

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 29 1981

UNITED STATES FUEL COMPANY, : Application for Review
Applicant :
v. : Docket No. WEST. 79-81-R
: Citation No. 789508; 4/10/79
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : King No. 5 Mine
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 80-62
Petitioner : A.O. No. 42-01389-03011 V
v. :
: King No. 5 Mine
UNITED STATES FUEL COMPANY, :
Respondent :

DECISION

Appearances: Richard H. Nebeker, Esq., Callister, Greene & Nebeker,
Salt Lake City, Utah, for United States Fuel Company;
Edward H. Fitch, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for the Mine
Safety and Health Administration.

Before: Judge Cook

I. Procedural Background

On May 7, 1979, United States Fuel Company (U.S. Fuel) filed an applica-
tion for review in Docket No. WEST 79-81-R pursuant to section 105(d) 1/ of
the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
(Supp. III 1979) (1977 Mine Act), requesting that Citation No. 789508 be

1/ Section 105(d) 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 notifica-
tion 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

declared invalid. The citation was issued at U.S. Fuel's Kings Mountain Mine on April 10, 1979, pursuant to section 104(d)(1) 2/ of the 1977 Mine Act and contains allegations (1) that a condition or practice in violation of mandatory standard 30 C.F.R. §75.316 existed in the mine; (2) that the violation was caused by U.S. Fuel's unwarrantable failure to comply with such mandatory standard; and (3) 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. U.S. Fuel's application for review alleged, *inter alia*, (1) that no violation of the cited mandatory Standard existed; (2) that the condition or practice set forth in the citation was not caused by U.S. Fuel's unwarrantable failure to comply with the 1977 Mine Act; and (3) that the condition or practice set forth in the citation was not of a nature which

fn. 1 (continued)

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 miner⁸ 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."

2/ Section 104(d)(1) provides as follows:

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

could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. An answer was filed by the Mine Safety and Health Administration (MSHA) on May 25, 1979.

Various notices of hearing were issued which ultimately scheduled the proceeding in Docket No. WEST 79-81-R for hearing on the merits on November 7, and 8, 1979, in Salt Lake City, Utah. Such hearing was held as scheduled with representatives of both parties present and participating. The parties made closing arguments following the presentation of the evidence.

On November 21, 1979, U.S. Fuel filed a motion styled "Motion to Re-open the Hearing, or in the Alternative to Have Admitted as Evidence, the Affidavits of Walter L. Wright, General Superintendent, and Bruce Sherman, the Miners' Representative, Attached Hereto." The same day, MSHA filed a statement in opposition thereto. On December 4, 1979, an order was issued granting U.S. Fuel's motion to reopen the hearing for the purpose of presenting the testimony of Messrs. Walter L. Wright and Bruce Sherman. The order contained a notice of hearing scheduling the hearing to reconvene on February 4, 1980, in Salt Lake City, Utah. Thereafter, an order was issued continuing the hearing to 2 p.m., on June 2, 1980, in Salt Lake City, Utah.

On November 26, 1979, MSHA filed a proposal for a penalty in Docket No. WEST 80-62 pursuant to section 110(a) of the 1977 Mine Act alleging one violation of 30 C.F.R. § 75.316, as set forth in 104(d)(1) Citation No. 789508, issued on April 10, 1979.

U.S. Fuel had not filed an answer to the proposal as of May 16, 1980. It should be noted that the Rules of Procedure of the Federal Mine Safety and Health Review Commission (Commission) require a party against whom a penalty is sought to file and serve an answer within 30 days after service of a copy of the proposal on the party. 29 C.F.R. § 2700.28 (1979). As a result of such failure to file an answer, Chief Administrative Law Judge James A. Broderick issued an order on May 16, 1980, requiring U.S. Fuel to show cause on or before May 30, 1980, as to (1) why it should not be deemed to have waived its right to a hearing and contest of the proposed penalty, and (2) why the proposed order of assessment should not be summarily entered as the final order of the Commission and collection procedures instituted. On May 22, 1980, the Commission's docket office received a telephone communication from counsel for U.S. Fuel pertaining to the order to show cause, and, on May 23, 1980, the case was assigned to the undersigned Administrative Law Judge.

Thereafter, a telephone conference was held during which the undersigned Administrative Law Judge and representatives of the parties participated. It was agreed that both cases would be submitted for decision based upon the record developed in Docket No. WEST 79-81-R on November 7 and 8, 1979, in Salt Lake City, Utah, and based upon a stipulation to be filed by the parties. Additionally, a schedule was set for the filing of briefs. As a result of the telephone conference, an order was issued on May 29, 1980, cancelling the June 2, 1980, hearing.

Both the stipulations and U.S. 'Fuel's brief were filed on June 17, 1980. U.S. Fuel filed its answer to the proposal for a penalty on June 20, 1980. MSHA filed a brief on July 9, 1980.

After the briefs were filed, it was decided to postpone the issuance of a decision in these cases until such time as the Commission issued its decision in Secretary of Labor, MSHA v. Cement Division, National Gypsum Company Docket No. VINC 79-154-PM, addressing the issue as to when a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, as that criterion is used in section 104 of the 1977 Mine Act. ^{3/} Chief Administrative Law Judge James A. Broderick issued his decision in the National Gypsum case on December 26, 1979, wherein he applied the rule of law announced by the Interior Board of Mine Operations Appeals in Alabama By-Products Corporation, 7 IBMA 85, 94, 83 I.D. 574, 1 BNA MSHC 1484, 1976-1977 CCH OSHD par. 21,298 (1976). See, 1 FMSHRC 2115 (1979). The Commission granted the mine operator's petition for discretionary review on January 31, 1980, and issued its decision on April 7, 1981. See, Secretary of Labor, MSHA v. Cement Division, National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981).

II. Violation Charged in Docket No. WEST 80-62

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>
789508	April 10, 1979	75.316

III. Witnesses and Exhibits

^{3/} An article appearing in 4 Mine 'Regulation & Productivity Report No. 25 (New York: McGraw-Hill, Inc.) (July 4, 1980) at pg. 2 stated, in part, as follows:

"The Mine Safety and Health Review Commission has expressed dissatisfaction with the legal precedents that federal inspectors follow to decide whether operators' violations are significant and substantial (S&S). In a public meeting, the commission. **voted** 3 to 1 (Commissioner Al Lawson dissented) to overturn a decision of Administrative Law Judge James Broderick that upheld nine S&S findings attached to citations issued to National Gypsum (MR, 1/11).

"Broderick indicated that he was bound to follow the test for S&S violations laid out by the old Interior Board of Mine Operations Appeals (IBMA) in its 1976 Alabama By-Products decision. Operating under that test, **which says** that all violations could be S&S except technical ones or ones posing only a remote chance of injury, federal coal mine inspectors have found about 61% of coal violations to be S&S, while metal/nonmetal mine inspectors have found about 91% of violations to be S&S, according to figures of the Mine Safety & Health Administration.

"What will remain unanswered until the commission issues a final opinion is how far MSHRC will move in the direction of the **IBMA's** pre-Alabama By-Products definition of an S&S violation as one posing a risk of serious bodily harm or death."

A. Witnesses

U.S. Fuel called as its witnesses Mr. Eddie Edwards, the continuous miner operator; Mr. William Russell **Allred**, the miner's helper; Mr. Jose Carlos **Salas**, the shuttle car operator; Mr. Buddy Gines, the section foreman; Mr. Robert S. Martinez, a company safety inspector on April 10, 1979, and a section foreman at the time of the hearing; and Mr. Louis **J.** Mele, the director of safety and training.

Both U.S. Fuel and MSHA called Federal **mine** inspector Ted **R.** Milovich as a witness.

B. Exhibits

1. **MSHA** introduced the following exhibits in evidence during the hearing:

M-1 is a typed copy of Citation No. 789508, April 10, 1979, 30 **C.F.R.** § 75.316.

M-2 contains copies of Inspector **Milovich's** handwritten notes pertaining to M-1.

M-2A is a typed copy of M-2.

M-3 is a copy of the ventilation system and methane and dust control plan in effect at the Ring No. 5 Mine on April 10, 1979.

M-4 is a drawing prepared by Inspector **Milovich.**

M-5 is a copy of the inspector's statement pertaining to M-1.

2. U.S. Fuel did not introduce any exhibits in evidence during the hearing.

3. The parties filed stipulations on June 17, 1980, stipulating the admission in evidence of (a) the November 15, 1979, affidavit of Bruce Sherman; (b) an attached Exhibit "A," which is a copy of U.S. Fuel's controlling company information report; and (c) an attached Exhibit "B," which is a computer printout compiled by the Directorate of Assessments setting forth the history of previous violations at U.S. Fuel's Ring No. 4 and King No. 5 Mines for which assessments have been paid, beginning January 1, 1970, and ending May 29, 1980.

IV. Issues

A. The following issues are presented in the above-captioned application for review proceeding:

1. Whether the condition described in 104(d)(1) Citation No. 789508 constitutes a violation of mandatory standard 30 C.F.R. § 75.316.

2. If the condition described in 104(d)(1) Citation No. 789508 constitutes a violation of mandatory standard 30 C.F.R. § 75.316, then 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, and whether such violation was caused by the mine operator's unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of mandatory standard 30 C.F.R. § 75.316 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

v. Opinion and Findings of Fact

A. Stipulations

1. During the hearing on November 7, 1979, the parties stipulated that the King No. 5 Mine is involved in interstate commerce (Tr. 7).

2. The parties filed stipulations on June 17, 1980, stating, in part, as follows:

[a] The above two docket numbers concern the same identical citation, Number 789508 issued on April 10, 1979, by MSHA Inspector Ted R. Milovich.

[b] A hearing was held in Docket No. WEST 79-81-R in Salt Lake City, Utah, on November 7 and 8, 1979, before Administrative Law Judge John F. Cook.

[c] The parties stipulate that the two cases should be consolidated and the record should be closed with the inclusion of the Affidavit of Mr. Bruce Sherman being admitted as part of the record. The Secretary specifically states that he is not opposed to the addition of Mr. Sherman's affidavit dated November 15, 1979, but further that he does not attest to the accuracy or truth of said Affidavit..

(d) The parties stipulate that the attached Exhibit "A" constitutes a copy of U.S. Fuel's Controlling Company Information Report which indicates a total production of 746,298 tons of coal was mined in 1979.

(e) The parties stipulate that the attached Exhibit "B" constitutes a printout of all paid violations by the company and may be used in determining the company's history or [sic] prior violations.

(f) The payment of any penalty in this matter will not affect U.S. Fuel Company's ability to remain in business.

(g) The violation was abated in normal good faith.

(h) The parties will file short briefs in this matter with U.S. Fuel's brief to be mailed on or by June 16, 1980, and MSHA's brief will be mailed on or by July 9, 1980.

B. Occurrence of Violation

Federal mine inspector Ted R. Milovich issued section 104(d)(1) Citation No. 789508 at U.S. Fuel's King No. 5 Mine during the course of his April 10, 1979, inspection. The citation alleges a violation of mandatory standard 30 C.F.R. § 75.316 in that "[t]he ventilation, methane and dust control plan was not being complied with in the No. 1 right entry of the first south section. The line brattice was 28 feet outby the point of deepest penetration and coal was being cut with a Joy continuous mining machine. No methane [was] detected. The plan 'allows 15 feet.'" (Exh. M-1). The applicable provision of the King No. 5 Mine's approved ventilation system and methane and dust control plan required that "[l]ine brattice or tubing will be installed at a distance no greater than 15 feet from the area of deepest penetration to which any portion of the face has been advanced in working faces from which coal is being cut, mined, or loaded." (Fourth and fifth pages of Exh. M-3, Tr. 45-46). A parenthetical statement following the requirement states that "15 feet is needed to allow proper maneuvering of the continuous miner. The King Mine has never in 70 years of mining, generated Methane of detectable quantity in any working place." (Fifth page of Exh. M-3); Mandatory standard 30 C.F.R. § 75.316 requires that:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 29, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The applicable portion of the regulation requires the mine operator to adopt a ventilation system and methane and dust control plan approved by the Secretary. The mine operator **violates** 30 C.F.R. § 75.316 by **failing** to comply with the approved plan. Peabody Coal Company 8 IBMA 121, 84 I.D. 469, 1 BNA MSHC 1573, 1977-1978 CCH OSHD par. 22,111 (1977); Zeigler Coal Company 4 IBMA 30, 82 I.D. 36, 1 BNA MSHC 1256, 1974-1975 CCH OSHD par. 10777 (1975, aff'd sub nom. Zeigler Coal Company v. (D.C. Cir. 1976) 398 (1976)).

The evidence presented by MSHA and U.S. Fuel paint starkly different pictures of the facts surrounding the issuance of the citation. In the absence of these two patently inconsistent versions of the events, the findings of **material fact** in these cases could be concisely stated without a prolonged discussion and analysis of the testimony of the individual witnesses. However, because the two versions are patently inconsistent, it is considered appropriate to discuss the testimony of the various witnesses in some detail.

Federal mine inspector Ted R. Milovich was accompanied on his inspection by Mr. Robert Martinez, the company safety inspector, and Mr. Bruce Sherman, a representative of the miners (Tr. 34). They entered the section and proceeded toward the face areas by walking **inby** through the belt entry (Tr. 34, 43). As the inspection party approached the feeder breaker, the Inspector observed a shuttle car, operated by Mr. Jose Carlos **Salas**, dumping a load of coal (Tr. 34-36). Being a somewhat **suspicious** person, 4/ the Inspector quickened his pace to follow the shuttle car into the working place (Tr. 34). Following the shuttle car required the inspector to make a right turn into a crosscut after passing the feeder breaker, and to thereafter make a left turn into the No. 1 right entry. This entry was adjacent to the belt entry (See, e.g., Exh. M-4). Messrs. Martinez and Sherman followed the same route as the inspector, but, because the inspector had quickened his pace, they arrived at the face area of the No. 1 right entry shortly after the inspector arrived there (See e.g., Tr. 301, 312).

Upon reaching the face area, the inspector made a series of observations which resulted in the issuance of the subject citation. A box cut on the right side of the entry was the point of deepest penetration to which the face had been advanced (Tr. 38). The evidence presented during the hearing establishes that the box cut was 5 feet deep. (See, e.g., Exh. M-4). Face ventilation was being provided through the use of line brattice which had been installed on the left side of the entry (Tr. 38). The line **brattice** was attached to timbers, or posts, which appear to have been installed for that purpose (See, e.g., Exh. M-4). According to the inspector, Mr. Eddie Edwards, the continuous miner operator, was cutting coal from the left side of the face

4/ Inspector Milovich testified on this point as follows:

"As he was leaving I stepped up my pace to follow this shuttle car into **the working place**, because **I** am somewhat of a suspicious person. **I** suspect that when a **shuttle** car operator **observes** an inspector they go up to the face and they say, 'the inspector is coming,' and things can change rapidly." (Tr. 34).

and loading it aboard Mr. Salas' shuttle car, which was positioned under the continuous miner's tail (Tr. 35-36, 96, 370, 373). The inspector testified that he observed sparks being generated from the left side of the cutting wheel when the continuous miner's ripper head made contact with the roof (Tr. 30, 346, 347, 370, 373). Visual observation enabled the inspector to determine immediately that the line brattice was not being maintained to within 15 feet of the point of deepest penetration. The inspector testified that he knew immediately that the 15 foot requirement had been violated because the continuous miner's cab was **inby** the end of the line brattice (Tr. 364, 369). The cab is approximately 20 feet from the cutting bits on the front of the machine (Tr. 121).

The inspector exchanged comments with members of the crew, and requested that nothing be moved or disturbed until such time as he discussed the matter with mine management (Tr. 36-37). Members of mine management were summoned to the scene and arrived shortly thereafter.

The continuous miner was backed out of the face area after management personnel were accorded the opportunity to observe the condition (Tr. 63). The inspector testified that the line brattice was attached to and terminated at the fourth post **outby** the face (fourth post). The **third** post **outby** the face (third post) was standing, but no line brattice was attached to it. The first post **outby** the face (first post) and the second post **outby** the face (second post) were lying on the ground on the left side of the entry. The cap pieces for the two downed posts were on the right rib siding (Exh. M-4, Tr. 57-62). The inspector's testimony reveals that the four posts and the line brattice were in that same position and condition when he first entered the face area and observed the continuous miner cutting coal from the left side of the face (Tr. 364, 373-374). His testimony further reveals that no line brattice was lying on the ground or was otherwise immediately available which could have been extended **inby** the fourth post (Tr. 50-51, 62, 360, 362, 367, 373, 381-382, 384-386). In fact, the inspector testified that he asked the company personnel to extend the line brattice on the fourth post to its maximum extension, and that when they did so he discovered only approximately 16 or 17 inches of line brattice which could be extended **inby** that post (Tr. 39-50).

A series of measurements were made using the fourth post **as the** point of reference. These measurements revealed that the line brattice terminated at a point approximately 28 feet **outby** the point of deepest penetration to which any portion of the face had been advanced, **i.e.**, 13 feet, or almost a full cut, more than permitted by the approved ventilation system and methane and dust control plan (Tr. 37-38, 46-47, Exh. M-4). The inspector testified that none of the company personnel present expressed the view that the measurement was being made using the **wrong** post as the point of reference, or stated that additional line brattice was present either on the ground or under the miner which should have been accounted for in the measurement. (See e.g., Tr. 43, 362, 374-375, 379).

The Inspector further testified that the citation was abated by two men who brought in additional brattice material, erected the two fallen posts and thereafter extended-the line brattice (Tr. 50-51, 64, 376).

In summary, the testimony of Inspector Milovich maintains that actual mining and loading activities were being performed at the face of the No. 1 right entry at a time when the line brattice terminated at a point approximately 28 feet **outby** the point of deepest penetration to which any portion of that face had **been advanced**. **His** testimony further maintains that there was no additional line brattice in the area which could have been used to comply with the applicable provision of the approved ventilation system and methane and dust control plan.

U.S. Fuel maintains that Inspector **Milovich's** version of the events surrounding the issuance of Citation No. 789508 **is** patently erroneous. Briefly stated, U.S. Fuel maintains that the crew began work on the left side of the No. 1 right entry by cleaning up some sloughage along the left rib. According to U.S. Fuel, Mr. **Salas** had transported one **shuttle** car load of this material to the feeder breaker and had just returned for a second load when the inspector arrived in the face area. According to U.S. Fuel, the **contin-**uous miner was pushing'sloughage into the face when Inspector Milovich arrived. U.S. Fuel maintains that the first post was knocked down by the continuous miner while maneuvering to clean up the sloughage, and that it was the only post that had been knocked down prior to the time that the inspector had the continuous miner operator back the machine out of the area along the left rib. U.S. Fuel maintains that this post was knocked down while the crew was working on the first shuttle car load of sloughage from the left side of the entry. It is U.S. Fuel's position that the second post was knocked down when the inspector had the miner operator back the machine out of the area along the left rib. Additionally, U.S. Fuel maintains that the line brattice was properly installed to within 15 feet of the point of deepest penetration at all relevant times, and that the line brattice **was** accidentally knocked down, along with the post, while maneuvering the continuous miner to clean up the sloughage.

U.S. Fuel employed the testimony of six witnesses and the affidavit of Mr. Bruce Sherman to set forth its version of the events surrounding the issuance of Citation No. 789508. However, their evidence contains numerous inconsistencies, especially in nine key areas, which reflect adversely on their credibility. Specifically, their evidence is inconsistent insofar as: (1) when the posts were installed on the left side of the entry; (2) identifying the post to which the line brattice was attached; (3) when the two posts were knocked down; (4) what activities were occurring **in** the face area when the inspector arrived there; (5) the location of **the** line brattice after it was knocked down and what the **various** witnesses did **or did not say** to the inspector concerning the location and condition of the **line brattice**; (6) whether the witnesses saw measurements being made; (7) whether additional brattice material was brought in to abate the **violation**; (8) whether the inspector and Mr. Eddie Edwards, the continuous miner operator, engaged in a conversation at the kitchen; and (9) whether Mr. Buddy Gines, the section

foreman, was in the face area shortly prior to the inspector's arrival there. Eight of these areas are discussed in detail below. The ninth, whether Mr. Gines was in the face area shortly prior to the inspector's arrival, will be discussed in a subsequent portion of this decision.

The first area of inconsistency is of a somewhat minor nature and relates to when the line posts were installed on the left side of the entry. Mr. Edwards, the continuous miner operator, **affirmatively** testified that he installed those line posts (Tr. 127-128). Mr. William Russell **Allred**, the miner's helper, indicated that at least one of the four posts at issue was standing up from the previous shift (Tr. 160).

The second area of inconsistency relates to identifying the **inby** most post to which the line brattice was attached immediately prior to the time that such line brattice was supposedly knocked down by the continuous miner. Mr. Edwards testified that the **line** brattice was attached up to and including the first post **outby** the face (Tr. 116, 123, 130-131, 133-134). Mr. **Allred** testified that the line brattice was attached only up to and including the second post **outby** the face prior to Mr. Edward's beginning his activities on the left side of the entry (Tr. 162, 163, 165, 192-193). Mr. **Salas**, the shuttle car operator, testified that the line brattice was attached up to and including the second post **outby** the face, and that the brattice came off of the first post **outby** the face when the miner operator knocked the first **timber** down on his way going in (Tr. 202, 215-216). The affidavit of Mr. Sherman states', in part, that he "observed that one timber (1st **outby** from the face) was knocked out and the brattice was still wrapped around it." This statement indicates that Mr. Sherman maintains that he observed evidence that the line brattice had been attached up to and including 'the first post **outby** the face. The testimony of Mr. Buddy Gines, the section foreman, indicates that he maintains that the line brattice was attached up to and including the first post **outby** the face (Tr. 271-272).

The third area of inconsistency relates to when the first and second posts were knocked down. Messrs. Edwards and **Salas** maintained that the first post was toppled by the continuous miner while maneuvering to clean up the sloughage, and that the second post was knocked down when the inspector had the miner operator back the machine out of the area along the left rib (Tr. 115, 123, 202, 205, 207). However, Mr. Edwards **testified at** a later point that he did not know whether he toppled one post while going in and the other post while going out, or both while going in or both while going out (Tr. 129-130). Mr. **Allred** testified at one point in his testimony that it was necessary to topple the first post in order to clean up the material present (Tr. 162). However, he later contradicted himself by testifying that he did not remember when Mr. Edwards knocked the posts down, that he did not even remember Mr. Edwards knocking them down, and that he really did not know whether Mr. Edwards knocked them down while going in or while pulling out (Tr. **173-174**). Of even greater significance on this point is the testimony of Mr. Louis J. Mele, U.S. Fuel's director of safety and training. Mr. **Mele** was one of the company officials summoned to the face area of the No. 1 right entry by Mr. Martinez. Mr. Mele testified that he observed the two posts

lying on the ground when he arrived in the face area. He further testified that he did not observe the two posts in their entirety because they were partially covered with coal (Tr. 397-398). His testimony that the two posts were partially covered with coal is inconsistent with the position of other witnesses for U.S. Fuel that the two posts, and particularly the second post, had just been knocked down. Mr. **Mele's** testimony that the two posts were partially buried is consistent only with Inspector Milovich's assertion that the two posts were down when he arrived in the face area and observed actual mining activity in progress, because some type of activity would have been required in order to partially bury the two posts.

The fourth area of inconsistency relates to what activities were occurring in the face area when Inspector Milovich arrived there. Mr. Edwards testified that he was cleaning sloughage from along the left rib, using the head of the miner to break up some large pieces that had sloughed down from the left rib, and loading the material aboard the shuttle car which was positioned under the continuous miner's tail (Tr. 114-115, 146-147, 151-152). On direct examination, he testified as follows:

I backed the miner up, I moved over, and I was moving in, and there was sloughage from the rib that had fallen down, and I was continuing to clean that sloughage up with my machine. In order to get that sloughage cleaned up -- there is **chunks** in there as big as [the bench in the courtroom where the hearing was held] and you have to start the cutter head to cut the coal to let it go up to the conveyor into the [shuttle car]. That's what I was doing. I was cutting up the sloughage; I entered the face, and then there was a big chunk right there; I started to cut it, and when I turned around to see how full the (shuttle car) was, and I seen Mr. Milovich coming down, and then I shut the machine off and I started back, and that's when he wrote up the citation.

(Tr. 114-115).

Mr. **Allred's** testimony on this point, although not as detailed, **indicates** that the crew was in the process of loading the shuttle car when the inspector arrived (Tr. 162). Mr. **Salas'** testimony, however, contradicts the testimony of Messrs. Edwards and **Allred** because he maintained that no loading was in progress. Mr. Salas testified as follows on direct examination:

Q. Now, was your shuttle car in the position approximately that **is** shown on Exhibit M-4 at the time Mr. **Milovich** arrived?

A. No. I was back a ways. I was behind the tail.

Q. **When** you say you were behind the tail were you ready to receive coal or was there something that would still be necessary to do before the miner pumped coal into your buggy?

A. Before I go in the tail has to be up, but his tail was down at the time and he was breaking up some 'gob in there.

Q. So he has a rear boom which is shown as -that projection from the miner over the shuttle car, and that boom had not been raised sufficiently for you to get underneath at the time that he was breaking up these lumps?

A. No, not at the time.

(Tr. 198-199).

The fifth area of inconsistency relates to the location of the line brattice after it was knocked down and what the various witnesses **did** or did not say to the inspector concerning the location and condition of the line brattice. Generally, the operator's witnesses and the affiant maintain that the toppled line brattice was on the floor of the entry, and that an argument ensued over the subject of mining without proper ventilation.

Mr. Sherman's affidavit maintains that the toppled line brattice was plainly visible.

Mr. Edwards testified at one point that the line brattice was on the ground underneath the continuous miner, and that that was why the inspector did not see it (Tr. 116-117). However, he later testified that the line brattice was on the ground when the measurements were made and that it was visible to anyone taking the trouble to walk around the left side of the continuous miner (Tr. 154), and that he did not know why the inspector did not see it (Tr. 143-144). As relates to any conversations with the inspector, Mr. Edwards testified that Inspector **Milovich** came in, stopped, shook his head and asked him "what the hell" he, Edwards, though he was doing (Tr. 124). Curiously, for a man who maintains that the line brattice had been **up**; Mr. Edwards never told the inspector (1) that the line brattice had been in place, (2) that it had just been knocked down by the continuous miner, or (3) that the line brattice was lying on the ground (Tr. 117, 129-130, 139-140). In fact, he testified that he did not respond to any of the inspector's direct questions **concerning why** the line brattice was not up (Tr. 117). At one point he testified that he did not know why he failed to mention the presence of the line brattice to the inspector upon learning that a ventilation violation had occurred (Tr. 152). He thereafter testified that he failed to mention it because he was shaken by the experience (Tr. 152-153).

It appears that Mr. **Allred** was suffering from a poor memory insofar as this, the most **critical** aspect of U.S. Fuel's case, was concerned. He testified that he did not know where the line brattice was (Tr. 171); that he did not see the brattice cloth when the continuous miner was pulled back and the measurements were taken (Tr. 172); and that he did not recall seeing any brattice cloth tucked underneath the machine (Tr. 173). As noted previously, Mr. **Allred** maintained at various points in his testimony that the line brattice was attached up to and including the second post **outby** the face.

Yet he testified, in the following passage, that he never brought this matter to the inspector's attention simply because he never says much to Inspector Milovich:

JUDGE COOK: If that was true, didn't you say something to the Inspector as to what you thought the situation was?

THE WITNESS: Myself, no. I don't say very much to him; never did. Never did.

(Tr. 188).

Mr. **Salas** testified that he saw the line brattice on the ground after the inspector's arrival on the **section** and before the continuous miner was backed out of the face (Tr. 203-204). He further testified that the line brattice was on the ground after the continuous miner was backed out of the face, but he could not remember whether it was **visible** on the left side or whether it was underneath the continuous miner (Tr. 205). However, he later testified that he never saw the line brattice on the floor after the miner pulled out (Tr. 212). Additionally, Mr. **Salas** testified that he did not say a word to the inspector concerning the violation, and indicated that he did not look for the brattice cloth after the section was shut **down** or **while** the argument was in progress (Tr. 206, 217) even though he could have easily seen the brattice cloth from his vantage point in front of the continuous miner (Tr. 216-219). In fact, he claimed that he was unable to remember the topic of the argument (Tr. 219). The implausibility of and apparent contradictions contained in his testimony are amply illustrated by the following excerpts from his cross-examination:

Q. Did you ever walk in front of the brattice -- I mean in front of the miner? Did you ever stand in front of the miner?

A. Yes.

Q. When did you ever do that?

A. After everybody was there.

Q. Everybody was there and you were standing in front of the miner?

A. They was just arguing.

Q. Everybody was arguing. Where was the brattice cloth?

A. I didn't look around for it.

Q. Oh, Jesus. The **brattice** cloth was hanging on the second, third and fourth posts when you were coming in; it falls off the second post when Mr. Edwards moves his machine in?

A. Right.

Q. It falls off the third post and **the** second post falls down when he backs the machine back, and then you are standing in front of he miner, with everybody standing **around arguing**, and you don't know where the brattice cloth is?

A. I didn't know it was a violation before or I would have looked for it.

(Tr. 216-217).

* * * * *

You remember [the condition and location of the brattice prior to the time the machine was backed out of the face] but you don't remember when you were standing in front of the miner? Did it disappear?

A. I wasn't looking for it.

Q. What were they arguing about?

A. I can't remember. It was none of my business. They were the ones.

Q. But you don't remember? That's what you **are** telling me, you really don't remember where **the brattice cloth** was at the point in time that you were- standing in front of the machine? Would you answer verbally for the record?

A. No.

(Tr. 219).

Mr. Buddy Gines was summoned to the face area and arrived there prior to the arrival of Mr. **Mele's** party. Mr. Gines testified that an argument ensued upon his arrival during which the inspector "got on me pretty bad for mining without air" (Tr. 237). Mr. Gines testified that the inspector kept saying that it was his responsibility to make sure that the crew did not cut past their ventilation; and that he got the impression that Inspector Milovich thought the crew had mined some considerable time with the posts and line brattice down (Tr. 237-238). Mr. Gines further testified that he attempted to explain to Inspector Milovich that the posts and line brattice were there, but that the inspector just kept getting on him about his responsibilities

and would not let him explain the matter (Tr. 238). This **angered Mr. Gines** and he therefore **simply** terminated the discussion with the **inspector and took** a seat along the right rib. **He** testified that he remained seated there **during** all subsequent activities and that he did not assist in the **taking of** measurements **or in** anything else (Tr. 237-238, 252, 256, 262).

According to Mr. Gines, the line brattice and timbers were present (Tr. 271). Yet curiously, he did not brief Mr. Mele and his party about the situation before they talked to the inspector. In fact, he did not even speak to them when they arrived (Tr. 282). Such **conduct** is inconsistent with Mr. Gines position that the crew had not mined past their ventilation. Logically, one would expect Mr. Gines to explain the situation to Mr. **Mele's** party and point out to them that the inspector's accusation was unfounded, that the inspector would not let him proffer an explanation, and that the inspector appeared unwilling to listen to reason. Instead, he said absolutely nothing to them.

Additionally, Mr. Gines did not affirmatively testify that someone told the inspector that measurements were being made in the wrong location. He testified only that he thought he heard someone tell the inspector that the measurement was being made **in** the wrong spot (Tr. 255).

Mr. Martinez testified that when **he arrived** at the face, the first post was lying on the ground and the line brattice was attached to the third post and was angling down to the second post (Tr. 302-303). Mr. Martinez testified that he assisted in making the 28 foot measurement (Tr. 304). It does not appear that Mr. Martinez had any discussion with the inspector concerning the fact that the posts had just been knocked down (Tr. 303). However, he testified on direct examination that other people made comments to the inspector as relates to the point of reference used in making the measurement:

Q. You helped take that measurement? Did anyone from the crew or supervisory personnel state to Mr. Milovich that he was measuring from the wrong point?

A. Yes, Sir.

Q. Do you know who said that?

A. There were several comments on the measurement. The supervisory, Andy Barnett and the crew members appeared to be -- as the brattice was angled **the[y]** didn't believe it was where it should be taken at. He was taking it from where it was intact all the way to the roof, the way the measurement was **made**.

(Tr. 304-305).

However, he appeared to become evasive when cross-examined on this point, maintaining that he did not really remember what was said:

Q. Did Mr. Mele or Mr. Barnett take the lead in advancing the company's position at the time? Was either one of them more dominant than the other in talking to Milovich?

A. Not that I recall.

Q. Both of them were talking to him at the same time?

A. People were talking.

Q. But you don't remember what was said?

A. Not really.

Q. Can you give me the flavor of what was said, what is your recollection of what was said? What were the arguments about?

A. People were arguing about the angle of the brattice after we had backed out, talking about where the measurements were taken. I really can't recall what they was talking. I was going about my job.

(Tr. 331-332).

Mr. Mele testified that the line brattice was probably on the fourth post on an angle when he arrived in the face area (Tr. 390). He testified that he saw the brattice cloth on the ground, but he had no idea as to how such observation squared with Mr. Edwards' testimony that the brattice cloth was under the continuous miner (Tr. 397).

It was apparent to Mr. Mele that Inspector Milovich had already taken some measurements, because when the two men first met the inspector stated that "the violation was 28 feet" (Tr. 390-391). Mr. Mele responded with the statement that it did not appear that far (Tr. 390-391). Thereafter, Mr. Mele assisted the inspector in making measurements. However, Mr. Mele indicated at several points in his testimony that nobody mentioned to Inspector Milovich that he was taking the measurements **in the** wrong location. He testified that he had no discussion with the inspector as to whether the measurement should be made from where the line brattice was actually hung on the post, or whether it should account for any of the additional brattice that was sloping down (Tr. 391). He further testified that while he was assisting in the measurement, nobody indicated that the measurement was being made in the wrong spot (Tr. 399-400). His testimony on this point flatly contradicts Mr. Martinez testimony on direct examination that he overheard supervisors or crew members tell the inspector that the measurements were being made in the wrong location.

In short, the reliable evidence shows that 'no statements were made to Inspector Milovich **indicating either** that the line brattice had just been

knocked down, or that the measurements should have been made by taking into account additional line brattice that U.S. Fuel maintains was present. The failure of U.S. Fuel's personnel to make such statements to **the inspector** tends to prove that Inspector Milovich gave an accurate portrayal of the conditions existing at the face of the No. 1 right entry. The failure of U.S. Fuel's personnel to point out such key facts to the inspector is conduct which is inconsistent with the position advanced by U.S. Fuel's witness' and affiant. The alternative would require the acceptance of an absurd proposition in which discussions take place concerning mining without proper ventilation, and measurements are made to determine how far the line brattice terminates from the point of deepest penetration to which any portion of the face has been advanced, and yet nobody bothers to point out the crucial facts necessary to avoid the issuance of a citation. Additionally, U.S. Fuel's evidence contains numerous inconsistencies as to the position and location of the brattice cloth that it maintains had just been knocked **down**.

The sixth area of inconsistency concerns whether the witnesses saw measurements being made. The inconsistency in this area is confined to the testimony of Mr. Edwards.

Briefly stated, measurements were taken in the following fashion: The first measurement was made by the inspector prior to the arrival of Mr. Mele's party. He threw his tape measure, which had a nut on the end, into the face and obtained a reading of approximately 28 feet (Tr. 37-38, 390-391). Inspector Milovich informed Mr. Mele of the reading when the latter arrived. Mr. Mele responded that the distance did not appear that far (Tr. 390-391). Company personnel assisted the inspector in taking another set of measurements, with Mr. Mele holding the tape at the face. Once again, a reading of approximately 28 feet was obtained (Tr. 37-38, 304, 317, 394).

At one point during cross-examination, Mr. Edwards denied that he saw measurements being made:

Q. Now, did you watch any of the measurements going on? Did you see the Inspector throw his tape up into the face with a nut on the end of it and read out about twenty-eight feet?

A. I didn't see nothing like that. I wasn't there. I wasn't paying any attention. All I know is that he started to write out the citation.

(Tr. 122).

However, he contradicted himself at a later point in his cross-examination:

Q. Did you see the Inspector measure the area?

A. Yes, I seen him measure it.

Q. Did you look at the tape at all?

A. No, I didn't.

Q. He measured it twice when you were there?

A. Yes, I know he measured it.

Q. Do you remember seeing him measure it twice?

A. Yes.

Q. You saw him throw it up once by himself and then he had somebody else walk up to the face at the roof support?.

A. Yes.

Q. Who did he have walk up to the face?

A. Lou Mele.

Q. who?

A. Lou Mele.

(Tr. 137-138). (Emphasis added).

The seventh area of inconsistency relates to whether additional brattice cloth was brought in to abate the violation. The inspector testified that the violation was abated by two men who brought in and installed additional line brattice (Tr. 50-51, 64, 376). U.S. Fuel maintains, however, that the violation was abated by reinstalling the line brattice which had fallen on the ground, and that additional brattice cloth was not brought in for this purpose. The most probative evidence adduced by U.S. Fuel in support of its position 5/ is the affidavit of Mr. Sherman which states, in part, that: "We rehung the brattice that had fallen off the timbers using the the [sic] brattice laying on the ground along the rib line and some wrapped around the

5/ The testimony of Messrs. Edwards, Gines, Martinez and Mele is less than **conclusive on this point.** Mr. Edwards testified that he did not see additional brattice cloth brought in to abate the citation (Tr. 125), and that nobody brought in extra brattice cloth (Tr. 141). However, the evidence presented indicates that Mr. Edwards was in no position to make a personal, firsthand observation of the abatement procedures because he was at the kitchen, and not the face, when abatement occurred. Mr. Gines testified only that he did not observe anybody bring in additional brattice cloth to abate the citation (Tr. 257). Mr. Martinez testified only that he did not know whether additional brattice cloth was brought in or, indeed, whether such action was necessary (Tr. 310). Mr. Mele testified only that to his knowledge new brattice cloth was not brought in to abate the citation (Tr. 398).

timber. There was approximately 30 feet of the line curtain laying there." However, Mr. **Allred** gave testimony during cross-examination which supports the testimony of Inspector **Milovich**. **Mr. Allred's** testimony on this point is as follows:

Q. Okay. Where was the brattice cloth that was connected to the three posts that were **inby** point "**C**" [on Exhibit M-4]?

A. I don't know.

Q. Did you see any brattice cloth there?

A. Did I see any?

Q. Yes.

A. After we backed up?

Q. Yes.

A. No, I don't recall what happened to it. Somebody else come in and fixed the place up. I don't know who did it. I don't know why they went back out to brattice. I do know the brattice was up to the farthest **roofbolt** post, but I am the miner helper and I did put it out there.

Q. You have just told me several things: [The testimony is omitted as relates to the first two topics identified.] Three, you told me that somebody went out and got new brattice cloth and came back in. Right?

A. Right.

Q. Did you see that hung?

A. No. If I remember right, I think we **went** to dinner and had somebody else do the hanging up and measuring. I can't remember for sure what happened there.

Q. But you do remember somebody brought new brattice cloth in?

A. No, I don't remember that. I think somebody told me somebody brought some brattice cloth in. I didn't see **nobody** bringing no brattice in. (Tr. 171-172).

The eighth area of inconsistency concerns whether Mr. Edwards and Inspector Milovich conversed at the kitchen. According to Inspector

Milovich, a conversation did occur there during which Mr. Edwards once again requested the inspector to overlook what he had found (Tr. 376-377). 6/ Mr. Edwards denied ever making such statements at any time (Tr. 125-126), and, in fact, maintained that he had had no conversations at all with the inspector in the kitchen area (Tr. 196). Mr. **Salas**, however, testified that the two men did converse in the kitchen area, but appeared to imply that they simply reminisced about "old times" (Tr. 210). He testified that he was unable to remember whether Mr. Edwards requested the inspector to overlook the violation (Tr. 211). Additionally, Mr. **Allred** testified that the two men engaged in a conversation in the kitchen area, but claimed that he was unable to remember whether Mr. Edwards made the request (Tr. 178-179). However, Mr. **Allred's** testimony does reveal that Mr. **Allred** discussed the violation with the inspector at that time (Tr. 187).

In summary, Mr. Edwards maintained that he had no conversation with the inspector in the kitchen area, while Messrs. **Salas** and **Allred** maintain that the two men did converse there. The two positions are inconsistent. Mr. **Allred's** testimony further indicates that the violation was discussed with the inspector in the kitchen area. Inspector Milovich's testimony as to the subject matter of his conversation with Mr. Edwards is considered accurate.

In view of the foregoing, I conclude that the testimony of Federal mine inspector Ted **R.** Milovich accurately sets forth the conditions existing in the face area of the No. 1 right entry when the citation was issued, and that U.S. Fuel has not produced credible evidence to rebut his testimony. 7/

6/ According to the inspector, the request was initially made in the face area of the No. 1 right entry moments after he caught Mr. Edwards mining without the required line brattice (Tr. 359).

7/ It appears that Messrs. Edwards, **Allred**, **Salas** and Gines may have had a motive to be less than candid in their testimony. According to Inspector Milovich, Mr. Walter Wright, the mine superintendent, arrived at the face with Mr. Mele. Inspector Milovich testified that Mr. Wright appeared particularly surprised at and quite upset with the condition, and that Mr. Wright stated that he would 'fire everybody on the section (Tr. 37, 51-52, 378). Mr. Edwards testified that Mr. Wright was not present (Tr. 134). Messrs. **Allred**, Gines and Martinez testified either that they did not remember seeing Mr. Wright or that they could not recall whether Mr. Wright was present (Tr. 185-186, 253, 265, 331). There is, however, evidence in the record which tends to corroborate the inspector's testimony that Mr. Wright was present and that he made the statement attributed to him.

Mr. Mele testified that Mr. Wright could have been present, although he was not certain (Tr. 388-389). Yet, Mr. Mele's testimony indicates that the statement is characteristic of Mr. Wright. According to Mr. Mele:

"He said that many times when we had such violations. I heard that several times, but I'm not too sure he was in there that day. I've heard him say that many times when I talked to him about violations, 'We are -going to fire the boss; we are going to fire the crew.' That's just something that he -- that is one of his -- we have never done it yet." (Tr. 398-399).

Accordingly, it is found that a preponderance of the evidence establishes a violation of mandatory standard 30 C.F.R. § 75.316. Actual mining and loading operations were underway in the face area of the No. 1 right entry of the King No. 5 Mine's first south section, and the line brattice terminated at a point approximately 28 feet outby the point of deepest penetration to which any portion of the face had been advanced. This condition violated the provision of the approved ventilation system and methane-and dust control plan which required the line brattice or tubing to be installed at a distance no greater-than 15 feet from the area of deepest penetration to which any portion of the face has been advanced in working faces from which coal is being cut, mined, or loaded.

C. Negligence of the Operator

The facts presented in these cases reveal that as of April 10, 1979, U.S. Fuel should have been more cognizant than usual of the need to maintain good ventilation because the King No. 5 Mine had experienced a series of three frictional coal dust ignitions during the recent past. The three ignitions occurred on March 21, March 23, and April 5, 1979, in another section of the mine located approximately 2,600 or 2,700 feet from the section involved in these proceedings (Tr. 14-15, Exh. M-4). ^{8/} Yet, the evidence shows that the line brattice terminated at a point 28 feet outby the point of deepest penetration to which any portion of the face of the No. 1 right entry had been advanced while coal was being cut, mined or loaded, i.e., 13 feet, or almost a full cut, more than the distance permitted by the approved ventilation system and methane and dust control plan (Exh. M-3, Tr. 46-47). Under the plan, 15 feet is a full cut (Tr. 46-47, Exh. M-3). The findings of fact set forth previously in this decision show that a substantial amount of mining and loading had occurred without the required line brattice installed. The only remaining question is whether U.S. Fuel's supervisory personnel knew or should have known that the condition existed. The evidence, as set forth below, shows that the section foreman had actual knowledge of the condition and failed to take corrective action.

As noted previously, the inspector quickened his pace to follow Mr. **Salas'** shuttle car into the working place. As he went through the cross-cut into the No. 1 right entry, he observed three miner's lights in the face

fn. 7 (continued)

Mr. Gines testified that he did not remember seeing Mr. Wright, and that he did not hear Mr. Wright say that the whole crew should be fired (Tr. 253). However, he testified that a union man told him later that he had heard that Mr. Wright was going to fire him.

Finally, Inspector Milovich's testimony is in accord with statements contained in his contemporaneous handwritten notes. The notes, written while underground (Tr. 95), record Mr. Wright's presence and the statement that he "would fire everyone on the section." (Exhs. M-2, M-2A).

^{8/} Counsel for MSHA indicated during the hearing that the three prior coal dust ignitions were flash, self-extinguishing situations, and not explosions (Tr. 106).

area (See, Exh. M-4). One of the three individuals had a lighted flame **safety lamp** (Tr. 34-35). Mr. **Salas**, the shuttle car operator, was not one of the-three men observed at the face because he was still driving the shuttle car into the section when the observation was made (Tr. 44). A series of observations and conversations enabled the inspector to determine that Mr. Gines, the section foreman, was the individual in the face area with the lighted flame safety lamp.

Shortly after the inspector observed the three lights, he and Mr. Gines passed each other at a point approximately 175 feet from the face while walking down the No. 1 right entry. The inspector was walking **inby** and Mr. Gines was walking **outby** (Tr. 34-35, 71). The inspector did not actually see Mr. Gines leave the face area because it appears that the shuttle car obstructed his view at the crucial point in time (Tr. 45). However, Mr. Gines was carrying a flame safety lamp when he and the inspector passed each other (Tr. 34-36). Additionally, there were only two people present at the **face**, discounting Mr. **Salas**, when the inspector arrived there. Neither of the two men had a flame safety lamp. An unlighted flame safety lamp was inside the continuous miner (Tr. 36, 45).

It appears that Inspector Milovich wanted to confirm his belief that Mr. Gines had been in the face area, **i.e.**, that Mr. Gines had been in a position to actually see the violation. After he stopped the mining activity, he asked Mr. **Allred** where Mr. Gines was (Tr. 78). Mr. **Allred** stated that Mr. Gines had just left (Tr. 36-37). When Mr. Gines returned to the face area, the inspector asked him whether he had just left the face area. Mr. Gines responded in the affirmative, stating that he had left "a little while ago." The inspector followed up his question by asking Mr. Gines whether he had seen how far the line brattice terminated from the point of deepest penetration. Mr. Gines answered by stating that it "didn't look that far to me" (Tr. 37, 77). The inspector thereupon **reached** the conclusion that Mr. Gines, a supervisory employee of U.S. Fuel, had seen the violation, and, accordingly, that the violation was caused by an unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316 (Tr. 35, 77).

U.S. Fuel's evidence was directed toward disproving both that Mr. Gines was in the face area shortly before the inspector arrived there, and that Mr. Gines had stated that the line brattice had not appeared that far back when he was in the area a short time earlier. However, U.S. Fuel's witnesses are not considered credible on these points.

Messrs. **Allred** and Edwards gave testimony which, if believed, would last place Mr. Gines in the area before activities began on the left side of the No. 1 entry (Tr. 155, 162, 167-170). Their testimony is inconsistent with that of Messrs. **Salas** and Gines. The testimony of Messrs. **Salas** and Gines places Mr. Gines in the vicinity of the face moments before the inspector's arrival at the face, a much later point in time than that testified to by Messrs. Edwards and **Allred**. Specifically, Mr. **Salas** had already taken one load of material from the left side of the entry and had just returned to the face area to pick up another load when the inspector arrived there. Yet,

Mr. **Salas** specifically recalled Seeing Mr. Gines in the **No. 1 right entry** while driving the shuttle car toward the face (Tr. 201). **In fact, Mr. Gines** admitted passing the inspector in the No. 1 right entry **(Tr. 235-236)**. Additionally, Mr. Gines contradicted Mr. **Allred's** testimony **on a crucial** point. Mr. Gines testified that he had just finished speaking to **Mr. Allred**, who was straightening the cable on the continuous miner, before passing the inspector (Tr. 234-255). Mr. **Allred** confirmed talking to 'Mr. Gines **while** straightening the cable, but indicated that the conversation occurred **before** activities began on the left side of the entry **(Tr. 167-170)**.

Furthermore, part of U.S. Fuel's evidence tends to confirm Inspector **Milovich's** account. Mr. Gines, by his own admission, places **himself in** the vicinity of the face at the relevant time. Mr. **Allred** confirms telling the inspector that Mr. Gines had "just left" the area **(Tr. 167)**.

In view of these considerations, I find that Inspector Milovich correctly deduced that Mr. Gines had just left the face area of the No. 1 right entry. I further find that Mr. Gines admitted to the inspector that he had observed the violative condition, but attempted to exculpate himself by maintaining that "it didn't look that far" when he was last at the face a few minutes earlier. Additionally, the evidence shows that Mr. Gines failed to take corrective action. His knowledge and his failure to act are imputable to U.S. Fuel. See, e.g., Nacco Mining Company, 3 FMSHRC 848, 2 BNA MSHC 1272, 1981 CCH OSHD par. 25,330 (1981).

In view of the recent history of frictional coal dust ignitions at the Ring No. 5 Mine, U.S. Fuel was under an affirmative obligation to be even more cognizant than usual of the need to maintain proper ventilation. **This** obligation was clearly not met. A substantial amount of mining and loading was performed without complying **with the** cited provision of the approved ventilation system and methane and dust control plan. The section foreman had actual knowledge of the violative condition and **failed to** take corrective action. The violation was readily visible (See, Tr. 121, 364, 369). Accordingly, it **is found** that U.S. Fuel demonstrated gross negligence.

D. Unwarrantable Failure Criterion

The subject 104(d)(1) citation contains the-allegation that the cited violation was caused by the mine operator's unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316. A violation of a mandatory health or safety standard is caused by an unwarrantable failure to comply 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, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977).

The findings of fact-and the discussion set forth in Part V(C) of this decision clearly show that U.S. Fuel failed to abate a violative condition

that it knew or should known existed because of a lack of due diligence, or because of indifference or lack of reasonable care. Accordingly, it is found that the violation was caused by U.S. Fuel's unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316.

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 National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981), the 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.'" 3 FMSHRC at 825. 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." 3 FMSHRC at 827. (Footnote omitted.) The particular facts surrounding the violation reveal the following:

As a general matter, the concentration of float coal dust in suspension is reduced if the proper amount of air and water is delivered to the face. Float coal dust is a potential fuel for an ignition or explosion. Proper ventilation reduces, but does not completely eliminate, the possibility of an ignition (Tr. 16, 18-19).

The King No. 5 Mine is a relatively new mine. It is close to the surface and has a large fan. There is adequate air in the mine, if it is properly directed (Tr. 33). The inspector found 8,500 feet of air going over the continuous miner, and the plan required only 6,000 feet of air (Tr. 22). However, the inspector was of the opinion 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 because air will naturally follow the shortest, most direct route into the return. With the line brattice installed so far from the face, very little air would be ventilating the face because it would be following the shortest route out the return. Therefore, there would be a possibility that the velocity would not be as great at the face (Tr. 53).

A methane test was made and no methane was detected. Previous samples collected for analysis had indicated that the mine did not liberate methane (Tr. 54-55). However, an ignition source for float coal dust was clearly present. Rock was being cut and was generating sparks and heat (Exh. M-5,

Tr. 30, 346-347, 370, 373). The **injury** resulting from or **contemplated by the** occurrence of an ignition or explosion could reasonably be expected to be serious.

In view of the foregoing, I find that the violation could have been a major cause of a danger to safety or health. The particular facts surrounding the violation show the existence of a reasonable likelihood that the hazard contributed to would result in an injury or an illness of a reasonably serious nature. Accordingly, I conclude 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.

F. Gravity of the Violation

The findings of fact set forth in Part V(E) of this decision show that the violation was serious.

G. Good Faith in Attempting Rapid Abatement

The citation was issued at approximately **10:25 a.m.**, on April 10, 1979. Abatement was due by **11:05 a.m.** that same day. The citation was terminated within the time set for abatement (**Exh. M-1**). The parties stipulated that the violation was abated in normal good faith (June 17, 1980, stipulations).

H. Size of the Operator's Business

The parties stipulated that U.S. Fuel mined 746,298 tons of coal in 1979. U.S. Fuel's controlling company information report reveals that 496,078 tons of that coal was mined at the King No. 4 Mine, and that the remaining 250,220 tons was mined at the King No. 5 Mine (June 17, 1980, stipulations).

I. History of Previous Violations

On June 17, 1980, the parties filed a computer printout prepared by the Directorate of Assessments setting forth the history of previous violations at the King No. 4 and King No. 5 Mines, beginning January 1, 1970, and ending May 29, 1980. The parties stipulated that such computer printout may be used in determining U.S. Fuel's history of previous violations.

Only those paid assessments for violations charged prior to April 10, 1979, may be properly considered in determining **U.S** Fuel's history of previous violations. See Peggs Run Coal Company, 5 IBMA 144, 82 **I.D.** 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975). The computer printout reveals that U.S. Fuel had paid assessments for the time period beginning January 1, 1970, and ending April 9, 1979, as follows:

Mandatory Standards

Mine	All §	§ 75.316 (highest fine)
King No. 4	1277	57, (\$2,500)
King No. 5	37	1 (\$30)
Totals	1314	58 (\$2,500)

(Note: All figures are approximations).

J. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

The parties stipulated that the payment of any penalty in this matter will not affect U.S. Fuel's ability to remain in business (June 17, 1980, stipulations).

VI. Conclusions of Law

1. United States Fuel Company and its King No. 5 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

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

3. Federal mine inspector Ted R. Milovich was a **duly authorized representative** of the Secretary of Labor at all times relevant to the issuance of Citation No. 789508.

4. The violation of mandatory standard 30 C.F.R. § 75.316 charged in Citation No. 789508 is found to have occurred as alleged.

5. The subject violation of mandatory standard 30 C.F.R. § 75.316 was caused by the mine operator's unwarrantable failure to comply with such mandatory standard.

6. The subject violation of mandatory standard 30 C.F.R. § 75.316 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard;

7. Citation No. 789508 was properly issued under section 104(d)(1) of the 1977 Mine Act.

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

VII. Proposed Findings of Fact and Conclusions of Law

The parties made closing arguments at the conclusion of the hearing on November 8, 1979. U.S. Fuel and MSHA filed briefs on June 17, 1980, and July 9, 1980, respectively. Such closing arguments and 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 these cases.

VIII. Penalty Assessed in Docket No. WEST 80-62

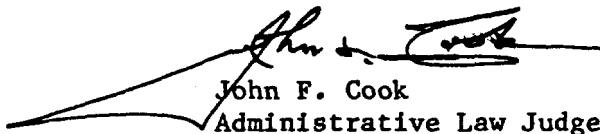
Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows in Docket No. WEST 80-62:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
789508,	4/10/79	75.316	\$3,000

ORDER

Accordingly, IT IS ORDERED that the application for review in Docket No. WEST 79-81-R be, and hereby is, DENIED, and that Citation No. 789508 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that U.S. Fuel pay the civil penalty in the amount of \$3,000 assessed in Docket No. WEST 80-62 within 30 days of the date of this decision.


John F. Cook
Administrative Law Judge

Distribution:

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

Richard H. Nebeker, Esq., Callister, Greene & Nebeker, 800 Kennecott
Building, Salt Lake City, UT 84133 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health,
U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution