FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 14 1981

YOUNGSTOWN MINES CORPORATION, Contestant	:	Notice of Contest
v.	:	Docket No. WEVA 81-303-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 917568 February 24, 1981 Dehue Mine
LOCAL UNION 5869, UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Roger S. Matthews, Esq., Youngstown Mines Corporation, Pittsburgh, Pennsylvania, for the Contestant;
James P. Kilcoyne, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent;
David Vidovich, President, Local Union 5869, District 17, United Mine Workers of America, Dehue, West Virginia, for the Intervenor.

Before: Judge Cook

I. Procedural Background

Youngstown Mines Corporation (Youngstown) timely filed a notice of contest in the above-captioned proceeding 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), to contest Withdrawal Order No. 917568. The withdrawal order was issued at Youngstown's Dehue Mine on February 24, 1981,

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

pursuant to section 104(d)(2) 2/ of the 1977 Mine Act. The notice of contest states, in part, as follows:

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fn. 1 (continued)
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."

2/ Section 104(d) of the 1977 Mine Act provides as follows:

"(1) 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.

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

The factual background and Youngstown's position with respect to the aforesaid Order is as follows:

1. On February 24, 1981, Federal Mine Inspector Dana Napier issued Order No. 917568 (hereinafter "Order") pursuant to the provisions of Section 104(d)(2) of the Act, for violations of the Federal Mine Safety and Health Act of 1977 based on a report contained in the third shift mine foreman's report book dated February 2, 1981. A copy of the Order is attached hereto and identified as "Exhibit "A".

2. Under the heading and caption "Condition or Practice" the Order alleges that:

> "The report of the 3rd shift mine foreman's report book dated 2/2/1981 and signed by Hiram Marcum, Jr. stating that the fan (No. 2) was off at 4:30 A.M. and in his statement in the record book indicate that men were started withdrawing at 5:06 A.M. on 2/2/81, which is not in compliance with 75.321."

3. A copy of the report of the third shift mine foreman's report book dated February 2, 1981 and signed by Hiram Marcum Jr. is attached hereto and identified as Exhibit "B". Under the [heading] and caption "Violation and Other Hazardous Conditions Observed and Reported" it states:

> "At 4:30 A.M. fireboss called and said he had no air on 2-South. Went to air lock doors inby 1st Rt. I then realized that the fan was off. I informed the dispatcher to get all sections on phone and tell them to come out side pulling disconnects and all power coming out. Started withdrawing men at 5:06 A.M. All men cleared mines at 5:40 A.M."

4. The Order further stated that that [sic] the alleged violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety and health hazard and that the alleged violation was caused by the unwarrantable failure of the operator to comply with a mandatory standard.

5. Youngstown avers that Order No. 917568 is invalid and illegal and should be vacated for the following reasons:

(a) The Order failed to cite a condition or practice which constitutes a violation of a mandatory health or safety standard;

(b) In issuing the Order, the Inspector acted arbitrarily, unreasonably, capriciously and in total disregard of the prevailing standards for issuance of Section 104(d)(2) Orders;

(c) The Order is improper because the violation was not "caused by an unwarrantable failure" of Youngstown to comply with the cited standard; and

(d) The Order is improper since conditions related to the alleged violation were not of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

* * * * * * *

WHEREFORE, Youngstown respectfully requests that the Order which is challenged herein be vacated and set aside and that all actions taken, or to be taken, with respect thereto or in consequence thereof, be declared null and void and of no effect.

On March 26, 1981, the Secretary of Labor (Secretary) filed an answer alleging, in part, that Withdrawal Order No. 917568 was properly issued pursuant to section 104(d) of the 1977 Mine Act; and that there was a violation of a mandatory safety standard which was caused by Youngstown's unwarrantable failure to comply with such mandatory safety standard. Additionally, the Secretary denied all other allegations in the notice of contest. Also, on March 26, 1981, Local Union 5869 of the United Mine Workers of America (Intervenor) filed a notice of intent to intervene.

In addition to filing its notice of contest, Youngstown also filed a motion to expedite the proceedings. As grounds therefore, Youngstown stated that "the alleged unwarrantable violation * * * is a serious allegation of impropriety of [Youngstown's], mine foreman, which could cause a serious loss of his ability to carry out his supervisory and other duties under the law." On March 27, 1981, a telephone conference was held with the undersigned Administrative Law Judge and representatives of the three parties participating. During the conference, counsel for Youngstown agreed to an April 28, 1981, hearing date. Accordingly, on March 30, 1981, a notice of hearing was issued scheduling the case for hearing on the merits on April 28, 1981, in Charleston, West Virginia.

On April 1, 1981, the Secretary filed a motion for continuance and opposition to motion for expedited proceedings. The Secretary opposed Youngstown's motion to expedite the proceedings and moved for a continuance pending the filing of the associated civil penalty proceeding. On April 10, 1981, an order was issued denying the motion for a continuance. The order recounted the results of the March 27, 1981, telephone conference. It was noted that the notice of hearing was issued on March 30, 1981, giving the parties 29 days

notice as to the time, place, nature of the hearing, the legal authority under which it was to be held, and the matters of fact and law asserted. The Rules of Procedure of the Federal Mine Safety and Health Review Commission (Commission) require only that such notice be given to the parties at least 20 days before the date set for hearing. 29 C.F.R. § 2700.53 (1980). The 29 days notice given to the parties was considered adequate to protect the Secretary's rights.

The hearing was held as scheduled with representatives of the three parties present and participating. Youngstown made a motion to dismiss at the close of the Secretary's case-in-chief. The motion was taken under advisement to be ruled upon at the time of the writing of the decision. Following the presentation of the evidence, a schedule was set for the filing of post-hearing briefs and proposed findings of fact and conclusions of law. However, subsequent events necessitated a revision of the schedule for filing reply briefs. Under the revised schedule, reply briefs were due on or before June 8, 1981.

Youngstown, the Secretary and the Intervenor filed posthearing briefs on May 20, 1981. On May 22, 1981, the Secretary filed amendments to correct typographical errors in his posthearing brief. Youngstown and the Secretary filed reply briefs on June 1, 1981. The Intervenor did not file a reply brief.

II. Witnesses and Exhibits

A. Witnesses

The Secretary called as his witnesses Dana Trescott Napier, a Federal mine inspector; and Naman J. Kitchen, a union safety committeeman at the Dehue Mine.

Youngstown called as its witnesses Gary Evans, a scoop operator on February 2, 1981; and Hiram Marcum, Jr., the third shift mine foreman at the Dehue Mine.

Both the Secretary and Youngstown called Frank Marino, the dispatcher, as a witness.

The Intervenor did not call any witnesses.

B. Exhibits

1. The Secretary introduced the following exhibits in evidence:

M-l is a copy of a letter dated February 18, 1981, received by the Mine Safety and Health Administration detailing a Union complaint and requesting an inspection of the Dehue Mine pursuant to section 103(g) of the 1977 Mine Act.

M-Z is a copy of the mine examiner's report prepared on February 2, 1981.

M-3 is a copy of the dispatcher's log prepared on February 2, 1981.

M-4 is a copy of Withdrawal Order No. 917568, February 24, 1981, 30 C.F.R. § 75.321, and a copy of the termination thereof.

M-5 is a copy of a two-page document styled "104(D) Unwarrantable Failure."

M-6 is a copy of the policy for fan stoppage procedures in effect at the Dehue Mine on February 2, 1981.

M-7 is a copy of the fan chart for the Dehue Mine's No. 2 fan covering February 2, 1981.

2. Youngstown introduced the following exhibit in evidence:

O-l is a mine map.

3. The Intervenor did not introduce any exhibits in evidence.

III. Issues

A. The general question presented is whether Withdrawal Order No. 917568 was validly issued pursuant to section 104(d)(2) of the 1977 Mine Act. The specific issues presented as to the withdrawal order's validity are as follows:

1. Whether the Secretary has proved the existence of the underlying section 104(d)(l) citation and withdrawal order.

2. Whether the Secretary has proved the absence of an intervening "clean" inspection of the entire mine between June 9, 1980, the date of issuance of the underlying section 104(d)(l) withdrawal order, and February 24, 1981, the date of issuance of the subject section 104(d)(2) withdrawal order.

3. Whether the condition or practice cited in Withdrawal Order No. 917568 sets forth a February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321.

4. If the condition or practice cited in Withdrawal Order No. 917568 sets forth a February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321, then whether such violation was caused by Youngstown's unwarrantable failure to comply with such mandatory safety standard.

B. The subject withdrawal order contains the additional 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.

Youngstown sought review of this allegation in its notice of contest, and the issue was litigated by the parties. Accordingly, the following additional issue is presented in this case: If the condition or practice cited in Withdrawal Order No. 917568 sets forth a February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321, 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.

IV. Opinion and Findings of Fact

A. Stipulations

1. The Dehue Mine was owned and operated by Youngstown Mines Corporation at the time of the alleged violation (Tr. 10).

2. Youngstown Mines Corporation and its Dehue Mine are subject to the jurisdiction of the 1977 Mine Act (Tr. 10).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 11).

4. Federal mine inspector Dana T. Napier issued Withdrawal Order No. 917568 and was a duly authorized representative of the Secretary of Labor (Tr. 11).

5. A true and-correct copy of Withdrawal Order No. 917568 was properly served upon the mine operator in accordance with section 104(a) of the 1977 Mine Act (Tr. 11).

B. Standards Governing the Validity of Section 104(d)(2) Withdrawal Orders

Section 104(d)(l) of the 1977 Mine Act provides for the issuance of both citations and withdrawal orders. This section of the 1977 Mine Act provides for the issuance of a citation when an authorized representative of the Secretary, upon any inspection of a coal or other mine, finds: (1) that there has been a violation of any mandatory health or safety standard; (2) 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 mine safety or health hazard; and (3) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. The section also provides for the issuance of a withdrawal order if, during the same inspection or any subsequent inspection of the mine within 90 days after the issuance of the citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply.

If a withdrawal order has been issued pursuant to section 104(d)(l) with respect to any area in a mine, then section 104(d)(2) authorizes the issuance

of a withdrawal order by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the 104(d)(l) withdrawal order until such time as an inspection of such mine discloses no similar violations. Following an inspection of the mine which discloses no similar violations, the provisions of section 104(d)(l) again become applicable to that mine.

Section 104(d)(2) of the 1977 Mine Act imposes no requirement of substantive similarity of violations. Accordingly, a 104(d)(2) withdrawal order is not invalid because the underlying violation, as set forth in the underlying 104(d)(l) withdrawal order, involves a different mandatory health or safety standard. See Eastern Associated Coal Corporation, 3 IBMA 331, 346, 351-352, 81 I.D. 567, 1 BNA MSHC 1179, 1974-1975 CCH OSHD par. 18,706 (1974), aff'd. on rehearing, 3 IBMA 383, 81 I.D. 627 (1974), overruled in part by Zeigler Coal Company, 6 IBMA 182, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976), and Alabama By-Products Corporation, 7 IBMA 85, 83 I.D. 574, 1 BNA MSHC 1484, 1976-1977 CCH OSHD par. 21,298 (1976), and Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977).

Additionally, no consideration need be given to the significant and substantial criterion of the violation giving rise to the 104(d)(2) withdrawal order in order to determine its validity. To be validly issued, a 104(d)(2) withdrawal order must be based upon a violation of a mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. Zeigler Coal Company, 6 IBMA 182, 188-190, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976). A violation of a mandatory health or safety 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, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977). A section 104(d)(2) withdrawal order "can be sustained, assuming the existence of procedural prerequisites and other necessary elements, whenever the operator actually knows or should know of a violation which it fails to abate." Pocahontas Fuel Company, 8 IBMA 136, 145, 84 I.D. 488, 1 BNA MSHC 1580, 1977-1978 CCH OSHD par. 22,218 (1977), aff'd. sub nom. Pocahontas Fuel Company v. Andrus, 590 F.2d 95 (4th Cir. 1979).

c. Youngstown's Motion to Vacate the Withdrawal Order at the Close of the Secretary's Case-in-Chief

Youngstown moved to vacate section 104(d)(2) Withdrawal Order No. 917568 at the close of the Secretary's case-in-chief. 3/ In support of

3/ Counsel for Youngstown styled the motion as a motion to dismiss, and requested that the withdrawal order be vacated. This motion will be

its motion, Youngstown argued: (1) that the issuing inspector applied an erroneous standard in issuing the withdrawal order by determining 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, where the significant and substantial criterion is not a requirement for the valid issuance of a section 104(d)(2) withdrawal order; (2) that the Secretary failed to prove that the underlying section 104(d)(l) withdrawal order was valid; (3) that the Secretary failed to prove the existence of the underlying section 104(d)(l) citation and withdrawal order; and (4) that the Secretary. failed to prove that a clean inspection of the entire mine had not occurred in the period between the issuance of the underlying section 104(d)(l) withdrawal order and the issuance of Withdrawal Order No. 917568. The motion was taken under advisement to be ruled upon at the time of the writing of the decision based on the record as it existed when the motion was made (Tr. 176-181).

Only the third and fourth grounds identified above have been reasserted by Youngstown in its posthearing brief. However, all four grounds will be addressed herein.

The first two grounds advanced by Youngstown in support of its motion to vacate the withdrawal order can be quickly disposed of. First, the law simply states that no consideration need be given to the significant and substantial criterion of the violation giving rise to the section 104(d)(2) withdrawal order in order to determine its validity. Zeigler Coal Company, 6 IBMA 182, 188-190, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976); cf. United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976). The law does not state that the inspector's inclusion of such findings on the face of a section 104(d)(2) withdrawal order renders it invalid. Second, the validity of the underlying section 104(d)(l) withdrawal order is not an issue in this proceeding. It is well established that the validity of the underlying section 104(d)(l) withdrawal order is not in issue in a proceeding for review of a section 104(d)(2) withdrawal order unless a notice of contest was filed within 30 days of the issuance of such 104(d)(l) withdrawal order to contest its validity. Zeigler Coal Company, 6 IBMA 182, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976); Zeigler Coal Company, 5 IBMA 346, 82 I.D. 632, 1975-1976 CCH OSHD par. 20,232 (1975).

The third argument advanced by Youngstown in support of its motion to vacate the withdrawal order asserts that the Secretary failed to prove the existence of the underlying section 104(d)(l) citation and withdrawal order (see Tr. 176; Youngstown's Posthearing Brief, pp. 8-9). In response, the Secretary maintains that sufficient evidence was adduced to prove the

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footnote 3 (continued
referred to in this decision as a motion to vacate the withdrawal order at the close of the Secretary's case-in-chief because this proceeding was initiated by Youngstown's filing of a notice of contest, and because of the nature of the relief requested in the motion.

existence of the underlying section 104(c)(l) withdrawal order (Secretary's Posthearing Brief, pp. 7-8). The Secretary also maintains, for various reasons, that he was not required to prove the existence of the underlying section 104(c)(l) citation (Secretary's Reply Brief, pp. l-3).

The matter of the existence of the underlying section 104(d)(l) withdrawal order can be easily disposed of. Section 104(d)(Z) Withdrawal Order No. 917568 contains an entry identifying the initial action as Order No. 910780, issued on June 9, 1980. The Secretary did not introduce in evidence either the original or a copy of Order No. 910780. However, Inspector Napier testified that he and others searched the files in the Logan, West Virginia, office of the Department of Labor's Mine Safety and Health Administration (MSHA). The search revealed that Order No. 910780, dated June 9, 1980, was issued pursuant to section 104(d)(l) of the 1977 Mine Act (Tr. 129-130). Accordingly, it is found that the Secretary has proved the existence of the underlying section 104(d)(l) withdrawal order.

The Secretary maintains that he was not required to prove the existence of the underlying section 104(c)(l) citation because, in the Secretary's view, Youngstown did not raise the issue either in its notice of contest or in its opening statement. The Secretary also maintains that the existence of the section 104(d)(l) citation can be logically inferred from the unrebutted evidence establishing the existence of the underlying section 104(d)(l) withdrawal order. Finally, 'the Secretary maintains that by challenging the validity of the section 104(d)(l) withdrawal order in its motion to vacate, Youngstown admitted such order's existence, and that, in so doing, it is without basis to challenge the existence of the section 104(d)(l) citation upon which the section 104(d)(l) withdrawal order is based. For the reasons set forth below, I conclude that the Secretary was required to prove the existence of the underlying section 104(d)(l) citation. I further conclude that the Secretary failed to prove the existence of such citation.

A mine operator's section 105(d) application for review or notice of contest must contain, amongst other things, a short and plain statement of the mine operator's position on each issue of law and fact that the mine operator contends is pertinent. 29 C.F.R. §§ 2700.20(c) and 2700.21(b) (1980). The Secretary has the obligation of presenting a prima facie case, with respect to each issue raised by the mine operator, that the withdrawal order or citation in question was validly issued. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1 BNA MSHC 1267, 1974-1975 CCH OSHD par. 19,633 (1975); Zeigler Coal Company, 4 'IBMA 88, 82 I.D. 111, 1 BNA MSHC 1260, 1974-1975 CCH OSHD par. 19,478 (1975). In the case of a section 104(d)(2) withdrawal order, the issues which can be raised by the mine operator include: (1) the existence of the underlying section 104(d)(l) citation and withdrawal order, (2) the fact of violation, (3) unwarrantable failure, (4) the occurrence of an intervening "clean" inspection of the entire mine, and (5) the other requirements for issuance of a section 104(d)(2) withdrawal order. C F & I Steel Corporation, 2 FMSHRC 3459, 2 BNA MSHC 1057, 1980 CCH OSHD par. 24,994 (1980); Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1 BNA MSHC 1267, 1974-1975 CCH OSHD par. 19,633 (1975).

Youngstown's notice of contest alleged that Withdrawal Order No. 917568 was invalid because, amongst other reasons, it was issued "in total disregard of the prevailing standards for issuance of Section 104(d)(2) Orders." This allegation was sufficient under 29 C.F.R. § 2700.20(c) (1980), to raise all issues pertaining to the validity of section 104(d)(2) Withdrawal Order No. 917568, including the issue as to the existence of the underlying section 104(d)(l) citation. The regulation, which sets forth the requirements for the contents of a notice of contest, "is not a license for academic quibbling over words, [but it plainly requires] a degree of specificity in pleading sufficient to apprise the trier of fact and other parties of the grounds of invalidity in issue." Zeigler Coal Company, 3 IBMA 448, 457, 81 I.D. 729, 1 BNA MSHC 1213, 1974-1975 CCH OSHD par. 19,131 (1974). The mine operator's allegation was sufficiently specific to provide notice to all parties that all issues pertaining to the validity of the withdrawal order had been raised. One of the prevailing standards for the issuance of a valid section 104(d)(2) withdrawal order is the existence of an underlying section 104(d)(l) citation.

The fact that Youngstown had raised all issues concerning the validity of Withdrawal Order No. 917568 was underscored at the beginning of the hearing when counsel for Youngstown outlined the issues presented. At one point in response to a question from the undersigned Administrative Law Judge, counsel for Youngstown stated that he expected "the government to put on a prima facie case as to all aspects of a 104(d)(2) order" (Tr. 7).

In view of the foregoing, I conclude that Youngstown raised all issues, including the issue as to the existence of the underlying section 104(d)(l) citation, both in its notice of contest and in its opening statement. The Secretary's position that the issue was not raised is not well founded.

The Secretary's position that the existence of the underlying section 104(d)(l) citation can be logically inferred from the unrebutted evidence establishing the existence of the underlying section 104(d)(l) withdrawal order is not well founded. A finding that the existence of the underlying section 104(d)(l) citation has been proved must be based on reliable, probative, and substantial evidence in order to comply with the requirements of the Administrative Procedure Act. See, 5 U.S.C. § 556(d). The evidence presented is not sufficient to make a finding as to the existence of such citation which complies with this requirement.

The testimony of Inspector Napier was the only reliable, probative, and substantial evidence establishing the existence of the underlying section 104(d)(l) withdrawal order. A copy of that withdrawal order, which should have contained an entry identifying the underlying section 104(d)(l) citation, was not placed in evidence. Additionally, neither the original nor a copy of the citation was placed in evidence, nor did any of the witnesses testify as to its existence. Furthermore, it cannot be concluded that the existence of the underlying section 104(d)(l) citation can be inferred from the entries contained in Exhibit M-5. The entries are not self-explanatory, and none of the witnesses identified any of the entries as denoting the underlying section 104(d)(l) citation.

The Secretary's final argument on this issue asserts that Youngstown is precluded from challenging the existence of the underlying section 104(d)(l) citation. The Secretary's reasoning is set forth as follows:

> Youngstown challenged the validity of the underlying 104(d)(l) order in its Motion to Dismiss [4/], thereby admitting its existence. (See Kentland-Elkhorn Coal Corporation, supra.) By admitting the existence of the underlying 104(d)(l) order, Youngstown is without basis to challenge the existence of 104(d)(l) citation on which the 104(d)(l) order is based.

In Kentland-Elkhorn, the mine operator sought review of a withdrawal order issued pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act). In its application for review, the mine operator challenged the ynderlying section 104(c)(l) notice of violation and withdrawal order as "* * * issued arbitrarily, unjustly, and without legal basis or foundation in law * * *." At no time did the mine operator challenge the existence of such 104(c)(l) notice and order. The Interior Board of Mine Operations Appeals (Board) held that the validity of the underlying notice and order could not be challenged in the proceeding because the mine operator had not sought timely review of them, but that they were admissible in evidence to establish their existence as an underlying part of the section 104(c) chain. However, the Board held that the Judge committed harmless error when he ruled the 104(c)(l) notice and order inadmissible because the mine operator, by challenging their validity, had admitted their existence.

In the instant case, Youngstown never challenged the validity of the underlying section 104(d)(l) citation and, accordingly, never admitted its existence. Assuming for purposes of argument that Youngstown admitted the existence of the underlying section 104(d)(l) withdrawal order by challenging its validity, such admission did not preclude Youngstown from continuing its challenge to the existence of the underlying section 104(d)(l) citation.

In view of the foregoing, I conclude that the Secretary was required to prove the existence of the underlying section 104(d)(l) citation. I further conclude that the Secretary failed to prove such citation's existence.

The fourth argument advanced by Youngstown in support of its motion to vacate the withdrawal order asserts that the Secretary failed to prove that a "clean" inspection of the entire mine had not occurred in the period between the issuance of the underlying section 104(d)(l) withdrawal order and the issuance of Withdrawal Order No. 917568. The Secretary concedes that this issue was raised, and that he was required to present a prima facie case regarding the absence of an intervening "clean" inspection of the entire mine (Tr. 8-9; Secretary's Reply Brief, p. 3).

4/ See n. 3, supra.

In C F & I Steel Corporation, 2 FMSHRC 3459, 2 BNA MSHC 1057, 1980 CCH OSHD par. 24,994 (1980), the mine operator sought review of a withdrawal order issued on December 5, 1975, pursuant to section 104(c)(2) of the 1969 Coal Act. The order was based upon an underlying section 104(c)(l) withdrawal order issued on August 6, 1975. The evidence presented showed that the Department of the Interior's Mining Enforcement and Safety Administration (MESA) had conducted two complete regular quarterly inspections of the mine between (1) July 25, 1975, and September 25, 1975; and (2) October 2, 1975, to December 16, 1975. Of the 38 inspection days required to complete both inspections, 30 were in the period between August 6 and December 5, 1975. The Commission held that "a prerequisite to the issuance of an order of withdrawal under section 104(c)(2) of the 1969 Coal Act was the absence of an intervening 'clean' inspection of the entire mine, and that it was MESA's obligation to present a prima facie case of that fact to sustain the order." 2 FMSHRC at 3461. To present a prima facie case on the "clean" inspection issue, the Government needed to show that a "clean" inspection of the entire mine had not occurred in the period between the two orders. The Commission specifically rejected the Government's position that a "clean" inspection of the entire mine within the meaning of section 104(c)(2) occurs only when it conducts a regular quarterly inspection from beginning to end after the underlying section 104(c)(l) order has been issued.

Additionally, a series of spot health, safety, health and safety, ventilation and section 103 inspections which collectively cover the entire mine and which do not result in the issuance of any section 104(c)(2) orders, have been held to constitute a "clean" inspection of the entire mine within the meaning of section 104(c)(2) of the 1969 Coal Act. Old Ben Coal Corporation, 3 FMSHRC 1186, 2 BNA MSHC 1305, 1981 CCH OSHD par. 25,397 (1981).

The language used in section 104(c)(2) of the 1969 Coal Act is identical in all material respects to that used in section 104(d)(2) of the 1977 Mine Act. Accordingly, the foregoing precedents are equally applicable to cases involving the validity of withdrawal orders issued pursuant to section 104(d)(2) of the 19.77 Mine Act.

The underlying section 104(d)(l) withdrawal order, Order No. 910780, was issued on June 9, 1980. The subject section 104(d)(2) withdrawal order was issued on February 24, 1980, i.e., 260 days later. The evidence presented is not sufficient to prove that an intervening "clean" inspection of the entire mine had not occurred between those dates.

The Secretary sought to prove through Exhibit M-5 that an intervening clean inspection-of the entire Dehue Mine had not occurred between June 9, 1980, and February 24, 1981. The exhibit is styled "104(d) Unwarrantable Failure," and consists of two pages, each of which is divided into five vertical columns. The column headings, when read from left to right, are "Date Issued," "Citation/Order No.," "Reg. Section," "Date Due," and "Abatement Date." The exhibit contains a total of 30 entries, beginning May 30, 1980, and ending February 24, 1981.

In the column bearing the heading "Reg. Section," 29 provisions of Title 30 of the Code of Federal Regulations and one provision of the 1977 Mine Act are cited. The notation "104 b" appears adjacent to two of the entries, "104 d 1" appears adjacent to seven of the entries, and "104 d 2" appears adjacent to eight of the entries. No notation appears adjacent to 11 of the entries in this column.

The entries contained in Exhibit M-5 are not self-explanatory. This defect in the exhibit was highlighted by the inspector's testimony that he required outside assistance to determine that No. 910780 was a 104(d)(l) withdrawal order, and not a citation (Tr. 129-130). Furthermore, the inspector gave testimony explaining only several of the individual entries appearing on the exhibit (Tr. 129, 132-133).

Inspector Napier gave a general explanation as to the nature of Exhibit M-5. When asked to explain the exhibit, he testified that he and his supervisor searched the records to determine whether the Dehue Mine was on a "(d) sequence," or whether a "clean" inspection had been made at that mine. He further testified that according to the instructions he had received, a "clean" inspection is a regular inspection of the complete mine, performed by one or more inspectors, during which the "(d) sequence violation" is not issued (Tr. 34-35). 5/ He testified at a later point in his testimony that when such an inspection is performed, the notation "clean inspection" is entered on Exhibit M-5. Since Exhibit M-5 does not contain such a notation, the inspector concluded that a "clean" inspection of the entire Dehue Mine had not been made (Tr. 131-132). He further testified that the last complete inspection of the Dehue Mine was performed between the months of October and December, 1980 (Tr. 132-133).

In addition to the foregoing, it is unclear whether Inspector Napier researched the Dehue Mine's inspection history as far back as June 9, 1980,

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5/ Inspector Napier testified on this point as follows during direct examination:

"Q. Okay. I will now show you what has been received in evidence as MSHA's Exhibit Number 5 (indicating). Will you explain that for the Court?

"A. Yes, sir. My supervisor, Oscar Nally, and myself, we searched the records to determine if the mine was on a (d) Sequence or if there was a clear inspection at the coal mine or if a clear inspection had been made at the coal mine.

"And by a clear interpretation of this, our instructions are that a clear inspection is a regular inspection of that complete coal mine by either one or more inspectors where that the (d) Sequence violation is not issued during that inspection.

"And that clears the run on the (d) Sequence. To our determination, they had not had, on the (d) Sequence, within ninety days, a clear inspection, or within the last portion we had been there the (d) Sequence was in continuance at this coal mine" (Tr. 34-35).

with an eye toward determining whether a "clean" inspection of the entire mine had been performed between such date and February 24, 1981. He testified that Exhibit M-5 revealed three unwarrantable failure violations occurring at the mine on December.,, 1980 (Tr. 132-133), and he appeared to imply that he had not researched the time period prior to the commencement of the regular inspection which began in October of 1980 (Tr. 35). Given his definition of a "clean" inspection, he may well have considered it unnecessary to research the time period prior to the commencement of the last regular inspection because the search had already revealed three unwarrantable failure violations dated December 3, 1980.

The foregoing evidence is not sufficient to support a finding that a "clean" inspection of the entire Dehue Mine had not occurred in the 260 days between June 9, 1980, and February 24, 1981. The Secretary's case on this issue stands or falls on the basis of Exhibit M-5, and that document is fatally flawed. The only type of inspection that would be expected to be recorded on Exhibit M-5 as a "clean" inspection would be a complete regular inspection of the entire mine which resulted in the issuance of no unwarrantable failure violations. A series of spot health, safety, health and safety, ventilation and section 103 inspections which collectively cover the entire mine and which do not result in the issuance of any unwarrantable failure violations would not be expected to be recorded on Exhibit M-5 as a "clean" inspection of the entire mine, given the policy in effect at MSHA's Logan, West Virginia, office. This is contrary to the rule of law set forth by the Commission in C F & I Steel Corporation, 2 FMSHRC 3459, 2 BNA MSHC 1057, 1980 CCH OSHD par. 24,994 (1980), and Old Ben Coal Corporation, 3 FMSHRC 1186, 2 BNA MSHC 1305, 1981 CCH OSHD par. 25,397 (1981), and precludes a finding that the Secretary has established a prima facie case as to the absence of an intervening "clean" inspection of the entire mine between June 9, 1980, and February 24, 1981.

In view of the foregoing, I conclude that the Secretary has failed to prove a prima facie case as to (1) the existence of the underlying section 104(d)(l) citation, and (2) the absence of an intervening "clean" inspection of the entire mine.

It is found later in this decision (1) that the cited violation of mandatory safety standard 30 C.F.R. § 75.321 occurred at Youngstown's Dehue Mine on February 2, 1981, (2) that such violation was caused by Youngstown's unwarrantable failure to comply with such mandatory standard, and (3) that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Accordingly, Youngstown's motion will be granted in part and denied in part. The subject section 104(d)(2) withdrawal order will not be vacated, but it will be modified to a section 104(d)(l) citation.

D. Power to Modify a Section 104(d)(2) Withdrawal Order to a Section 104(d)(l) Citation

Section 105(d) of the 1977 Mine Act provides, in part, that if, within 30 days of receipt thereof, a mine operator notifies the Secretary that he

intends to contest the issuance of an order issued under section 104, the Secretary shall immediately advise the Commission of such notification. Then, the Commission is required to afford an opportunity for a hearing in accordance with 5 U.S.C. § 554, but without regard to 5 U.S.C. § 554(a)(3). Section 105(d) empowers the Commission and its Administrative Law Judges to thereafter "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's * * * order, or directing other appropriate relief." (Emphasis added.) It is therefore clear that the statute empowers the undersigned Administrative Law Judge to modify the subject 104(d)(2) withdrawal order to a 104(d)(l) citation.

It is recognized that certain Board decisions under the 1969 Coal Act can be broadly read for the proposition that an Administrative Law Judge does not have the authority under any circumstances to modify a withdrawal order to a citation. See Freeman Coal Mining Company, 3 IBMA 434, 444-446, 81 I.D. 723, 1 BNA MSHC 1209, 1974-1975 CCH OSHD par. 19,177 (1974); Zeigler Coal Company, 2 IBMA 216, 224-225, 80 I.D. 626, 1 BNA MSHC 1078, 1973-1974 CCH OSHD. par. 16,608 (1973); Freeman Coal Mining Corporation, 2 IBMA 197, 209-210, 80 I.D. 610, 1 BNA MSHC 1073, 1973-1974 CCH OSHD par. 16,567 (1973), aff'd. on other grounds sub nom. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). To the extent that such a broad reading of those decisions is possible, they are not considered good law under the 1977 Mine Act. A blanket prohibition against modifying a withdrawal order to a citation is considered contrary to the powers expressly conferred on the Commission and its Administrative Law Judges by section 105(d) of the 1977 Mine Act.

The subject withdrawal order must be pronounced invalid as a section 104(d)(2) withdrawal order only because the Secretary failed to prove both the existence of the underlying section 104(d)(l) citation and the absence of an intervening "clean" inspection of the entire mine. The failure of proof on one or both of these two issues requires a disposition invalidating the order as a section 104(d)(2) withdrawal order.

However, the fact that the withdrawal order is invalid because of a failure of proof on these two issues does not mean that the additional allegations appearing on the face of the order are not well founded. The withdrawal order alleges, and the proof shows, the occurrence of a condition in violation of mandatory safety standard 30 C.F.R. § 75.321; that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard; and that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. These issues have been litigated by the parties, and findings of fact and conclusions of law are set forth herein resolving these issues in favor of'the Secretary. It is therefore considered appropriate to modify the withdrawal order to a section 104(d)(l) citation containing findings which reflect what the proof shows. The modification will not result in a finding that a condition existed other than the one charged, nor that Youngstown violated any mandatory standard other than the one charged.

E. Occurrence of Violation

Federal mine inspector Dana T. Napier issued Withdrawal Order No. 917568 at Youngstown's Dehue Mine on February 24, 1981, during the course of a special inspection conducted pursuant to section 103(g) of the 1977 Mine Act (Exh. M-l; Tr. 19-20, 28). The withdrawal order alleges a violation of mandatory safety standard 30 C.F.R. § 75.321 in that:

> The report of the 3rd shift mine foreman's report book dated [February 2, 1981,] and signed by Hiram Marcum, Jr. stating that the fan (No. 2) was off at 4:30 a.m. and in his statement in the record book indicate that men were started withdrawing at 5:06 a.m. on [February 2, 1981,] which is not in compliance with [30 C.F.R. §] 75.321.

(Exh. M-4).

Mandatory safety standard 30 C.F.R. § 75.321 provides as follows:

> Each operator shall adopt a plan on'or before May 29, 1970, which shall provide that when any mine fan stops, immediate action shall be taken by the operator or his agent (a) to withdraw all persons from the working sections, (b) to cut off the power in the mine in a timely manner, (c) to provide for restoration of power and resumption of work if ventilation is restored within a reasonable period as set forth in the plan after the working places and other active workings where methane is likely to accumulate are reexamined by a certified person to determine if methane in amounts of 1.0 volume per centum or more exists therein, and (d) to provide for withdrawal of all persons from the mine if ventilation cannot be restored within such reasonable time. The plan and revisions thereof approved by the Secretary shall be set out in printed form and a copy shall be furnished to the Secretary or his authorized representative.

30 C.F.R. § 75.321-1 provides that "[u]nless a different period of time is approved by the Coal Mine Safety District Manager, 'reasonable period' referred to in § 75.321 means a time lapse of not more than 15 minutes." The Dehue Mine's fan stoppage plan, in effect on February 2, 1981, contained the following requirement:

> If FAN is OFF for more than 15 MINUTES, notify all people underground and tell them to come outside and the last people coming out of an area will knock the AC and DC Power for their area. When the FAN is OFF for 15 MINUTES and people start outside EVERYONE (INCLUDING FOREMEN) will come directly outside. [Emphasis in original.] (Exh. M-6.)

In short, the fan stoppage plan required the mine operator, amongst other things, to start withdrawing all people from the mine if the fan was off for more than 15 minutes (see Tr. 29).

The evidence presented shows that three fans are used to ventilate the Dehue Mine. The No. 1 fan ventilates the old portion of the mine, and produces approximately 150,000 cubic feet of air per minute (Tr. 32). The No. 2 fan ventilates the active portion of the mine, and produces approximately 250,000 cubic feet of air per minute (Tr. 32-33). According to Mr. Hiram Marcum, Jr., the third shift mine foreman, the No. 2 fan is the main ventilating fan for the active working area (Tr. 227). The No. 3 fan, a bleeder fan, produces approximately 16,000 cubic feet of air per minute (Tr. 32).

The No. 2 fan stopped at approximately 4 a.m. on February 2, 1981 (Exh. M-7; Tr. 33-34, 87, 107-108). The fan was not restarted until approximately 7 a.m. on February 2, 1981 (Exh. M-7; Tr. 58). Youngstown did not begin withdrawing the miners from the Dehue Mine's underground workings until approximately 5:06 a.m. (Exh. M-2; Tr. 30-31, 170-171), i.e., approximately 1 hour after the No. 2 fan stopped.

In summary, the Dehue Mine's No. 2 fan was off for approximately 1 hour on February 2, 1981, before Youngstown began withdrawing the miners from the mine's underground workings. This clearly violated the 15-minute requirement set forth in the Dehue Mine's fan stoppage plan. Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. § 75.321 has been established by a preponderance of the evidence.

F. Unwarrantable Failure Criterion

Withdrawal Order No. 917568 contains the allegation that the cited violation was caused by the mine operator's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321. 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 evidence presented in this case shows that the No. 2 fan was off for approximately 1 hour before Youngstown began to withdraw the miners from the Dehue Mine's underground workings, and that Youngstown's failure to begin the evacuation earlier was caused by an unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321.

The evidence presented as to the general layout of the Dehue Mine reveals that the mine's underground workings are situated on both sides of the Guyandotte River. The No. 3 fan, the dispatcher's office and the slope entrance are located on the east side of the river (Exh. O-l; Tr. 41-45). The dispatcher's office is located on the surface next to the slope entrance (Tr. 45, 172).

The underground areas identified as First Right, First Northwest, South Mains (10 Drive), and Second South are located on the west side of the river.

The No. 2 fan and two intake air shafts are also located on the west side of the river (Exh. O-l; Tr. 32-33, 41-45). One of those intake air shafts is located in reasonably close proximity to the No. 2 fan. The other intake air shaft, known as the Sugar Branch Shaft, appears to be located in one of the westernmost portions of the mine (Exh. O-l).

The underground areas located on the east side of the river are connected to the underground areas on the west side of the river by three entries passing underneath the river. One of those entries is on return air and another is on neutral air. The middle entry is the track entry, and it is on intake air (Exh. O-l). The No. 2 fan and the nearby intake air shaft are located fairly close to the point at which the three entries passing underneath the river join the underground workings on its western side (Exh. O-l). In terms of distance, the No. 2 fan is located on the surface approximately one-quarter of a mile from the slope entrance which, as noted above, is located on the east side of the river (Exh. O-l; Tr. 117). An individual proceeding underground from the slope entrance to the underground workings on the west side of the river would be required to pass close to the No. 2 fan's air shaft (Tr. 116).

The evidence as to the specific activities occurring on the morning of February 2, 1981, reveals that two fire bosses, Mr. Louis Zeto and Mr. Isaac Nelson, were on duty on the third shift on February 2, 1981. Mr. Zeto had responsibility for Second South Mains and First Right Mains. Mr. Nelson had responsibility for 10 Drive, Second Right off South Mains, and First Northwest (Tr. 220-221). Additionally, it is important to bear in mind throughout the discussion which follows that the fan alarm for the No. 2 fan was inoperable at all times relevant to the February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321 which is the subject matter of this case. 6/

6/ The alarm system for the No. 2 fan was wired to a horn signaling device located at or near the lamphouse. The horn signaling device was approximately 30 or 40 feet from the dispatcher's office. The alarm system is the usual method for determining whether a fan stoppage has occurred. However, the fan alarm did not sound on the morning of February 2, 1981, because the alarm system was inoperable at all times relevant to the violation charged. Inspector Napier issued a separate citation to Youngstown for its failure to have an operable fan alarm system. The inoperable fan alarm was taken into account by the inspector in making his decision to issue the subject withdrawal order (Tr. 82-83, 102, 189).

The citation encompassing the inoperable fan alarm is not part of the subject matter of this proceeding. The Secretary has not stressed the inoperable fan alarm in arguing that the violation which is the subject matter of this case was caused by Youngstown's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321.

Mr. Hiram Mar-cum, Jr., the third shift mine foreman, went underground at approximately 12:30 a.m. on February 2, 1981. He eventually proceeded to First Northwest where he and Messrs. Gary Evans and Ray Wolford performed work to prepare the area for mining which was to occur on the following day. The setting of timbers was one of the activities that the three men intended to perform there. However, no available timbers were present. Therefore, the three men proceeded outside the mine for the purpose of obtaining some. They used a track-mounted jeep to ride to the bottom of the slope and, thereafter, transferred to the slope car, or cage, for the ride up the slope (Tr. 201-203, 218-219). It is clear beyond any doubt that the three men passed through the intake entry located beneath the Guyandotte River while riding from First Northwest to the bottom of the slope.

Upon reaching the top of the slope, Mr. Marcum was immediately summoned to the dispatcher's office by Mr. Frank Marino, the dispatcher, who informed him that Mr. Zeto had just called on the pager to report an air problem, and that Mr. Zeto was standing by to talk with him (Tr. 183-184). Mr. Mar-cum proceeded immediately to the dispatcher's office and took the call. At 4:45 a.m., Mr. Marcum was informed by Mr. Zeto that he had "no air" on the Second South Mains (Tr. 183-185, 221-222). Mr. Zeto informed Mr. Marcum that he was going to check the section further to see if he could find anything wrong, and requested Mr. Marcum to call Mr. Isaac Nelson, the other fire boss, for the purpose of determining whether everything was all right at 10 Drive (Tr. 185, 221).

Then, Mr. Marcum asked Mr. Marino where Mr. Nelson was located. Mr. Marino responded that Mr. Nelson had departed South Mains heading for First Northwest at 4:30 a.m. (Tr. 184-185). Mr. Marcum then contacted Mr. Nelson on the pager. Mr. Nelson was on First Northwest at the time. Mr. Marcum asked Mr. Nelson whether he had made 10 Drive, and Mr. Nelson responded in the affirmative (Tr. 185-186). Mr. Marcum followed up this question by asking Mr. Nelson whether he had found anything wrong on 10 Drive, such as any downed curtains or any falls. Mr. Nelson responded in the negative, but stated that he could not get any air on 10 Drive (Tr. 186-187, 197-198). Mr. Marcum instructed Mr. Nelson to "go on up at First Northwest and see if you're getting any air" and to immediately report his findings to Mr. Marino (Tr. 187, 198-199).

Mr. Marcum, accompanied by Messrs. Evans and Wolford, returned underground. Mr. Marcum intended to go to 10 Drive to personally check the area and determine the cause of the problem (Tr. 187-188).

The three men stopped at First Right so that Mr. Marcum could call Mr. Marino. He placed the call and asked Mr. Marino whether Mr. Nelson had reported back. Mr. Marino responded in the negative (Tr. 188, 206, 232-233). Mr. Marcum testified that he knew something was wrong when he stopped at First Right because the volume of air passing through the area was noticeably less than it should have been (Tr. 223, 232-233). Mr. Evans' testimony indicates that after calling Mr. Marino, Mr. Marcum stated that he could not feel any air movement. Mr. Evans further testified that he acknowledged Mr. Marcum's remark by stating: "Well, I can't feel nothing, either" (Tr. 206).

Then, the three men proceeded inby First Right along the G.K. Mains toward South Mains High Top (Tr. 206, 223; Exh. O-l). The men stopped at the double air lock doors which had been installed in No. 38 break, and Mr. Evans headed for those doors (Tr. 224). Mr. Marcum testified that he knew that no air was coming down the return even before Mr. Evans opened the air lock door because he could not hear the air whistling through the return (Tr. 224, 232-233). The first double door opened effortlessly (Tr. 224). Roth Mr. Evans and Mr. Marcum testified that they knew at that point that the fan had stopped (Tr. 206, 224, 232-233).

The three men retreated outby and checked the return overcast at First Right. There was no air movement in the overcast. Mr. Marcum called Mr. Marino on the pager, informed him that the fan had stopped, and told him to begin withdrawing the men from the mine. Mr. Marino received this call at approximately 5:06 a.m., and the evacuation of the mine began (Tr. 188, 224-225).

The evidence presented in this case points unmistakably to the conclusion that Youngstown's failure to begin withdrawing the miners from the Dehue Mine's underground workings until 5:06 a.m. was caused by an unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321, notwithstanding the fact that the No. 2 fan's alarm system was inoperable at all times relevant to this proceeding. This conclusion is based on the combined actions of Mr. Isaac Nelson, one of the two fire bosses, and Mr. Hiram Marcum, Jr., the third shift mine foreman.

Federal law imposes an affirmative obligation on the operator of a coal mine which is subject to the provisions of the 1977 Mine Act to maintain adequate ventilation in such mine's underground workings so as to dilute, render harmless, and carry away volatile methane gas. Explosive concentrations of methane gas pose well recognized dangers to the safety of the miners in the mine's underground workings, and the ventilation requirements set forth in the various mandatory safety standards applicable to underground coal mines are intended, in part, to eliminate those dangers. 7/ See, e.g.,

7/ See S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 629 (1978), which states, in part, as follows:

"Investigation of the Scotin [sic] mine disaster in Eastern Kentucky provides but one case in point. On March 8 and 11, 1976, two explosions of methane gas in the Scotia mine resulted in the deaths of twenty-three (23) miners and three (3) federal mine inspectors. Methane is a colorless, odorless, tasteless gas which is liberated or escapes naturally in certain mines. (Although methane liberation is most commonly associated with coal mining, it is present in connection with the mining of other minerals also, trona, for example.) Methane is explosive when it constitutes between 5 and 15 percent of the atmosphere of a mine, and when, while in that concentration range, it is ignited by some ignition source. The pressure of methane in a mine is controlled by adequate ventilation; and thus, ventilation of a mine is important not only to provide fresh air to miners, and to

30 C.F.R. §§ 75.300, 75.301, 75.301-4, 75.301-5, 75.302, 75.307, 75.308, 75.309, 75.310, 75.311, and 75.312. In addition, the need for vigilance and timely action as to health and safety matters is underscored by those provisions which require the performance of examinations and tests designed to determine whether there is compliance with the mandatory health and safety standards and to detect safety and health hazards. See, e.g., 30 C.F.R. §§ 75.205, 75.300, 75.300-4, 75.303, 75.304, 75.305, 75.306, 75.307, and 75.320.

In view of these considerations, it must be concluded that a fire boss, amongst others, who detects a loss of air during the course of his duties is under an affirmative obligation to immediately notify the appropriate representatives of the mine operator that he has detected a loss of air. A "fire boss" is defined, amongst other definitions, as "[a] person designated to examine the mine for gas and other dangers," and as "[a] state certified supervisory mine official who examines the mine for firedamp, gas, and other dangers before a shift comes into it and who usually makes a second examination during the shift * * *." Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 429. It must be further concluded that a mine foreman, or other similarly situated representative of the mine operator, who receives a report that a loss of air has been detected underground, is required to conduct his search for the cause of the problem in the most direct and most efficient manner available to him. In the instant case, both Mr. Nelson and Mr. Marcum were negligent in discharging their respective duties.

Mr. Nelson detected the loss of air on 10 Drive prior to departing South Mains for First Northwest at 4:30 a.m. Yet, he made no attempt to promptly inform his superior as to the existence of the condition. In fact, he made no attempt to communicate his findings to his superior until he was contacted by Mr. Mar-cum at approximately 4:45 a.m., i.e., after the mine foreman directed an inquiry to him (Tr. 198). The knowledge acquired by Mr. Nelson at or before 4:30 a.m. as to the loss of air is properly imputed to Youngstown. The actual or constructive knowledge of a person designated by the mine operator to perform required examinations is properly imputed to the mine operator. Pocahontas Fuel Company, 8 IBMA 136, 84 I.D. 448, 1 BNA MSHC 1580, 1977-1978 CCH OSHD par. 22,218 (1977), aff'd. sub nom. Pocahontas Fuel

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fn. 7 (continued)
control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive. In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the most important safety standards under the [1969] Coal Act."

Additionally, Inspector Napier testified that a recent methane gas explosion at Westmoreland Coal Company's Ferrell No. 17 Mine, which resulted in the death of five miners, occurred when improper ventilation permitted the gas to build up (Tr. 39).

Company v. Andrus, 590 F.2d 95 (4th Cir. 1979). Additionally, his negligence in failing to promptly communicate his findings to mine management is imputable to Youngstown. See generally, Nacco Mining Company, 3 FMSHRC 848, 2 BNA MSHC 1272, 1981 CCH OSHD par. 25,330 (1981).

Mr. Marcum testified that he did not think that a fan problem existed when he began his return trip to the mine's underground workings because: (1) the fan alarm did not go off, (2) only one fire boss had called reporting "no air," and (3) none of the workers underground had called to report an air problem (Tr. 225-226). Significantly, he maintained that he did not talk to Mr. Nelson before beginning his return trip underground (Tr. 223, 232). But he also maintained that he might have suspected a fan problem had he been successful in contacting Mr. Nelson before returning underground, and had Mr. Nelson also reported "no air" (Tr. 223).

Mr. Marcum's testimony is not credible insofar as he maintains that he did not talk to Mr. Nelson before beginning his return trip underground. Mr. Marino testified that Mr. Marcum contacted Mr. Nelson on the pager after talking to Mr. Zeto and before returning underground, and that Mr. Nelson reported a loss of air, or "no air," on 10 Drive during their conversation (Tr. 184-197, 197-198). Mr. Marino's testimony is considered credible on this point. Therefore, Mr. Marcum, by his own admission, should have suspected a fan problem before beginning his return trip underground.

However, it appears that Mr. Marcum managed to convince himself before beginning his return trip underground that the problem had been caused by either a roof fall or a downed curtain somewhere on South Mains (10 Drive) (Tr. 199, 205, 211). It further appears that Mr. Marcum became so preoccupied with this belief (1) that he failed to notice those things which a reasonable man in his position would have noticed, observations which should have led him to deduce that a fan stoppage had occurred, and (2) that he passed, but failed to stop and to examine, the No. 2 fan's air shaft on his way to South Mains. A reasonable man in his position would have stopped and examined the air shaft, an examination which would have conclusively revealed that a fan stoppage had occurred, instead of proceeding farther into the mine.

The evidence shows that the largest volume of intake air used to ventilate the active workings enters the mine through the slope entrance (Tr. 106). In fact, approximately 95,000 cubic feet per minute of the 250,000 cubic feet per minute of air drawn into the mine by the No. 2 fan enters through the slope, and moves at a speed of approximately 10 to 12 miles per hour (Tr. 35-36, 140-141). Air movement is barely perceptible in the slope when the No. 2 fan is off (Tr. 141-142). A number of observations could and should have been made in the vicinity of the slope, observations which would have led a reasonable man to conclude that a fan stoppage had occurred. First, the slope entrance is approximately 15 feet wide and 8 to 9 feet high (Tr. 158, 159). A cloth rag attached to a wire was hanging in the slope entrance. The rag was hanging approximately 2 feet down from the roof, and measured approximately 8 inches in length and 4 inches in width (Tr. 140-142, 158-159, 190). The

rag is drawn horizontally until it almost touches the roof when the No. 2 fan is on, but hangs in a vertical position and barely moves when the No. 2 fan is off (Tr. 140-142). Second, Mr. Marcum should have been able to feel the lack of air movement as he stood at the top of the slope (Tr. 35-36, 99, 141). Third, Mr. Marcum should have detected a lack of air pressure pushing against a small wooden door located at the top of the slope which must be opened to board the slope car (Tr. 140-141, 161). Fourth, Mr. Marcum should have detected the absence of air while riding the open slope car (Tr. 140-141, 147). Finally, Mr. Marcum should have noticed the lack of air movement when he reached the bottom of the slope (Tr. 106-107).

Only a stoppage of the No. 2 fan could have accounted for the absence of air in the slope area. The roof fall or short circuit in the air which Mr. Marcum appears to have suspected would not have accounted for this phenomenon (Tr. 36-37, 99-100, 148-149). The mine is too large, covers too much territory, for a roof fall or similar problem to have interferred with the ventilation in such a way that Mr. Zeto would not get any air on Second South (Tr. 148-150).

Additionally, Mr. Marcum passed, but failed to stop and examine, the No. 2 fan's air shaft on his way to South Mains. He could have disembarked from the jeep and walked through some air lock doors into an overcast? and thereafter proceed to the air shaft. If the No. 2 fan had been working, the air movement at the bottom of that shaft would have been quite noticeable (Tr. 116-117, 150-153, 157-158). Similarly, the absence of air movement would have been quite noticeable.

In view of the combined actions of Messrs. Nelson and Marcum, I conclude that Youngstown failed to abate a violative condition that it knew or should have known existed because of a lack of due diligence or because of indifference or lack of reasonable care. The failure to begin withdrawing the miners from the Dehue Mine's underground workings until approximately 5:06 a.m. was caused by an unwarrantable failure to comply with the requirements of mandatory safety standard 30 C.F.R. § 75.321.

G. Significant and Substantial Criterion

Withdrawal Order No. 917568 contains the additional 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. Although no consideration need be given to the significant and substantial criterion in order to determine the validity of a section 104(d)(2) withdrawal order, Youngstown sought review of the allegation in its notice of contest and the issue was litigated by the parties.

In National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981), the Commission held:

> [T]hat 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:

> Although 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 No. 2 fan ventilates the active portion of the mine, and produces approximately 250,000 cubic feet of air per minute (Tr. 32-33). It is the main ventilating fan for the active working area (Tr. 227).

A substantial amount of the methane gas liberated by the Dehue Mine is removed from the underground workings by the No. 2 fan. Methane gas is removed from the mine by that fan at a rate of approximately 175,000 cubic feet in a 24-hour period. Of the three fans used to ventilate the mine, the No. 2 fan removes the most methane (Tr. 33, 38). The fan stoppage could have permitted a substantial amount of methane gas to build up in the Dehue Mine's active workings. Given an ignition source, an explosion could have occurred. All miners in the active workings would have been exposed to fatal injuries (Tr. 38-39, 49). Approximately 19 men were working underground at the time (Tr. 220). Accordingly, it must be concluded that the violation was extremely 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.

V. Conclusions of Law

1. Youngstown Mines Corporation and its Dehue 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 Dana T. Napier was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Withdrawal Order No. 917568.

4. The Secretary of Labor has failed to prove that Withdrawal Order No. 917568 was validly issued pursuant to section 104(d)(2) of the 1977 Mine Act because he has failed to prove: (1) the existence of the underlying section 104(d)(l) citation; and (2) the absence of an intervening "clean" inspection of the entire Dehue Mine between June 9, 1980, the date of issuance of the underlying section 104(d)(l) withdrawal order, and February 24, 1981, the date of issuance of Withdrawal Order No. 917568.

5. The violation of mandatory safety standard 30 C.F.R. § 75.321 charged in Withdrawal Order No. 917568 is found to have occurred.

6. The subject violation of mandatory safety standard 30 C.F.R. § 75.321 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. § 75.321 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

8. 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

The Secretary, Youngstown, and the Intervenor filed posthearing briefs. Additionally, the Secretary and Youngstown filed reply 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 Youngstown's motion to vacate section 104(d)(2) Withdrawal Order No. 917568 at the close of the Secretary's case-in-chief be, and hereby is, GRANTED IN PART and DENIED IN PART; and that Youngstown's notice of contest be, and hereby is, GRANTED IN PART and DENIED IN PART. IT IS THEREFORE ORDERED that Withdrawal Order No. 917568 be, and hereby is, MODIFIED from a section 104(d)(2) withdrawal order to a section 104(d)(l) citation containing findings: (1) that a violation of mandatory safety standard 30 C.F.R. § 75.321 occurred at Youngstown's Dehue Mine on February 2, 1981, in that the No. 2 fan stopped at approximately 4 a.m. and Youngstown did not begin to withdraw the miners from the mine's underground workings until approximately 5:06 a.m., in violation of the 15-minute requirement set forth in the fan stoppage plan; (2) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard; and (3) that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

IT IS FURTHER ORDERED that No. 917568, as so modified, be, and hereby is, AFFIRMED.

John F. Cook
Administrative Law Judge

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