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DELMONT RESOURCES v. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

DELMONT RESOURCES, INC.,  
CONTESTANT

v.

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

Notice of Contest

Docket No. PENN 80-268-R

Citation No. 624406  
January 15, 1980, modified  
to to May 14, 1980

Delmont Mine

DECISION

Appearances: Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley,  
Whyte & Hardesty, Pittsburgh, Pennsylvania, and Raymond  
J. Hoehler, Esq., Greensburg, Pennsylvania, for the  
Contestant;  
Covette Rooney, Esq., Office of the Solicitor, U.S.  
Department of Labor, Philadelphia, Pennsylvania, for  
the Respondent;

Before: Judge Cook

I. Procedural Background

On June 13, 1980, Delmont Resources, Inc. (Delmont), filed a  
notice of contest in the above-captioned proceeding pursuant to  
section 105(d) (FN.1) of

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the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act) to contest Citation No. 624406, as modified on May 14, 1980. The citation was issued at the Delmont Mine on January 15, 1980, (FN.2) pursuant to section 104(d)(1) of the 1977 Mine Act. (FN.3) The notice of contest states, in part, as follows:

1. At approximately 0900 hours on Tuesday, January 15, 1980, Federal Mine Inspector Anthony J. Russo issued Citation No. 0624406 (hereinafter sometimes "Citation"), pursuant to the provisions of Section 104(d)(1) of the [1977 Mine] Act, for a condition he allegedly observed in the 4 Left Section I.D. No. 003 of Delmont Resources' Delmont Mine.

2. The aforesaid Citation which was issued on January 15, 1980 and alleged a violation of 30 C.F.R. 75.200 further alleged that Republic Steel Corporation was the operator of the Delmont Mine.

3. Under the heading and caption "Condition or Practice" the aforesaid Citation also alleged that:  
"The approved roof control plan was not being complied with in the entries of the working section of 4 Left I.D. No. 003. All three entries from the faces outby approximately 200 feet including cross cuts between the three entries and all the

way down the No. 1 entry to the belt conveyor were driven in excess of 18 feet wide. The measurements were from 19 to 21 feet wide."

The aforesaid Citation directed that the condition be abated by Friday, January 18, 1980, but by no specific time.

4. Despite the abatement period set forth in the aforesaid Citation, it is averred upon information and belief, that Inspector Russo told the Delmont Mine foreman, in the presence of others, that all of the entries would have to be timbered by 9 a.m. Wednesday, the following day, January 16, 1980 or that a withdrawal order pursuant to Section 104(d)(1) of the Act would be written.

5. At 0800 hours on Friday, January 18, 1980, Inspector Russo issued modified Citation No. 0624406-1 (hereinafter "Modification No. 1") pursuant to the provisions of Section 104(d)(1) of the Act. Modification No. 1 did not specify the area of the mine to which it applied.

6. Modification No. 1, which was issued on January 18, 1980, alleged under the heading and caption "Justification for Action Checked Below" that:

"The Citation 0624406 is hereby modified to change part and section to 75-1704-1-A instead of 75.0200 and to include in the Citation that until the area is supported with posts on (5) five foot centers the required width of six feet could not be maintained in the designated return escapeway."

7. Modification No. 1, by necessity, appeared to revoke the violation alleged in the aforesaid Citation. However, while Modification No. 1 changed the part and section of 30 C.F.R. cited from 30 C.F.R. 75.200 (Roof Support) to 30 C.F.R. [75.]1704-1-A (Escapeway), the language of the aforesaid Citation which alleged a violation of the approved roof control plan was not deleted.

8. At 1030 hours on Friday, January 18, 1980, Inspector Russo terminated the aforesaid Citation.

9. At 0710 hours on Wednesday, January 23, 1980, Inspector Russo modified Citation No. 0624406 a second time (hereinafter "Modification No. 2") to specify 800 hours as the time for abatement on the date which had already been specified in Citation No. 0624406.

10. At 0700 hours on Wednesday, May 14, 1980, Inspector Russo modified Citation No. 0624406 for a third time (hereinafter "Modification No. 3") to change the name of the operator from Republic Steel Corporation to Delmont Resources, Inc.

11. Delmont Resources avers that Citation No. 0624406, as modified, is invalid and void and should be vacated and set aside for the following reasons:

(a) The Citation, as modified, failed to cite a condition or practice which constitutes a violation of a mandatory health or safety standard under 30 C.F.R. 75.200;

(b) The Citation, as modified, failed to cite a condition or practice caused by an unwarrantable failure of Delmont Resources to comply with a mandatory health or safety standard;

(c) The Citation, as modified, failed to cite a condition or practice of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard;

(d) The Citation, as modified, failed to particularize the provisions of the Act or regulations which were allegedly violated, and was inadequately specific;

(e) The Citation, as modified, did not particularize the exact locations which were allegedly in violation of the approved roof control plan and was inadequately specific;

(f) The Citation, as modified, failed to give Delmont Resources an adequate and reasonable time for abatement of the alleged violation;

(g) In issuing and in modifying the Citation, the Inspector failed to give due consideration to the fact that the roof in the entries and cross cuts of the 4 Left I.D. No. 003 Section of the Delmont Mine consisted of sand rock with no cracks or slips and that the cross cuts were posted off;

(g) In issuing and modifying the Citation, the Inspector failed to give due consideration to the fact that the alleged violation presented a

non-immediate and non-serious threat to the safety of miners;

(h) In issuing and modifying the Citation, the Inspector acted arbitrarily, unreasonably, capriciously and in total disregard of the prevailing standards for the issuance of Section 104(d)(1) citations.

12. Subsequently, on dates specified below, Inspector Russo, pursuant to Section 104(d)(1) of the Act, issued the following Orders which reference the aforesaid Citation:

- (a) Order No. 0624408 issued on January 16, 1980;
- (b) Order No. 0624410 issued on January 24, 1980;
- (c) Order No. 0624412 issued on February 2, 1980;  
and
- (d) Order No. 0624414 issued on February 14, 1980.

(Footnote omitted). (FN.4)

Delmont prayed for the entry of an order vacating the citation, as modified, and declaring all actions taken, or to be taken, with respect thereto or in consequence thereof null, void and of no effect.

On July 3, 1980, the Mine Safety and Health Administration (MSHA) filed an answer and motion for continuance. In its answer, MSHA (1) admitted the issuance of Citation No. 624406, as modified, and alleged that it was properly issued; (2) erroneously alleged that the citation was issued pursuant to section 104(a) of the 1977 Mine Act; and (3) alleged that a violation of a mandatory safety standard occurred. MSHA's motion for continuance requested that the case be continued pending the filing of a civil penalty proceeding addressing the subject citation. On July 11, 1980, Delmont filed a reply to MSHA's motion for continuance setting forth Delmont's opposition to a continuance. The motion for continuance was denied on July 28, 1980.

On August 8, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on September 16, 1980, in Washington, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating. Following the presentation of evidence, a schedule was set

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for the filing of posthearing briefs and proposed findings of fact and conclusions of law. MSHA and Delmont filed posthearing briefs on November 17, 1980, and November 20, 1980, respectively. Neither party filed a reply brief.

## II. Witnesses and Exhibits

### A. Witnesses

MSHA called as its witnesses Anthony J. Russo, a Federal mine inspector; James C. DeForrest, a belt repairman at the Delmont Mine; and Roger Uhazie, a Federal coal mine inspection supervisor.

Delmont called as its witnesses John J. Cunnard, Jr., a section foreman at the Delmont Mine; and Homer Miller, the mine foreman at the Delmont Mine.

### B. Exhibits

#### 1. MSHA introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 624406, January 15, 1980, 30 C.F.R. 75.200.

M-2 is a copy of the Delmont Mine's approved roof-control plan, dated July 9, 1979.

M-3 is a copy of a map showing the section of the Delmont Mine encompassed by the citation.

M-4 is a copy of the termination of M-1.

M-5 is a copy of modification 624406-1, dated January 18, 1980.

M-6 is a copy of modification 624407-3, dated January 24, 1980.

M-7 is a copy of modification 624406-2, dated January 23, 1980.

M-8 is a copy of modification 624406-3, dated May 14, 1980.

#### 2. Delmont introduced the following exhibits in evidence:

O-1 is a map of the 4 Left Section of the Delmont Mine.

O-2 is a drawing, based upon drawing No. 1-A of the approved roof-control plan, illustrating the first step of the mining cycle in a typical working place.

O-3 is a drawing, based upon drawing No. 1-A of the approved roof-control plan, illustrating the second step of the mining cycle in a typical working place.

O-4 is a drawing, based upon drawing No. 1-A of the approved roof-control plan, illustrating the third step of the mining cycle in a typical working place.

O-5 is a copy of a memorandum dated July 27, 1977, from the Assistant Administrator for Coal Mine Health and Safety, Mining Enforcement and Safety Administration, United States Department of the Interior, to Coal Mine Health and Safety District Managers, addressing the subject of unwarrantable failure violations under section 104(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970).

3. X-1 is a drawing prepared by James C. DeForrest during the course of his testimony.

### III. Issues

The general question presented is whether Citation No. 624406, as modified on May 14, 1980, was properly issued to Delmont pursuant to section 104(d)(1) of the 1977 Mine Act. The specific issues are as follows:

A. Whether Citation No. 624406, as modified by the various modifications, complied with the specificity requirement set forth in section 104(a) of the 1977 Mine Act.

B. Whether the condition or practice cited in Citation No. 624406 on January 15, 1980, constituted a violation of mandatory safety standard 30 C.F.R. 75.200.

C. If the condition or practice cited in Citation No. 624406 on January 15, 1980, constituted a violation of mandatory safety standard 30 C.F.R. 75.200, then whether such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard, and whether such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

### IV. Opinion and Findings of Fact

#### A. Stipulations

1. The Delmont Mine is owned and operated by the Contestant, Delmont Resources, Inc. (Tr. 8-9).

2. The Delmont Mine is subject to the jurisdiction of the 1977 Mine Act (Tr. 8-9).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 8-9).

4. The subject citation, modifications and termination thereof were properly served by a duly authorized representative of the Secretary of Labor



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upon an agent of Delmont Resources, Inc., at the dates, times and places stated therein (Tr. 8-9).

5. The alleged violation was abated in a timely fashion (Tr. 9).

6. Delmont Resources, Inc., produced approximately 65,655 tons of coal in 1979, and has approximately 50 employees (Tr. 9).

B. Specificity of Citation No. 624406

Delmont's initial challenge asserts that Citation No. 624406, when viewed in light of the subsequent modifications, fails to satisfy the specificity requirement set forth in that portion of section 104(a) of the 1977 Mine Act which provides that "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the [1977 Mine] Act, standard, rule, regulation, or order alleged to have been violated." The record contains the following facts material to the issue of whether the specificity requirement has been satisfied:

Federal mine inspector Anthony J. Russo visited the Delmont Mine on January 15, 1980, to continue a regular inspection. At approximately 9 a.m., he issued Citation No. 624406 charging a violation of mandatory safety standard 30 C.F.R. 75.200 in that "[t]he approved roof control plan was not being complied with in three entries of the working section of 4 Left, I.D. No. 003. All three entries from the faces outby approximately 200 feet including the crosscuts between the three entries, and all the way down the No. 1 entry to the belt conveyor were driven in excess of 18 feet wide. The measurements were from 19 to 21 feet wide." The citation was served to John J. Cunnard, Jr., a section foreman, and designated Republic Steel Corporation as the mine operator. The operator's agents were told that abatement was due by 8 a.m. on January 18, 1980. The termination due date appears on the face of the citation, but the time does not. The operator's agents were notified orally that 8 a.m. was the precise hour by which abatement was due.

The testimony of Inspector Russo and the testimony of Mr. Homer Miller, the mine foreman, reflects agreement that abatement procedures were discussed on January 15, 1980. However, they demonstrated some disagreement as to precisely what was said and as to where it was said. Inspector Russo testified that when he returned to the surface he instructed mine management to install wooden posts in those areas exceeding 19 feet in width. He denied requiring them to install posts all the way down the No. 1 entry. Mr. Miller testified that he discussed the matter underground with Inspector Russo, at which time the inspector stated that he had found some wide places and set forth his requirements to abate the citation. According to Mr. Miller, Inspector Russo told him to install posts on 4-foot centers from the face all the way to the mouth of the entry, and did not limit it to those areas greater than 18 feet wide. Regardless of which account is the most accurate, both witnesses agree that mine

management was informed of the actions necessary to abate the citation.

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Delmont commenced its abatement activities on January 15, 1980, and completed them on January 16, 1980. Abatement was accomplished through the installation of 365 posts on 4-foot centers.

Inspector Russo returned to the mine on January 18, 1980. At approximately 8 a.m., he issued modification 624406-1 which states that "Citation No. 624406 is hereby modified to change the part and section to 75.1704-1(a) instead of 75.200 and to include in the citation that until the area is supported with posts on 5-foot centers, the required width of 6 feet could not be maintained in the designated return escapeway" (Exh. M-5). Inspector Russo's testimony clarified this modification. His intention was to modify Citation No. 624407, which was also issued on January 15, 1980. (FN.5) He corrected his error on January 24, 1980, by issuing modification 624407-3 to show that modification 624406-1 was modified to 624407-1 (Exh. M-6).

When modification 624406-1 was issued, the inspector did not tell the operator that the abatement procedures discussed on January 15, 1980, were changed in any way. More significantly, modification 624406-1 was served on Mr. Miller. His testimony makes clear that he knew at the time that Inspector Russo had committed an error in writing the modification.

At 10:30 a.m. on January 18, 1980, Inspector Russo terminated Citation No. 624406. The citation was terminated because "[w]ooden posts were installed to bring the width of all entries and crosscuts down to 18 feet wide as required by the roof control plan" (Exh. M-4). The termination was served on Mr. Miller.

At 7:10 a.m. on January 23, 1980, the citation was modified to fill an omission on the face of the original citation by designating 8 a.m. as the time by which termination was due (Exh. M-7).

At 7 a.m. on May 14, 1980, the citation was modified "to show the operator name as 'Delmont Resources, Inc.' not Republic Steel Corporation" (Exh. M-8).

Exhibits M-4, M-5, M-6, M-7 and M-8 were served on Homer Miller and designate Delmont Resources, Inc., as the mine operator.

Delmont argues that the citation, as modified, does not satisfy the requirement set forth in section 104(a) of the 1977 Mine Act that the citation contain a reference to the regulation allegedly violated. Delmont points out that the citation as written on January 15, 1980, alleges a violation of mandatory safety standard 30 C.F.R. 75.200, and argues that modification 624406-1 of January 18, 1980, changed the cited regulation to 30 C.F.R. 75.1704-1(a). The latter regulation pertains to the requirements for designated escapeways. According to Delmont, the statute requires the citation to specify with precision the regulation alleged to have been violated so that the mine operator will have notice as to the type of abatement action required. Delmont further argues that a modification changing the cited regulation creates ambiguity or confusion as to what the precise violation is and as to whether the work performed has abated the initial citation (Delmont's Posthearing Brief, pp. 2-4).

The applicable law can be stated concisely. Adequate notice is necessary to enable the mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." *Old Ben Coal Company*, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 CCH OSHD par. 19,723 (1975). In a civil penalty proceeding, notice is adequate, even though it does not specify the particular section of the 1977 Mine Act or mandatory safety standard violated, if the alleged violation is described with sufficient specificity to permit abatement. At the stage where the operator is charged with a violation of law in a civil penalty proceeding, it is entitled to adequate and timely notice of the section of the 1977 Mine Act or mandatory safety standard involved so as to permit preparation of a timely and adequate defense. *Old Ben Coal Company*, supra; *Eastern Associated Coal Corporation*, 1 IBMA 233, 79 I.D. 723, 1971-1973 CCH OSHD par. 15,388 (1972). In determining whether adequate notice has been given, the inquiry need not be confined to the four corners of the citation or order. It is appropriate to consider other oral and written communications given to the operator. Citations and orders will not be invalidated for failure to comply with the specificity requirement absent a showing that prejudice has resulted to the mine operator. *Jim Walters Resources, Inc.*, 1 FMSHRC 1827, 1 BNA MSHC 2233, 1979 CCH OSHD par. 24,046 (1979) declining to follow *Armco Steel Corporation*, 8 IBMA 88, 84 I.D. 454, 1977-1978 CCH OSHD par. 22,089 (1977), aff'd. on reconsideration, 8 IBMA 245, 1978 CCH OSHD par. 22,550 (1978).

Delmont failed to introduce any probative evidence to prove that any or all of the modifications created ambiguity or confusion as to the precise violation charged, or created ambiguity or confusion as to whether the work performed was adequate to abate the initial citation. In fact, the evidence makes it clear beyond a shadow of a doubt that any irregularities appearing on the face of the citation or on the face of any of the modifications created absolutely no ambiguity or confusion as to either point mentioned by Delmont.

Inspector Russo informed Delmont's agent on January 15, 1980, that abatement was due by 8 a.m. on January 18, 1980. In fact, the abatement work was completed the following day, and the citation was terminated at 10:30 a.m. on January 18, 1980.

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Modification 624406-1, issued at 8 a.m. on January 18, 1980, created no confusion or ambiguity because Mr. Miller knew at the time that the modification was issued in error. If Mr. Miller had any doubts on this point, they should have been resolved when the inspector terminated the citation 2-1/2 hours later without requiring additional abatement work.

Additionally, Delmont has not shown that any irregularities appearing on the face of the citation, or on the face of any of the modifications, in any way prejudiced its ability to prepare for the instant hearing. Delmont defended on the merits by presenting evidence on the issues of whether the cited condition or practice violated 30 C.F.R. 75.200, whether the violation was caused by the operator's unwarrantable failure to comply with such mandatory safety standard, and whether the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

In view of the foregoing, I conclude that any irregularities appearing on the face of either the citation or the various modifications did not result in any prejudice to Delmont's abatement efforts or trial preparation. Delmont's challenge to Citation No. 624406 on the grounds that it fails to comply with the specificity requirement set forth in section 104(a) of the 1977 Mine Act is not well founded. Such basis for challenge is rejected because it is unsupported by the evidence.

#### C. Occurrence of Violation

As noted above, Citation No. 624406 charges that a violation of mandatory safety standard 30 C.F.R. 75.200 existed at the Delmont Mine on January 15, 1980, in that "[t]he approved roof control plan was not being complied with in three entries of the working section of 4 Left, I.D. No. 003. All three entries from the faces outby approximately 200 feet including the crosscuts between the three entries, and all the way down the No. 1 entry to the belt conveyor were driven in excess of 18 feet wide. The measurements were from 19 to 21 feet wide" (Exh. M-1). The Delmont Mine's approved roof-control plan, in effect on January 15, 1980, prescribed 18 feet as the maximum width for entries, crosscuts, rooms and room crosscuts. The approved roof-control plan does not allow for any type of deviation from the 18-foot width requirement.

Mandatory safety standard 30 C.F.R. 75.200 provides that:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be

adopted

and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The mine operator violates mandatory safety standard 30 C.F.R. 75.200 by failing to comply with the provisions of the approved roof-control plan. Pontiki Coal Corporation, 1 FMSHRC 1476, 1 BNA MSHC 2208, 1979 CCH OSHD par. 23,979 (1979); Peabody Coal Company, 8 IBMA 121, 84 I.D. 469, 1977-1978 CCH OSHD par. 22,111 (1977); Zeigler Coal Company, 5 IBMA 132, 82 I.D. 441, 1975-1976 CCH OSHD par. 19,998 (1975).

The citation encompasses a rather extensive portion of the Delmont Mine's 4 Left Section. It appears to allege that the condition or practice existed in the No. 1 entry from the face to the belt conveyor drive; in the Nos. 2 and 3 entries from the faces outby approximately 200 feet; in the last open crosscut, the second open crosscut, and the third open crosscut between Nos. 1 and 2 entries; and the last open crosscut, the second open crosscut, and the third open crosscut between Nos. 2 and 3 entries (Exh. M-1, M-3). The citation, on its face, further appears to allege that all such areas were uniformly driven in excess of 18 feet wide, with the width measurements ranging from 19 to 21 feet. However, the evidence is insufficient to sustain such a sweeping allegation.

MSHA now appears to concede that all areas encompassed by the citation were not uniformly driven in excess of 18 feet wide. MSHA argues that Inspector Russo took approximately 16 measurements in the entries and crosscuts and obtained readings of 19 to 21 feet. MSHA further argues that the excessive width condition existed for a distance of approximately 10 to 21 feet in the areas where the measurements were taken (MSHA's Posthearing Brief, pp. 3-4).

It appears that measurements were taken only in locations that appeared wide. The evidence shows that the No. 1 entry was approximately 700 to 800 feet long, and that measurements were taken at three to five locations in the No. 1 entry. At least three of these locations were outby the power box. It appears that the power box was located two crosscuts outby the face. Measurements were taken at two locations in the No. 2 entry. One of these locations was in the vicinity of spad No. 269, and the other location was in the vicinity of spad No. 281. Measurements were taken at two locations in the No. 3 entry from spad No. 268 to spad No. 284. Measurements were taken



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in the last open crosscut between No. 1 entry and No. 2 entry, in the last open crosscut between No. 2 entry and No. 3 entry, and in the second open crosscut between the No. 2 entry and the No. 3 entry. The measurements at each such location revealed the width to be between 19 and 21 feet, and there were no additional supports in the area.

The evidence is sufficient to establish the length of the affected areas at only three locations where measurements were taken. The condition existed for a distance of 2 to 3 feet at the following locations: (1) the second open crosscut between the No. 2 entry and the No. 3 entry; (2) the last open crosscut between the No. 1 entry and the No. 2 entry; and (3) a spot in the No. 1 entry approximately 60 feet outby the face.

In view of the foregoing, I find the evidence sufficient to establish a practice at the Delmont Mine in violation of the roof-control plan's 18-foot width requirement for entries and crosscuts. The evidence is sufficient to establish the existence of the individual conditions comprising the practice only at those locations where measurements were actually taken. A practice in violation of mandatory safety standard 30 C.F.R. 75.200 has been established by a preponderance of the evidence.

#### D. Unwarrantable Failure

A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1977-1978 CCH OSHD par. 21,676 (1977).

The evidence presented in this case indicates that the violation of January 15, 1980, was caused by the operator's unwarrantable failure to comply with the 18-foot width requirement for entries and crosscuts as set forth in the approved roof-control plan. The practice resulted from a combination of poor mining practices, a pitch from left to right in the floor of the entries, and the unevenness of the sandrock roof. None of the excessive widths were caused by spalling or sloughing.

The evidence presented indicates that some of the wide places existed for a very substantial period of time, and that the individual conditions comprising the practice should have been detected during the course of the required examinations. The evidence further indicates that the excessive width conditions should have been detected by the individuals in charge of roof bolting on the section. Considering the roof-bolting pattern, the conditions could have been easily and promptly detected by simply measuring the distance between the last roof bolt installed and the rib. However, as a general rule, such measurements were not taken. Additionally, simply gazing at the

roof-bolting pattern from the proper angle would have been sufficient to detect the wide areas.

Of even greater significance is the testimony of Mr. John J. Cunnard, Jr., the section foreman. His testimony indicates that he was aware that some excessively wide areas existed in the cited portion of the Delmont Mine.

In view of the foregoing, I conclude that Delmont failed to abate a practice that it knew or should have known existed, and that Delmont failed to abate the practice because of a lack of reasonable care or because of an absence of due diligence. The violation was caused by an unwarrantable failure to comply with the width requirements of the approved roof-control plan.

#### E. Significant and Substantial Criterion

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In *Secretary of Labor, MSHA v. Cement Division, National Gypsum Company*, Docket No. VINC 79-154-PM (FMSHRC, filed April 7, 1981), the Federal Mine Safety and Health Review Commission (Commission) held "that a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Slip op. at 4. Additionally, the Commission stated that "[a]lthough the [1977 Mine Act] does not define the key terms 'hazard' or 'significantly and substantially', in this context we understand the word 'hazard' to denote a measure of danger to safety or health, and that a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." Slip op. at 6 (footnote omitted.)

As noted previously in this decision, the evidence establishes only that the 18-foot width requirement was exceeded at those locations where measurements were made. The measurements at such locations showed them to be 19 to 21 feet wide. The evidence establishes the length of the violation at only three locations within the cited area. In those three areas, the excessive width condition existed for a distance of 2 to 3 feet.

The evidence reveals that the roof in the No. 1 entry was composed of sand rock almost all the way to the face where it changed to shale (Tr. 163, 182). The roof was in good condition to within approximately 100 feet of the face (Tr. 37, 63-64, 115-116). The roof in such area was not cracked and no pieces were falling from it (Tr. 115-116). However, the roof was loose and cracked in the face area of the entry (Tr. 63-64).

A fault existed in the No. 2 and No. 3 entries. It appears that the fault ran diagonally from the lower right hand side of the section to the upper left hand side of the section (Tr. 126).

The face area of the No. 2 entry and the face area of the No. 3 entry were cracked and deteriorated due to the fact that they were going through the fault area (Tr. 37).

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It appears that good roof conditions existed in the last open crosscut (Tr. 109-111).

The inspector did not take a sound and vibration test because he did not have the necessary equipment (Tr. 60). However, it appears that the roof was in a safe condition. The approved roof-control plan required the installation of roof bolts at least 36 inches in length (Tr. 154, Exh. M-2, p. 2). The mine operator had installed roof bolts measuring 4 feet in length (Tr. 154, 182), and none of the roof bolts in the cited area were bearing excessive weight (Tr. 64, 164). There were no additional supports in the cited area (Tr. 36). Additionally, there was little or no spalling or sloughing of the roof or ribs (Tr. 34-35, 84, 164).

For the reasons set forth below, I find the evidence insufficient to sustain the allegation that the practice in violation of mandatory safety standard 30 C.F.R. 75.200 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

MSHA argues that Inspector Russo took approximately 16 measurements of the entries and crosscuts, and that the measurements revealed widths from 19 to 21 feet in areas approximately 10 to 21 feet in length. (MSHA's Posthearing Brief, pp. 3-4). It thus appears that MSHA maintains that the practice consisted of approximately 16 separate instances of excessive widths, measuring from 19 to 21 feet, each extending for distances of approximately 10 to 21 feet. MSHA argues that the practice met the significant and substantial criterion because "a roof fall was probable. Excessive widths without additional supports put stress on a roof. The inspector also noted that in certain areas the roof was cracked and deteriorated" (MSHA's Posthearing Brief, p. 10).

The evidence fails to support MSHA's position that the violation was significant and substantial. First, the evidence does not support the contention that the practice consisted of approximately 16 separate instances of excessive widths, each of which extended for approximately 10 to 21 feet in length. The evidence shows less than 16 instances of excessive widths, and in only three instances is there probative evidence as relates to length. In those three instances, the excessive width condition existed for a distance of 2 to 3 feet. The absence of more precise evidence as to length in the other locations is deemed of particular significance to the conclusion that MSHA has failed to prove that the violation was significant and substantial.

Second, there is no evidence that a roof fall was probable or that the roof was under stress. There was little or no spalling or sloughing. Four-foot roof bolts had been installed and the roof bolts were not bearing excessive weight.

Additionally, MSHA permitted Delmont to exceed the 18-foot width requirement by up to 12 inches at intermittent locations. This 12-inch deviation was apportioned with 6 inches on either

side of the entry as

~1096

measured from the roof bolt closest to the rib (Tr. 87-88, 186, Exh. M-2). In this regard, it should also be noted that Inspector Russo intended to require posting only in those areas exceeding 19 feet in width (Tr. 87). The fact that MSHA permitted 19-foot widths under certain circumstances, and intended to permit them in the abatement of the cited practice, indicates that a 19-foot width measurement was not significant and substantial given the roof conditions in existence at the time. It appears that in at least some of the areas cited, the inspector obtained width measurements of approximately 19 feet prior to the issuance of the citation.

In view of the foregoing, I find the evidence insufficient to sustain a conclusion that the violation could have been a major cause of a danger to safety or health. The evidence is insufficient to sustain a conclusion that a reasonable likelihood existed that the hazard contributed to would have resulted in an injury. Accordingly, I conclude that MSHA has failed to prove that the violation described was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

#### V. Conclusions of Law

1. Delmont Resources, Inc. and its Delmont Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Anthony J. Russo was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance and modifications of Citation No. 624406.

4. Citation No. 624406, as modified, complied with the specificity requirement set forth in section 104(a) of the 1977 Mine Act.

5. Citation No. 624406 sets forth a practice in violation of mandatory safety standard 30 C.F.R. 75.200, and in existence at the Delmont Mine on January 15, 1980, only to the extent found in Part IV(C), supra.

6. The subject violation of mandatory safety standard 30 C.F.R. 75.200 was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard.

7. The subject violation of mandatory safety standard 30 C.F.R. 75.200 was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

8. Citation No. 624406, as modified, was improperly issued

under section 104(d)(1) of the 1977 Mine Act.

9. All of the conclusions of law set forth in Part IV, supra, are reaffirmed and incorporated herein.



VI. Proposed Findings of Fact and Conclusions of Law

MSHA and Delmont filed posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, IT IS ORDERED that the notice of contest of 104(d)(1) Citation No. 624406 is GRANTED IN PART and DENIED IN PART. IT IS THEREFORE ORDERED that Citation No. 624406 be, and hereby is, MODIFIED from a 104(d)(1) citation to a 104(a) citation containing findings: (1) that on January 15, 1980, a practice in violation of mandatory safety standard 30 C.F.R. 75.200, as set forth in Part IV(C), supra, existed in the 4 Left Section of the Delmont Mine; (FN.6) and (2) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard.

IT IS FURTHER ORDERED that Citation No. 624406, as so modified, be, and hereby is, AFFIRMED.

John F. Cook  
Administrative Law Judge

AA

~FOOTNOTE ONE

1 Section 105(d) of the 1977 Mine Act provides as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected

miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

~FOOTNOTE\_TWO

2 The citation erroneously designated Republic Steel Corporation as the operator of the Delmont Mine. The citation was modified on May 14, 1980, to show the operator's name as Delmont Resources, Inc., not Republic Steel Corporation (see Exhs. M-1 and M-8).

~FOOTNOTE\_THREE

3 Section 104(d)(1) of the 1977 Mine Act provides, in part, 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."

~FOOTNOTE\_FOUR

4 Copies of the referenced citation, termination and modifications were attached to the notice of contest as Exhibits A through E.

~FOOTNOTE\_FIVE

5 The following description appears under the "condition or practice" heading on Citation No. 624407:

"An area 14 feet long and 11 feet wide in the designated return escape-way approximately 100 feet outby survey point 284 was not supported according to the approved roof control plan, bolting, full bolting or crossbarring. The area was supported solely by wooden posts which is not according to the plan. This condition was allowed to exist in the 4 Left section, I.D. No. 003, survey point 284 in the No. 3 entry" (Tr. 99).

~FOOTNOTE\_SIX

6 The "condition or practice" section of Citation No. 624406 is modified to read as follows:

"The approved roof control plan was not being complied with at certain locations in the working section of 4 Left, I.D. No. 003, in that the crosscuts and entries were driven in excess of 18 feet wide at such locations. There were three to five places in the No. 1 entry. At least three of these places were outby the power box, which was located two crosscuts outby the face. There were two places in the No. 2 entry, one in the

vicinity of spad No. 269, and the other in the vicinity of spad No. 281. There were two places in the No. 3 entry from spad No. 268 to spad No. 284. Places existed in the last open crosscut between No. 1 entry and No. 2 entry, in the last open crosscut between No. 2 entry and No. 3 entry, and in the second open crosscut between the No. 2 entry and the No. 3 entry. The measurements at each such location revealed the width to be between 19 and 21 feet.

"The condition existed for a distance of 2 to 3 feet at the following locations: (1) the second open crosscut between the No. 2 entry and the No. 3 entry; (2) the last open crosscut between the No. 1 entry and the No. 2 entry; and (3) a spot in the No. 1 entry approximately 60 feet outby the face."