proof. *Energy Fuels Coal Co., Inc.*, 12 FMSHRC 698, 703-04 (April 1990)(ALJ). For the reasons set forth in that decision, the order is vacated.

#### 4. Citation No. 4057727

On October 31, 1995, Inspector Shiveley issued a citation alleging a violation of section 75.370(a)(1). In the citation, the inspector alleges that Basin Resources was not complying with the ventilation plan in the 5 left section, entry Nos. 2 and 3, because dry haul roads existed for a distance of 110 feet starting at crosscut No. 19. Inspector Shiveley determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation.

The Secretary relies on the same provision of the ventilation plan as Order No. 4057466 above. The Secretary did not establish that the respirable dust was greater than 1.0 mg/m<sup>3</sup>. For the reasons discussed above, the citation is vacated.

#### 5. Citation No. 4057742

On October 4, 1995, Inspector Shiveley issued a citation alleging a violation of section 75.351(f). In the citation, the inspector alleges that the atmospheric monitoring system ("AMS") for the bleeder system in NW-1 through NW-6 had not been calibrated at least once every 31 days. The citation states that it was last calibrated on September 1, 1995. Inspector Shiveley determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation.

Inspector Shiveley determined that there was a violation based on his review of the company's records. (Tr. 162). Mr. Hallows testified that Basin Resources could not calibrate the AMS because the area was subject to a section 107(a) order of withdrawal. (Tr. 450; Ex. R-L).

The record reveals that a section 107(a) order was issued by Inspector Shiveley on September 5, 1995, and that the order was not terminated until October 10, 1995. (Ex. R-L). The order states that it covered the No. 3 entry of the four left longwall starting inby crosscut No. 44 and continued for a distance of 50 feet. *Id.* There is no dispute that the calibration could not be made in the area covered by the imminent danger order. Nevertheless, the Mine Act imposes strict liability and the citation is affirmed as a non-serious violation with low negligence.

#### 6. Citation No. 4057673

On November 2, 1995, Inspector Simmons issued a citation alleging a violation of section 75.364(a)(2)(iii). In the citation, the inspector alleges that the four left bleeder entry was not examined in its entirety at least every seven days. The citation states that the bleeder had not been examined beyond crosscut No. 38 because the entry was blocked by a roof fall or floor heave. The last examination was conducted on October 25, 1995. Inspector Simmons determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard requires a weekly examination of at least one entry of each set of bleeder entries used as part of a bleeder system.

There is no dispute that the weekly examination was not performed beyond crosscut No. 38. The standard requires that the examiner travel the entry "in its entirety." Basin Resources could not get into the area to perform the examination because of the conditions in the area. The inspector admitted that a person could not get through the entry beyond that crosscut. (Tr. 71). The standard provides that a primary purpose of the examination is to measure methane and oxygen concentrations, and to determine if a sufficient quantity of air is moving in the proper direction. The inspector was concerned that methane could build up in the bleeder or water could accumulate. (Tr. 72).

Basin Resources argues that the citation should be vacated because unsafe conditions made an examination impossible. It points to section 75.364(d), which requires that hazardous conditions be corrected immediately and miners withdrawn from the area until the conditions are corrected. I find that the Secretary established a violation. Basin Resources did not perform a sufficient examination of the bleeder entry to comply with the requirements of the standard. The fact that it was blocked may be taken into consideration when evaluating negligence. Basin Resources was required to correct the hazardous condition immediately. Accordingly, the citation is affirmed as a non-serious violation with low negligence.

#### 7. Citation No. 4057680

On November 8, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(1). In the citation, the inspector alleged that the primary escapeway in the No. Four entry of the 3<sup>rd</sup> North section was not being maintained to assure safe passage of miners because water in excess of 20 inches was present between crosscuts 66 and 67. He determined that the violation was not S&S. The Secretary proposes a penalty of \$1,450 for the

alleged violation. The safety standard requires escapeways to be maintained in a safe condition to "always assure passage of anyone, including disabled persons."

Inspector Simmons testified that he was concerned that someone traveling through the water could fall and become seriously injured. (Tr. 100). He assumed that miners would take an alternate route that was not affected by the water. (Tr. 101-02). Mr. Hallows testified that the mine was in the process of pumping out the water in the area and that the escapeway had been rerouted to avoid the water. (Tr. 464-65; Ex. R-S). I find that the Secretary established a violation. Basin Resources' argument that the citation should be vacated because the escape had been rerouted is rejected. Accordingly, the citation is affirmed as a non-serious violation.

#### 8. Citation Nos. 4057506 and 4057962

Citation No. 4057506, issued by Inspector Fleshman on May 24, 1995, alleges an S&S violation of section 75.380(d)(4). It was originally issued as a section 104(d)(2) order, but the parties agreed to reduce the level of negligence, delete the unwarrantable failure designation, and modify it to a section 104(a) citation. (Tr. 4, 285-86). Citation No. 4057962, issued by Inspector Simmons on November 9, 1995, alleges a non-S&S violation of section 75.364(b)(2). Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

### C. Combustible Materials

#### 1. Order No. 3849793

On April 7, 1995, Inspector Shiveley issued a section 104(d)(2) order alleging a violation of section 75.400. In the order, the inspector alleges that accumulations of paper, empty oil cans, and broken wooden pallets were allowed to be stored in a trash wagon in crosscut 39 of 4 Left section. The order states that miners have been putting trash in the wagon for two days. It also states that the practice of storing trash in open trash wagons was previously discussed with management. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$6,000 for the alleged violation. Section 75.400 provides, in part, that coal dust and other combustible materials shall be cleaned up and not be allowed to accumulate in active workings.

Inspector Shiveley testified that when he saw the trash wagon, he asked Joe Whalen, a miner, how long it had been there. He testified that the miner replied that the wagon had been there at least a day and half. (Tr. 124). He also believed that the amount of trash in the wagon indicated that it had been there for some time. (Tr. 131). The inspector immediately issued the order. *Id.* He determined that the violation was unwarrantable because the issue of trash wagons had been previously discussed with mine management. (Tr. 125-28). In addition, the condition was obvious and management should have realized that the wagon needed to be emptied. *Id.*

Tom Sciacca, a former accident-prevention coordinator at the mine, testified that the amount of trash in the wagon could have accumulated in a shift. (Tr. 403, 405-07). He stated that the procedure at the mine was to dump the trash onto a rail car whenever it became full. (Tr. 404). He stated that the trash wagon was scheduled to be removed from the section the morning of April 7. *Id.*

It is clear that the trash wagon had been in crosscut 39 for a day and a half, but it is not clear how long the trash had been there. (Tr. 132). It could have been emptied during that period without the knowledge of Mr. Whalen. (Tr. 137). I credit the testimony of Mr. Sciacca that trash can accumulate quickly. When a trash wagon is taken to be emptied, another trash wagon is put in its place. (Tr. 407). Thus, the fact that a trash wagon was in an area for several days does not establish that the trash had been there for the same length of time.

A mine operator is required to immediately remove accumulations of coal dust. Trash is another matter, however. Under the standard, a mine operator must have a regular program to clean up trash. Whether there is a violation must be considered on a case-by-case basis. Basin Resources collects its trash in trash wagons and removes them when they are full. I find that the Secretary did not establish a violation. Inspector Shiveley relied on the statement of Mr. Whalen to establish a violation. He did not ask Mr. Whalen if he knew how long the trash had been in the crosscut, he asked how long the wagon had been there. Thus, the Secretary did not establish that the trash had been allowed to accumulate in the crosscut for an unreasonable length of time. *See Basin Resources, Inc.*, 19 FMSHRC 711, 717-18 (April 1997)(ALJ). Accordingly, the order is vacated.

## 2. Order No. 4057499

On May 24, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of section 75.400. In the order, the inspector alleges that about 30 empty rock-dust bags, cardboard, empty plastic containers, and rags were allowed to exist in 4 left section along Crosscut 41 between entry Nos. 2 and 3. Inspector Fleshman determined that the violation was not S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$7,000 for the alleged violation.

Inspector Fleshman testified that the violation was unwarrantable because he observed the trash on the previous day and told Mr. Sciacca that it needed to be cleaned up. (Tr. 276; Ex. R-D2). Mr. Sciacca testified that a trash wagon had been hooked up to a scoop and was traveling around the mine picking up trash when the order was issued. (Tr. 417). He stated that the cited accumulation had not been cleaned up because the trash wagon had not arrived at that location at the time of the inspection. (Tr. 418). He testified that the wagon arrived about 10 minutes after the order was issued. Inspector Fleshman warned Mr. Sciacca about the trash at 2:50 a.m. on May 23 and issued the order at 12:50 a.m. on May 24.

Basin Resources does not contest the violation but contends that it was not caused by its unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than

ordinary negligence. It is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” The Commission has held that “a number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

In this case, the violative condition had existed for at least a day and Basin Resources was put on notice that greater efforts were necessary to come into compliance. On the other hand, the violation was not particularly extensive and operator had begun efforts to come into compliance. Taking these factors into consideration, I find that the Secretary established that the violation was the result of Basin Resources’ unwarrantable failure. The failure to remove the trash in a more expeditious manner was the result of a serious lack of reasonable care.

### 3. Citation No. 4057613

On September 20, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 77.202. In the citation, the inspector alleged that fine coal dust was allowed to accumulate on electrical control boxes in the control room of the coal tipple building. The citation states that the fine coal dust was on top of all of the control boxes and was one-sixteenth to one-eighth of an inch thick. He determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard states, in part, that coal dust shall not be allowed to accumulate in dangerous amounts on the surfaces of structures, enclosures, or other facilities.

Inspector Shiveley testified that when he entered the electrical control room, he observed a layer of fine coal dust on the surfaces of electrical equipment. (Tr. 147). He determined that it was unlikely that anyone would be injured as a result of the violation, but that coal dust was present in a combustible amount. (Tr. 148). He stated that even a small film of coal dust is combustible and would be a violation of the standard. He testified that arcing occurs when electrical control boxes are turned on or off creating an ignition source for the fine coal dust. (Tr. 151).

Basin Resources argues that the mere presence of coal dust is not a violation of the standard. Rather, the Secretary must show that the amount of dust is sufficient to propagate a fire. I find that the Secretary met her burden of proof. Whether an accumulation of fine coal dust is “dangerous” depends on the amount of the accumulation and the existence and location of sources of ignition. See *Rochester and Pittsburgh Coal Co.*, 12 FMSHRC 220, 231-32 (February 1990)(ALJ). The inspector determined that the accumulation was one-eighth of an inch thick in many areas and that it covered all surfaces. There were sources of ignition in the immediate vicinity. Although it was unlikely that the accumulation would ignite and cause a serious injury,

the fine coal dust was allowed to accumulate in dangerous amounts. Accordingly, the violation is affirmed.

4. Citation Nos. 4057647, 4057726, 4057674, and 4057963

Citation No. 4057647, issued by Inspector Simmons on September 29, 1995, alleges a non S&S violation of section 75.400. Citation No. 4057726, issued by Inspector Shiveley on October 31, 1995, alleges a non-S&S violation of section 75.402. Citation No. 4057674, issued by Inspector Simmons on November 3, 1995, alleges a non S&S violation of section 75.403. Citation No. 4057963, issued by Inspector Simmons on November 14, 1995, alleges an S&S violation of section 75.400. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

**D. Electrical Equipment**

1. Citation No. 4057676

On November 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.512. In the citation, the inspector alleged that a complete weekly examination had not been conducted on all electrical equipment for the week of October 29 through November 4, 1995. The citation states that the circuits in the monitoring system for the bleeders from NW-1 through NW-6 were last examined on October 25. He determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard requires that all electrical equipment be examined on a weekly basis, at section 75.512-2.

There is no dispute that a complete weekly examination was not performed. Basin Resources contends that its personnel could not get into the area to perform the examination because of the conditions in the area. The inspector admitted that a person could not get to the cited circuits because the area was blocked by the same roof fall discussed with respect to Citation No. 4057673. (Tr. 88-89, 91). Mr. Hallows testified that, due to unsafe roof conditions, the examination could not be made. (Tr. 462; Ex. R-Q).

Basin Resources argues that the citation should be vacated because unsafe conditions made an examination impossible. I find that the Secretary established a violation. Basin Resources did not perform the examination of the cited equipment. The Mine Act imposes strict liability on mine operators. The fact that the area was blocked may be taken into consideration when evaluating negligence. Accordingly, the citation is affirmed as a non-serious violation, with low negligence.

## 2. Citation No. 4057612

On September 20, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 77.516. In the citation, the inspector alleged that the ¾-inch metal conduit for the 480-volt power circuit to the vibrator screen motor in the coal tipple was not supported as required by the National Electrical Code. The citation states that the conduit was required to be supported within four feet of each box, cabinet, or other termination point. He determined that the violation was not S&S. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that all wiring and electrical equipment shall meet the requirements of the National Electrical Code.

Basin Resources does not dispute that the condition violated the standard. It argues that the condition had existed for some time and had never been cited by an MSHA inspector. Mr. Hallows testified that the conduit had never been supported at the location cited by the inspector. (Tr. 448; Ex. R-K). He further testified that MSHA inspectors had inspected the area many times. Mr. Salerno confirmed this testimony. (Tr. 544-47). I credit this testimony.

While it is true that MSHA inspectors had traveled through the area many times during previous inspections and had never issued any citations for the condition, it is also true that Basin Resources managers had traveled through the area on numerous occasions. It is a mine operator's responsibility to take steps to comply with safety standards, not MSHA inspectors. I affirm the citation as a non-serious violation and reduce the negligence slightly.

## 3. Citation Nos. 4057723, 3590053, 4057611, and 4057677

Citation No. 4057723, issued by Inspector Shiveley on October 25, 1995, alleges a non-S&S violation of section 75.503. Citation No. 3590053, issued by Inspector Fleshman on October 26, 1995, alleges a non-S&S violation of section 75.503. Citation No. 4057611, issued by Inspector Shiveley on September 20, 1995, alleges a non-S&S violation of section 77.502. Citation No. 4057677, issued by Inspector Simmons on November 6, 1995, alleges a non-S&S violation of section 75.507. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

### **E. Machinery and Equipment**

#### 1. Citation No. 4057648

On September 29, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1722(a). In the citation, the inspector alleged that a guard was not provided for the right side of the take-up roller on the No. 8 belt conveyor. The guard was leaning against the coal rib. The citation states that the belt and rear take-up roller could easily be contacted. He determined that the violation was S&S and Basin Resources' negligence was moderate. The

Secretary proposes a penalty of \$1,450 for the alleged violation. The safety standard requires, in part, that guards be provided for gears; drive, head, tail, and take-up pulleys; flywheels; and similar moving machine parts that may be contacted by and cause injury to persons.

Basin Resources stipulated that the violation occurred and that the violation was S&S, but contends that its negligence was low. (Tr. 38). Inspector Simmons testified that the guard was taken off at some point and was leaning against the rib. (Tr. 40; Ex. G-4). He believes that the person who took off the guard was "inattentive" and that a finding of moderate negligence is appropriate. *Id.* The belt was running when he issued the citation. He said that anyone could see that the guard was leaning against the rib and had not been replaced. (Tr. 42, 42). He believed that a miner should have been able to see this condition and correct it. *Id.*

Basin Resources argues that the condition was so obvious and easy to remedy that the hourly employee who took off the guard should have replaced it before starting the belt. It believes that the negligence of the miner who took off the guard should not be imputed to the operator in this instance, citing *Fort Scott Fertilizer-Cullor, Inc.* 17 FMSHRC 1112, 1115-16 (July 1995).

The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. *Id.* The Secretary bears the burden of proof on the issue of negligence. I agree with Basin Resources that the Secretary did not establish that the company's negligence was moderate. I find that Basin Resources' negligence was less than moderate and reduce the penalty accordingly.

## 2. Citation No. 4057741

On October 4, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.1722(a). In the citation, the inspector alleged that a guard was not extended a sufficient distance to prevent a person from reaching into fan blades and belts on a loader/forklift. The citation states that a 3-by 18-inch opening was present in the engine compartment around the generator pulley, a belt, and the fan blade. He determined that the violation was S&S and Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,450 for the alleged violation.

Inspector Shiveley testified that a number of people work on and around the forklift. (Tr. 154). The area of exposure was about waist high and was within the area where people could expose their hands. *Id.* He considered the violation to be S&S because of the activity and exposure. (Tr. 155). He believed that it was reasonably likely that somebody would contact the moving machine parts and sustain a serious injury. *Id.* Mr. Sciacca testified that it would be impossible for the operator of the forklift to place his hands into the cited opening. (Tr. 419). He testified that other miners could not get their hands into the opening because the mine uses pallets to transport items. (Tr. 420-21). Thus, he did not believe that anyone would be close to the opening when the forklift was operating.

Basin Resources contests the inspector's S&S and negligence determinations. I find that the Secretary met her burden of proof with respect to both determinations. Assuming continuing normal mining operations, it was reasonably likely that someone would inadvertently come into contact with the moving machine parts. The Secretary is not required to establish that it was more probable than not that an injury would result. I find that it is reasonably likely that a miner working around the forklift will slip or otherwise accidentally come into contact with the moving machine parts. The Secretary also established that Basin Resources was negligent with respect to the violation.

### 3. Citation No. 4057675

On November 3, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1722(c). In the citation, the inspector alleged that the guard provided for the slope belt tail roller was not secured in place while the belt conveyor was running. He determined that an opening 2½ feet wide and 6 feet high was present that exposed the pinch points of the belt and tail roller. He determined that the violation was S&S and Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,450 for the alleged violation. The safety standard requires, in part, that guards shall be securely in place while machinery is being operated, except when the machinery is being tested.

Inspector Simmons testified that a section of the guard was removed and not replaced. (Tr. 81; Ex. G-6). He further testified that he has issued two citations in the past for the same condition at this location. (Tr. 82). Basin Resources does not contest the violation or the S&S determination. It contends that the Secretary did not establish that its negligence was moderate, as discussed above with respect to Citation No. 4057648. I find that the Secretary met her burden of proof. On prior inspections, Inspector Simmons issued similar citations at the same location. Management is responsible for taking adequate steps to ensure that its workforce adheres to MSHA's safety standards. The citation is affirmed as written.

### 4. Citation No. 4057678

On November 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1722(c). In the citation, the inspector alleged that the guard provided for the fan pulley and belts on a continuous mining machine was not secured in place. The guard had slid forward leaving a six-inch by six-inch opening directly in front of the fan pulley and belts. He determined that the violation was not S&S and Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,019 for the alleged violation.

Inspector Simmons testified that the mining machine operator should have made sure that the guards were in place. (Tr. 94). The machine operator should have taken steps to make sure that the guard would not slide forward while the machinery was operating.

Basin Resources contends that it should be assessed a low penalty for this violation because its negligence was low. It argues that the negligence of the mining machine operator in

not correcting the problem should not be imputed to it. There is no dispute that the sliding problem was easy to fix. I agree with Basin Resources that the Secretary did not establish that the company's negligence was moderate. I find that Basin Resources' negligence was less than moderate and reduce the penalty accordingly.

5. Citation No. 4057944 and Order No. 4057671

On October 17, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1403-5(j). In the citation, the inspector alleged that no guard or crossover was provided in by the No. 5 left belt drive where a beltman was observed crossing under the belt about ten feet in by the head drive. He determined that the violation was S&S and Basin Resources' negligence was moderate. Section 1403-5(j) is a safeguard criterion that provides that persons shall not cross moving belt conveyors except where suitable crossing facilities are provided.

Inspector Simmons issued the citation because he observed a beltman crossing under the moving belt. (Tr. 45). He stated that a safeguard was issued at the mine on February 24, 1994, requiring crossovers or guards where persons travel under the belt. (Tr. 46). The safeguard required the installation of a guard "to prevent material from falling and to prevent persons and equipment from contacting the belt conveyor at all locations where personnel and equipment pass under moving belt conveyors." (Ex. G-5 p. 2). When the inspector arrived in the area, he observed a beltman on the other side of the drive. Inspector Simmons asked him "how he got over there," because the inspector wanted to go over there too. (Tr. 48-49). Instead of answering him, the beltman apparently walked over to the inspector by going under the moving belt. *Id.* The inspector then issued the citation. The belt was about five feet high at that location. The inspector did not see any crossovers or guarded locations along the belt. (Tr. 52).

On November 1, 1995, Inspector Simmons issued Order No. 4057671, under section 104(b) of the Mine Act. The order states that no effort was made to install a guard or crossover in by the No. 5 belt drive where a beltman traveled under the belt. Inspector Simmons testified that when he returned to the area two weeks later, no guard had been installed. (Tr. 52-53). He also did not observe any material in the area to indicate that the operator had begun work on the guard. The Secretary proposes a penalty of \$4,600 for the alleged violation.

Basin Resources contends that the only reason that the beltman traveled under the moving belt is because he thought Inspector Simmons was directing him to do so. Inspector Simmons admitted that it was possible that the beltman crossed under the belt because the beltman thought that the inspector wanted to talk to him. (Tr. 58). He testified, however, that this beltman told him that he had crossed under the moving belt earlier in the shift. (Tr. 59). The inspector also testified that there was no other way to get from one side of the belt to the other in the vicinity of the belt drive.

Mr. Salerno testified when the inspection party arrived at the belt, Inspector Simmons "hollered something" to the beltman and the beltman walked under the belt to the inspector. (Tr.

550). He testified that there was a cross-under in the vicinity, but he did not know how far away it was. He also testified that between the time the original citation was issued and the section 104(b) order was issued, a guard was installed at the cited location. (Tr. 548-49; Ex. R-M). He testified that the guard must have been removed in the interim.

I find that the Secretary established an S&S violation of the safeguard. It is undisputed that the beltman walked under the moving conveyor while Inspector Simmons was there. More importantly, the beltman told the inspector that he had walked under the conveyor in the past. Based on the record, I find that a beltman would need to be on both sides of the belt during a shift and that there was no area in the vicinity where he could safely travel under the belt. The violation was S&S because it was reasonably likely that a miner would be seriously injured, assuming continued normal mining operations. Coal or other material could fall off the belt and strike a miner, or a miner's clothing could become entangled in the moving parts and he could be seriously injured as a result.

I credit the testimony of Inspector Simmons that the condition had not been abated when he revisited the area on November 1, 1995. He originally determined that the condition could be abated in about three hours. Mr. Salerno testified that, depending on the availability of materials, the guard could have been fabricated and installed in about three hours. (Tr. 552-54). He further testified that the outby foreman told him that a guard had been put up after the citation was issued. I find that the condition had not been abated on November 1. It is highly unlikely that a guard would have been put up and then completely removed from the area. Basin Resources did not present any testimony explaining why such an action would have taken place. Inspector Simmons testified that there were no indications at the belt that a guard had once been in place or that the company was in the process of installing a guard.

I find that the Secretary established a *prima facie* case that the "violation described in the underlying citation existed at the time the section 104(b) order was issued." *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (April 1989). I also find that Basin Resources did not rebut the *prima facie* case by showing that "the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred." *Id.* Accordingly, 104(b) order No. 4057671 is affirmed.

#### **F. Other Citations**

1. Citation Nos. 4057616, 4057617, 4057618, 4057619, 4057620, 4057649, 4057650, 4057651, 4057652, and 4057653.

On October 3, 1995, Inspectors Shiveley and Simmons issued citations alleging violations of the Secretary's part 50 regulations. Citation No. 4057616 alleges a non-S&S violation of 30 C.F.R. §50.30(a). The remaining nine citations allege non-S&S violations of section 50.20-1. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. The violations were not serious. Based on the description of

the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III below.

2. Citation No. 4057755

On October 18, 1995, Inspector Shiveley issued a citation alleging an S&S violation of section 77.1710(g). Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the description of the violation in the citation, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalty set forth in section III of this decision.

3. Citation No. 9894927

At the hearing, the Secretary agreed to vacate this citation. (Tr. 3-4).

## II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 925 citations and orders in the 24 months preceding October 17, 1995, and that Basin Resources paid penalties for 736 of these citations and orders during the same period. (Ex. G-1B). I also find that Basin Resources was a rather large mine operator. The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. With one exception, the Secretary has not alleged that Basin Resources failed to timely abate the citations and order. Unless otherwise noted above, all of the violations were serious and the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

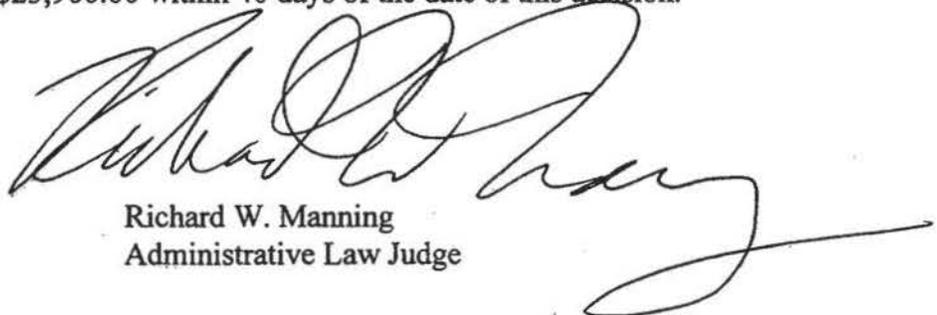
## III. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
<u>WEST 96-80</u>		
3849793	75.400	vacated
4057482	75.323(c)(1)	vacated
4057499	75.400	\$4,000.00
4057506	75.380(d)(4)	1,200.00
4057464	75.370(a)(1)	400.00
4057466	75.370(a)(1)	vacated
4058110	75.220(a)(1)	400.00
<u>WEST 96-126</u>		
4057611	77.502	400.00
4057612	77.516	100.00
4057613	77.202	400.00
4057647	75.400	400.00
4057648	75.1722(a)	600.00
4057616	50.30(a)	100.00
4057617	50.20-1	100.00
4057618	50.20-1	100.00
4057619	50.20-1	100.00
4057620	50.20-1	100.00
4057649	50.20-1	100.00
4057650	50.20-1	100.00
4057651	50.20-1	100.00
4057652	50.20-1	100.00
4057653	50.20-1	100.00
4057741	75.1722(a)	1,200.00
4057742	75.315(f)	200.00
4057944	75.1403-(5)(j)	4,500.00
4057755	77.1710(g)	1,200.00
<u>WEST 96-127</u>		
4057722	75.202(a)	1,200.00
4057723	75.503	200.00
3298166	75.202(a)	1,200.00
3590053	75.503	200.00
4057725	75.202(a)	400.00
4057726	75.402	200.00
4057727	75.370(a)(1)	vacated
4057672	75.212(c)	400.00

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4057673	75.364(a)(2)(iii)	100.00
4057674	75.403	400.00
4057675	75.1722(c)	1,200.00
4057676	75.512	100.00
4057677	75.507	200.00
4057678	75.1722(c)	100.00
4057680	75.380(d)(1)	200.00
4057961	75.220(a)(1)	400.00
4057962	75.364(b)(2)	200.00
9894927	70.207	vacated
4057963	75.400	1,200.00
<b>Total Penalty</b>		<b>\$23,900.00</b>

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and order listed above are hereby **VACATED, AFFIRMED, or MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$23,900.00 within 40 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 13 1997**

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-235
Petitioner	:	A. C. No. 42-01280-03644
v.	:	
	:	Docket No. WEST 96-338
WHITE OAK MINING	:	A. C. No. 42-01280-03654
AND CONSTRUCTION CO., INC.,	:	
Respondent	:	White Oak #2 Mine

**DECISION**

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, Richard L. Bury, Conference and Litigation Representative, Mine Safety and Health Administration, Price, Utah, for Petitioner; William K. Doran, Esq., Heenan, Althen & Roles, Washington, D.C., for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against White Oak Mining and Construction Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege five violations of the Secretary's mandatory health and safety standards and seek penalties of \$57,679.00. For the reasons set forth below, I vacate one order, affirm one order, modify and affirm one citation, approve the settlement of the two remaining citations and assess penalties of \$33,880.00.

A hearing was held April 22-24, 1997, in Price, Utah. The parties also submitted post-hearing briefs in the cases.

**Background**

The White Oak No. 2 Mine is an underground coal mine owned and operated by White Oak Mining and Construction Company in Carbon County, Utah. White Oak began operating the mine in 1993. The same mine had been operated by Valley Camp from 1972 through 1992. The mine was closed between November, 1992, and October, 1993. The mine employs an average of 114 miners and has two production shifts and one maintenance shift per day.

Under both Valley Camp and White Oak, operation of the mine has essentially been the same. Mining is done on the "room and pillar" method using remote-control continuous-mining machines to do 40 foot, extended cut mining. The mining sequence is that the continuous miner cuts coal at the face, the entry is roof bolted and then cleaned. Mining is performed in a 20 foot coal seam, which means that both the roof and the floor, as well as the ribs, are coal.

**Docket No. WEST 96-235**

Prior to the hearing, the Secretary filed an agreement to settle Citation Nos. 3855479 and 3585746. The agreement provided for a 20 percent reduction in the penalties, from \$1,660.00 to \$1,328.00, based on the operator's ability to pay. The agreement stated: "This operator is currently making monthly payments to MSHA to catch up on a debt that exceeds \$200,000.00, and further penalties will impair its ability to continue in business." The agreement was affirmed by the parties at the hearing. (Tr. 645-46.) Based on the representations and documentation submitted, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and accepted the agreement. (Tr. 647.)

**Citation No. 3855479**

This citation was contested at the hearing. MSHA Inspector Lana J. Passarella testified that she was performing quarterly, AAA inspection at the White Oak No. 2 Mine on January 3, 1996, when she encountered an accumulation of loose coal at the feeder breaker in the 2<sup>nd</sup> East working section. She explained that the feeder/breaker is where loaded shuttle cars unload the coal that they have been filled with by the continuous miner and that it is located two crosscuts, about 200 feet, from the working faces.

She described the accumulation as being 7 feet wide and extending up the entry in front of the feeder for 17 feet and along the crosscut to the right of the feeder for 19 feet. She said that the average depth of the accumulation was about 12 inches, although in at least one place she measured it as being 4 feet high. She further related that the coal was damp.

Inspector Passarella testified that, as a result of these observations, she issued Citation No. 3855479. The citation alleges a violation of section 75.400, 30 C.F.R. § 75.400, of the Secretary's regulations in that: "Accumulations of loose coal was [sic] present on both sides of the feeder breaker in 2<sup>nd</sup> East working section. They varied in depth up to 4 feet and in width up to 7 feet. The accumulations were damp."<sup>1</sup>

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<sup>1</sup> Section 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

While the company does not dispute that there were accumulations at the feeder/breaker, it does not agree that the accumulations were as extensive as claimed by the inspector. The Underground Mine Manager, Mike Gipson, testified:

So at the time, yes, there was coal there. But now that coal was not back, in my opinion, 17 feet or 19 feet. And it wasn't, you know, as deep as she says in the citation. To my opinion, what happened -- that coal -- the direction of the coal was running east to west. When you go to the left of that feeder, the coal seam goes up. When you go to the right of [the] feeder, the seam goes down.

So what happens, it's real hard to -- when you make your crosscuts to make them come up even like this table, you can't do that. Sometimes the operator cuts it too high, too low, whatever. So if they cut the cross entry too high, then you cannot -- you don't grade the floor up until the roof bolter comes back in and roof bolts it. Then the miner on the cycle will come grade the floor out to make it where shuttle cars can travel.

Q. Okay. So in this particular situation, how would that particular coal have gotten there?

A. In my opinion, what happened in that, that floor busted out there.

....

Q. As a result of what? What would cause that?

A. From the grading of the floor prior to shuttle cars traveling back across it.

(Tr. 707-08.)

I accept the inspector's opinion over that of the Mine Manager. Inspector Passarella measured the accumulations; Gipson did not. Furthermore, Gipson's testimony clearly shows that there were extensive accumulations, even if they did not extend 17 feet up the entry and 19 feet along the crosscut. Moreover, Gipson's explanation of the cause of the accumulations does not provide any excuse for them. The feeder was located at least two crosscuts away from the working entries. Consequently, it was not in an area which had just been mined, roof bolted and opened to shuttle car traffic. Thus, if shuttle cars had broken up the floor, they had done so several days prior to the inspection and the resulting accumulations should already have been cleaned up. Finally, I find it significant that no one from the company challenged the citation when it was issued or at the close out conference.

I conclude that there were accumulations at the feeder/breaker in the 2<sup>nd</sup> East working section which violation section 75.400. Accordingly, I affirm Citation No. 3855449.

### Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission 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 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.

See also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria).

In *United States Steel Mining Co., 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).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts

surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The inspector testified that she designated the violation as S&S because: "Loose coal has more surface area than solid coal and it makes it easier to ignite. Also, where the accumulations were located, they had -- shuttle cars were returning over the loose coal, which makes it even more finer [*sic*] and even more flammable. And with the energized cable there, I was worried about an arc, an electric arc." (Tr. 660.) She said that even though the accumulations were damp, the dry, cool air in the mine during the winter dries things out faster. In fact, she noted that most fires and explosions occur during the winter. Inspector Passarella further testified that if a fire did break out, everyone inby the feeder would be affected because the belt air was coming into the section.

On the other hand, the Respondent points out that the mine does not liberate methane, that the mine has no history of ignitions or combustion events and that, as admitted by the inspector, the accumulations were damp. White Oak further argues that the Secretary did not offer any evidence that the trailing cables were defective or how they would be an ignition source.

The Commission has provided the following guidance for determining whether an accumulation violation is S&S:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990) ("*UP&L*"); *Texasgulf*, 10 FMSHRC at 500-03.

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (January 1997).

An examination of the record reveals that there is nothing in it to show a "confluence of factors" that would lead to an ignition. While the accumulations were extensive, they were damp. Indeed, the evidence is that the coal contains 10 percent moisture before it is mined. Furthermore, even if the coal were to dry out, none of the other necessary factors were present. It is un rebutted that the mine did not have methane. There is no evidence that the shuttle cars' trailing cables were defective or in any way likely to become an ignition source. While the trailing cables were the only ignition source mentioned at the hearing, I note that there was other equipment in the area

including the feeder/breaker and conveyor belt.<sup>2</sup> However, there is nothing in the record to indicate that they were defective or of such physical condition that they could be possible ignition sources. Finally, it is un rebutted that this mine does not have a history of ignitions or combustion events.

Accordingly, I find that the Secretary has not established that there was a reasonable likelihood that the accumulations would result in a miner being injured by fire or explosion. That being the case, I conclude that the violation was not "significant and substantial."

### Negligence

The inspector found that the Respondent was moderately negligent in permitting the accumulations. She stated: "For the amount of accumulations there and the people that were on the crew, including the boss, they should -- it was obvious they had to have known, and yet they didn't do nothing [*sic*] to correct that condition." (Tr. 669-70.)

The company argues that the following factors indicate that there was no negligence on its part: (1) the accumulation could not have been there longer than 2 hours; (2) MSHA had not provided consistent guidance as to the size of an accumulation which constitutes a violation; and, (3) the company had installed a three-way feeder to address MSHA's accumulation concerns, had established a routine procedure and schedule for cleaning the area and was following that procedure. I do not find these arguments persuasive.

Other than the Respondent's conjecture, there is no evidence that the accumulation either resulted from an accident or had only been there for 2 hours. No evidence was presented that the feeder/breaker area had been cleaned 2-hours prior to the discovery of the accumulations. Nor was any evidence offered to show that an accident resulting in spillage had occurred just prior to the inspector's arrival. On the other hand, as the inspector testified, the size of the accumulation makes it highly unlikely that it had accrued since the beginning of the shift.

White Oak argues that its negligence should be mitigated because MSHA would not provide them with a specific size at which an accumulation became a violation. However, the reason MSHA would not provide such a definition is that it could not. Whether an accumulation is a violation depends on the specific circumstances surrounding the accumulation. Furthermore, in this case the accumulation was so large that there should have been no doubt that it was a violation.

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<sup>2</sup> The Secretary did not discuss this citation in her brief.

Finally, it is commendable that the company was taking steps to address the accumulation problem in the mine. Nevertheless, the fact that they had a procedure for cleaning the feeder/breaker area, does not relieve the Respondent of the responsibility for cleaning up accumulations of this magnitude when they are discovered.

I find that this mine had a problem with accumulations that it was taking steps to rectify. However, this accumulation was large and was located in a place frequented by miners. It should have been obvious that waiting for it to be cleaned-up "on cycle" was not appropriate. Therefore, I conclude that the violation resulted from White Oak's "moderate" negligence.

### **Docket No. WEST 96-338**

#### **Factual Setting**

Blue Samples was 20 years old when he was hired by White Oak in March, 1995, as a mechanic. This was his first job in a coal mine. After receiving 32 of his required 40 hours of newly employed, inexperienced miner training at a local college, he reported to the mine for work on March 7. There he was given additional training on mine hazards, the mine map and the use of the man trip by the shift maintenance foreman. The foreman had not been certified as a trainer by MSHA and his training did not satisfy the remaining 8 hour requirement.

On March 14, Samples was assigned to work as a miner helper working with the operator of a continuous-mining machine. He was task trained for this position by Keith Smith, another miner helper. This training lasted approximately 30 minutes. Samples also worked as a miner helper for at least part of his shift on March 21, 22 and 23.

He was again assigned to work as a miner helper on March 24. While assisting Smith move the continuous miner from the No. 4 entry to the No. 5 entry, he was struck in the head by the miner's tail boom and killed. He had worked in the mine a total of 15 shifts.

The accident investigation was headed by MSHA Inspector Ted E. Farmer. The investigation resulted in the issuance of two orders on April 4, 1995, for violations of section 48.7 of the regulations, 30 C.F.R. § 48.7. Order No. 3415830 alleges a violation of section 48.7(c), 30 C.F.R. § 48.7(c) because:

The task training provided to Blue Samples for the position of continuous-mining machine helper was inadequate. Samples, a newly employed inexperienced miner, was fatally injured on March 24, 1995. The individual who conducted the task training for Samples stated that he was not aware of 30 CFR Part 48.7 task training requirements and

did not use the approved training plan, dated November 25, 1994, to insure that all subjects and course materials were taught. Training was not provided to Samples as per the approved plan in the following task training subjects and courses for miner helper: operation and maintenance of special equipment used in extended cuts; MSHA standards; company policy and programs; scaling; servicing the continuous miner; changing miner bits.

Remote control operations of continuous miners create special safety considerations with respect to tramping the machine. These are well known and have been documented by the manufacturer. Such safety operating procedures were not included in the task training for Blue Samples.

In its service bulletin No. FG-176 dated 09/24/91 Joy Manufacturing Company makes the following statements: "The concept of operating equipment by remote control provides increased operator safety and comfort while achieving maximum productivity from the machine. However, as with any piece of equipment this increased safety aspect can only be realized if safe operating practices are followed. Failure to follow the proper operating procedures could result in serious injury or death. This bulletin provides some general guidelines. Except where noted these guidelines apply to all model remotes."

Later in the bulletin Joy states: "One of the most significant potential hazards is being pinched between the machine and the rib. Therefore, all personnel must remain a safe-distance from the machine" (emphasis in bulletin).

This violation contributed to the fatal accident to Samples.

(Govt. Ex. 12.)

Order No. 3415831 alleges a violation of section 48.7(a), 30 C.F.R. § 48.7(a),<sup>3</sup> because:

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<sup>3</sup> The order originally charged a violation of section 48.7(c), but was amended to allege a violation of section 48.7(a), over the objection of the Respondent, at the hearing. (Tr. 321-25.) The Respondent has renewed its objection in its brief. The company argues that it has been prejudiced by the amendment because "changing the standard cited adds to the facts at issue in the case. Because respondent was not on notice prior to the hearing that those facts would be in

Keith Smith, the continuous miner operator on the afternoon shift of 3/24/95 was not adequately task trained. His task training did not include established and well known safe operating procedures necessary to prevent serious injury or death to those persons associated with remote control operation of the continuous miner. Remote control operations of continuous miners create special safety considerations with respect to tramming the machine. These are well known and documented by the manufacturer. Such operating procedures were not included in the task training.

(Govt. Ex. 11.) The order also contains the language from the *Joy Service Bulletin* found in the previous order.

### **Findings of Fact and Conclusions of Law**

The regulation alleged to have been violated in this case states, in pertinent part:

**§ 48.7 Training of miners assigned to a task in which they have had no previous experience; minimum course of instruction.**

(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

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**fn. 3 (continued)**

issue, it was not able to thoroughly prepare to present evidence as to those facts” (Resp. Br., fn 3 at 31-32.) At the time the order was amended, the Secretary was still presenting her case. The Respondent has not shown that the additional facts were so unusual or disconnected from the facts necessary to prove a violation of section 48.7(c) that it was precluded from presenting evidence on them at the hearing. Therefore, there was no prejudice and the objection is again overruled.

(1) *Health and safety aspects and safe operating procedures for work tasks, equipment, and machinery.* The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and

(2) (i) *Supervised practice during non-production.* The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; on<sup>4</sup>

(ii) *Supervised operation during production.* The training shall include, while under the direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

....

....

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task.

### **Order No. 3415830**

The issue in deciding this violation is not whether Blue Samples was task trained, but whether that task training was "adequate." "Adequate" is not defined in the regulations, nor is there any case law as to what does, or does not, constitute adequate task training. However, based on this record, I have no problem concluding that Samples was not adequately task trained. I further have no problem concluding that the failure to adequately task train him "significantly and substantially" contributed to his death and that the failure to adequately task train him resulted from White Oak's "unwarrantable failure" to comply with the regulations.

In cases where a regulation does not provide sufficient notice of required conduct an objective standard must be applied. *BHP Minerals International Inc.*, 18 FMSHRC 1342, 1345

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<sup>4</sup> "On" apparently should be "or." "Paragraph (a)(2)(i) of § 48.7 appearing on page 47463 is corrected in the seventh line of the paragraph by deleting the word 'of' immediately after the semicolon and replacing it with the word 'or.' 44 Fed. Reg. 1980 (1979). Evidently, one "typo" was substituted for another.

(August 1996). Section 48.7 is the Secretary's implementation of section 115(a)(4) of the Act, 30 U.S.C. § 825(a)(4).<sup>5</sup> Its purpose is "to insure that miners will be effectively trained in matters affecting their health and safety, with the ultimate goal of reducing the frequency and severity of injuries in mines." *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (citation omitted). Consequently, whether Samples' training was "adequate" depends on "what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1618 (September 1987) (citations omitted).

Keith Smith testified that he task trained Samples as a miner helper for "at least 30 minutes or maybe a little longer." (Tr. 49.) He described the training as follows:

Me and him walked up to the miner and I discussed with him about getting up around the head with the bits on and being up at the head of the miner and being back by the boom. I told him to stand with the operator because he has a lot of experience. If he stands at the spot with the operator, he's not going to get in one of them pinch points.

And I told him to look out for nicks or holes in the cable, that if there's any nicks or holes in the cable, tell the operator and then we'll get a mechanic up there. . . .

I showed him how to move the cable out of the road when the miner's backing up, and I told him if the cable was down by the tracks not to reach down and grab it if he's moving the miner because I told him you can get your hand caught or pinched. And I said if the cable loops down behind the miner as the shuttle car's coming in, I said to wave to the operator so he'll stop and then grab the cable. Don't just reach in and grab it.

And I showed him the scrubber, I showed him how to hang the ventilation rag, to check its curtain on down the line, to make sure that the travel pads were up.

....

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<sup>5</sup> Section 115(a) directs the Secretary to "promulgate regulations with respect to . . . health and safety training programs . . ." It sets out the minimum requirements for training. Section 115(a)(4) concerns task training and states, "any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task."

You got to have enough air in there to mine. And I believe I told him how much air that we needed to mine with the scrubber.

....

And I showed him how to use the spad gun.

....

And I showed him where the scaling bar was on the miner, showed him [how to] scale down the rib, told him to check the ribs and the overhang. And I told him that when they're through cutting -- well, I showed him how to put -- well, I left -- you have the lid and the bits, and I showed him where that was so that when he went to put the cut rope on the miner head, showed him how to do that so that when they back up -- and we put ropes about every 40 to 60 feet on our cables, and I showed him how to loop them on the head.

And I told him that when we leave -- as the miner's leaving, before we do those things to make sure that he puts a reflector in the face. Or not at the face, but at the second to last row of bolts.

....

And I told him not to ever go out past the last pin under any circumstances. And I told him to be -- just really be careful because that miner -- when you go to split the tracks it swings really fast.

And then we walked back down to the transformer and I showed him -- kind of drew a picture of entries with my finger on the rock dust out on the transformer. And showed him the way to -- plus I showed him visually, you know walked him down.

....

Showing him where to put the curtains and how they was supposed to be exactly to get the air up to the face.

....

And me and him walked down there, like I said, and I was showing him with my finger in the transformer. And I asked him how he felt about it and he said he thought it was okay. And I says, well, we got to fill out

the task training report. And I asked him -- I says, if there's anything you don't understand let me know now, and we'll go back up and go over it. And I said, make sure because I don't want you to go up there and feel uncomfortable about being up around the miner. And he said no, so we filled it out. We walked back up there and then I went and done the things I needed to do.

....

And through his shift, as I was going by the miner and moving it and stuff, I watched him and --

....

I discussed with him the same things that were discussed with me through the years.

....

Done it the same way it was done to me.

(Tr. 100-105.) This description was considerably more detailed than what he told the inspector, shortly after the accident, about the training. (Resp. Ex. B.)

Smith added the following in response to further questions from the company's lawyer:

Q. Now let me ask you, if there was going to be one thing that you were going to focus on in the training of a mine helper, what would that be?

A. Well, actually there's two.

Q. Okay. Well, what would the two most important things be?

A. Well, the first important thing is to stay clear of the miner and let the operator know what you're going to do. And I make that pretty clear with everybody that I ever worked with because it's a piece of machinery and things can happen to people. They need to be watching carefully and letting other people know what they're doing.

Q. Okay. And what's the second thing?

A. The second thing is the ventilation.

Q. Now did you discuss those things with Mr. Samples?

A. Yes.

Q. Okay. Did you explain to him -- did you describe for Mr. Samples how the continuous miner worked?

A. Yes.

Q. You explained to him that it was a track vehicle?

A. Yes. I explained to him that it was a track vehicle and that when you run the remote, that when you -- it has two little -- well, I call them knobs, but they're little sticks that stick up like that and have a little round top on them. When you take your fingers and go like this and push one lever to the left back towards you and push the other one forward, it will swing the miner to the left.

Q. Okay.

A. And if you reverse it, it swings to the right. And it moves so fast, it really moves so fast that you really got to watch what you're doing working around that. And I explained that.

(Tr. 105-07.)

Smith was not aware that the company had an approved training plan for task training. (Govt. Ex. 8.) Therefore, he did not know that the miner helper was supposed to be trained in changing miner bits, hanging ventilation curtains, the operation and maintenance of special equipment used in extended-cut mining, servicing the continuous miner and scaling. (*Id.* at 5.) Nor did he know that his training methods were supposed to include demonstration, lecture and discussion and that his course materials were supposed to include the machine, MSHA standards, company policy and programs and safeguards required when using extended-cut mining. (*Id.*) Finally, he did not know that the task training was not concluded until he had observed Samples demonstrating safe work practices. (*Id.*)

Smith was also not aware of the *Joy Service Bulletin* which prescribed safety guidelines for operation of the specific machine on which Samples was being task trained as a miner helper. (Govt. Ex. 3.) While no regulation requires that it be included in the training materials or that it actually be shown to the miner being trained, common sense suggests that it would be an excellent training device and that at a minimum its guidelines be encompassed in the plan's subject matter to be covered and in the company policy and programs.

The task training regulation does not set out a prescribed minimum amount of time that task training must take. Neither does White Oak's training plan. The reasons for this is that the length of time required to give the training depends on the experience and knowledge of the person being trained. Obviously, it will take more time to train someone who is new to the mine environment, has not been around the machine while it is operating, and is not familiar with what goes on at the face in producing coal, than it is someone who is an experienced miner. There is no doubt in this case that Smith knew he was dealing with a newly employed, inexperienced miner.<sup>6</sup>

It is evident from Smith's testimony, even as expanded at the hearing, that he did not cover everything in the company's training plan or the *Joy Service Bulletin*, that there was very little, if any, demonstration by Smith, that the machine was the only course material used, and that he did not observe Samples performing his job safely before signing off on the Certificate of Training that training had been completed and having Samples sign off that he had been trained. Further, it is doubtful that Smith could have covered everything he claims to have covered in 30 minutes. Clearly, he could not have covered everything required in the training plan in 30 minutes.

In conclusion, I find the fact that Blue Samples was a newly employed, inexperienced miner, having only been a miner for 11 shifts when he was task trained, that the training only lasted for 30 minutes, and that Smith was not aware of, and thus did not use, the company's training plan or the *Joy Service Bulletin* when training him, all demonstrate that Blue Samples was not adequately task trained. I agree with MSHA Electrical and Education and Training Supervisor for District 9 Donald Gibson when he stated that "just going down these items [in the training plan] it's going to take more than and longer than a half hour to teach an inexperienced miner new to the mining environment what he needs to know. One, to protect himself, two, to protect his coworker." (Tr. 380.) A reasonably prudent person familiar with the health and safety purpose of the task training requirement would have provided Blue Samples with more training than he was given in this case. Accordingly, I conclude that White Oak violated section 48.7(c) by not adequately task training Blue Samples as a miner helper.

#### Significant and Substantial

It is not clear exactly how this accident occurred. Alvero Zarate testified that: "We put the cable in the boom and Mr. Smith said the miner was going to move on, so I told Blue Samples to move out of the way because the miner was moving on. And I moved around the corner [into the entry] and the miner moved a couple feet, and that's when Blue got hit." (Tr. 26.) He stated that he saw Samples get hit with the boom, "the mine[r] swung to the right and hit him against the rib," although "I didn't see the injury, but I guess he got hit in the head." (*Id.*)

---

<sup>6</sup> Ironically, in filling out the Certificate of Training, Smith checked "Newly Employed, Inexperienced Miner" rather than "New Task" for the type of training being given.

However, he further testified that when he told Samples that the miner was going to move and he moved he thought Samples was clear of the boom "[b]ecause he was far from the boom. He wasn't too close to the boom" and that "I told Keith that everything was clear." (Tr. 32.) Finally, he testified that he does not know whether Samples moved after he told him that the miner was going to move because "I turned around and -- I didn't see him move." (Tr. 36.)

The only other witness to the accident, who testified, was Smith. He said: "Well, we unloaded the cable that me and Blue put on the miner head, and then hooked on our cut rope, our slack rope, and I told them that I was going to move the miner. And I walked up [to the front of the miner near the cutting drums, on the entry side of the miner] and put the remote box on. I looked back, I seen them standing in the clear, and then I went ahead and started trammng the miner." (Tr. 65.) He later testified:

I walked from where we was hooking the ropes along the boom and alongside the miner and reached over on the miner and picked up the remote box and hooked it on, and looked back to see where them guys were and let them know that I was going ahead and move.

Q. Could you see them at that point?

A. Yes.

Q. Was there anything obstructing your view?

A. No.

Q. Now, when you moved forward, did you think that Blue was clear of the boom?

A. Yes.

Q. Okay. Where did you think Blue was?

A. Where I had left him at the -- about four feet right at the end of the boom.

(Tr. 120.)

Finally, in response to my questions Smith stated:

Q. Where were you looking when you started operating the miner?

A. When I started operating the miner -- when I turned it on, I looked back. And then when I went to pull forward, I turned forward.

Q. How did you learn about the accident?

A. Alvero was waving his light at me, so I stopped the miner and I looked down the entry because I thought the cable was being pulled too tight. And then I looked down along the rib and I seen Blue laying [sic] on the ground.

Q. Okay. Where he was laying [sic], was that where he had been standing when you looked down there?

A. No.

Q. Where had he been standing in relation to where he was laying [sic]?

A. At the end, back behind the boom.

Q. Was he against the rib?

A. No.

Q. He was out in the middle of the . . . cross-cut?

....

A. Well, here's the boom of the miner, and him and Al were standing right here.

Q. So in relation to the miner, they were standing behind the miner about in the middle of it?

A. Yeah.

Q. Both of them?

A. Yes.

Q. When you started operating?

A. When I, yeah, hooked the remote box up, yes.

Q. Where was Zarate when he got your attention?

A. He was standing on the opposite side of the miner at the boom. Here's the boom. He was standing right here.

Q. Okay. Look at the sketch, [Govt. Ex.] No. 10, the last one. Do you see where it says Alvero Zarate? Is that where he was standing?

A. No.

Q. Where was he standing?

A. He was standing over on the opposite side of the miner back by the boom, straight across from where Blue was.

(Tr. 133-35.)

While the testimony of these witnesses is somewhat inconsistent and contradictory, two facts seem clear: (1) Both Zarate and Smith thought that Samples was in a safe position when Smith got ready to move the miner; and, (2) Samples must have moved after the two witnesses directed their attention forward. Obviously, we will never know why Samples moved. However, it is clear from the facts of this case that he had not had sufficient training to know just how dangerous a tramming miner and its free swinging boom could be.

Therefore, I find that the failure to adequately task train Blue Samples contributed to a discrete safety hazard, not knowing how to handle himself safely in the mine environment, and that there is a reasonable likelihood that this hazard resulted in the event which led to his death, unquestionably an injury of a reasonably serious nature. Accordingly, I conclude that the violation was "significant and substantial."

#### Unwarrantable failure

The inspector considered that this violation resulted from the company's "unwarrantable failure" to comply with the regulation. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

Inspector Ted Farmer testified concerning this issue that "I feel that it is really inexcusable to allow a newly employed, inexperienced miner to go underground and perform the types of duties that he was performing without the proper and adequate task training. And that's why I wrote it unwarrantable." (Tr. 222.) I do too.

Blue Samples received 32 hours of classroom training as a new miner. He was supposed to receive eight additional hours at the mine. The subjects to be covered were; (1) Introduction to Work Environment; (2) Health and Safety Aspects of Tasks Assigned; and (3) Authority and Responsibility of Supervisors and Miners' Representative. At best he was given an introduction to the mine environment. The Certificate of Training indicates he was shown the mine map, the mine plan and shown how to use a man trip. This training was provided by William Potter, who also took Samples into the mine. Although section 48.3(g), 30 C.F.R. § 48.3(g), requires that this training be conducted by MSHA approved instructors, Potter was not an approved instructor.<sup>7</sup> Potter knew that he was not approved and the company knew, or should have known, it.

There is no evidence that Samples had completed task training as a mechanic, or, indeed, that he had been given any task training at all in this area. As has already been seen, his task training as a miner helper was woefully inadequate.

The blame for these deficiencies cannot all, or even mostly, be placed on Smith. I have no doubt that he gave Samples the same type of training that he had received. This is not his fault, but the fault of the company. White Oak has a training plan, but Smith did not know about it. It would seem logical that when assigning a miner to task train another miner, especially a new miner, one would make sure that the trainer was aware of, and used, the training plan. Furthermore, I note that the company's training plan, although it has been approved by MSHA, does not mention that training is to be given in the "health and safety aspects and safe operating procedures" for work tasks.

Finally, evidence was presented at the hearing that an inspection begun as a result of this accident turned up as many as 13 additional training violations. Even if not all of the violations were in fact violations, this is indicative of the company's attitude toward training.

All of this demonstrates an indifference at the White Oak No. 2 mine to training. Consequently, I conclude that the negligence involved in this violation was "high" and that the violation resulted from the company's "unwarrantable failure" to adequately train Blue Samples.

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<sup>7</sup> Subsequent to this incident, Potter requested approval from MSHA as a trainer and it was given, apparently based on his resume.

**Order No. 3415831**

It is easy to decide how things should have been handled after the fact, and it is natural to want to place blame when someone is killed in a mining accident. It does not follow, however, that because an accident occurred which may have been contributed to by a miner's unsafe act, that the miner was not adequately trained.<sup>8</sup> I find that in the instance of this order the blame has been misplaced. I find that Keith Smith was adequately task trained as a miner operator.

It is undisputed that the task training of Smith lasted only between 15 and 30 minutes and that it did not cover everything contained in the company's task training plan or the *Joy Service Bulletin*. If Smith were a new miner, had never been a miner helper or had never operated a continuous miner before, this would clearly be inadequate. But that is not the case.

Except for the time between November 1992, when Valley Camp closed the mine, and October 1993, when White Oak reopened, Smith had worked in this mine since June 2, 1975. With Valley Camp he had been a laborer, block build operator, shuttle car operator, wagoner operator, beltman, miner helper, miner operator and had worked on the surface on "Cats" pushing the coal pile.

Remote control miners were first used in the mine in 1987 or 1988. They were the same continuous miners, including the same remote control box, that were being used when Smith was task trained in January 1994. Smith was a miner helper and miner operator on these remote control miners when the mine closed in 1992.

Needless to say, Smith was an experienced miner and miner operator when hired by White Oak. He was hired by White Oak as a miner helper and was assigned to work with Shane Hansen. He worked with Hansen for three months before Hansen task trained him as a miner operator. In addition, Hansen had also worked for Valley Camp up until the mine closed and was familiar with Smith's work. Thus, Hansen was fully aware of what Smith could and could not do and what he already knew when he trained him.

The only reason that Smith had to be task trained at all was that he had not operated a continuous miner within the 12 months preceding the assignment. He had, however, operated a continuous miner within the 15 months preceding the assignment. Obviously, this 3 month difference is not enough to require that the miner be given task training as if he had never seen a remote control continuous miner.

---

<sup>8</sup> The Secretary's theory of the case is that Smith operated the miner with the machine's lights in his eyes and, therefore, he could not see Samples. This theory is based on MSHA's recreation of the incident, in which the person playing the part of Smith said that the lights were in his eyes. No one ever asked Smith, either during the investigation or at the hearing, whether the lights were in his eyes. He testified that his view was not obstructed. (*Supra* at 16.)

In conclusion, I find that a reasonably prudent person would conclude that Smith had been adequately trained as a continuous miner operator. To the extent that Donald Gibson's testimony may conflict with this conclusion, it is rejected as not being based on all of the factors cited above and because it is contrary to reasonableness and common sense. Accordingly, I conclude that White Oak did not violate section 48.7(a) with regard to the task training of Keith Smith.

### Civil Penalty Assessment

The Secretary has proposed a penalty of \$1,019.00 for the accumulation violation and a \$25,000.00 penalty for the failure to adequately task train Blue Samples. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

The parties have stipulated that White Oak produced 1,068,646 tons of coal in 1996. (Tr. 7.) With respect to the remaining criteria, since no evidence was presented that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violations, I find that White Oak did demonstrate good faith in this area. The company's history of violations indicates an immoderate number of prior violations. (Govt. Ex. 1; Resp. Ex. A.) In fact, the Proposed Assessment form indicates that there were 2.44 violations per inspection day in the 2-years preceding the instant violations. (Resp. Ex. D.) According to section 100.3(c), 30 C.F.R. § 100.3(c), anything over 2.1 authorizes the maximum number of penalty points for history of prior violations. Therefore, I find that the Respondent's history of prior violations is poor.

Since the training violation resulted in a fatality it is obvious that the gravity of the violation is extremely serious, and I so find. On the other hand, having concluded that the accumulation violation was not S&S, I find that the gravity of that violation is not serious. I have already found that the company was moderately negligent with respect to the accumulation and was highly negligent in failing to adequately task train Samples.

The respondent presented some evidence and testimony with regard to its ability to remain in business. While the evidence presented was not of the type found by the Commission to be sufficient to support such a claim, *see, e.g., Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (April 1997) (and cases cited therein), it appears that the Secretary has conceded this issue by agreeing to reduce the penalty for two citations in Docket No. WEST 96-235 by 20 percent

based on the company's ability to pay. Therefore, I will also reduce the penalties I impose by 20 percent.<sup>9</sup>

In Docket No. WEST 96-235, I conclude that an appropriate penalty for the accumulation violation, Citation No. 3855449, is \$690.00. Reducing that by 20 percent, I assess a penalty of \$552.00. In accordance with the settlement agreement, I assess penalties of \$1,038.00 for Citation No. 3855479, and \$290.00 for Citation No. 3585746.

Turning to Docket No. WEST 96-338, the only factor that prevents imposing the maximum penalty for this violation is that the level of negligence did not amount to "reckless disregard." Therefore, taking everything into consideration, I find that a penalty of \$40,000.00 is appropriate. Reducing that by 20 percent, I assess a penalty of \$32,000.00 for Order No. 3415830.

### **ORDER**

Accordingly, Citation Nos. 3855479 and 3585746 are **AFFIRMED**, and Citation No. 3855449 is modified by deleting the "significant and substantial" designation and is **AFFIRMED** as modified in Docket No. WEST 96-235; and, Order No. 3415830 is **AFFIRMED** and Order No. 3415831 is **VACATED** in Docket No. WEST 96-338. White Oak Mining and Construction Company is **ORDERED TO PAY** civil penalties of **\$33,880.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

  
T. Todd Hodgdon  
Administrative Law Judge

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<sup>9</sup> White Oak requested in its brief that the record be kept open for an additional 60 days to that it could submit a "certified audit" of the company's financial situation. A Notice of Hearing was first issued in this case on December 19, 1996. It scheduled a hearing for February 19, 1997. That hearing was continued at the last minute and rescheduled for April. Thus, the Respondent has had seven months to obtain such evidence. I see no reason to wait longer. Furthermore, I am reducing the penalties based on ability to pay. Accordingly, the request is **DENIED**.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**AUG 14 1997**

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 94-1223
	:	A. C. No. 15-15592-03592 M
DEWEY HUBBARD, employed by ALPHA MINING COMPANY, Respondent	:	No. 1 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 94-1224
	:	A. C. No. 15-15592-03593 M
ROBERT HARDIN, employed by ALPHA MINING COMPANY, Respondent	:	No. 1 Mine

**DECISION ON REMAND**

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Dept. of Labor,  
Arlington, Virginia, on behalf of the Petitioner;  
Bill Hayes, Esq., Middlesboro, Kentucky, on behalf of the Respondents.

Before: Judge Melick

These cases are before me upon remand by the Commission on May 12, 1997. The parties subsequently settled the case with an agreement which reads as follows:

1. On May 19, 1994, Stanley Sampsel, a duly authorized representative of the Secretary of Labor, issued Citation No. 4038467 to the Alpha Mining Company pursuant to Section 104(d)(1) of the Mine Safety and Health Act of 1977 (hereinafter "The Act). He had found a full pack and an empty pack of cigarettes in possession of the mine foreman, Dewey Hubbard, found a working cigarette lighter and a cigarette butt on the mine floor and found a cigarette butt and an empty pack of cigarettes around the work station of Robert Hardin. Alpha Mining Company was assessed a proposed penalty in the amount of \$10,000. The petitioner also issued one citation each, to two individuals - Robert Lee Hardin

and Dewey Hubbard - who are employees of Alpha Mining Company (Citation Nos. 4039257 and 4039258). These citations were issued pursuant to Section 110(g) of the Act because the inspector determined that the two individuals willfully violated the provisions of the Act and regulations which prohibit smoking and the carriage of smoking materials. The Secretary proposed penalties in the amount of \$500.00 per person. The mine operator and the two employees requested hearings regarding the proposed civil money penalties. The above-captioned civil penalty proceedings initiated on September 1, 1994 and were consolidated for trial. On November 22, 1994, a trial was held in Gate City, Virginia.

On May 23, 1995 the Court found that the Alpha Mining Company had violated the Act and regulations and assessed a penalty in the amount of \$10,000. With regard to Mr. Hubbard, the court found that he willfully carried a full pack of cigarettes in his lunch bucket and imposed a penalty in the amount of \$250.00. The Court concluded that Hubbard's possession of an empty package of cigarettes did not constitute a violation of 30 C.F.R. § 75.1702. With regard to Mr. Hardin, the Court concluded that his alleged possession of a cigarette butt did not constitute the carriage of "smoking materials" in violation of 30 C.F.R. § 75.1702. The Secretary appealed these holdings.

On May 12, 1997 The Commission remanded these cases following a decision granting the Secretary's Petition for Discretionary Review. On review the Commission ruled that cigarette butts and cigarette packs that were empty when found constitute "smoking materials." Accordingly, the carriage of these items was found to have violated § 317 (c) of the Act. The Commission reserved for decision the issue of whether the citations properly alleged that the miners smoked as well as carried smoking materials underground. In addition, the Commission did not resolve whether the possession of multiple smoking materials constitute separate instances of violations of § 317 (c) and C.F.R. § 75.1702.

2. Rather than continue the litigation of these matters, the respondents and the Secretary of Labor have agreed to settle this matter. In particular, the respondents have both agreed in writing to comply with the smoking prohibitions of the regulation should they ever resume employment in the mining industry. [Attachments omitted] Respondent's counsel has represented that neither Mr. Hardin [n]or Mr. Hubbard is currently employed in the mining industry.

3. With regard to Mr. Hubbard, the Secretary has reviewed information and representation[s] of respondent's counsel that Hubbard is, and has been for approximately one year, unemployed, and that he has not worked in the mining industry since Alpha Mining operations ceased. He has also already paid a penalty in the amount of \$3500.00 with regard to a separate § 110(c) action

arising out of this inspection. Accordingly, the Secretary agrees that the prior penalty of \$250.00 (issued pursuant to § 110(g)) is suitable for both violations and waives any additional penalty for the act of possessing the empty pack of cigarettes in addition to the act of possessing a full pack of cigarettes.

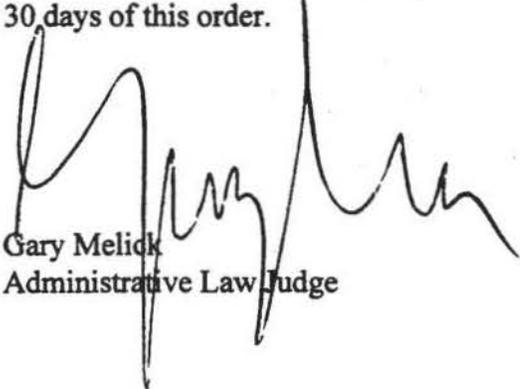
4. With regard to Mr. Hardin, the Secretary has agreed to reduce the penalty proposal from \$500.00 to \$50.00 (\$25.00 per violation) because Mr. Hardin is no longer in the mining industry, because he is now working in employment which is compensated at or near the minimum wage, and because the possession of an empty pack of cigarettes and a cigarette butt provide relatively little risk of additional injury to miners.

5. The Secretary believes that the proposed settlement is appropriate and reflects due consideration for the penalty criteria including gravity, negligence and the miners' ability to meet their financial obligations.

While the undersigned respectfully disagrees that empty cigarette packages and unsmokeable cigarette butts constitute "smoking materials" within the meaning of Section 317(c) of the Act and 30 C.F.R. § 75.1702, the Commission has ruled otherwise. Based on the Commission's decision that the carrying of such materials may be a violation of those provisions, the proposed settlement can be approved. See Co-Op Mining Company, 2 FMSHRC 3471 (December 1980).

#### **ORDER**

Dewey Hubbard is ordered to pay a civil penalty of \$250.00, if he has not already done so, for the violations charged in Docket No. KENT 94-1223 within 30 days of this order. Robert Hardin is ordered to pay a civil penalty of \$50.00, if he has not already done so, for the violations charged in Docket No. KENT 94-1224 within 30 days of this order.



Gary Melick  
Administrative Law Judge

**Distribution:**

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

**AUG 15 1997**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 96-67-M
Petitioner	:	A. C. No. 30-01545-05512
v.	:	
	:	Docket No. YORK 96-69-M
F. PALUMBO SAND & GRAVEL,	:	A. C. No. 30-01545-05513
Respondent	:	
	:	Dover Pit

**DECISION**

Appearances: John G. Campbell, Esq., James A. Magenheimer, Esq., Office of the Solicitor, U. S. Department of Labor, New York, New York, for the Secretary; Fortunato Palumbo, Pro Se, F. Paulumbo Sand and Gravel, Dover Plains, New York.

Before: Judge Barbour

In these civil penalty cases, the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of civil penalties against F. Palumbo Sand & Gravel (the company), for numerous alleged violations of the mandatory safety standards for surface metal and nonmetal mines. (The standards are found at 30 C.F.R. Part 56.) The Secretary alleges the violations occurred at the company's Dover Pit located in Dutchess County, New York, and that several of the violations were significant and substantial contributions to mine safety hazards (S&S violations). The alleged violations were cited on April 10, 17-19, 1996.

The company raises a general defense to the validity of the inspections that resulted in the citations and specific defenses to the particular alleged violations. The cases were heard in Poughkeepsie, New York.

**THE NATURE OF THE FACILITY**

John Paterson, an MSHA inspector, and Fortunato Palumbo, an owner of the company, described the facility as a sand and gravel extraction and processing operation. At the pit, stone is extracted and processed. Once extracted, the stone is put into a hopper, passed from the

hopper into a vibrating feeder, and passed from the feeder onto a vibrating screen. Stone smaller than an inch and a half in size is dropped onto a main conveyor belt . Larger material is passed through a jaw crusher where it is reduced in size and dropped onto the same belt. Once on the main conveyor belt, the crushed stone is carried to a screen tower where three vibrating screens separate the stone. Larger stone is carried on a transfer conveyor to a cone crusher where it is reduced to a smaller size. It then is transported by conveyor belt to a stock pile (Tr. 44-45, 58). Also, sand is processed at the facility (Id.).

### **MOTION TO DISMISS**

At the commencement of the proceedings, Carmine Palumbo, co-owner of the company, moved in effect to vacate the citations and to dismiss the proceedings. He explained that MSHA improperly inspected the pit and issued the citations before the facility was ready to operate. According to Palumbo, MSHA instructed the company to advise it by telephone when it was going to commence operations in the spring. Previously, inspectors had not come to the mine until the agency was notified. However, in April 1996, MSHA did not wait for a telephone call. Rather, MSHA's inspectors arrived unannounced. In Carmine Palumbo's view, their visit was premature. He maintained that the inspectors "shouldn't have been there until [the facility] was officially open for business" (Tr. 22).

Fortunato Palumbo explained that due to weather conditions the pit closed for the winter and that it was customary for the company to make repairs and to do needed maintenance prior to starting operations in the spring. Normally, this work was done in March. However, the winter of 1995-1996 was a long one, with heavy snow in March and snow and rain in April. Therefore, when the inspectors arrived, the company was still in the process of repairing equipment and replacing needed components (Tr. 51-53).

Fortunato Palumbo expressed the company's objection to the April inspections:

We . . . feel like the man that's got a car in a repair shop with brakes being replaced and a policeman coming in and giving you a citation for bad brakes. It is not something that we consider to have been fair or equitable (Tr. 53).

Counsel for the Secretary responded that the Mine Act prohibits prior notice of inspections and that MSHA inspectors acted within the law when they conducted the inspections in question (Tr. 21).

I took the arguments under advisement (Tr. 23). After considering all of the testimony, and for the reasons that follow, I conclude the facility was operating when MSHA's inspectors arrived at the mine and that the April inspections were proper.

Patterson was the first inspector to visit the pit in April. His testimony regarding what he was told at the mine and what he saw during his inspections was credible and is decisive. He stated that Carmine Palumbo told him "he would rather [Patterson] left and come back another time," that the facility "had been operation for only a week or two and they hadn't had a chance . . . to get things done they wanted to do" (Tr. 43). Moreover, while at the pit Patterson observed the front end loader operating, as well as the jaw crusher and the vibrating screens. In addition, the conveyor belts were running and stone was being conveyed to the stock piles (Tr. 44).

The Palumbo's argued the pit was in a "shakedown" period, and I do not doubt it. It is logical that the first few days after the pit reopened for the season, the company would check and repair equipment. However, it is also true equipment at the facility was operating, and even if very few miners were as yet working at the pit, those present were entitled to the protection of the Act and the regulations promulgated pursuant to the Act. MSHA's inspectors had every right to arrive unannounced at the pit and, based upon what they saw, to inspect the facility (see 30 U.S.C. § 813(a)).

**CONTESTED CITATIONS**  
**YORK 96-67-M**

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285641	4/8/96	12025	\$81

The citation states:

The 3 phase power circuit of [the] 5 horsepower, 230/460 volt Teco motor that powers the cone crusher hydraulic pump was not grounded.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Section 56.12025 requires in part that "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

Patterson described the motor that provided power for the cone crusher's pump as cylindrical in shape and 10 to 12 inches in diameter. The motor was encased in metal and mounted on a metal platform (Tr. 68-69). Electricity entered the motor through a junction box. (Although he stated on the citation the electricity rated 230 to 460 volts, Patterson testified it was actually 240 to 460 volts (Tr. 77-78)).

Patterson saw only three wires entering the box. In his opinion, there should have been a fourth wire, a ground wire. When Patterson did not see the fourth wire, he concluded the metal casing of the motor was not grounded and section 56.12025 was violated (Tr. 69; see Gov. Exh. 2B).

Patterson was not alone in this view. MSHA electrical inspector, Jon Montgomery, who inspected the mine a few days after Patterson, also believed that a fourth wire was necessary to meet the standard's grounding requirement. He testified a ground wire was "the best way" to insure a path back to the electrical source (Tr. 278, 280).

Patterson believed the lack of a ground wire was dangerous. If insulation on a conduit wore and exposed a naked wire, and if the bare wire touched the motor's metal casing, a person who touched the metal could be severely shocked or electrocuted (Tr. 70). However, if the metal casing were properly grounded, the electricity would travel back to the source of the power, rather than through the person (Tr. 71).

Employees regularly traveled in the area where the motor was located to grease the crusher or to check oil levels on the equipment. Also, there was a portable welder in the area, sitting within a foot or two of the motor (Tr. 72). The mine floor in the area where the motor was located was saturated with water (Tr. 71). In Patterson's opinion, this increased the likelihood of a person becoming "a fantastic conductor" for electricity (Tr. 76).

Fortunato Palumbo asked Patterson if he knew whether the motor casing and the entire structure on which it sat was grounded "through steel beams and . . . steel lattice work," i.e., if he knew whether everything was frame grounded (Tr. 77). Patterson did not know, but he testified he told Carmine Palumbo that even if the motor casing were frame grounded, there had to be a wire ground that went back to the electrical source (Tr. 81-82). Patterson emphasized that MSHA did not accept frame grounding. The agency required a four wire system (Tr. 79). According to Patterson, MSHA's policy was set forth in the agency's *Program Policy Manual (PPM)* (85-86).

Fortunato Palumbo stated that he did not know if the ground wire was missing, as Patterson maintained (Tr. 84), but in any event, the pump motor was frame grounded.

### **THE VIOLATION**

Patterson was specific in describing the lack of an observable ground wire (Tr. 69), whereas Fortunato Palumbo did not know whether it was missing (Tr. 84). Therefore, I find the Secretary established that there was no fourth wire to ground the motor's metal casing.

Fortunato Palumbo was equally specific in testifying how the cited equipment was frame grounded (Tr. 83-84), whereas Patterson did not know whether or not it was (Tr. 85). Therefore, I find the company established the motor casing was frame grounded.

Section 56.12025 does not set forth any particular means for grounding metal enclosing or encasing electrical motors. The standards for metal and nonmetal mines define "electrical grounding" as "to connect with the ground to make the earth part of the circuit" (30 C.F.R. § 56.2). This is exactly what Fortunato Palumbo described with respect to the frame grounding of the cited motor casing.

In a case involving a similar set of facts, Commission Administrative Law Judge Richard Manning stated that he did "not doubt that a fourth wire grounding system is state of the art at the present time and that it offers certain advantages over . . . [a frame grounding] system," but that if the proof established the cited casing was frame grounded, "[t]he Secretary failed to show . . . that the metal encasing the cited motor was not grounded nor provided with equivalent protection" *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 396-397 (March 1996)). I find Judge Manning's reasoning equally applicable here.

Further, although Patterson believed the *PPM* prohibited frame grounding, I do not read it to do so. There is no provision of the *PPM* dealing with section 56.12025, and the provision to which the inspector apparently referred, 56/57.12028, is intended to insure that continuity and resistance tests of grounding systems are conducted on a specific schedule. While the provision may have been premised on the assumption that the systems tested are not frame grounded systems, it does not specifically prohibit frame grounding (Gov. Exh. 3; see also IV *PPM* at 51-52).

Commission Administrative Law Judge Augustus Cetti has suggested, "If the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rule making to achieve this goal" (*Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 388 (March 1996) (ALJ Cetti)). It is a good suggestion.

I conclude the alleged violation has not been proven.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4286260	4/8/96	14112(b)	\$ 111

The citation states:

The guard had been removed from the back-side of the crossover belt tail pulley and was not replaced. The self cleaning tail pulley was approximately 2 feet above ground level. Existing hardware for attaching the guard indicates this tail pulley had previously been guarded.

In addition to alleging a violation of the standard, the citation contains an S&S finding.

Patterson observed stone being carried on the crossover conveyor belt (Tr. 41-42). Although the belt was operating, the guard protecting its tail pulley assembly was missing. There had been hooks on the tail pulley to which a guard screen had been attached, but the hooks either were so bent they could not be used, or they had been removed (Tr. 38-39).

The tail pulley assembly was between 1 and 2 feet above ground. A space that measured about 1 1/2 feet wide existed on both sides of the tail pulley. This was enough room for a miner to walk without restriction into the tail pulley (Tr. 28). Employees had to go into the area to grease the pulley. From time to time they also needed to clean spillage under and around the pulley, to dislodge stones stuck in the pulley, and to adjust the belt (Tr. 30).

Without a guard, Patterson believed it reasonably likely a miner's clothing would be caught in the tail pulley and the miner would be dragged into the mechanism. The miner would suffer injuries ranging from broken bones to death (Tr. 29-31).

Fortunato Palumbo agreed with Patterson that the guard was missing (Tr. 37). However he disagreed with Patterson's assessment of the hazard. He testified that all maintenance of the equipment was done in the morning before the equipment was started, and if there was any spillage it was cleaned up after the equipment was shut down (Tr. 63).

### **THE VIOLATION**

Section 56.14112(b) requires that "Guards . . . be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

The company did not dispute that the guard was missing and the belt was operating. Therefore, I find these conditions existed. The company maintained as a general matter that it was in the process of repairing and maintaining the equipment at the pit and the guard "would normally have been there when [the company] completed [the] repairs and maintenance" (Tr. 37). However, no one was doing adjustment or maintenance on the tail pulley assembly or the conveyor belt when Patterson was there, and Patterson saw no evidence such work was in progress. I conclude the Secretary proved the violation as charged.

### **S&S AND GRAVITY**

A violation is properly designated 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 reasonable serious nature" (*Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

(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 reasonable serious nature (*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); see also *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-105 (5<sup>th</sup> Cir. 1988) (approving *Mathies* criteria)).

The question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations (*Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (February 1991); *U. S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985)).

Here, there was a violation, and the lack of a guard at the tail pulley contributed to the hazard that a miner working in the vicinity of the pulley would be caught in the pulley mechanism and be seriously injured or worse.

I credit Patterson's testimony that from time-to-time miners needed access to the tail pulley to adjust it, clean up around it, and/or maintain it (Tr. 30). While I credit Fortunato Palumbo's testimony such work usually was done either before the belt was started or after it was shut down (Tr. 63), I would be naive to believe this always occurred. It is common knowledge that clean up or maintenance work is at times required after the belt has started operating and that miners attempt to do the work quickly before the belt is shut down. It is something that happens in the context of continued normal mining operations.

I therefore conclude that as mining continued it was reasonably likely that a miner would attempt to do clean up or maintenance work around the unguarded trail pulley assembly, would be caught and dragged into the pulley, and that the resulting injuries would be of a reasonably serious nature. The violation was S&S.

Because the company was doing maintenance work at the same time it was processing stone, it is likely miners either had been and would be in the vicinity of the tail pulley. In view of the fact that I believe it is likely some work around the pulley would be conducted while the conveyor belt was running, and in view of the gravity of the injuries that could be expected when a miner was caught in the unguarded pulley assembly, I find the violation was serious.

## NEGLIGENCE

I have found there was maintenance work going on at the facility. I also believe the Palumbos' contention the facility was not yet in a total operational mode. Because the facility was not yet operating at "full tilt," the frequency with which miners were exposed to the hazards of everyday mining was lessened, as was the company's duty of care. I conclude, therefore, that the company's negligence was moderate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285642	4/8/96	14109(b)(1)	\$50

The citation states:

The metal rails that were used to prevent a person from falling against the first 4 troughing rolls and [the] belt (both sides) of the crossover conveyor had been removed and were not replaced. The unguarded rolls were approximately 3 1/2 to 5 1/2 feet above ground level.

Patterson testified the conveyor belt below the cone crusher was not guarded adequately to prevent miners from contacting the belt or four troughing rolls under the belt (Tr. 100). ("Troughing rolls" are defined as "[R]olls . . . that are so mounted on an incline as to elevate each edge of the belt into a trough" (U. S. Department of the Interior, *A Dictionary of Mining Mineral and Related Terms* (1968) at 1169)). Patterson stated the purpose of the rolls was to "make the belt into a trough . . . to keep the material within the belt so it doesn't run off all over the ground" (Tr. 102; see Gov. Exh. 2C, 2 BB).

The conveyor belt was between 3 1/2 to 5 1/2 feet above the ground. The belt was running and there was stone on it. Railings that had protected miners from the danger of contacting the belt and rollers had been removed. Patterson feared a person walking by the belt could fall or trip or slip and be caught in turning rollers (Tr. 101-103).

Fortunato Palumbo again maintained that the plant was being operated only on a "test run" basis and that, in fact, the plant could not have been fully operational because at that time there was no water to clean the material as it was processed (Tr. 105). According to Palumbo, the railings had been taken down when new rollers were installed (Tr. 108-109). There was stone on the belt and the belt was running because the only way to make sure the belt was aligned properly was to run it (Tr. 110).

## THE VIOLATION

Section 56.14109(b)(1) states that "Unguarded conveyors next to the travelways shall be equipped with — [r]ailings which — [a]re positioned to prevent persons from falling on or against the conveyor."

To establish a violation the Secretary must prove the cited conveyor was unguarded, that it was next to a travelway, and that it did not have a railing to prevent a person from falling on or against the conveyor. Patterson testified without dispute that both sides of the crossover conveyor were unguarded (Tr. 100). Patterson also testified without dispute that there were no railings to prevent a person from stumbling or tripping into the belt mechanisms (Tr. 101). Patterson did not specifically testify that a travelway was next to the belt, but he did state that without the railings, a person walking by the belt could fall, trip, or slip and be caught in the unguarded conveyor belt and rollers (Tr. 101). Obviously, a person could not fall, trip, or slip into these mechanisms unless the person was or had traveled in the vicinity of the rollers. It is obvious too that a person would have to walk or travel next to the belt to gain access to the conveyor belt rollers. I infer from these factors, as well as from the fact railings had been in place previously (Tr. 108), that the belt was next to a travelway, and I conclude the Secretary established the violation.

In finding the violation, I reject any suggestion compliance was not required because the railings had been removed in order to install new rollers. That work was over. Fortunato Palumbo spoke of the rollers as having been "newly installed" (Tr. 108). The railings should have been replaced once the work was finished.

I also reject the suggestion there was no violation because the pit was operating on a "test run" basis. As I have found, while I do not doubt maintenance work was being done, it is also true that equipment was being operated and stone was moving along and through the equipment. As a result, the company's miners were entitled to the full protection of the Act, whether or not the facility was totally operational.

## GRAVITY

Patterson found that the violation was not serious. It long has been held the gravity of a violation is determined by analyzing the potential hazard to the safety of miners and the probability of the hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 120 (May 1972)). While Patterson testified regarding the potential hazard to miners, neither he nor any other witness for the Secretary offered a view as to the probability of a miner being caught in the conveyor belt rollers or being injured by falling onto the belt. For example, there was no testimony regarding the frequency with which miners accessed the travelway nor was there testimony regarding conditions on the travelway. I find, therefore, that this was not a serious violation.

## NEGLIGENCE

For the reasons stated with regard to Citation No. 4286260, I find the company's negligence was moderate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285643	4/9/96	12025	\$117

The citation states:

The 110 volt electrical circuit that provides power to the diesel pump located at the diesel fuel skid tank was not provided with a guard. The ground prong had been removed from the power cord plug in the switch/utility trailer.

In addition to alleging a violation of the standard, the citation contains an S&S finding.

While at the pit's motor control trailer, Patterson noticed and inspected the electric cable that provided power to the diesel fuel pump. (Patterson described the fuel pump as the "type of . . . pump that . . . would pump gas into your vehicle at a service station" (Tr. 121).) The cable carried 110 volts of electricity. The cable ran from the trailer up a hill to the fuel pump. The pump was enclosed in a metal housing. A rope was tied around the housing and Patterson noticed that the wire which had served as the ground wire for the pump was hanging loose, unconnected to the pump (Tr. 121, 123; see Gov. Exh. 2F). The disconnected ground wire indicated to Patterson that the metal casing enclosing the pump motor was not grounded (Tr. 122).

Patterson believed that the failure to ground the motor's casing subjected miners to the danger of being shocked or burned. If the electrical circuit to the pump contained a fault, a miner who was pumping fuel and touched the pump could, as Patterson put it, "get zapped" (Tr. 123). Further, the earth around the pump was damp (Id.).

Fortunato Palumbo maintained the pump had been idle all winter and when Patterson saw it the company was in the process of checking the pump's electrical integrity. This was part of the normal spring "shakedown" procedure (Tr. 127).

## THE VIOLATION

As noted, section 56.12025 requires the grounding of metal enclosures or casings of electrical circuits. Patterson's testimony describes, and the Secretary's photographic evidence confirms, that the metal casing of the electrical motor of the fuel pump was not grounded (Tr. 121-123; Gov. Exh. 2F). Fortunato Palumbo essentially agreed that Patterson accurately described the condition of the pump (Tr. 126-127). Patterson saw no evidence the company was

engaged actively in checking the pump's electrical circuits when he inspected the pump. If the company checked the circuits prior to Patterson's inspection, it should have reconnected the ground wire. Further, the company did not contend the pump casing was frame grounded. Therefore, I find that the violation existed as charged.

### S&S and GRAVITY

The Secretary established three elements of the proof necessary to sustain an S&S finding. There was a violation of the cited mandatory safety standard, the violation subjected those who used the pump to the possibility of being shocked, perhaps seriously. However, it is not possible to determine the reasonably likelihood of the injury. Patterson testified that if there was a fault in the circuit, any miner touching the pump could be shocked (Tr. 123). He also testified that the pump might be used up to two times a day (Tr. 124). What he did not reveal was how likely an electrical fault was or would be as mining continued. Nor did he explain how miners using the pump would touch its energized casing or how likely such contact was. Without evidence on the "likelihood" factor, I cannot find the violation was S&S.

Nevertheless, the violation was serious. Although the likelihood of an electrical fault is not clear, it is possible one could have occurred. The conductor to the pump carried 110 volts, and the metal casing could have been energized. Also, it is possible that a miner using the pump could have touched the casing. The ground around the pump was damp. As Patterson explained, the violation could have lead to a miner's body becoming the shortest route to ground the current (Tr. 123). Further, although the circuit carried only 110 volts, Montgomery persuasively described, in the context of another violation, how shocks from low voltage can have serious consequences (Tr. 276-277).

### NEGLIGENCE

For the reasons stated with respect to Citation No. 4286260, I find the company's negligence was moderate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285644	4/9/96	4101	\$50

The citation states:

Signs prohibiting smoking and open flames were not posted at the diesel fuel skid tank.

Patterson noticed an above-ground fuel tank attached to the pump. The tank contained diesel fuel. Patterson saw no signs warning against smoking or open flames. Patterson believed the signs were required by section 56.4101 (Tr. 138).

In Patterson's opinion the lack of warning signs could have lead to someone smoking or to someone using an open flame — a blow torch, for example — which in turn could have resulted in a fire or explosion (Tr. 139). However, Patterson agreed with Fortunato Palumbo, that diesel fuel is less volatile and harder to ignite than gasoline and that this somewhat lessened the chance of a fire or explosion (Tr. 141-142).

### THE VIOLATION

Section 56.4101 states "Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The company does not dispute there were no signs. Nor does it dispute there was a fire or explosion hazard at the tank. Rather, it argues the danger was less with diesel fuel than if the tank held gasoline. Therefore, I agree with Carmine Palumbo who stated, "We are guilty of not having a sign" (Tr. 142), and I find that the company violated section 56.4101.

### GRAVITY

Failure to post the signs was not a serious violation. The signs are not a primary preventive measure. Rather, they are secondary in that they are designed to remind miners of what they already know — not to smoke or use open flames around a visually obvious fuel tank. The fact that few miners were at the mine reduced the possibility the lack of a sign would contribute to a fire or explosion, and Patterson agreed that the diesel fuel was less likely to be ignited by a lighted cigarette or an open flame (Tr. 141-142).

### NEGLIGENCE

Although the violation was visually obvious, the company's negligence was low given the fact that the company was just beginning its seasonal operation, the fact that few miners were at the mine, and the fact that hazard was not serious.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285645	4/9/96	14112(b)	\$111

The citation states:

Both sides and the back of the tail pulley guard at the main belt below the jaw crusher were removed and were not replaced before the belt was energized. Existing bolts on the conveyor frame indicate this area had been guarded

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson found the tail pulley of the main conveyor belt beneath the jaw crusher was not guarded. (The conveyor transports material from the crusher to the screen tower.) The pulley was located about 1 1/2 to 2 feet above the ground. The pulley was different from a drum type

pulley in that it had rotor-like fins that spun around and helped keep the pulley area clean (Tr. 143; see Gov. Exh. 2H). Both the conveyor belt and the jaw crusher were operating when Patterson observed the condition (Tr. 152).

Because the pulley area was unguarded, Patterson feared miners who reached into the area with shovels or with their hands to dislodge stuck stone or foreign materials, or to grease the mechanism, would become caught by the "fins" and pulled into the pulley (Tr. 143-145). "We have accidents all the time," he stated, "where people loose arms, hands, the entire arm gets ripped off. We've had guys caught in these things and sucked into the equipment and . . . [t]hey come out hamburger" (Tr. 144-145).

Moreover, the bottom part of the belt was running in accumulated materials, and Patterson felt that a miner might come at any time to clean up beneath the unguarded area (Tr. 144, 148). The tail pulley had been guarded (Tr. 151-152). However, the guards had been taken off. They were not in the area, and no one knew where they were (Tr. 151).

Fortunato Palumbo maintained that the guards had been removed because the company was in the process of getting the belt ready for use during the season, and that once the "shake-down" period was over, the guards would have been replaced (Tr. 150).

### THE VIOLATION

As previously stated, section 56.14112(b) requires guards on pulleys to be in place while the machinery is being operated, except when the equipment is being tested or adjusted and when such work cannot be done without taking off the guards.

I find the violation existed as alleged. The company did not dispute the pulley area was unguarded. Nor did the company dispute the conveyor belt was being operated. While it would have been difficult for a miner accidentally to access the area and become caught in the pulley, one who purposefully tried to clean the area under the belt or to service the pulley while the belt was operating, easily could have been caught by the "fins" and pulled into the unguarded pulley.

The company's arguments it should not have been cited for a condition existing while it was readying the facility for full production and it had to remove to guards to do maintenance work on the conveyor belt and pulley again are rejected (Tr. 150). While it may well be true the guards were removed to facilitate maintenance work on the conveyor belt and pulley, I conclude the work had finished and the company was too slow in replacing the guards. I am persuaded of this by Patterson's testimony that when he observed the tail pulley, the conveyor belt and jaw crusher were operating (Tr. 152). Patterson did not see anyone working on the pulley or belt and when he asked about the guards, all he was told was that no one knew where they were (Tr. 151). There was no testimony that anyone told him the guards had been removed to make repairs or adjustments to the conveyor belt and/or tail pulley. Nor was there any visual evidence such repairs or adjustments were necessary.

## S&S and GRAVITY

There was a violation of the standard. The violation meant those who tried to service the pulley while the conveyor belt was running or who tried to clean accumulated materials from under the belt would have been subjected to being caught in the pulley and seriously injured. Patterson offered valid reasons why it was reasonably likely such an accident would have happened. First, although access to the pulley area was difficult, it was not impossible. Anyone who purposefully tried to service or to clean up under the pulley could have done so. Second, there was an accumulation under the pulley and the belt was running in it. This created an immediate incentive for the company to insure the area was cleaned. As Fortunato Palumbo explained, the belt cost approximately \$2,500. Keeping it from running in accumulations extended the life of the belt, as did keeping the pulleys greased (Tr. 153).

I have credited Fortunato Palumbo's contention it was the company's policy regularly to clean up and service the belts and pulleys while the belts were not running (Tr. 153). It is simply good mining practice to implement such a rule. However, miners do not always do what they are instructed to do, and access to the unguarded area presented miners with the opportunity to do those jobs without waiting for the belt to shut down, an opportunity that easily could have been too tempting for a miner in a hurry (see Tr. 147-148). Given access to the area, the need to work in the area, and the economic incentive quickly to do the work, I conclude it was reasonable likely as mining continued a company employee would have been caught in the unguarded pulley and severely injured or killed (Tr. 144-145). The violation was S&S.

The violation was also serious. There was an obvious need to access the area to clean under the unguarded pulley. This need raised the real possibility that a person trying to clean material from under the pulley or trying to service the pulley would, as Patterson graphically stated, become entangled in the mechanism and lose a hand, an arm, or worse.

## NEGLIGENCE

For the reasons stated with respect to Citation No. 4286260, I find the company's negligence was moderate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285646	4/9/96	14112(b)	\$111

The citation states:

The guards had been removed and were not replaced from the head pulley (lower side) and from the gear reducer drive pulleys leaving the conveyor belt and v-belts . . . nip points exposed. [The e]xposed belts & pulleys were approx. 6 feet above [the] screen deck walkway. Existing bolts indicate a guard had been attached at this location.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson testified that during the inspection he noticed there were no guards for the lower side of the head pulley of the conveyor belt, the main conveyor belt drive motor, and the gear reducer pulley. He explained that the head pulley is located at the discharge end of the main conveyor belt, approximately 6 feet directly above the walkway on the screen tower (Tr. 156-157). The motor that powers the gear reducer also is located at this end of the belt (Tr. 155-156).

When Patterson noticed that the guards were missing, the belt and head pulley were operating (Tr. 161; see Gov. Exhs. 2I, 2J). Patterson also noticed bolts and "maybe brackets," indicating guards once had been in place (Tr. 156).

Patterson feared an employee who traveled the walkway under the pulley in order to clean up spillage, to grease the pulley, or to adjust the belt, would slip, would put out an arm or hand to maintain his or her balance, and would become entangled in the moving parts of the pulley, drive motor, or the motor's v-belt (Tr. 157, 164). Also, he was concerned if the belt frayed, that one of the loose pieces of belt would catch an employee's clothing. The result would be cuts, broken bones, the loss of a limb, or death (Tr. 157-158).

Patterson stated that "in many cases" MSHA inspectors found miners servicing belts and pulleys while the belts were running, although he was not aware of any such incidents at the Dover Pit (Tr. 160).

Fortunato Palumbo maintained the equipment that lacked the guards was closer to 8 feet above the walkway than to 6 feet (Tr. 167). At first he also maintained that when the shaker screen was operating the walkway under the pulley vibrated so much that no one but "a blooming idiot" would stand under the pulley and try to service the conveyor or pulley (*Id.*), and Patterson appeared to agree with Palumbo that it was extremely unlikely any miner would stand on the walkway under such conditions (Tr. 169). However, in subsequent testimony, both men seemed to agree that operation of the shaker screen did not cause the walkway to vibrate to any great extent (Tr. 201-205).

Fortunato Palumbo confirmed that the area had been guarded. He stated the guards had been removed because all of them were being changed (Tr. 171). In addition, Carmine Palumbo explained that the stairs leading to the shaker screen walkway had a bar across them to prevent access and that a person could not get to the walkway unless he or she went over or under the bar (Tr. 172-173).

Patterson concurred there was a bar on the stairs (he called it a "gate"), however, as he recalled, the "gate" was open when he was there (Tr. 174). In any event, Patterson testified he explained to Carmine Palumbo that area guards were not an acceptable means of complying with the standard (Tr. 175).

## **THE VIOLATION**

The requirements of the standard have been stated previously.

Here, the company did not disagree with Patterson's testimony that the cited machinery was operating and unguarded (*see* Tr. 171). Rather, the company's primary defenses were that the machinery was 7 or 8 feet above the walkway and access to the walkway was barred.

While 30 C.F.R. § 56.14107(b) exempts operators from guarding exposed moving parts that are at least 7 feet away from walking or working surfaces, I conclude the exemption is not applicable. I credit Patterson's estimate that the cited machinery was approximately 6 feet above the platform. Patterson saw the area and the fact the machinery was guarded previously implies his on site estimate was accurate.

Further, the violation is not excused by the fact that the stairs leading to the walkway had a bar or "gate." Patterson, at the time he cited the violation, recalled that it was open (Tr. 174). Even if it was closed, the gate could not serve as a defense. There was nothing to prevent a miner from going under or over it to reach the walkway, (*see Jamison Company*, 15 FMSRHC 2549, 2554 (December 1993) (ALJ Lasher)).

## **S&S and GRAVITY**

Patterson testified about the injuries that would have befallen miners who became caught in the moving and unguarded machinery, but neither Patterson nor any other witness offered testimony there was a reasonable likelihood the hazard would result in such injuries. Patterson's statement that "in many cases" MSHA's inspectors found miner's working on unguarded machinery while the machinery was operating was followed by an admission this had not occurred at the Palumbos' operation (Tr. 160). Further, the Secretary offered no evidence regarding the frequency of service on the cited equipment and no explanation of how such work was done. Also, while the height of the unguarded machinery did not make service of the equipment impossible, it made service and contact extremely difficult and greatly reduced the likelihood of contact (Tr. 169). For these reasons, I conclude the violation was not S&S.

Because the likelihood of injury arising from the violation was remote, I also conclude the violation was not serious. The gravity of injuries that might have occurred was more than offset by their improbability.

## **NEGLIGENCE**

Because I credit the company's contention the pit was in the process of being placed on a fully operational basis, because few miners were exposed to the hazards of noncompliance, and because, in this instance, the hazards resulted in a very remote chance of injuries, I find the company's duty of care was lessened and its negligence was low.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285647	4/9/96	12025	\$111

The citation states:

The 30 horse power, 230/460 volt, 3 phase electric drive motor for the shaker screen was not grounded. This is a wet screen which causes the entire screen deck[,] walkway, and electric motor to be wet during plant operations, depending on wind.

In addition to alleging a violation of the standard, the citation contains an S&S finding.

Patterson testified that the 30 horse power electric drive motor for the shaker screen is 16 to 18 inches long and 10 to 12 inches in diameter (Tr. 176). The motor is attached to a steel plate, which in turn is attached to the metal walkway that passed under the machinery referenced in the previous citation (Tr. 177-178).

Patterson saw only three wires coming out of the drive motor (Tr. 176; Gov. Exh. 2K). He did not see a ground wire (Tr. 181). Patterson again stated his belief that "you've got to have that fourth wire to provide a ground . . . When you see a three phase with only three wires, you know that you don't have a ground" (Tr. 181). At the time Patterson saw the motor, the shaker screen had been running. As a result, the tower walkway was wet.

Patterson feared the vibrations of the shaker screen would cause the electrical conductors entering the motor to rub against the motor's metal casing and to fray their insulation, exposing the naked wires. Because the conductors were not grounded, they could energize the motor casing, the plate to which it was attached, and the metal walkway that touched the plate. Anyone who touched the metal could suffer a sever shock or be electrocuted (Tr. 178). The hazard was heightened by the fact the walkway was wet.

The company maintained it did not violate the standard. Fortunato Palumbo testified that the motor was frame grounded and that he believed frame grounding constituted compliance with the standard (Tr. 183). Carmine Palumbo added that because the motor was frame grounded, if there were a short in one of the motor's conductors, the motor and all the metal contacting it would have been grounded (Tr. 184).

### **THE VIOLATION**

Section 56.12025 required the metal casing of the drive motor to be grounded. The Secretary did not refute Palumbo's contention the motor was frame grounded, and I accept it. For the reasons stated with regard to Citation No. 4285641, I conclude the Secretary has failed to establish a violation of the standard. In other words, I find that the frame grounding described by the Palumbos constituted compliance.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285648	4/9/96	14107(a)	\$81

The citation states:

The shaker screen drive motor v-belts & pulleys guard did not extend a distance to prevent accidental contact with the moving machine parts or exposed in-running nip points. Two 1/2 -5/8 inch rebars were used to restrict travel to the exposed belts[,] pulleys, & machine parts [.] One of the top bar[s] was out at this time.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson testified that he issued the citation because the cited moving parts (the drive motor and pulleys), "were not guarded . . . per MSHA specs" (Tr. 188). The equipment, which is part of the shaker screen tower structure, was operating when he observed it. The drive motor was turning and the pulleys were revolving (Tr. 190). Some screen cloth was placed approximately 8 to 10 inches from the equipment. ("Screen cloth" is defined as "[a] woven medium suitable for use in a screen deck" (U. S. Department of the Interior, *A Dictionary of Mining, Mineral and Related Terms* (1996); see also Tr. 189). The screen cloth did not cover all of the pinch points created by the belts and pulleys and Patterson stated that he "explained to Carmine Palumbo . . . that [the] entire assembly belt and pulleys had to be guarded so that [a] . . . person would not reach into or behind [the] belts and pulleys and make contact" (Tr. 195). Further, the location of the screen cloth left room for a miner to reach behind the cloth and become entangled (Tr. 195-196). The adjacent walkway was wet and subject to freezing, factors that Patterson believed added to the hazard (Tr. 204-205).

Patterson feared any person on the walkway who traveled past the cited parts would be in danger of becoming entangled in the unguarded pulleys and belts. He described the drive motor and associated pulleys as located 3 1/2 to 4 feet above the walkway, and he maintained that the moving machine parts were easy to contact (Tr. 191; Gov. Exh. 2K). He testified there were a number of reasons a miner would use the walkway and pass by the parts, including checking the screen for debris or holes and cleaning spillage from the walkway (Tr. 191, 210-211). In addition, he had seen persons trying to grease pulleys while the equipment was running, although not at this mine (Tr. 192). Any person who contacted the moving parts would be badly cut and/or bruised, or would lose fingers or an arm, or would be killed (*Id.*).

In Patterson's opinion, the condition was S&S because the height of the equipment, combined with the wet walkway and the loose stones scattered on the walkway, made it reasonably likely persons would slip, trip, or fall and become tangled in the belts and pulleys (Tr. 191).

Fortunato Palumbo argued that there was no reason for a miner to be on the walkway while the screen was running and the motor and pulleys were operating (Tr. 200). Carmine Palumbo testified that the only time a person would be on the walkway would be to change the bearings on the shaker screen, something that happened twice a year and when the equipment was not operating (Tr. 202-203). He also noted the presence of two guardrails that were intended to keep persons off of the walkway (*Id.*).

### **THE VIOLATION**

I have no doubt the company violated section 56.14107(a). Patterson carefully described the moving machine parts and how they were either inadequately guarded or not guarded at all and explained how the parts could cause injury. The company did not contest Patterson's description of the unguarded parts, or that they were moving. Rather, the company maintained guarding was unnecessary because there was no reason why miners would access the area while the parts were operating. Because the language of the standard "specifically and unequivocally requires guarding for any of the enumerated moving parts that can cause injury if contacted" (*Highlands Board of County Commissioners*, 12 FMSRHC 270, 291 (February 1992) (ALJ Koutras)), the company's concerns do not bear upon whether compliance was required, but rather upon the S&S nature of the condition, its gravity, and the company's negligence in allowing the condition to exist. In other words, because the moving machine parts cited by Patterson could cause injury and were inadequately guarded or totally unguarded, the violation existed as charged.

### **S&S and GRAVITY**

The violation was both S&S and serious. Unlike the testimony presented regarding Citation No. 4285646, the government established the reasonable likelihood the hazard posed by the unguarded machinery would result in miners becoming caught in the moving and unguarded machine parts. The machinery was easily accessible to miners present on the walkway. Neither of the Palumbos contested Patterson's description of the equipment as being 3 1/2 to 4 feet above the walkway (Tr. 191). Further, neither contested his contention that the wet walkway and loose stones on the walkway combined to create a slipping hazard and that a person who slipped or fell toward the belts and pulleys could become entangled in them. Further, it is logical that the water and stones on the walkway increased the likelihood of a slip or fall in the direction of the belts and pulleys.

While I accept Carmine Palumbo's assertion that bearings on the shaker screen were changed twice a year and that the equipment was not be operated while this work was performed, I reject his testimony that this was the only work that brought miners to the walkway. Obviously, the cited belts and pulleys had to be serviced from time to time. Also, Patterson's contention that from time to time employees needed to check the shaker screen for debris and holes and to clean spillage from the walkway was logical and credible (Tr. 191, 210-211). It is the kind of work that always needs to be done.

From this I infer miners were at times required to travel and to work in the vicinity of the unguarded equipment. Further, and as I have explained previously, while I credit the company's contention that it was company policy to turn off the equipment when such work was done, I cannot conclude the policy was followed invariably. Human nature being what it is, it defies belief that miners would always insist on the operation shutting down before accessing the walkway to work.

Therefore, I conclude it was reasonably likely that as mining continued at the pit, a miner would have slipped or fallen on the walkway and become entangled in the unguarded belts and pulleys, or would have been otherwise pulled into the moving parts. It was also reasonably likely that when this happened the miner would have suffered injuries ranging from relatively minor (bruises), to very serious (major cuts, the loss of a digit or appendage), or worse (death).

In addition, because the injuries posed by the unguarded belts and pulleys could have been severe and because miners were from time to time exposed to such injuries by accessing the walkway, I also find that the violation was serious.

### NEGLIGENCE

For the reasons stated with respect to Citation No. 4286260, I find the company's negligence was moderate.

### YORK 96-69-M

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285649	4/9/96	14112(b)	\$111

The citation states:

The tail pulley guard had been removed and was not replaced on the 3/8 stone belt. The unguarded tail pulley was approximately 2 feet above the existing ground level. Existing bolts indicate the tail pulley had been guarded previously.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

### YORK 96-67-M

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285650	4/9/96	14112(b)	\$111

The citation states:

The tail pulley guard had been removed and was not replaced at the sand belt. The unguarded tail pulley was approximately 4 to 5 feet above the existing ground level. Existing bolts indicate the tail pulley had previously been guarded.

In addition to alleging a violation of the standard, the citation contains an S&S finding.

Essentially, the allegations concerning Citation Nos. 4285649 and 4285650 were tried together.

With regard to Citation No. 4285649, Patterson testified the tail pulley assembly area of the 3/8 inch stone conveyor belt was not guarded. (The belt transported finished stone from a transfer point to a stock pile.) Patterson noticed "attachments like hooks and so forth" that had been used to attach a guard (Tr. 216, 220; Gov. Exh. 2M). The stone conveyor belt was operating during the inspection (Tr. 215-216).

Because the conveyor tail pulley was within 4 to 5 feet of the ground, Patterson believed any person working or traveling near it could be entangled in the unguarded pulley or the belt (Tr. 217, 219). Work activities that would bring a miner in close proximity to the unguarded area were aligning the belt to get it running as straight as possible or cleaning up accumulated spillage under the belt (Tr. 219). If the clothing of the miner doing such work became caught in unguarded tail pulley, the person could be pulled into the conveyor belt and be "turned into hamburger" (*Id.*). Adding to the hazard was the fact that it was April and that miners wore extra clothing that could more easily be caught in the mechanisms (Tr. 219).

Fortunato Palumbo testified that the stone conveyor belt was misaligned. The misalignment had to be corrected, and the only way to correct it was to make an adjustment and then to run the belt to see if it was aligned properly (*Id.*). Palumbo also testified that to realign the belt, the guard had to be removed from the belt drive area (Tr. 225).

When questioned by Fortunato Palumbo, Patterson agreed the stone conveyor belt was misaligned (Tr. 221). Patterson also agreed that belts usually are operated while they are realigned (Tr. 225). Patterson stated that "the guard can be taken off if there is an adjustment" (Tr. 226). However, Patterson saw no tools indicating the company was in the process of adjusting the belt, nor did he find the guard anywhere near the tail pulley assembly (*Id.*).

With regard to Citation No. 4285650, Patterson stated that as he approached the tail pulley of the sand conveyor, he noticed the pulley guard was missing. (The sand conveyor carries sand from the sand screw to a stockpile (Tr. 231)). Like the stone conveyor tail pulley,

Patterson saw indications the sand conveyor tail pulley once had been guarded. Hooks and bolts indicated where the guard had been attached (Tr. 230-231; Gov. Exh. 2N). Patterson recalled the sand conveyor belt and the tail pulley as being in operation during the inspection (Tr. 231-232).

There was standing water in the area, but enough sand had built up around the pulley for a miner to access the unguarded area (Tr. 231). Therefore, the lack of a guard meant that when the belt was running and a miner was near it, there was danger the miner would be caught in the pulley. His or her clothing would be entangled in the moving parts or in the pulley's nip points, and the miner would be dragged into the pulley mechanism. Patterson believed it reasonably likely that broken bones, lost limbs, or death would result (Tr. 232).

Because of its height, the tail pulley was easily accessible to anyone working around it. Such a person would be greasing the pulley, cleaning up around the belt, checking the operation of the sand screen, or making adjustments to the belt (Tr. 233). Patterson felt that "at any time someone could walk right up to [the unguarded area]" because "[t]here was nothing to restrict anyone from going up" (Tr. 234).

Fortunato Palumbo agreed the guard was not in place (Tr. 235-236).

### **THE VIOLATIONS**

To prove a violation of the standard, the Secretary must establish that the guards were missing and that the tail pulleys were operating. In both instances, the parties agreed the guards were missing. Further, Patterson testified credibly that he had seen the belts and the pulleys operating during the course of his inspection (Tr. 216-217). Based upon all of the evidence, I find that the cited tail pulleys were not guarded and were "being operated" within the meaning of the standard.

However, the standard also states that a guard need not be in place when an operator is "making adjustments which cannot be performed without removal of the guard" (30 U.S.C. §56.14112(b)), and I find this exception applicable in the case of the stone conveyor tail pulley. The gist of Fortunato Palumbo's testimony was that the company was in the process of realigning the belt and that to do this the guard had to be and was removed (Tr. 225). Patterson agreed the stone conveyor belt was misaligned (Tr. 221) and the guard could be taken off to align the belt.

The fact Patterson saw no tools or the old guard near the tail pulley, does not defeat the exception. The company may have taken its tools and the old guard elsewhere. Or, it may have disposed of the old guard. The evidence establishes that the belt was in need of alignment, that the company was in the process of getting the plant ready for the operating season, and that

the guard could be removed to do the realignment. Therefore, I have no reason to doubt Fortunato Palumbo's assertion that the guard was missing because the belt was being aligned. The violation of section 56.14112(b) alleged in Citation No. 4285649 has not been established.

The allegation with regard to the sand conveyor tail pulley (Citation No. 4285650) is another story. Although Fortunato Palumbo stated that he "offered the same comments" regarding both the sand conveyor tail pulley and the stone conveyor tail pulley, neither he nor Carmine Palumbo testified that the sand conveyor belt was misaligned or had been realigned. Nor did Patterson testify he observed a problem with the belt's alignment.

The Palumbos were representing the company without benefit of counsel, and I allowed them considerable leeway. However, to find the exception applied there has to be testimonial or documentary evidence the guard was missing so that necessary adjustments could be made, and there is no such evidence here. Therefore, the violation of section 56.14112(b), as alleged in Citation No. 4285650, has been established.

### **S&S and GRAVITY**

The violation was both S&S and serious. The Secretary proved it was reasonably likely the hazard posed by the unguarded sand conveyor tail pulley would result in a miner being caught in the pulley. First, the unguarded pulley was easily accessible. The company did not dispute Patterson's opinion that there was nothing to prevent or deter access to the pulley, and the fact that water was standing in the area was negated by the sand "bridge" that was present (Tr. 231). Nor did the company question the fact that location of the unguarded pulley, was such that a miner easily could walk into it or have an extended arm or piece of clothing caught in it (Tr. 230). Further, Patterson credibly testified to activities that would bring a miner into contact with the unguarded pulley — cleaning up around the belt and checking the operation of the sand screen (Tr. 233). Clearly, as mining continued these activities would have taken place and when they did, open access to the tail pulley made it reasonably likely an accident would occur. Finally, as Patterson testified, the result of any accident would have been reasonably serious or worse (Tr. 232).

Because the injuries posed by the unguarded sand conveyor tail pulley would have been serious or worse, and because as mining continued, miners would have been exposed to the danger, I find the violation was serious.

### **NEGLIGENCE**

For the reasons stated with regard to Citation No. 4286260, I find the company's negligence was moderate.

<b><u>Citation</u></b>	<b><u>Date</u></b>	<b><u>56 C.F.R. §</u></b>	<b><u>Proposed Penalty</u></b>
4285651	4/9/96	18002	\$50

The citation states:

Records of inspections of working places for conditions which adversely affect safety or health . . . were not being . . . completed and recorded by a competent person or the operator.

YORK 96-69-M

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285652	4/10/96	12028	\$50

The citation states:

The operator did not have available for review records of the annual continuity & resistance test of the plant's grounding system. MSHA records indicate the last continuity & resistance test was conducted on 3/12/95.

Essentially the allegations concerning Citation Nos. 4385651 and 4385652 were tried together.

With regard to Citation No. 4385651, Patterson explained that section 56.18002(a) in part requires a competent person to examine each working place at least once each shift for conditions which may adversely affect safety or health and that section 56.18002(b) requires a record of the examinations to be kept for 1 year. In addition, the records must be available for review by MSHA and its inspectors (Tr. 237-238).

Patterson stated it was his usual practice upon conducting an inspection to ask the person in charge of the mine where such records are located. At the Dover Pit, Patterson asked Carmine Palumbo. Palumbo responded that the records might be at the office. When Patterson and Palumbo got to the office, Palumbo could not find them (Tr. 238).

Patterson did not believe there was "any great hazard" associated with failing to have available the results of the examinations (Tr. 242). Nevertheless, Patterson noted the records could be useful to an operator because they could alert the operator to conditions that needed correction (Tr. 243).

Fortunato Palumbo testified the examinations were conducted but that he "was not aware . . . there was a requirement for a written record" (Tr. 240).

With regard to Citation No. 4685652, Patterson explained that section 56.12028 requires in part that the continuity and resistance of grounding systems be tested annually after the systems have been installed. In addition, a record of the resistance measured during the most recent tests must be made available to MSHA and its inspectors upon request. The tests establish the continuity of the system and reveal the presence of any electrical faults (Tr. 245).

According to Patterson, when he was at the mine on April 10, he asked to see the result of the last annual continuity and resistance test for the plant's grounding system. Carmine Palumbo thought the reports might be at the office. When Patterson and Palumbo got to the office, Palumbo could not find the records (Tr. 244-246).

Fortunato Palumbo testified that the continuity and resistance tests were last done in the spring of 1995, but that he too could not find a record of the tests (Tr. 249-250, 251).

### THE VIOLATIONS, GRAVITY, & NEGLIGENCE

Patterson and Fortunato Palumbo agreed the required records were not kept (Tr. 240, 249-250, 251). Patterson essentially testified that the failure to keep the records was not serious (Tr. 242). Therefore, I find that the violations occurred and that they were of minimal gravity.

The company's failure to keep written records represents a moderate lack of care. The record keeping requirements are clearly stated in the regulations, and it is the duty of an operator to know and abide by the regulations. Ignorance does not lessen the operator's duty to comply.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>
4285271	4/17/96	12030	\$157

The citation states in part:

The MCC [motor control center] trailer used to power the plant has not been maintained, or, used in a workman-like manner, has no evidence of a proper and safe grounding system, and contains other violations creating some potentially dangerous conditions.

In addition to alleging a violation of the standard, the citation contains an S&S finding.

Jon Montgomery is an MSHA electrical inspector. He went to the Dover Pit on April 17, 1996, in order to further inspect the operation's grounding system (Tr. 253-255). Montgomery first inspected the motor control center trailer (a van-type trailer). In addition to being used for storage, the trailer housed the electrical controls for almost all of the electrical equipment at the pit, including the conveyor belts, shakers, and the cone crusher (Tr. 257).

Inside the trailer Montgomery noticed a number of exposed and energized relay devices. He also noticed starters, disconnecting devices, and conduits that were exposed and unprotected (Tr. 258, 262-263, 267-270, 271; Gov. Exhs. 2O, 2P, 2T, 2U, 2V). In addition, he observed cables that were not bushed where they left junction boxes (Tr. 265-266; Gov. Exh. 2R), other cables that were not installed in a workman-like manner, and fuses that were too large for their

conductors (Tr. 259). Finally, the electrical service mast (a conduit that rose above the trailer and that provided access to incoming electrical wires) was laying on an angle and was not supported (Tr. 259-260; Gov. Exh. 2W). The condition of the service mast put additional stress on the cables entering the trailer (Tr. 273).

Carmino Palumbo's son was at the mine on April 17, and Montgomery asked him how long the conditions had existed. He did not know (Tr. 275). On the other hand, Fortunato Palumbo told Montgomery the conditions had "been like that for many years" and that other MSHA inspectors had "no problem" with them (Tr. 275-276).

In Montgomery's opinion all of these conditions created a serious shock and fire hazard, and he cited the company for failing to correct them before the electrical equipment was energized (Tr. 259-261, 263, 267). Montgomery believed that a short in the system would have resulted in a fire in the trailer or a shock hazard to miners working in the trailer (Tr. 260). In his view, the confluence of the conditions made it reasonably likely an injury would have resulted (Tr. 282-283). He noted employees often were exposed to the conditions because they frequently entered the trailer during the course of a shift to start and stop equipment and to obtain parts (Tr. 283).

Fortunato Palumbo reiterated what he had told Montgomery, that the wiring in the trailer had been in place for "a number of years" (Tr. 285). Indeed, some of it was installed in 1971 or 1972 (*Id.*). He maintained many of the unprotected wires did not require conduits because they had an "extra heavy covering" (Tr. 286), and that, in any event, the trailer itself was grounded by structural frame grounding (Tr. 287). He admitted, however, that the service mast was not as straight as "good practice" required (Tr. 288).

### **THE VIOLATION**

Section 56.12030 requires that "a potentially dangerous condition" be "corrected before equipment or wiring is energized." I credit Montgomery's testimony regarding the conditions he found inside the trailer and the condition of the outside service mast. Montgomery's recitation of the conditions was detailed and was confirmed by pictorial evidence entered into the record by the Secretary (*see* Gov. Exhs. 20-2X). Further, the company did not contest his description as much as challenge the conclusions he drew from the conditions. Since it is clear from Patterson's testimony the electrical equipment had been running at the plant, and since it is also clear that the conditions Montgomery described existed when Patterson was there and the equipment was running, the question of whether or not a violation occurred turns upon whether the conditions were potentially dangerous.

I agree with Montgomery that the exposed wiring should have been protected from unintended damage, and that failure to protect it presented a fire and shock hazard. The standards do not exempt conductors from the protection afforded by covers or conduits on the basis of their jackets. Vibrations or other stress factors eventually can wear through the toughest outer jackets.

I also agree with Montgomery that fuses that were too large for the conductors they serviced added to the danger. He persuasively described what could happen: “[I]n the event of a short circuit [or] overload, the fuse is intended — or the circuit breaker is intended [to] open. If you size that too large then the fuse or the circuit breaker will not open . . . and the conductor will start overheating resulting in, most times, a fire” (Tr. 259).

I further agree that the bent service mast put stress on the incoming electrical wires and made it more likely the live wires would disconnect in the trailer, especially in view of the fact the wires outside were subject to the weight of ice forming on them during spring storms (Tr. 273). In this regard, I note Fortunato Palumbo’s statement that “[g]ood practice” required the mast head to be straight and supported (Tr. 288).

The fact that miners frequently entered the trailer to start or stop equipment and to obtain parts, meant that they were directly subjected to the hazards, and this too contributed to making the conditions “potentially dangerous” within the meaning of the standard.

Without considering whether or not there was a “safe grounding system” (Citation No. 4285271) there is more than ample evidence of the potential dangers posed to miners by the other cited conditions, and I sustain the alleged violation.

### **S&S and GRAVITY**

The violation was both S&S and serious. The conditions cited by Montgomery, created a measure of danger to the safety of the miners who entered the trailer. Moreover, as mining continued, the frequent visits of the miners to the trailer, combined with the unprotected wires, the improper fuses, and the added strain on the electric conductors coming into the trailer made it reasonably likely a short circuit or an exposed live wire would result in a miner being burned or shocked or both. The resulting injuries would have been reasonably serious, if not fatal.

Electrical conduits, connections, and overload protective devices are potentially very dangerous if they are not installed and maintained as required. In view of the gravity of the injures that could be expected and the extensiveness of the violative conditions in and immediately outside the trailer, this was a serious violation.

## **NEGLIGENCE**

The conditions that constituted the violation were numerous and visually obvious. The potential danger to miners from the electrical components in and immediately outside the trailer meant the company had a high duty of care to make certain all were properly installed and maintained. The extensive disarray found by Montgomery and the length of time the conditions apparently existed are indicative of the company's more than moderate failure to meet its duty.

## **OTHER CIVIL PENALTY CRITERIA HISTORY OF PREVIOUS VIOLATIONS**

The company has a very small history of previous violations in that during the 2 years prior to the first violation alleged in these cases, the company's applicable history consisted of two violations (Tr. 13-17; Gov. Exh. 1).

## **SIZE OF BUSINESS**

It is clear that the company is very small. When Patterson was at the mine only two miners were working (Tr. 26). Further, in proposing penalties for the alleged violations, MSHA assigned the company no points for its size, which means that according to MSHA's records, 10,000 annual hours or less are worked at the mine. This is the smallest category MSHA recognizes (see 30 C.F.R. § 100.3(b)).

## **ABILITY TO CONTINUE IN BUSINESS**

The burden is on the operator to come forward with proof that the size of any penalty will effect adversely its ability to continue in business. The company did not offer any evidence in this regard, and I find that the size of the penalties assessed will not effect the company's ability to mine.

## **GOOD FAITH IN ATTEMPTING TO ACHIEVE RAPID COMPLIANCE**

The parties stipulated that the company exhibited good faith in rapidly abating any violations that existed (Tr. 66-67).

## **CIVIL PENALTY ASSESSMENTS**

### **YORK 96-67-M**

<b><u>Citation</u></b>	<b><u>Date</u></b>	<b><u>56 C.F.R. §</u></b>	<b><u>Proposed Penalty</u></b>	<b><u>Assessment</u></b>
4285641	4/8/96	12025	\$ 117	\$ 0

There was no violation of the standard.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285642	4/8/96	14109 (b)(1)	\$50	\$75

The violation was not serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$75 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4286260	4/8/96	14112(b)	\$ 111	\$90

The violation was serious and the company's negligent was moderate. Given these and the other civil penalty criteria discussed about, I conclude a penalty of \$90 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285643	4/9/96	12025	\$117	\$90

The violation was serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$90 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285644	4/9/96	4101	\$50	\$50

The violation was not serious and the company's negligence was low. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$50 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285645	4/9/96	14112(b)	\$111	\$90

The violation was serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$90 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285646	4/9/96	14112(b)	\$111	\$50

The violation was not serious and the company's negligence was low. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$50 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285647	4/9/96	12025	\$111	\$0

There was no violation of the standard.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285648	4/9/96	14107(a)	\$81	\$90

The violation was serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$90 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285650	4/9/96	14112(b)	\$111	\$90

The violation was serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$90 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285651	4/9/96	18002	\$50	\$75

The violation was not serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$75 is appropriate.

**YORK 96-69-M**

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285649	4/9/96	14112(b)	\$111	\$0

There was no violation of the standard.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285652	4/10/96	12028	\$50	\$75

The violation was not serious and the company's negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of \$75 is appropriate.

<u>Citation</u>	<u>Date</u>	<u>56 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4285271	4/17/96	12030	\$157	\$150

The violation was serious and the company's negligence was more than moderate. Given these and the other civil penalty discussed above, I conclude that a penalty of \$150 is appropriate.

**ORDER**

Within 30 days of the date of this decision, the Secretary **WILL VACATE** Citations No. 4285641, 4285647, and 4285649 and **WILL MODIFY** Citation Nos. 4285643 and 4285646 by deleting the S&S findings. Within the same 30 days, Palumbo Sand & Gravel **WILL PAY** civil penalties as follows:

Docket No. YORK 96-67-M — \$700  
Docket No. YORK 96-69-M — \$225

Upon vacation and modification of the citations and payment of the assessed penalties, these proceedings are **DISMISSED**.

*David Barbour*  
David Barbour  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**AUG 20 1997**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 94-15
Petitioner	:	A. C. No. 36-04109-03522 A
v.	:	
	:	Ambrosia Tipple Mine
WAYNE R. STEEN Employed by	:	
AMBROSIA COAL COMPANY,	:	
Respondent	:	

**REMAND DECISION**

BEFORE: Judge Barbour

In this civil penalty proceeding, the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitioned for the assessment of a civil penalty against Wayne R. Steen, a foreman of Ambrosia Coal & Construction Company (company). The petition was filed pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. § 820(c)). The Secretary alleged Steen knowingly violated 30 C.F.R. § 77.404(a) by allowing a highlift to be operated with defective brakes. (Section 77.404(a) in part requires mobile equipment to be maintained in safe operating condition and equipment in unsafe condition to be removed immediately from service.) Steen denied the allegations, and the case was heard and decided by Commission Administrative Law Judge William Fauver.

**DECISIONS OF THE JUDGE AND THE COMMISSION**

Judge Fauver held Steen was a corporate agent under section 110(c) of the Act and Steen knowingly authorized a violation of the standard. The judge found Steen knew for 5 or 6 days the highlift's brakes were defective, yet failed to repair them or to remove the highlift from service (16 FMSHC 2293, 2300, 2302 (November 1994)). Although the Secretary proposed a civil penalty of \$3,500, the judge assessed Steen \$4,000 for the violation (16 FMSHRC at 2303-06).

Judge Fauver based the penalty upon his findings that Steen exhibited high negligence in allowing the highlift to be operated without effective brakes (16 FMSHRC at 2304), the violation was reasonably likely to result in a serious injury (16 FMSHRC at 2305), and after being cited for the violation, there was instant action to comply with the standard (16 FMSHRC at 2305). The judge also believed the amount assessed was "sufficient to deter ... [Steen], and others similarly situated, from committing a similar violation in the future" (16 FMSRHC at 2305).

Steen appealed, and although the Commission upheld the judge's findings regarding Steen's liability under section 110(c) and Steen's knowing violation of the standard (*Ambrosia Coal & Construction Company (Ambrosia I)* 18 FMSHRC 1552, 1563 (September 1996)), it concluded the judge improperly considered the deterrent effect of penalty. (The Commission stated, "[d]eterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered" (18 FMSRHC at 1565).) The Commission also held the judge failed to set forth adequate findings when applying the statutory penalty criteria to Steen. The Commission remanded the matter for reassessment of the penalty (18 FMSHRC at 1555-56).

On remand, the judge noted he had found the violation to be a significant and substantial contribution to a mine safety hazard due to high negligence. He also noted Steen's financial situation justified amortizing the payment of a civil penalty and Steen had no record of previous violations. Putting aside the deterrent effect of the penalty with respect to Steen and others similarly situated, he concluded the six statutory civil penalty criteria warranted the assessment of a civil penalty of \$3,500 payable in ten consecutive installments of \$350 (18 FMSHRC 1874, 1875-76 (October 1996)).

Once again, Steen appealed. He argued the judge did not make necessary factual findings as to his income or net worth and that the penalty of \$3,500 was excessive in light of his financial situation. In Steen's view, a total penalty of \$575 was appropriate.

The Commission affirmed Judge Fauver's consideration of four of the six statutory civil penalty criteria (*Ambrosia Coal & Construction Company (Ambrosia II)* 19 FMSHRC 819, 823-824 (May 1997)). However, it concluded the judge's consideration of the criteria of "ability to continue in business" and "size" were incomplete, and it remanded the matter for further application of the criteria and reassessment (19 FMSHRC at 824-825).

### **POST REMAND PROCEEDINGS**

On remand, the judge ordered the parties to confer to determine if they could stipulate to a statement of Steen's current income, net worth, and financial obligations, and to include in the stipulation copies of Steen's latest federal income tax return, his W-2 Form and a balance sheet. The judge also requested a statement whether or not Steen had the financial ability to pay a civil penalty of \$3,500 in 10 monthly installments of \$350 and continue to meet other financial

obligations. If Steen could not, the judge requested the parties to stipulate the civil penalty and the amount of the monthly installments he could pay (Order On Remand (May 9, 1997) (as modified May 30, 1997)).

In response, the parties submitted a statement of the income of Steen and his wife (Stip., Exh. A), a statement of the monthly expenses of the Steen family (Id., Exh. B) (excepting from the agreement the claim of \$400 in monthly medical and dental expenses), a statement of the assets of Steen and his wife (Id., Exh. C), a copy of the 1996 joint U. S. Individual Income Tax Return of Steen and his wife (Id., Exh. D), and a copy of the 1996 W-2 forms of Steen and his wife (Id., Exhs. E and F). Steen submitted a separate statement of dental expenses (Statement Concerning Dental Expenditures (June 19, 1997)).

Judge Fauver offered the parties an opportunity to request a hearing on the remanded issues. If they did not want one, he stated he would consider the information submitted as evidentiary and decide the issues on the record (Order (June 25, 1997)). The Judge also stated "Since . . . Steen's tax returns are jointly filed, his income and financial obligations will be considered on the basis of household and financial obligations" (Id., n.1).

The parties declined a hearing and submitted briefs. On July 25, 1997, the matter was reassigned to me.

#### **ASSESSMENT OF A CIVIL PENALTY** **THE UNDERLYING PRINCIPLES**

I have a narrow duty on remand — to assess a civil penalty based upon Judge Fauver's prior findings regarding four of the six civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(i)) and my findings regarding the remaining two criteria, "ability to continue in business" and "size." In assessing the penalty, I am instructed by the Commission to make specific findings and be guided by principles set forth in *Sunny Ridge Mining Co.* (19 FMSHRC 254 (February 1997) (see *Ambrosia II.*, 19 FMSHRC at 823-824).

In *Sunny Ridge*, which was decided after Judge Fauver's October 1996 decision, the Commission held that when assessing a civil penalty in a section 110(c) case, a judge must make findings on the penalty criteria as they apply to the individual who has been found liable and must be mindful of facts such as "the individual's income and family support responsibilities, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay" (19 FMSHRC at 272).

When applying these principles to the criterion of "ability to continue in business," the Commission stated the relevant inquiry is whether the penalty "will effect the individual's ability to meet his [or her] financial obligations" (*Ambrosia II.*, 19 FMSRHC at 824). With respect to the criterion of "size," the Commission directed an inquiry into "whether the penalty is appropriate in light of the individual's income and net worth" (Id.).

Because section 110(c) places liability upon individual corporate directors, officers, or agents and because the Commission has emphasized the effect of the penalty upon the individual who has been found liable under section 110(c), Steen argues it was an error for Judge Fauver to state that he would consider Steen's financial information on the basis of household income and financial obligations. Steen also maintains it would be an error for me to consider any part of Mrs. Steen's income in assessing the penalty. Rather, I should consider "only ... Steen's income, net worth and financial obligations and explain how they affect the penalty" (Reply Brief Following Commission's Second Remand 3 (emphasis added)). In other words, Steen would have me exclude from consideration all income earned by his wife and a percentage of household liabilities equal to the percentage of her contribution to household income.

I decline to do so. Implicit in Judge Fauver's decision to consider Steen's income and financial obligations on the basis of household income and financial obligations is the fact the Steens do not live economically discrete lives. Like most domestic partners, they function as an economic unit. They commingle economic resources and jointly assume economic responsibilities. They file a joint federal income tax return ( Stip., Exh. D). They jointly hold real property (Stip., Exh. C). Personal property, such as automobiles and household property, is titled jointly (Id.). They have a joint personal checking account (See Statement Concerning Dental Expenses). Moreover, as may be inferred from the list of expenses, they are equally liable for most, if not all, of their debts (Stip., Exh. B). I must make findings based on fiscal reality not its artificial segmentation. Therefore, I will consider their joint income as Steen's income, their joint property as his property, and their joint liabilities as his liabilities.

#### **ABILITY TO CONTINUE IN BUSINESS**

The parties stipulated to monthly family expenses of \$2,715 (Exh. B-1) (\$3,115 less medical and dental expenses of \$400) and Steen submitted documentation to substantiate the dental balance owed or to be incurred (Stipulation 2; Statement Concerning Dental Expenses). The dental statement details expenses paid from August 12, 1996 through June 16, 1997 (\$2,276). It also indicates two additional appointments scheduled for Mrs. Steen in late June 1997, and August 1997, for an examination of work already performed. The statement declares as of June 19, 1997 "[a]ll of ... [Mrs. Steen's] major work appears to have been completed." The statement does not indicate an existing balance is due.

With no major dental work anticipated, and with no existing balance, it appears that as of June 19, Steen and Mrs. Steen have paid most of her past due dental bills, and her future dental expenses will be for forthcoming appointments and routine dental work. Recognizing unexpected medical and dental expenses can arise and estimating future expenses is to some extent an exercise in imprecision, I conclude allocating \$250 a month to medical and dental expenses is reasonable.

Therefore, based upon the parties' stipulations and Steen's statement concerning dental expenses, I find Steen has monthly family expenses of \$2,965 (\$3,115 less \$400 plus \$250).

To meet these expenses, Steen has available to him monthly family income of \$3,156 (Stip., Exh. A). This leaves a balance of \$191 per month. Presently Steen is meeting his financial obligations with money to spare.

### **SIZE**

The parties stipulated that Steen's annual net income is \$20,300 and his combined annual net income is \$37,873 (Stip., Exh. A). Steen's net income is well above the "poverty level" for a family of three (\$12,517 in 1996 according to the U.S. Department of Commerce (<http://www.census.gov/hhes/poverty/threshld/thresh96.html>)). Moreover, Steen has significant equity in his home (\$43,610) and he has automobiles and other personal property worth \$5,500 (Stip., Exh. C). In light of his income and net worth, I conclude Steen is well able to pay a penalty of at least moderate size, provided the penalty is amortized.

### **THE PENALTY**

Judge Fauver concluded that Steen exhibited high negligence in authorizing the violation of section 77.404(a). He also found the violation was serious, and that the criteria of good faith abatement did not apply (18 FMSHRC at 1875). These findings were affirmed by the Commission (*Ambrosia II*, 19 FMSHRC at 823-824). Judge Fauver also found, and the Commission affirmed, Steen's employer, Ambrosia, had an average history of previous violations and he noted there was no indication Steen previously violated section 110(c) of the Act (18 FMSHRC at 1875; *Ambrosia II*, 19 FMSRHC at 823-824).

Weighing these factors, along with Steen's income, family support responsibilities, and net worth, I conclude that a total penalty of \$2,000 is warranted and that it should be payed in installments for 12 consecutive months. I recognize the penalty and payments will not be inconsequential for Steen, given his obligations and income, but then neither was his knowing and egregious violation of section 77.404(a).

It bears repeating the highlift was operating with brakes that could not hold on a 30 to 40 degree ramp, through a tipple yard with unobstructed access to a nearby highway, and with an operator who did not have a seatbelt (16 FMSHRC at 2299). Steen had full knowledge of all these conditions, yet he allowed the highlift of operate for at least 5 and possibly 6 working days (16 FMSHRC at 2302), endangering himself (Steen actually operated the highlift while it had defective brakes (*Id.*)), the highlift operator, other miners, and the public.

It also bears repeating, as Judge Fauver pointed out originally, that section 110(c) is included in the Act to deter this kind of violation.

## TWO LESSONS

Two cautionary lessons attend this case. First, a foreman of a corporate operator who knows of existing violations of the Mine Act or its standards must promptly remedy them. A foreman who fails to act does so at his or her fiscal peril.

Second, through *Sunny Ridge*, the Secretary is on notice concerning the type of information the Commission deems necessary to establish the "ability to continue in business" and "size penalty" criteria. The burden of proof is on the Secretary. Failure to offer the evidence through stipulation or documentation prior to the closing of the evidentiary record will result in a judge being unable to consider the criteria and, most likely, in a much lower civil penalty. This will necessitate more intensive prehearing preparations by the Secretary, since, in all probability, judges will not look favorably on requests to submit the information post hearing.

## ORDER

Steen shall pay a civil penalty of \$2,000. Payment shall be made in 11 consecutive installments of \$166.66 each and the 12<sup>th</sup> installment of \$166.74. Payments will begin on November 1, 1997, and continue on the first day of each succeeding month until the full amount has been paid. Upon full payment of the penalty, this proceeding is **DISMISSED**.



David F. Barbour  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**AUG 26 1997**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-79
Petitioner	:	A.C. No. 05-02820-03774
	:	
v.	:	Docket No. WEST 96-125
	:	A.C. No. 05-02820-03778
	:	
BASIN RESOURCES, INC.,	:	Golden Eagle Mine
Respondent	:	

**DECISION**

Appearances: Edward B. Ritchie, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Vincennes, Indiana, and Edward Falkowski, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner; Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Inc. ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820. The petitions allege 38 violations of the Secretary's safety regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and Basin Resources filed a post-hearing brief.

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

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Citation No. 4057626

On September 11, 1995, MSHA Inspector Melvin Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.220(a)(1). In the citation, the inspector alleged that Basin Resources was not complying with its roof control plan. The citation states that an amendment to the plan dated June 21, 1995, requires the use of truss bolts in certain areas of the entry No. 3 of the 4 left section. The citation alleges that truss bolts had not been installed in the cited area and that vertical yield control supports ("VYC") had been installed as supplemental support. The inspector determined that the violation was not of a significant and substantial ("S&S") nature and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation.

Inspector Shiveley testified that Basin Resources sought an amendment to its roof control plan so that it could use truss bolts in lieu of cribs for supplemental roof support in a test area. (Tr. 14-18; Ex. R-B). The amendment was approved by MSHA on June 21, 1995. *Id.* The amendment applies only to a specified section of the No. 3 entry in the 4 left section (the "test area"). Inspector Shiveley testified that truss bolting was not present when he inspected the test area on September 11. (Tr. 19-20). Instead, supplemental support was provided by VYC supports. VYCs are a type of supplemental roof support that is approved for use at the Golden Eagle Mine. (Tr. 20). The No. 3 entry was a travelway to the bleeders and the roof was under pressure because the longwall machine had retreated outby. Inspector Shiveley testified that roof bolts had been installed in the cited area. (Tr. 52). He also stated that if the operator had not amended its roof control plan to establish the test area, the VYC supports would not have violated the plan. (Tr. 53). It was his position that because the operator had amended the plan to use truss bolts, it could no longer use VYCs or other cribbing material in the test area.

Kay Hallows, the former safety director for the Golden Eagle Mine, testified that it was his understanding that the mine could continue to use any approved supplemental support in the test area and that the plan amendment also authorized the use of truss bolts. (Tr. 141-42). He did not believe that the mine was required to use truss bolts in the test area. *Id.* He testified that MSHA had not advised mine officials of its more restrictive interpretation of the plan amendment prior to the issuance of the citation. It appears that truss bolts were never used in the test area. (Tr. 151).

Basin Resources argues that the citation should be vacated because the plan was amended to allow the use of truss bolts as an alternative to cribs or other types of supplemental supports. Basin Resources states that the Secretary's restrictive interpretation of the plan amendment is unreasonable and that Basin Resources was not given notice of this interpretation. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (August 1995). It argues that the citation should be vacated.

Basin Resources requested permission to use truss bolts "in lieu of" cribs for supplemental support in the test area. (Ex. R-B pp. 2 and 6). The diagram accompanying the request states that a "truss system will be installed." *Id.* at 3. The term "in lieu of" means "instead of" or "in the place of." *Webster's New Collegiate Dictionary 657 (1979)*. Thus, given the language in Basin Resources' request to amend the roof control plan, I find that the Secretary's interpretation of the amendment is reasonable. The request clearly states that Basin resources *will* install truss bolts *instead of* cribs. The request does not indicate that the amended plan would permit Basin Resources to install truss bolts in the test area if it subsequently decided to do so. I also find that Basin Resources was provided sufficient notice of the Secretary's interpretation because the Secretary merely relied upon the language contained in Basin Resources' request. Accordingly, the citation is affirmed.

I find that the violation was not serious because supplemental support had been installed. I also find that Basin Resources' negligence was less than moderate. Although it amended the plan to use truss bolts, it installed an approved supplemental roof support system in the test area. A penalty of \$100 is appropriate.

B. Citation No. 4057638

On September 18, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.364(a)(1). In the citation, the inspector alleged that a weekly examination for hazardous conditions was not conducted for the week of 9-10-95 through 9-16-95 in the 4 left section, No. 3 entry. The citation states that conditions in the entry prevented personnel from entering the area to conduct the examination. The citation also states that a monitoring system was in the area to measure methane and carbon monoxide levels in the area. The inspector determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard provides, in part, that a certified person shall examine unsealed worked-out areas to the area of deepest penetration at least once every seven days.

Inspector Shiveley examined Basin Resources' record books and determined that the cited area had not been examined. (Tr. 28, 33). He testified that the examiner did not examine an "area that was inby crosscut 44 into and throughout the bleeder system on the backside of these longwall panels." (Tr. 29). The No. 3 entry in the 4 left section was a bleeder entry. *Id.* He further testified that the examination was not performed because he previously issued an imminent danger order in the area due to unstable roof conditions. (Tr. 30; Ex. R-D). The order prevented persons from entering the No. 3 entry. (Tr. 31-32). The inspector further stated that the methane and carbon monoxide monitoring system was in use on the day he issued the citation. (Tr. 35-36). The monitoring system does not indicate oxygen levels, air currents or other hazards. *Id.* Given the history of roof problems at the mine, he believed that Basin Resources should have taken greater measures to control the roof in the entry. (Tr. 39).

The basic facts are not in dispute. Basin Resources argues that the imminent danger order prohibited miners from entering the No. 3 entry to conduct the required examination.

Accordingly, it maintains that the citation must be vacated. It contends that safety standards must be interpreted "so as to harmonize with and further and not to conflict with the objective" of the Mine Act. *Secretary of Labor v. Western-Fuels Utah*, 900 F.2d 318, 320 (D.C. Cir. 1990) (citation omitted). Basin Resources states that the requirements of section 75.364(a)(1) should have been suspended during the pendency of the section 107(a) order.

I reject Basin Resources' arguments and affirm the citation. First, the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i), 30 U.S.C. § 820(i). Second, the imminent danger order was issued due to the poor condition of the roof in the entry. I credit the testimony of Inspector Shiveley that Basin Resources could have done more to support the roof in the area. In addition, Basin Resources did not provide for an alternate means to reach the area that was required to be examined. Thus, this case does not present a situation in which a section of a mine is inaccessible due to circumstances beyond the control of the mine operator.

I find that the violation was not serious because the imminent danger order prevented anyone from entering the area and being exposed to any hazards. In addition, the monitoring system allowed Basin Resources to determine whether dangerous quantities of methane were accumulating in the bleeders. I also find that Basin Resources' negligence was less than moderate. Its examiner was unable to enter the cited area and the withdrawal order prevented it from making the examination. A penalty of \$100 is appropriate.

#### C. Citation No. 4057610

On September 20, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 77.1605(k). In the citation, the inspector alleged that a berm or guard was not provided on the outer bank of the elevated roadway between the raw coal pile and the old coal storage bin, for a distance of 60 feet. The citation states that equipment used the roadway during the working shift and that a 20-foot deep ditch was along the edge of the roadway. The inspector determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard provides that berms or guards shall be provided on the outer banks of elevated roadways.

Inspector Shiveley testified that it appeared that Basin Resources had dug a big trench beside the roadway that increased the drop-off along the roadway. (Tr. 42). He stated that the drop-off was nearly vertical. (Tr. 43). Inspector Shiveley determined that the violation was not S&S because, at the time he issued the citation, the roadway was not heavily used. (Tr. 46). He believed that there had once been a berm in the cited area but that it had been removed to perform work in the area. (Tr. 46-48, 56).

Basin Resources contends that there had never been a berm in the cited area. Mr. Hallows testified that no berm was ever in the cited area since he joined Basin Resources in April 1994. (Tr. 144). He testified that no citation had ever been issued for the condition. He stated that the "ditch" mentioned by the inspector had been present for some time but that he did not know if the ditch had been recently cleaned out or whether there had been "fresh digging" along the roadway. (Tr. 154-55).

I find that the Secretary established a violation. There is no dispute that there was a drop-off on the outer back of the roadway. I also find that the violation was not serious, based on the inspector's testimony. Basin Resources maintains that its negligence was low because the roadway had never had a berm at the cited location. If I assume that a berm was never present, I am still faced with the fact the Inspector Shiveley testified that the area below the roadway had been dug deeper. Basin Resources' argument that it was faced with inconsistent enforcement fails if, in fact, a deeper ditch created a more serious drop-off. I credit Mr. Hallows' testimony that there was never a berm present, but I also find that digging in the area below the roadway created a more hazardous condition. I find that Basin Resources' negligence was slightly less than moderate based on the testimony of Mr. Hallows. A penalty of \$400 is appropriate.

D. Citation No. 4057634

On September 12, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.1101-9(a)(1). In the citation, the inspector alleged that the nozzle on the fire suppression system on a shuttle car in the 5 left section was not protected against the entrance of moisture, dust, or dirt. The citation states that the protective cover was missing. The inspector determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard provides that dry chemical fire extinguishing systems on underground equipment shall be protected against the entrance of moisture, dust, or dirt.

Basin Resources does not dispute that the dry chemical fire extinguisher nozzle on the shuttle car was not equipped with a protective cover. Rather, it maintains that the shuttle car was being repaired and that the cited condition would have been corrected before the shuttle car was placed into service. Inspector Shiveley testified that the shuttle car was parked in a crosscut on the 5 left section, just off the entry, in an intake air course. (Tr. 59-60). The 5 left section was an active working section. He testified that the shuttle car was not tagged out and there was no other indication that it was not in service. *Id.* He did not see any mechanics working on the shuttle car. (Tr. 61). It did not appear to Inspector Shiveley that the shuttle car was under repair at the time of his inspection. (Tr. 69, 72). He also stated that even if the shuttle car were being repaired for a mechanical problem unrelated to the fire suppression system, he would have still issued the citation. (Tr. 61). He stated that fire suppression devices are needed when repairs are being made on equipment because of the risk of a fire. (Tr. 61-62). He stated that the nozzle was clean. (Tr. 71).

Mr. Hallows testified that the cited shuttle car was torn down for repair and was not in operating condition. (Tr. 146; Ex. R-G). He said that it should have been apparent that the shuttle car was not operable. (Tr. 147). He believes that the mechanic would have replaced the protective cover before the shuttle car was put back into service. *Id.*

I find that the Secretary established a violation. The safety standard, as cited here, is designed to protect the nozzle from the harmful effects of moisture, dust, and dirt. Dust and dirt may enter the nozzle when repairs are being made on the shuttle car. (Tr. 61). A fire could break out while repairs are being made. Thus, the protective purposes of the standard apply even when the equipment is out of service. In contrast, mobile equipment does not need to have operative brakes when it is under repair until it is moved to be placed into service. Thus, even if the shuttle was under repair, as asserted by Basin Resources, the requirements of the standard applied.

I find that the violation was not serious, based on the testimony of Inspector Shiveley. I find that Basin Resources' negligence was somewhat less than moderate because the equipment was not in use. A penalty of \$100 is appropriate.

#### E. Other Citations

Basin Resources also contested 34 other section 104(a) citations in these cases. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. (Tr. 5). It only contests the amount of the penalty proposed by the Secretary for each of these citations. It contends that the Secretary's penalties are too high. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

## II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 918 citations and orders in the 24 months preceding September 25, 1995, and that Basin Resources paid penalties for 736 of these citations and orders during the same period. (Ex. P-1). I also find that Basin Resources was a rather large mine operator with 23,505,829 tons of production in 1994. (Stipulation). The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. Basin Resources demonstrated good faith in abating all of the violations. (Stipulation). Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

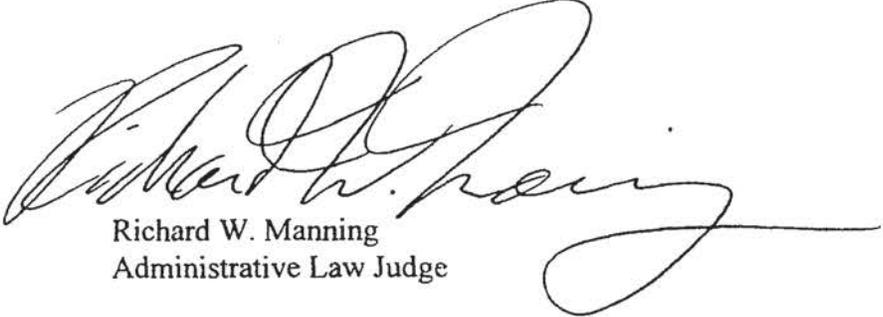
### III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
<u>WEST 96-79</u>		
4058071	75.202(a)	\$1,200.00
4058072	75.400	400.00
4058073	75.402	400.00
4057692	75.202(a)	1,200.00
4057630	75.202(a)	1,200.00
4057631	75.400	400.00
4057632	75.512	400.00
4057633	75.400	400.00
4057634	75.1107-9(a)(1)	100.00
4057635	75.1725(a)	200.00
4057603	77.1104	400.00
4057604	75.400	400.00
4057605	75.402	400.00
4057606	75.1725(a)	1,200.00
4057607	75.1403-10(i)	200.00
4057608	75.202(a)	400.00
4057609	75.503	200.00
4057614	75.904	200.00
4057615	75.1107-1(a)(3)(ii)	200.00
<u>WEST 96-125</u>		
4058067	75.400	1,200.00
4058068	75.1100-3	400.00
4058069	75.402	400.00
4058070	75.220(a)(1)	400.00
4058079	75.1403-10(i)	1,200.00
4058080	75.370(a)(1)	200.00
4057623	75.400	400.00
4057624	75.380(d)(1)	1,200.00
4057626	75.220(a)(1)	100.00
4057627	75.370(a)(1)	200.00
4057628	75.370(a)(1)	200.00
4057636	75.380(d)(1)	200.00
4057637	75.400	400.00

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4057601	77.1104	400.00
4057602	77.205(b)	1,200.00
4057638	75.364(a)(1)	100.00
4057639	77.205(b)	200.00
4057640	77.205(b)	200.00
4057610	77.1605(k)	400.00
	Total Penalty	\$18,500.00

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations listed above are hereby **AFFIRMED** or **MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$18,500.00 within 40 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

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RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

**AUG 29 1997**

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-23
Petitioner	:	A.C. No. 15-16020-03521
v.	:	
	:	Docket No. KENT 97-73
COSTAIN COAL INCORPORATED,	:	A.C. No. 15-16020-03523
Respondent	:	
	:	Smith Underground No. 1 Mine

## DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;  
Charles E. Lowther, Esq., Mitchell, Joiner, Hardesty & Lowther, Madisonville, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Costain Coal Incorporated, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege two violations of the Secretary's mandatory health and safety standards and seek penalties of \$1,500.00. For the reasons set forth below, I affirm the citation and order and assess penalties of \$1,500.00.

A hearing was held on June 3, 1997, in Evansville, Indiana. The parties also submitted post-hearing briefs in the cases.

## Background

Costain Coal's Smith Underground No. 1 mine is located in Webster County, Kentucky. On July 23, 1996, MSHA Inspector Robert Sims was conducting a quarterly inspection at the mine when he observed that only the front tips of the arms of the automatic temporary roof support (ATRS) system on the twin-boom roof bolter were in contact with the mine roof. Consequently, he issued Citation No. 4067761, alleging a violation of section 75.220(a)(1) of the regulations, 30 C.F.R. § 75.220(a)(1), because he: "Observed 2 roof bolt operators operating the Lee Norris Double Boom Bolter in the number 1 entry of the South West Panel 001 unit and the rear tips of both ATRS's were not pressurized against the mine roof. They were in the process of

installing roof bolts on their normal bolt spacing and had not reduced the support patterns to a 2' by 4' pattern as required on page 8 of the Roof Control Plan." (Govt. Ex. 5.)

On July 25, he witnessed a similar violation in the No. 7 entry and issued Order No. 4067768. It states: "Observed 2 roof bolt operators operating the Lee Norris Double Boom bolter in the number 7 entry intersection on 002 unit in the South West Panel. The ATRS would not pressurize against the mine roof and the bolt spacing was not reduced to a 2 x 4 pattern as required on page 8 of the approved Roof Control Plan." (Govt. Ex. 7.)

### **Findings of Fact and Conclusions of Law**

Section 75.220(a)(1) provides, as pertinent to this case: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." The Respondent's roof control plan requires that: "When the ATRS will not be set due to height limitations, bolts will be installed on a two by four pattern or the roof will be supported by roof bolts spaced in such a manner which will permit the operator to work under permanently supported roof at all times." (Govt. Ex. 2, at 13.)

Costain concedes that in both instances the company violated section 75.220(a)(1) and that the violations were "significant and substantial." (Tr. 11.) Therefore, the only issue to be determined is whether the violations resulted from the Respondent's "unwarrantable failure" to comply with the regulation. I conclude that they did.

The Secretary argues that the following factors support a finding that the company unwarrantably failed to follow section 75.220(a)(1). Prior to the violations, the company had been put on notice that it had to follow its roof control plan when the ATRS did not set against the roof. The Company did not train its roof bolters how to recognize when the roof control plan required a two by four bolting pattern until after the July 25, 1996, violation. The violations should have been obvious to the roof bolters. Finally, the mine had a significant roof fall problem.

The Respondent asserts that it reacted immediately to correct the problem. After the company was cited for a violation in March 1996, it began efforts to modify the equipment so that the ATRS could be set when the roof was higher than ten feet. Further, Costain contends that it is difficult to tell by looking at the roof whether bolts are in a two by four pattern. Finally, the company argues that it did not violate the regulation intentionally.

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of

reasonable care.’ [Emery] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991).” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

With regard to determining whether a violation has resulted from an operator’s “unwarrantable failure,” the Commission has stated:

We examine various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (January 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

*Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997).

In this case, several of these factors lead to a conclusion of “unwarrantable failure.” The company had clearly been put on notice that greater efforts were necessary for compliance. MSHA Field Office Supervisor Ted Smith first noticed the problem of the ATRS not reaching the roof in November 1995, pointed the problem out to the mine foreman while in the mine, and further discussed corrective measures with the foreman and the superintendent when they got outside. On March 25, 1996, Smith and Inspector Sims were at the mine and issued a citation for failing to comply with the roof control plan by not bolting on a two by four pattern when the ATRS would not set against the roof. (Govt. Ex. 3.) The very next day, Sims issued an order for the same problem.<sup>1</sup> (Govt. Ex. 4.)

While the company did take some action as a result of the March violations, it was mainly in the area of attempting to modify the equipment to operate in areas with a higher roof. Little or no guidance was given to roof bolters in determining when the ATRS was set against the roof or what a two by four bolting pattern looked like. According to the roof bolters who testified, it was not until after the July 25 order that they were given direction in what set against the roof meant and how to recognize it.

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<sup>1</sup> Though the problem was the same, Sims cited a different regulation, 30 C.F.R. § 75.202(b), because he did not want to be accused of “double dipping.” (Tr. 26.)

Although the Respondent implies that the contrary is true, the violations were obvious. Inspectors Smith and Sims spotted the violations just by looking at the ATRS and whether it was pressed against the roof. The company's roof bolters could have made similar observations by looking at each other's ATRS, but they apparently were not instructed to do so. The inspectors were also able to tell that a two by four bolting pattern was not being used by observation, even though they verified it by measurement just to make sure. The obvious difference in the two patterns is graphically demonstrated by pictures furnished by the company which show that the bolt plates are almost touching one another in a two by four pattern and are spread far apart in the normal four and one-half foot advance pattern. (Resp. Ex. D, pictures 1- 3.)

Finally, the violations posed a high degree of danger. The mine had experienced unfavorable roof conditions. It had sustained 74 roof falls in 1996, one of which was a 350 foot fall which had occurred within 400 feet of the No. 1 entry. In addition, the mine map projection indicated a possible washout,<sup>2</sup> and a linear line<sup>3</sup> across six of the ten entries being worked on at the time, both of which indicate that bad roof may be encountered. (Govt. Ex. 6.) Furthermore, the preshift examination on July 22 had found water coming into the No. 7 entry. As a result, the intersections and crosscuts had to be collared before mining could be done. Lastly, if this were not enough, when the ATRS is not properly set against the roof, the drill vibrates and shakes thereby making it more likely that pieces of the roof will come down.

The danger with the ATRS not setting against the roof is that the bolters are working under unsupported roof. That is why the roof control plan calls for a two by four pattern when the ATRS does not set. By drilling only two feet out, the bolter can remain under supported roof. The danger of working under unsupported roof is so great by itself, that the Commission has in the past relied

upon the high degree of danger posed by roof control plan violations as a basis for finding unwarrantable failure. See *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (August 1994) (allowing work under unsupported roof was result of unwarrantable failure where installation of temporary roof supports, as required under roof control plan, was "necessary for safe mining practice"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where "roof conditions were highly dangerous"); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (temporary roof support violation resulted from unwarrantable failure where prior history of roof falls "placed

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<sup>2</sup> A "washout" is a "channel cut into or through a coal seam at some during or after the formation of the seam, generally filled with sandstone--or more rarely with shale--similar to that of the roof." Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1217 (1968).

<sup>3</sup> A "linear line" is drawn based on satellite photographs of heat emanations from the earth which may indicate slips, faults and possible bad top areas underground. (Tr. 36-37.)

[operator] on notice that heightened scrutiny to assure compliance with its roof control plan was vital"). See also *Lion Mining Co.*, 18 FMSHRC 695, 700-02 (May 1996) (vacating judge's finding that roof control plan violation was not unwarrantable).

*Faith Coal Co.*, Docket No. SE 91-97, etc., slip op. at 12 (August 6, 1997).

While it is evident that the Respondent did not deliberately violate its roof control plan, the violations were obvious, the company had been placed on notice that greater efforts were necessary for compliance, its response to that notice was inadequate, and the danger was great. Accordingly, I conclude that the degree of negligence involved in these violations was "high" and that they resulted from Costain's unwarrantable failure to follow its roof control plan and the regulations.

### Civil Penalty Assessment

The Secretary has proposed civil penalties of \$1,500.00 for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 FMSHRC 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with those criteria, the parties have stipulated that: (1) the Smith Underground No. 1 mine is a large mine producing approximately 989,000 tons of coal per year; (2) Costain Coal Inc. is a large company which generates 10,000,000 tons of coal per year; and (3) a reasonable penalty will not affect the company's ability to remain in business. (Govt. Ex. 1.) The *Assessed Violation History Report* indicates that both the company and the mine have a low history of prior violations. (Govt. Ex. 8.) The gravity of the violations was serious and the company's negligence was high. Finally, the evidence indicates that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

Balancing all of this together, I conclude that the penalties of \$600.00 for Citation No. 4067761 and \$900.00 for Order No. 4067768, proposed by the Secretary, are appropriate. Accordingly, I will assess penalties of \$1,500.00 in these cases.

**ORDER**

Citation No. 4067761 in Docket No. KENT 97-23 and Order No. 4067768 in Docket No. KENT 97-73 are **AFFIRMED**. Costain Coal Incorporated is **ORDERED TO PAY** civil penalties of **\$1,500.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon  
Administrative Law Judge  
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