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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MATHIES COAL COMPANY, CONTESTANT	Contest of Order
v.	Docket No. PENN 79-89-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 620637 June 20, 1979 Mathies Mine

Appearances: Michel Nardi, Esq., Mathies Coal Company, Pittsburgh, Pennsylvania, for Contestant
Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent
The United Mine Workers of America (UMWA) filed an answer but did not enter an appearance at the hearing.

DECISION

Before: Judge Stewart

In the course of a ventilation saturation inspection at the Mathies Coal Company's Mathies Mine, the inspector issued Order No. 0620637 pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). (FN.1) The operator filed a timely challenge to this order pursuant to section 105(d) of the Act. Subsequent to the hearing in this matter held in Pittsburgh, Pennsylvania, on February 5, 1980, Contestant and Respondent Mine Safety and Health Administration submitted posthearing briefs. Proposed findings and conclusions therein inconsistent with or immaterial to this decision are rejected.

In issuing Order No. 620637, Inspector Wolfe cited 30 C.F.R. 75.1002-1(a) and alleged the existence of the following condition or practice:

> The nonpermissible S & S battery charger located between the 6 and 7 entries at the 26 á 48 split on the 14 Butt 19 1/2 face section (I.D. 055) was 95 feet, as measured with a standard measuring tape, from the line of pillar being extracted. The foreman in charge stated that he had seen the charger earlier in the shift.

Section 75.1002-1(a) reads as follows:

> Electrical equipment other than trolley wires, trolley feeder wires, high voltage cables, and transformers shall be permissible, and maintained in a permissible condition when such electrical equipment is located within 150 feet from pillar workings, except as provided in paragraphs (b) and (c) of this section.

The factual details established at the hearing are set forth below in the stipulations by the parties, the synopsis of the exhibits, and the synopsis of the testimony of each witness called by the parties.

Stipulations

At the hearing, the parties stipulated that the Mathies Mine is owned and operated by Mathies Coal Company; that both are subject to the jurisdiction of the Mine Safety and Health Act of 1977; that the Administrative law Judge has jurisdiction over this proceeding; that inspector Okey Wolfe was at all times relevant hereto an authorized representative of the Secretary of Labor; that true and correct copies of the order and modification were served upon the operator in accordance with the provisions of the Act; that copies of the order and modification are authentic and may be entered into evidence as authentic documents; that the citation or the violation was timely abated; that the battery charger in question was not permissible electrical equipment; that the battery charger was located 95 feet from the pillar line as specified in the order; and that the subject battery charger was deenergized and unplugged from the load center.

Exhibits

MSHA Exhibit 1 is Order of Withdrawal No. 0620637. MSHA Exhibit 2 is a modification of that order stating that the "type of action" should be 104(d)(2) rather than 104(a).

Contestant's Exhibit 1 is a wiring diagram for the battery charger. Contestant's Exhibit 2 is a drawing of 14 butt 19-1/2 face section showing the general location of the gob, the bleeder entry, the battery charger, and the load center.

Testimony of MSHA Witnesses

Okey Wolfe--Federal Coal Mine Inspector, MSHA

The inspector visited the Mathies Mine on June 20, 1979, for the purpose of making a ventilation inspection. While conducting his inspection on the 14 butt 19-1/2 face section, he found the battery charger located between the sixth and seventh entries at the 26á48 switch, a distance of 95 feet from the outside corner of the pillar. This was a retreat mining section and pillar-extraction was in progress. The inspector took measurements and talked to the section foreman in charge of the day shift. William Lendvei, the section foreman, stated that he had seen the charger during that shift prior to the commencement of mining and that the charger had been in this location at least for a day or two. By questioning foreman Lendvei, the inspector determined that mining had been done on the same pillar on the midnight shift. He informed Mr. Matson, the company representative traveling with him that day, that an order had been issued and in discussing the violation, Mr. Matson concurred that a violation did exist by stating, "They (the company) had been caught with their pants down."

The notation "104(a)" on the order of withdrawal was a mistake on the part of the inspector. He usually issues a 104(a) citation and in filling out the form without thinking, he wrote "104(a)" rather than "104(d)(2)." When he discovered the violation, he informed the foreman that an order was going to be issued. After Inspector Wolfe discovered his mistake on the ride back to the office, the order was modified by inspector Thomas H. Devault to show that the type of action was a 104(d)(2).

The battery scoop has to be charged periodically depending upon the amount of use it receives. The battery charger was set up as a charging station but it was not hooked up. In order for it to be put to use, it would be plugged into the power center and energized. The scoop is used for cleaning up sections. It does a better job of getting up against the ribs to get the loose coal than the miner itself does. The inspector has seen it used to haul supplies from outer areas to working places if needed. It is possible for mining operations to take place without the use of a scoop and coal could be mined without using a scoop even once during a shift. The scoop was not being operated on the section when the inspector arrived and he does not recall seeing it in use until the order was issued when it was used to move the charger.

The charger was not energized and the cable was wound up at the charger. The load center was located a little over a block of coal outby the charging station, a distance of a little more than 96 feet. The distance between the center lines of the block entries was 96 feet. Give or take a couple of yards, the battery charger was 120 feet from the battery charger. To be energized, the charger must be plugged into the load center. The load center was energized. There were no batteries in the charger.

The continuous-mining machine is permissible equipment which can be used inby the last open crosscut or in return areas. Permissible equipment is so sealed that, where there is a chance of arcing or sparking from the

components of the electrical equipment, it will prevent the escape of flame into what might possibly be a methane atmosphere. Equipment is certified by the Secretary as to whether it is permissible or nonpermissible. Under section 75.1002-1, the idea is to keep any type of nonpermissible equipment that could serve as an ignition source more than 150 feet away from any pillar areas. It is not uncommon for methane to build up in a pillar and a large flow of air can force methane out of the gob area into the working place. In order to have a fire or explosion, there must be an ignition source. The effect of a roof fall within 150 feet of the gob where methane was liberated on a deenergized continuous-mining machine and a deenergized battery charger would be similar. The methane detected by the inspector in the outlying area was very minimal. He could not attest to what was back in the pillar. The battery charger does not have gasoline in it.

The inspector did not measure the length of the charger cable. In his opinion, there was enough cable to reach the power center but he did not stretch it out. If the cable had been too short, the charger could be energized by moving the power center, moving the charger, or possibly using a jumper cable. The input voltage on the charger was 440 volts AC. The scoop batteries can be charged by removing the batteries or by leaving the tray on the scoop and charging the batteries with it on. The inspector saw no other battery-charging station on the section and did not know where the next nearest battery-charging station was located.

In referring to the distance between the battery charger and the load center marked on Contestant's Exhibit 2, the inspector stated that he was not sure that they were "quite that far out, but it's close." The distance was about 100 feet. He acknowledged that it was possible that the cable was in fact too short. The load center was active at the time providing power to other operating machinery.

Testimony of Contestant's Witnesses

Allen M. Newcoe--Manager of Purchasing and Materials Control, Eastern Region, Consolidation Coal Company

A permissible enclosure is one so constructed that it eliminates the escape of hot gases. It protects against the admission of combustible materials into the area in which electrical equipment is operated in case there is an internal explosion. If a piece of equipment is not being operated, the permissibility would not be questioned.

When exposed to a roof fall within 150 feet of a pillar line, there would be a great hazard from energized, nonpermissible equipment and less of a hazard from energized permissible equipment. If they were both deenergized, there would be no hazard present. Contestant's Exhibit 1 is a schematic diagram of a battery charger with a 440-volt input and a 20-volt output. A battery charger's function is to charge batteries.

To energize the battery charger, it is plugged into a 440-volt source, the switch on the load center turned on, and the switch on the battery charger activated. He knows of no other equipment used in the section that

utilizes batteries requiring charging in this particular battery charger. The load center is not permissible equipment. The charger serves as a power source for the mining face equipment and is continually energized during mining operations. The function of the scoop is to clean up or to transport materials to the mining junction. The length of time that a charge for a battery will last is based on the use and load it is carrying. Normally, it will operate a full shift without being recharged. There would be no purpose in energizing the battery charger other than for charging the battery to the scoop. A roof fall on the battery charger in its deenergized, unplugged state would be no different from a roof fall on a lunch bucket.

Mr. Newcoe works at the offices of Consolidation and was not at the mine to observe the actual work activities of the section. The scoop would probably not be operated continuously for 8 hours. The plug is inserted by hand, normally without the use of tools, by plugging it in and spinning the cap.

Bruce Matson--General Assistant Mine Foreman

Mr. Matson escorted Inspector Wolfe on a "blitz" inspection which was being made by a number of Federal inspectors. When Mr. Wolfe told him that the battery charger was not within permissible distance from the pillar line, Mr. Matson replied that it was inoperable and the cable was wrapped up on the charger. The battery charger was not being used at the time. The scoop was not running at the time but it could have been operated. The battery charger was better than one block from the load center, a distance of over 100 feet. The cable itself was not as long as the block. There were no batteries in the general vicinity of the battery charger. The charger must be operated in intake air because of the hydrogen gas generated. The section was mined from left to right and there was mining on the last block on the right side of the section. Mining the next pillar line, starting with block No. 73, would establish a new pillar line. The belt line, the track, and the load center would be moved back.

The load center had been moved back and energized. The unenergized battery charger was disconnected so it could be moved back. The cable was wrapped up on the charger so it could be handled without damage to the cable when it was picked up and transported to another charger station. It would be necessary to erect another charger station. It was eventually moved one break outby.

The scoop was not used continuously. It was run once or possibly twice each shift. It would probably last 3 or 4 days or possibly the entire week. It was used only for the primary supplies. Assuming one block per day on three shifts, it would take a full week to mine the pillar line. If the battery had been charged before mining was commenced, the charged battery would last until mining had been completed. Mining had been in progress 4 work days, going into the fifth day. There had been some trouble with the scoop when the battery itself would not

hold a charge but people had been called in to repair it.

Mr. Matson does not recall making a statement that the company had been caught with its pants down. It has been common mining practice when moving the belt and the tracks back from an area that has been mined, to cut the trolley wire and leave that portion of the trolley wire within a 150-foot distance. He had never received a citation for doing so notwithstanding the provisions of section 75.1002. There are five working sections under his jurisdiction at the mine. He does not visit each section every day but he receives reports of adverse conditions. When the scoop had difficulty in holding a charge, it would run down sooner than it normally would. Mining in the last block had started on the midnight shift. They were not mining when he got there.

It was his understanding that section 75.1002 applied to energized equipment and he did not think that having a battery charger within 150 feet of the gob was a violation when it was deenergized. A new charging station was constructed and the battery charger moved back. One-half hour or less was required to do so. It had been more than a week prior to the 20th when there had been trouble with the battery charger and it had been repaired. He does not know the days it was out of service and the days it was in service. He believes there was a fault in the charger itself. Instead of an 8-hour charge, it was only giving it a 3- or 4-hour charge. He does not know if the batteries were replaced in the scoop. The problem had first become apparent several weeks previously. It was holding its charge on the 20th. Mining in entry No. 6 was on the last block, block No. 71. Block No. 72 was to remain. The belt and track were not as shown on Exhibit 0-2. They had been moved back two blocks 4 or 5 days before the date of the citation. The load center was also moved back at that time.

The distance from the battery charger to the load center was more than one block. From center-to-center a block would be 96 feet. The distance would probably be another 50 feet. The load center was not in the intersection as shown in Exhibit 0-2. Ordinarily, the belt, track and load center are moved back about once each week. He does not know of his own knowledge how far the charger was from the load center.

The battery charger could not have been used from the load center for 4 or 5 days. He believes the scoop could go that long without a charge. He assumes the charger station had not been built because they were mining coal. To build a charger station, six posts are set and the area enclosed with tin sheeting. After an air current is directed to the location, the charger can be moved to the station. The trouble with the charger had been eliminated at least a week before the (d)(2) order. From indications on Exhibit 0-2, the battery charger was used 4 or 5 days previously when the belt, track, and load center had been moved. That is the normal mining cycle.

William Lendvei--Section Foreman

Mr. Lendvei worked the 8 to 4 shift on June 20 on the 14

butt 19-1/2 section. He went into the mine with Mr. Wolfe and the UMWA safety representative. After walking through the section at about 8:45 a.m., he started mining. After mining five or six buggies, the inspector told him to stop

mining because the charger was in violation of the law. He was told he had 30 minutes to move it, so he shut down. He believed that so long as it was deenergized it would not create a hazard and was surprised that this was a violation of the law. The battery charger was not energized and the cable was coiled next to it. The cable would not reach the load center. He had been mining there about 4 days and did not use the battery charger during that time. It could not be used with the cable wrapped up. He did not measure the cable but knew from previous times that it is less than one block--96 feet. The distance from the battery charger to the load center was 1-1/2 blocks. He does not recall the last time the battery was charged. He believed the battery charger would be moved when there was a breakdown or delay in mining. He would not have used it at that location. The scoop was used to transport posts and supplies. He does not know the extent of the use of the scoop on the evening or midnight shift. The scoop is not used to clean up.

Validity of Order No. 620637

An order of withdrawal may be issued pursuant to section 104(d)(1) (FN.2) if, given the requisite underlying citation, an authorized representative of the Secretary finds a violation and finds such violation to be caused by unwarrantable failure of the operator to comply. Once an order has been issued pursuant to section 104(d)(1), an order pursuant to section 104(d)(2) may be issued upon observation by an authorized representative of a "similar" violation. That is, a 104(d)(2) order is properly issued if an authorized representative observes a violation and finds that such violation was caused by an unwarrantable failure to comply on the part of the operator.

Mathies urges that: (1) a deenergized battery charger located within 150 feet of the gob is not a violation of 30 C.F.R. 75.1002-1; (2) Contestant's actions did not constitute an unwarrantable failure to comply with

30 C.F.R. 75.1002-1; and (3) the condition as it existed did not significantly and substantially contribute to the cause and effect of a mine safety hazard.

It is undisputed that the battery charger in question was not permissible equipment, that it was located within 95 feet of the pillar line as specified in the order and that it was deenergized and unplugged from the load center.

In order to energize the battery charger, it was necessary to plug it into the energized load center and then activate it by switching it on. The load center, which was not permissible equipment, was located 1-1/2 blocks, or approximately 150 feet, outby the battery charger. The battery charger cable was less than 96 feet in length and was too short to reach the load center. It had been coiled and placed on the battery charger.

The battery charger was used primarily to charge the batteries of the scoop, a piece of equipment used to haul posts and supplies from the track entry to the particular mining area. The scoop was not used on a continual basis during mining operations. The length of time a charge would last was dependent upon the use of the scoop and the load carried. The last occasion prior to June 20, 1979, on which the scoop batteries had been recharged was not established.

Violation of 30 C.F.R. 75.1002-1

In pertinent part, section 75.1002-1(a) requires that electrical equipment, be permissible and maintained in a permissible condition when such equipment is located within 150 feet from pillar workings. The battery charger was clearly non-permissible and located about 95 feet from the pillar line. This condition was in violation of the standard as alleged.

Mathies' argument that the condition was non-hazardous and, therefore, not a violation of the standard (FN.3) is rejected on two grounds. In the first place, the condition was hazardous and, secondly, there is nothing in the standard to support the contention that the violation thereof is premised on the existence of a hazard.

A battery charger which may be energized is a potential source of ignition. (FN.4) The unrebutted testimony of the inspector established that the charger could have been energized by moving the load center or by use of

a jumper or extension cable. Mathies contention that it would have been necessary to move the charger outby its location if it were to be used is rejected. Since the charger could be energized and used at its location within 150 feet from the pillar workings, the hazard against which section 75.1002-1(a) is directed clearly existed.

Even if the conditon was not hazardous, it would have been a violation of section 75.1002-1. Section 75.1002-1 contains certain qualifications to the application of the mandatory standard but the element of hazard is not one of them. In essence, Mathies' contention that there is no violation if the proscribed condition is not a hazard is an attempt to add an exception to the regulation.

Some regulations promulgated under the Act in Title 30, Code of Federal Regulations, Section 75, do contain requirements that must be met only when there is an unsafe condition. Where certain explosive gases are liberated accidentally, a report must be made and ventilation and control measures instituted to reduce the accumulations (section 75.301-8). Exposed moving machine parts which may cause injury to persons must be guarded (section 75.1722(a). Safety chains, suitable locking devices, or automatic cut-off valves are required at connections of machines to certain high pressure hose lines or between certain high pressure hose lines where connection failure would create a hazard, (Section 75.1730(e)). Protective clothing or equipment and face-shields or goggles must be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles. (Section 75.1720(a))

Section 75.1002-1, however, is clearly not premised on the existence of a hazard. The qualifying language therein prescribes no exception for an unenergized battery charger. In view of the clear language of the standard, no basis exists for qualifying the application of the standard by reading into it a requirement that the condition be hazardous.

Effect of Subsequent Modification

When the inspector discovered the battery charger, he issued an oral order of withdrawal. He also issued MSHA Form 7090-3 on which he clearly marked "Order of Withdrawal." The form, as issued, clearly indicated that the order of withdrawal was directed at the 14 butt 19-1/2 face section. The order of withdrawal was issued at 10:15 a.m. At 11:05 a.m., after the battery charger had been moved outby so that it was more than 150 feet from the pillar line, the inspector noted on the same form that the order was terminated.

On the form there is a space with the heading "Type of Action." In this space, the inspector inadvertently inserted the characters "104(a)." He explained that he did this "without thinking" because he issues more 104(a) citations than orders of withdrawal during his inspections. After the

inspector became aware of his mistake on his way to the office, he had inspector Thomas H. DeVault issue a modification to show that the "type of action" was 104(d)(2). (FN.5) On the order of withdrawal, the inspector had noted in the space marked "Initial Action" that the underlying order, No. 231726, was the one issued on November 14, 1978.

In McCoy Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration, Docket No. KENT 80-243-R (October 31, 1980) (Judge Steffey), the Administrative Law Judge held that the inspector's order was not rendered invalid by the fact that he mistakenly wrote an incorrect citation number in the "initial action line." In its contest of an order, the contestant argued that the inspector did not correct the reference to the incorrect citation until it had already filed its notice of contest. Contestant also contended that section 104(h) of the Act does not permit the inspector to modify an order after he has terminated it. In rejecting these arguments, the Judge stated in part:

> In Old Ben Coal Co., 2 FMSHRC 1187 (1980), the Commission affirmed an administrative law judge's decision which had affirmed four orders of withdrawal which indicated that they had been issued under section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 when, in fact, they should have shown that they were issued under section 104(c)(2) of the 1969 Act. The judge had held that the incorrect reference to section 104(c)(1) was no more than a clerical error which did not prejudice Old Ben in any way. The Commission stated that it agreed with the judge that Old Ben was not prejudiced because Old Ben did not show how its defense to a 104(c)(2) order would differ from its defense to a 104(c)(1) order * * * It appears to me that an inspector ought to be able to correct a mistake regardless of whether he discovers it before or after a Notice of Contest has been filed or whether he discovers it after he has already terminated the order.

There was never any doubt that Inspector Wolfe issued an order of withdrawal and that it was issued under subsection 104(d)(2) of the Act. Mathies' contention that the order was issued invalidly in that section 104(a) was cited on the order and the order had been abated 4 hours prior to its modification to cite section 104(d)(2) is without merit. Although there

was a clerical error on the form on which the order was issued, it was clear from the beginning that the inspector issued an order of withdrawal and not a citation. This error was discovered and corrected on the same day that the order was issued. There is no evidence whatever that Mathies was misled or prejudiced by the clerical error.

Significant and Substantial Contribution to the Cause and Effect of a Mine Safety Hazard

Mathies asserted that the condition as it existed did not significantly and substantially contribute to the cause and effect of a mine safety hazard. Although the Secretary did not so allege, the record establishes that the condition did significantly and substantially contribute to the cause and effect of a mine safety hazard.

Section 104(d)(2) does not condition the issuance of an order of withdrawal on a finding that the condition found significantly and substantially contributed to the cause and effect of a mine safety hazard. There is no such gravity requirement for orders of withdrawal issued under section 104(d)(2). See International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403, 1407 (D.C. Cir. 1976). Even if there had been such a requirement, it would have been met in this case. As previously discussed in this decision, a hazard was clearly present.

The battery on the scoop would last for several hours. The length of time was dependent upon the load and the usage. With no use, the charge might last for several weeks; given normal use, it might last for a week. Although there had been a time when the battery would hold a charge for only 3 or 4 hours, the problem had been corrected before June 20. On June 20, mining had been in progress for 3 or 4 days and the scoop had been used. The date of the last recharge was not specifically established.

If the battery were to run down before the pillar line was completed, there was no way to recharge it on the section other than to use the battery charger. Although Mr. Lendvei, the section foreman, testified that he would not have used the charger in the location where it was found by the inspector, there would have been no operable scoop on the section to move the charger if the battery had been run down due to hard use or recurring fault. If the battery had run down, the charger more than likely would have been used to charge the battery by someone on one of the three shifts. Even if the charger had been dragged outby by manual labor or means other than the scoop, there is no assurance that it would be moved beyond the 150-foot distance from the gob or that a split of intake air would have been provided to carry away the hydrogen gas generated during charging of the batteries. The charger could have been energized at the location in which it was found by the inspector through use of an extension or jumper cable, or even by moving the power center. Such use of the charger could have had disastrous results. It is evident that the violation found by the inspector was serious.

Certainly, the location of the battery charger was not a mere technical violation that posed no risk to any miner as asserted by Mathies.

Unwarrantable Failure

Mathies asserts that it did not unwarrantably violate 30 C.F.R. 75.1002-1 because the section foreman could not reasonably be expected to know that the existence of a deenergized battery charger within the 150-foot distance was a violation of the law since it was his understanding that the law only applied to battery chargers that were in fact being used.

Section Foreman Lendvei was aware that the battery charger was not outside the 150-foot zone prescribed by law. That is, he had knowledge of the condition which was in violation of the standard. His misapprehension of the law does not excuse his failure, or that of Contestant, to comply with the standard. The prohibition was clearly spelled out in the regulations. Exceptions in addition to those which might be set forth in the standard should not have been presumed.

The record indicates that the battery charger was not moved outby to a safe location because the operator was mining coal and, although it might have been moved if production were to be temporarily halted due to a breakdown, the failure to move the battery charger was a deliberate omission on the part of the operator. Any inconvenience or possible loss of production that might result from the very short time required to use the scoop to transport the battery charger and erect a new battery-charging station in no way serves as an excuse for failure to comply with the mandatory standard.

Contestant also asserted in its brief that:

> With respect to the issue of unwarrantability, it is well settled that a violation of a mandatory safety standard is negligence per se. Therefore, if the conditions cited in the above Order are found to constitute a violation of the duty imposed by the mandatory standard, ordinary negligence can be conclusively presumed. Negligence per se, however, will not satisfy the element of unwarrantability otherwise every failure of the operator to fulfill the duty imposed by the mandatory safety standard could constitute an unwarrantable failure, Zeigler Coal Company, 7 IBMA 280, (1977).
>
> An unwarrantable failure to comply [has been defined by the Interior Board of Mine Operations Appeals as] the failure of the Operator to abate a condition or practice constituting a violation of mandatory standard which the Operator knew or should have known existed Zeigler Coal Company, 7 IBMA 280, 295, IBMA Docket No. 74-37 (1977) (emphasis added).

It is important to note that the Board's decision in Zeigler Coal Company, supra, discussed at length the legislative history and case law applications of the unwarrantability requirements of Section 104(c) of the 1969 Act. This section of the law remains basically unchanged under the 1977 Act. (FN.6)

The violation of a mandatory safety standard is not negligence per se. There may be a violation of a mandatory safety standard without negligence on the part of the operator. However, the record in this case has established negligence and an unwarrantable failure to comply well beyond the definition enunciated in Zeigler. Since the violation existed as alleged and it was the result of an unwarrantable failure on the part of Mathies to comply with section 75.1002-1, the order of withdrawal was properly issued pursuant to section 104(d)(2) of the Act.

ORDER

It is ORDERED that Order No. 0620637 is AFFIRMED and that the above-captioned contest of order is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Originally, on June 20, 1979, the inspector purported to have issued Order of Withdrawal No. 620637 pursuant to section 104(a) of the Act. Later, on the same day, he issued a modification of Order No. 620637 showing the order to have been issued pursuant to section 104(d)(2).

~FOOTNOTE_TWO

2 Section 104(d)(1) of the Act reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation,

except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE_THREE

3 Mathies asserted that: "Clearly, the drafters of the regulations contemplated the use of nonpermissible equipment within the 150-foot distance from the pillar line, since the purpose of the standard is to protect against explosive hazards. Consequently, a battery charger's location does not become relevant with respect to the subject mandatory standard until it is energized, adding the element of potential hazard."

~FOOTNOTE_FOUR

4 Mathies' analogy of a deenergized charger to a lunch pail is specious for this very reason. A lunch pail is not a piece of electrical equipment which might be energized or activated.

~FOOTNOTE_FIVE

5 Section 104(d)(2) of the Act reads as follows:

> "If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to [section 104(d)(1) of the Act], a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under [section 104(d)(1)] until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

~FOOTNOTE_SIX

6 The 1977 Act adopted the safety and health standards then existing under the 1969 Act with the proviso that "any new standards [promulgated] in areas covered by existing standards cannot reduce existing levels of protection." Sen. Rep. No. 95-181, 1977 U.S. Code Cong. and Admm. Nes 3401 at 3411.