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SOL (MSHA) V. MID-CONTINENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),
PETITIONER — CIVIL PENALTY PROCEEDING

v. — DOCKET NO. WEST 82-174

MID-CONTINENT RESOURCES, INC.,
RESPONDENT — MINE: Dutch Creek No. 1

Appearances:
Alan H. Yamamoto Esq.
Office of the Solicitor, United States Department of Labor
Arlington, Virginia,
for the Petitioner

Edward Mulhall, Jr. Esq.
Delaney & Balcomb
Glenwood Springs, Colorado,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Mid-Continent Resources, Inc., (Mid-Continent), with violating safety regulations adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing was held in Carbondale, Colorado on October 19-20, 1982.

The parties filed post trial briefs.

ISSUES

The issues are whether respondent violated the regulations, and, if so, what penalty is appropriate.

## SUMMARY OF THE CASE

In this civil penalty proceedings the Secretary alleges respondent violated three safety regulations.

The initial citation concerns a defective monitor. It is claimed to be defective because it did not deenergize add on lights and because a warning light could not be seen when the remote control unit was in use. The first allegation is affirmed and the second is vacated.

The second citation concerns electrical work performed by a non-qualified person in installing a switch box cover in April 1981 and in wiring a light switch in 1978. The first allegation is affirmed and the second is vacated.

The third citation concerns a methane monitor maintenance program. This citation is vacated.

A broad overview of the explosion at this mine may be seen in MSHA's official report received in evidence as Exhibit P 1.

For convenience the decision summarizes the relevant evidence as it relates to each citation. The evidence may relate to more than one citation.

Very few credibility issues arise in the case. When they do their resolution will be apparent in the text of the decision.

## CITATION 802484

This citation, alleging a violation of 30 C.F.R. 75.313, provides as follows:

> The methane monitor installed on the 12CM continuous mining machine, Serial No. JM2228, located in the 102 Section was not installed in a manner to deenergize automatically the continuous miner in that the lighting system of the machine remained energized when the concentration of methane reached 2.0 percent. The methane monitor also was not installed so as to give a warning automatically at all times when the concentration of methane reached 1.0 percent while the machine was being operated by remote control. The warning light is located in a position that cannot be seen at all times. These conditions were observed on April 25, 1981, during an inspection as part of the accident investigation of the April 15, 1981, explosion.

The standard allegedly violated, duly promulgated in Title 30 Code of Federal Regulations, is likewise contained in Section 303(1) of the Act. The standard provides as follows:

75.313 Methane monitor [STATUTORY PROVISIONS]

> The Secretary or his authorized representative shall require, as an additional device for detecting concentrations of methane, that a methane monitor, approved as reliable by the Secretary after March 30, 1970, be installed, when available, on any electric face cutting equipment, continuous miner, longwall face equipment, and loading machine, except that no monitor shall be required to be installed on any such equipment prior to the date on which such equipment is required to be permissible under sections 75.500, 75.501, and 75.504. When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary. The sensing device of such monitor shall be installed as close to the working face as practicable. Such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane. An authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage determined by such representative which shall not be more than 2.0 volume per centum of methane.

SECRETARY'S EVIDENCE

Clarence J. Daniels, James Smith, and Cecil Lester, all MSHA supervisors who investigated the electrical system at the Mid-Continent mine, testified for the Secretary (Tr. 11, 26).

On April 15, 1981, at 4:10 p.m. a devastating methane and coal dust explosion shattered the 102 section Mid-Continent's Dutch Creek Mine No. 1 (Tr. 11, P1).

The last completed MSHA inspection at this mine took place January 5, 1981 through January 19, 1981. A subsequent general inspection, began March 30, 1981, was in progress at the time of the explosion (Tr. 72-73, P1). MSHA Coal Mine Inspector Louis Villegos was in the 102 section on two occasions on the day of the explosion. He left the section at 11:30 a.m. and was the first MSHA official to return to the mine, at 5:55 p.m.

There have been five ignitions and two previous explosions over the years in this mine (Tr. 125).

From the positions of six of the victims the investigators concluded that at the time of the explosion the miners were attempting to remove methane from the face area by winging the line curtain across the face (P1 at 31).

MSHA investigated the mine, including the entire electrical system in the 102 section, beginning April 22, 1981 and concluding May 8, 1981 (Tr. 11, 12, P1 at 28). The purpose of the investigation was to determine the cause of the explosion, to create an awareness of the hazards for the industry, and to attempt to prevent future occurrences (Tr. 11). Pursuant to Section 103(a) of the Act, 30 U.S.C. 813(a), the Secretary issued a comprehensive detailed report concerning this incident. The report, received in evidence, is Exhibit P1.

MSHA investigated the continuous miner and its methane monitor system. In this decision the continuous miner is also referred to as the miner, the CM, the 12CM, and the Joy 12CM.

Sixteen citations were issued. Four of the citations related to the explosion and three of the citations are in contest (Tr. 12, 46).

The high voltage system was well installed and maintained (Tr. 12).

The electrical power to the 37 foot long continuous miner comes from a transformer and power center through a trailing cable to a point onboard the 12CM. From there the power goes to a control unit for the various components on the machine itself (Tr. 29, 317).

When the methane monitor was tested at the two percent methane level it was found that the add-on McJunkin lights on the continuous miner (Joy 12CM) would not deenergize (Tr. 13, 27). The lighting system was not properly connected to the relay (Tr. 13).

The methane monitor operates in this fashion: when the sensor detects a two percent level of methane in the atmosphere a red light goes on and the monitor automatically cuts off the 12CM at the trailing cable onboard the miner (Tr. 14, 17, 29, 113, 114). The monitor system, manufactured by BACHARACH,(FOOTNOTE 1) consists of a relay, a power supply, a readout system, sensor heads, and cables (Tr. 34, 35).

The McJunkin lights were connected in parallel with the existing monitor relay instead of being in a series as the wiring diagram of the add-on system required (Tr. 13, 29, 41). The hookup of lights to the controller is a matter of an electrician following the diagram inside the compartment and making the proper connections (Tr. 29). It would be simple for a knowledgable electrician (Tr. 30-31).

It is important that the methane monitor deactivate as much of the machine as possible (Tr. 110). This helps eliminate ignition sources (Tr. 110, 111). MSHA policy requires the monitor to deenergize all possible moving parts and ignition sources (Tr. 112). Only that part of the power keeping the monitor activated remains energized (Tr. 113). The methane monitor itself remains functional to give an indication of the presence of methane and to prevent the reactivation of the continuous miner (Tr. 113).

In the great majority of instances the methane monitor shuts off the power on the machine and the trailing cable stays energized (Tr. 120). On the 12CM the trailing cable goes into the junction box on the right hand side next to the operator's cab. The left rear controller box controls the various devices on the miner (Tr. 120). The controller is the large explosion proof compartment containing the electrical components, wiring, relays, and transformers that control the motors.

The methane monitor originates in a control compartment from the existing voltage on the left side of the machine (Tr. 28). The trailing cable (550 volts) remains energized up to the first protective device on the machine, that is, up to one of the controllers. If the trailing cable leading up to the machine has any defects then MSHA considers it part of the continuous miner (Tr. 47, 48).

MSHA's regulations require the machine itself, excluding trailing cables, shall be deenergized up to the methane monitor leaving the methane monitor energized. All lights on the CM would be deenergized (Tr. 53).

According to MSHA inspector Lester, the defect was that the McJunkin add-on lights stayed on when the methane monitor reached a two percent concentration of methane (Tr. 398).

The Secretary's regulations further require that if the monitor senses a methane concentration of one percent then a warning light goes on. When this occurs the operator is required to make changes to reduce the methane concentration (Tr. 19).

The wiring of the add-on lighting system on the miner, installed in 1978, did not conform to the wiring diagram approved by the MSHA subdistrict manager (Tr. 13, 15, 17, 407). The wiring diagram shows a two pole lighting switch but there was, in actuality, only a one pole switch connection (Tr. 15). The two pole switch to turn the lights "on" and "off" was not included in the secondary circuit of the lighting transformer (Finding of Fact No. 21, P1 at 51). MSHA's approval of the add-on light installation was in accordance with the manufacturer's instructions (Tr. 17). If a system is maintained as directed a fire or explosion will not occur (Tr. 16). The remote control system and methane monitor system were both approved by MSHA; however, after installing the add-on lights Mid-Continent was not required to have the system inspected before placing the miner back in operation (Tr. 17). Properly the add-on lights should have been installed in sequence behind the methane monitor system

(Tr. 29).

The MSHA national policy relating to processing field changes for installing illumination systems on permissible equipment was issued under date of December 16, 1977 (Tr. 388, P6). Witness Lester formulates and drafts such national policy (Tr. 388).

When the add-on lights were installed MSHA National Policy was the same as the local policy. It allowed an adopting company to make the installation and put the machine in service if the operator obtained prior MSHA approval (Tr. 49, 408, MSHA letter P1 at Appendix M).

Mid-Continent officials discussed the methane monitor with MSHA inspectors, but had not advised MSHA that the methane monitor was improperly connected (Finding of Fact No. 26, P1 at 52).

In the inspection after the explosion, other than the add-on lights, nothing was found to have been changed on the 12CM continuous miner from the way it had been manufactured (Tr. 407). Further, there were no other defects in the monitor itself, except for some difficulty in zeroing it in (Tr. 104).

A methane readout, or indicator, mounted on the dashboard of the monitor (activated at a concentration of one percent) is a two inch circular dial with an eraser size warning light (Tr. 19, 32, 34, 35). The one percent warning light is observable from directly behind the cab of the miner. But if the operator was behind the machine itself he could not see it (Tr. 115). It is an important requirement for the operator to know when the methane concentration reaches one percent. The operator can then shut down the machine and do whatever needs to be done to eliminate the hazardous condition (Tr. 17, 19, 114)). The explosive range of methane is between 5 to 15 percent (Tr. 116). When operating the remote control device in certain positions the continuous miner operator cannot see the warning light (Tr. 17, 18, 20, 22, 32).

The miner operator often stands in a crosscut 30 to 40 feet outby the face to operate the remote control (Tr. 21, 36-37). Generally the operator would be operating the remote control from the crosscut where he could see the face of the coal he is cutting (Tr. 36-37). Section 313 requires a warning light on the monitor (Tr. 22). On Mid-Continent's machine, due to the cab and obstructions, it was not possible to see the dial from a point behind the miner (Tr. 115). However, the warning device, which has little illumination, came on at all times on the indicator when the methane concentration reached one percent (Tr. 36, 39).

MSHA approved the indicator gauge, its installation on the dashboard, and its intensity as well as the methane monitor (Tr. 41). The remote control and the BACHARACH monitor are parts included in the purchase order of the Joy 12CM (Tr. 33, 34, P1 at Appendix M). But MSHA does not specifically approve any method of using a remote control device but that does not mean the operator can use the device in any manner he likes (Tr. 18, 19). The regulations do not state whether the methane warning is to be

oral or visual.  Further, there is no line of site requirement in the regulation (Tr. 36). That is, the regulation does not require the operator to be in a "line of sight" behind the indicator.  In his investigation the inspector found he couldn't see the headlights come on when he was beyond the tailpiece nor when he was 50 feet back (Tr. 40).

Mid-Continent's mine liberates about one and a half million cubic feet of methane in a 24 hour period. This is a gaseous coal seam (Tr. 20).

Mid-Continent's mine is in the 103(i) category [of the Act] and, as such, the mine must be inspected by MSHA every five working days (Tr. 42). These are spot inspections; in addition, there must be at least one quarterly inspection. The mine also has a resident MSHA inspector (Tr. 42-43, P1 at 4). During regular inspections the inspector will do a permissibility check on the equipment and other hazards. Electrical inspections are not done by an electrical expert. Electrical inspections usually involve a visual check of the power sensor, cables, and circuit breakers (Tr. 43-44). An MSHA inspector might also check the monitor. He does not have to be an electrical inspector to test the methane monitor with a test kit (Tr. 45).

## RESPONDENT'S EVIDENCE

M. J. Turnipseed, manager of mine operations, Jesus Meraz, master mechanic, and John Jerome, a foreman, testified for Mid-Continent concerning this citation.

This mine is subject to bumps, bounces, outbursts, and pushes. These events cause various phenomena in a mining section and liberate methane (Tr. 148-151, 155, 317).

In looking at the 102 section after the explosion, Mid-Continent's manager and production foreman Jerome concluded that a very small push occurred. This affected the airflow. Further, there was a gas explosion 150 feet outby the face. This, in turn, triggered a dust explosion up the beltline (Tr. 158, 159, 309, 310, 326).

There were two very good production crews working the 102 section. One crew foreman was John Jerome. In the previous shift from 7 a.m. to 3 p.m. conditions were normal and 20 or 22 buggies of coal were mined in the upper entry (Tr. 303). The other production foreman was Ron Patch. His shift started at 3 p.m., and the explosion occurred at 4:08 p.m. (Tr. 290, P1). He died in the explosion with crew members Eugene Guthrie (mechanic/electrician), Kelly Greene (foreman in training), Glen Sharp, (CM operator), Terry Lucero (miner-helper), Thomas Vetter (shuttle car operator), Hugh Pierce (apprentice miner), Daniel Litweller (apprentice miner), Brett Tucker (apprentice miner). Also killed in the slopes section were Johnny Rhodes (crew foreman), John Azala (CM operator), Loren Mead (miner-helper), Kyle Cook (shuttle car operator). Robert Ragle (foreman) was also killed in the explosion (Tr. 163-165, 299, 300, 312, R19).

The mine manager recalls that Mid-Continent purchased several sets of add-on McJunkin lights which were manufactured about 1975 by Joy Manufacturing Company (Tr. 178-179, 202, 203). The addition of the add-on lights required a field change on each piece of equipment (Tr. 179).

The company would usually talk to MSHA and submit wiring and location diagrams (Tr. 179). MSHA would usually tell the company to go ahead with the installation and they (MSHA) would check it on the next inspection (Tr. 180, 181). But one of the first installations of the add-on lights was to this particular CM machine, No. 2228. This machine was originally in Bear Creek No. 4 mine. It was never taken out of service and it was in use in Section 102 on the day of the explosion (Tr. 181-182). Since there were problems on the first few installations, this continuous miner was inspected by MSHA before it was allowed to be put into service (Tr. 180-181). MSHA inspected the continuous miner to see that the lights were installed in an approved manner. This included checking the power source, cable glands, permissibility, routing of cables, and conformity to the wiring diagram submitted to MSHA for approval (Tr. 182). The continuous miner was never modified in any manner as far as the McJunkin add-on lights were concerned (Tr. 183). Mid-Continent's manager would not make a field modification without a written approval and an MSHA inspection (Tr. 184). The equipment in the 102 section was inspected during spot inspections as well as during quarterly inspections. MSHA sees that the machine remains as originally manufactured (Tr. 185).

It was no secret that when the methane monitor on the continuous miner cut the power it did not deenergize the lights. The add-on lights stayed on all the time unless the power was turned off at the power center. Foreman Jerome knew there was a switch to shut off the lights but he never used it. Someone at Mid-Continent had discussed this with MSHA (Tr. 183, 184, 319, 328). The miner stayed in that condition for three years (Tr. 188). To change it would require another letter to Price, Utah (Tr. 184).

The monitor has a sensing head called a Whetstone Bridge. The net result of its technical aspect is to show the percentage of methane in the air (Tr. 188-192, R20, P1 at Appendix M).

The monitor also shows an amber warning devise at a one percent concentration of methane. At a two percent concentration the monitor automatically shuts down the machine by disconnecting the power at the main control box (Tr. 194). The monitor itself and the 550 volts in the trailing cable to the machine are not deenergized (Tr. 193). With this continuous miner (CM No. JM 2228) the add-on lights did not deenergize (Tr. 193, 195).

When next to the shuttle car you can see the warning light on the methane monitor (Tr. 322). The miner operator does not have the duty to notify the foreman when he sees the warning light because the foreman is next to the operator (Tr. 323).

Mid-Continent's foreman Jerome would send someone back to the power center to cut the power when he'd see the one percent methane concentration light. Shutting off the energy at the power center deenergizes the auxillary lights, the trailer cable, and the methane monitor (Tr. 318-321).

The continuous miner as purchased contains a remote control device. The readout gauge was mounted in the cab of the CM and never changed (Tr. 192, 193). The remote control device permits the continuous miner to be operated by a worker in a safe remote location such as in a crosscut (Tr. 192, 314, 316). When mining from a crosscut you cannot see the warning light on the methane monitor (Tr. 320). That's why the miners check for methane after each buggy (Tr. 320-321).

The coal in the Dutch Creek No. 1 Mine liberates one and one half million cubic feet of methane (CH4) in a 24 hour period (Tr. 203, 204). Ventilation is furnished by fans from fresh air producing 500,000 cfm (cubic feet air per minute) (Tr. 203). Methane would be .2% (Tr. 203-205). Brattice cloth directs the air to the working face (Tr. 205-207). The air return from the 102 section was 120,000 to 160,000 cfm. This is a large volume of ventilation air when compared with other mines (Tr. 208, 304, 323-324). The ventilation plan must be approved by MSHA. The law requires 9000 cfm. Mid-Continent's normal is 100,000 cfm (Tr. 211).

In addition to the monitors sensing for methane, miners also check at the working face with a hand held methanometer every 10 minutes and when the shuttle car goes to deliver its load to the belt conveyor. Further checks for methane are conducted in the return airways as well as in preshift and onshift examinations (Tr. 210, 211, 212, 304-305, 320).

As a result of the explosion, the power center, located in the crosscut some 450 feet from the face, was virtually demolished (Tr. 244-245, 307, 342). All of the brattice, usually ten feet from the face, was burned (Tr. 311, 318).

The State of Colorado Division of Mines investigated the explosion and issued an official report (Tr. 198, 199, R21).

## DISCUSSION

This citation centers on two allegations. Initially, it alleges that the McJunkin lighting system on the continuous miner remained energized when the concentration of methane reached 2.0 percent. The second allegation is that the methane monitor was not installed in such a fashion as to give a warning automatically when the concentration of methane reached 1.0 percent when the machine was being operated by the remote control device.

For the reasons hereafter stated the initial allegation in the citation is affirmed. The latter allegation is vacated.

A portion of Section 75.313 requires "such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage %y(3)4B which shall not be more than 2.0 volume per centum of methane." MSHA's evidence establishes that the McJunkin lights did not deenergize at the two percent methane concentration. The lights

were inboard the main controller. If the add-on lights had been installed properly they should have been deenergized by the methane monitor. Mid-Continent's evidence confirms this portion of the citation (Tr. 193, 195).

Mid-Continent's brief, an extensive review of many facts in the case, addresses this citation (Brief at 70-83).

I agree with Mid-Continent that the citation as written is twofold but I do not agree that the citation is necessarily misleading.

Mid-Continent attacks MSHA's evidence that the hookup on the lights "would be simple to an electrician that knows what he is doing" (Tr. 31). Mid-Continent's comment adds that it is "simple to the electrician who knows what MSHA or the MSHA electrical inspector wants" (Brief at 72).

I am not persuaded. It was Mid-Continent that submitted the wiring diagram to MSHA. It was that wiring diagram that MSHA approved. Thereafter, different and incorrect wiring was installed. It is Mid-Continent's obligation and not MSHA's to make the actual installation. Exhibits R14 and R15 show the electrical leads for the McJunkin light system; R16 shows the circuit breaker for the methane monitor system (Tr. 142, 143, R17). I agree with MSHA that the proper hookup should have been simple for an electrician.

Mid-Continent further assails the failure of the MSHA inspectors between 1978 and April 15, 1981 to detect and require the correction of the allegedly defective hookup (Brief at 73). On this issue MSHA asserts that while Mid-Continent officials discussed the methane monitor system with MSHA they (MSHA) were never advised the monitor was improperly connected (Finding of Fact No. 26, P1 at 52). In addition, it could not be determined whether the wiring was inspected by MSHA because the records of inspections do not detail all of the inspectors' activities (Finding of Fact No. 22, P1 at 51). On the other hand Mid-Continent's manager asserts MSHA and Mid-Continent "did have discussions on it" (Tr. 184).

I credit MSHA's version that it did not know of the defective wiring. I base this on the obvious: MSHA at this mine has never been shown to be timid or hesitant in issuing citations. At the time of the general inspection, which was in progress at the time of the inspection, 21 citations and one withdrawal order had been issued (P1 at 3). This aggressiveness in enforcing the Act is further demonstrated by the 482 citations assessed in Dutch Creek Mine No. 1 alone in the two years beginning April 15, 1979 (P2, P3, as limited at Tr. 412). In short, on this record, I conclude that had MSHA known the wiring on the monitor was defective it would have promptly issued a withdrawal order. I further reject Mid-Continent's position because witness Turnipseed's testimony is somewhat vague. He didn't know the people who were parties to the discussion about the lights and it was, at best, his "understanding" (Tr. 183, 184).

But Mid-Continent's position, even if factually supported, would reverse the existing law. It would make MSHA rather than the operator responsible for complying with the regulations. To

the contrary, the statute imposes the duty on the operator to comply, 30 U.S.C.  817(c), Beckley Coal Company v. Secretary of Labor, 1 FMSHRC 1794 (1979).

Implicit in Mid-Continent's argument is the doctrine of estoppel. On this point the law is clear: Estoppel does not lie against the federal government, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), Secretary v. J & R Coal Company, 3 FMSHRC 591 (1981), Lasher, J.

Mid-Continent further argues that the evidence establishes "without equivocation or doubt", that the trailing cable from the section's power center to the continuous mining machine remains energized (citing Daniels, Tr. 47; Smith, Tr. 119; Jerome, Tr. 319; Turnipseed, Tr. 259), and the methane monitor system onboard the continuous mining machine stays energized as does the trailing cable (Turnipseed, Tr. 259; Daniels, Tr. 47). This was MSHA policy (Turnipseed, ibid)."

Mid-Continent argues that the foregoing clear evidence of MSHA's policy is glaringly inaccurate when contrasted with MSHA's written policy statement (R30). Mid-Continent cites the MSHA inspection manual (R30-II 264, 265) in support of its argument that MSHA requires that:

> The methane monitor shall be connected in such a manner so as to deenergize all electric circuits in the section when the concentration of methane reaches a maximum of 2.0 volume per centum of methane, except that the methane monitor may remain energized (R30, II at 264, 265).

I disagree. The MSHA policy statement relied on by Mid-Continent commences by referring to "longwall installations" (R30, page II - 264). This is clearly not such an installation. Further, I reject this view because in any event MSHA's inspection manual is not necessarily binding on the Commission, Secretary v. King Knob Coal Company, supra. The law is clear: The manual's instructions, even if they supported Mid-Continent's position, are not officially promulgated and do not prescribe rules of law binding on the Commission, Old Ben Coal Company 2 FMSHRC 2806, 2809 (1980). In general, as in this situation, the express language of a statute or regulation unquestionably controls over field manual material, H.B. Zachry v. OSHRC, 638 F. 2d 812, 817 (5th Cir 1981).

The primary duty of the operator is to provide for the safety of its miners. It is clear in this case that the methane monitor did not deenergize the add-on lights which were inboard the main controller. Hence a violation occurred.

Mid-Continent contends that another possible source of ignition was the damaged flame safety lamp found approximately 210 feet outby the face in the 102 section (Brief at 75-80).

On this record there are several possible sources of ignition. Mid-Continent's manager Turnipseed concedes that the failure to deenergize the lights could have caused the explosion (Tr. 290). Other possible sources include the defective switch box flange (discussed in the following citation); an electrical

spark, which was the conclusion reached by the Bureau of Mines of the State of Colorado in their statutory investigation (R21, R31); a defective safety lamp; a torch igniter (P1 at 45); and a welder striker (P1 at Appendix N2).

The testimony of witness Turnipseed concerning the flame safety lamp is reviewed in connection with the following citation, infra, page 17. I agree with Mid-Continent that the evidence, including the documentary detail published by the Bureau of Mines (R29A, R29B), is interesting. But the existence of other sources of ignition would not relieve Mid-Continent of liability for a proven violation. Simply stated, the presence of multiple ignition sources would not constitute a defense when the operator violates a mandatory safety standard. In any event, concerning the safety lamp, I credit MSHA's evaluation that the safety lamps did not initiate the explosion (P1 at Appendix N-5 and N-6).

The second allegation in this citation focuses on the proposition that the methane monitor should give a warning automatically at all times when the concentration of methane reached 1.0 percent while the machine was being operated by the remote control unit.

The monitor did have such a readout, or indicator, in the cab. Exhibit R7 is a photograph of the gauge (Tr. 141). The amber warning light goes on when the concentration of methane reaches one percent. The gist of MSHA's theory of this portion of the citation is that the miner operator could not see the warning light while operating the remote control unit. The evidence establishes that the operator usually uses the remote control device for the continuous miner while standing in the crosscut. In that position the CM operator can avoid any outburst or push of coal which could possibly come as far back as to cover the front of the continuous miner.

The regulation on this point requires the monitor "to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane." There was such a functioning automatic device.

I find nothing in the regulation or in the legislative history of the Act that supports the Secretary's position. If the Secretary wants the warning device on the remote control unit itself or if he wants it mounted in a position on the cab of the continuous miner where it can be seen from all directions, then he should redraft his regulation and state that requirement. While mine operators are obliged to comply with every mandatory standard, the language of each standard must reasonably convey to the operator the nature of the practices or procedures required or forbidden, Diamond Roofing Company v. OSHRC, 528 F. 2d 645 (5th Cir. 1976); Phelps Dodge Corporation v. FMSHRC, 681 F. 2d 1189 (9th Cir. 1982).

The Secretary's brief (at 7-9) only addresses the desirability of locating the methane monitor warning light where it can be seen at all times. But the regulation fails to prohibit the practice of using the remote control unit when the operator is not in a position to see the warning light. Otherwise stated, the regulation does not require the warning light to be located where it can be seen at all times.

In sum, Citation 802484 as it relates to the failure of the methane monitor to deenergize the add-on McJunkin lighting system is affirmed. That portion of the citation relating to a warning light when the methane concentration reaches 1.0 percent is vacated.

CITATION 802486

This citation, alleging a violation of 30 C.F.R. 75.511, provides as follows:

> Electric work performed on April 6, 1981, consisting of installation of a cover on an explosion-proof compartment and the wiring of a two pole light switch on the Joy 12CM continuous mining machine, Serial No. JM2228, in the 102 Section, was not performed by a qualified person nor under the direct supervision of a qualified person. This violation was determined during an inspection as part of the accident investigation of the April 15, 1981, explosion.

The standard allegedly violated, duly promulgated in Title 30, Code of Federal Regulations, is likewise contained in Section 303(12)(f) of the Act. The standard provides as follows:

> 75.511 Low-, medium-, or high voltage distribution circuits and equipment; repair.
>
> [STATUTORY PROVISIONS]
>
> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

SECRETARY'S EVIDENCE

Clarence J. Daniels, James Smith, and Cecil Lester, all MSHA supervisors testified for the Secretary.

In investigating the Dutch Creek Mine explosion inspector Daniels was advised by Jesus Merez (master mechanic) and John Cerise (foreman) that the cover plate, (also called lid), to the light switch compartment on the 12CM was installed on the machine by the third (C) shift on April 6, 1981 (Tr. 56-57, 72, 389, 403). The actual replacement consisted of removing a compartment lid without an "on" and "off" switch and replacing with a compartment lid with an "on" and "off" switch (Tr, 51, 66). To make the installation it is necessary to connect two wires to a transformer, maybe three if there is a ground (Tr. 66-67). It would take 30 minutes to hook up, reassemble, and cleanup the box (Tr. 68). It could be done in less than two hours (Tr. 68). Cerise examined the box on April 6 to see if the switch worked

but he did not examine the box for permissibility (Tr. 57-58). At the time of his investigation inspector Lester noted and drew a sketch showing that the switch located in the lid cover was in the "off" position (Tr. 390).

When asked about who installed the cover plate, foreman Cerise stated he didn't know but he thought it was Marge Thiel (Tr. 57-58). Marge Thiel, who is not a qualified person, was interviewed by MSHA. She stated to MSHA that she couldn't remember whether she put on the lid or not (Tr. 57-60, 390). All of the qualified persons, except those killed in the explosion, were asked about the lid. None of them could recall having installed it (Tr. 58-60, 63). John Ball, the other electrician, said he couldn't remember putting the lid on. But if he had, he would have checked it for permissibility (Tr. 58, 389-390). Since the qualified miners said they did not put the cover on the box then an unqualified person would have done it (Tr. 58).

The maintenance foreman on the "B" shift said his shift hadn't put on the cover (Tr. 59). Carl Heater, the "A" shift foreman, had no knowledge indicating it had been installed on his shift (Tr. 59-60).

The maintenance shift foreman thought it might have been installed on his shift but he couldn't recall the name of the worker who installed it (Tr. 59-60).

The installation of the cover was not satisfactory because a wire connecting the switch was too long. This resulted in the wire being trapped between two bolts of the explosion proof compartment (Tr. 61, 62, Exhibit P1 at Appendix L, Figures 1 to 6).

Inspector Smith noticed that the trapped wire between two bolts was mashed very flat. Although deformed, the wire was not bare (Tr. 123). The switch box was examined for arcing but none was seen (Tr. 123). The light switch compartment itself was not permissible(FOOTNOTE 2) because there was an opening in excess of 15/1000 of an inch between two bolts on the cover (Tr. 61, 343). The box was later removed and taken to the MSHA testing lab (Tr. 393, Testing results in P1 at Appendix N-4).

Mid-Continent's permissibility books reflected that a permissibility check was done on April 9, 1981. The records show the check was done by "E.G.". One of the Mid-Continent's electricians, Eugene Guthrie, was killed in the explosion (Tr. 73-75). On April 9 and 13, 1981 the 12CM was inspected for permissibility by MSHA inspectors. The captured wire defeated permissibility (Tr. 75).

On the night of April 13 Louis Villegos, an able and conscientious MSHA inspector, conducted an inspection of the continuous miner (Tr. 77-78). If the installation [of the cover] was improper it would have been picked up by MSHA's Villegos on April 13th (Tr. 83).

Usually permissibility is checked by taking a feeler gauge and moving it around the flange joint (Tr. 77-78). James Smith, an MSHA supervisor, discovered the non-permissible condition during the post explosion investigation. Lester and Meraz were present (Tr. 78, 79). Inspector Smith found the opening with a 5/1000 of an inch feeler gauge. Then he went to his largest feeler gauge, a 15/1000. He could still insert his largest gauge (Tr. 122). In Smith's judgment the opening was more than twice the 15/1000 of an inch opening. The largest opening allowed is 4/1000 of an inch (Tr. 128, 129, P1 at 41). Eventually the box was removed by MSHA for testing (Tr. 81).

If the box had been installed by a non-qualified person and there had not been a trapped wire, there would still be a violation (Tr. 84). A qualified person is necessary in an effort to insure that explosion proof compartments are put back in the same manner as they were originally approved (Tr. 61). This requires a qualified person trained in permissibility (Tr. 61). It is important that all electrical work be done by a qualified person. This is because equipment should not be left in an unsafe condition (Tr. 124). It is also vital in this mine which liberates a large amount of methane (Tr. 124).

The cover of the box is fourteen by fourteen by eight inches. It weighs approximately ten pounds (Tr. 62). The cover would most likely have been installed during the maintenance (C) shift (Tr. 65, 70).

Eugene Guthrie, a "B" shift mechanic/electrician worked for Arch Cardova (Tr. 65, 77). Cardova, the graveyard maintenance foreman, told MSHA that the cover had not been installed on his shift (Tr. 65, 75-76).

RESPONDENT'S EVIDENCE

M.J. Turnipseed, Jesus Merez, and John Jerome testified for Mid-Continent concerning this citation.

All workers appointed to the position of foreman at Mid-Continent are well qualified and have taken extensive examinations (Tr. 213-214). Mid-Continent also conducts classes for the mechanic/electrician job category (Tr. 215-216). On April 15, 1981 there was no scarcity of workers for the fo reman/mechanic/electrician category (Tr. 216). The company training program arises out of a labor agreement dating back to 1978 (Tr. 216-218, R22).

Mid-Continent requires extensive qualifications and certification for an hourly employee to bid on the job vacancy known as an underground mechanic/electrician (Tr. 221, 224, 226, R23, R24, R25, R26, R27, R28). One classification of workers at Mid-Continent combines mechanic-electrician. The company does not have mechanic per se or electricians per se (Tr. 223).

Any of the qualified workers including Ambrose, Ball, Guthrie (deceased), Clark, Cordova, Cerise, and Heater could have

worked on the switch box (Tr. 380-381). Carl Heater was the electrician/mechanic on Jerome's production shift. Eugene Guthrie held the comparable position on the other shift (Tr. 329).

It is custom and practice at Mid-Continent to comply with the law (Tr. 228). Its workers are well trained enough to know it is not permitted to have an uncertified person perform a job (Tr. 229, 315, 316).

If an uncertified person started to crawl into a flame proof electrical compartment, reaction could be slight to violent (Tr. 229-230). The switch box cover was ordered March 23 and arrived March 30, 1981. It was installed about April 6 by the graveyard crew (Tr. 370).

The mine manager was present when the investigation party discovered the impermissible main flange joint. Marks on the box indicated flame coke inside the box. There was some evidence this condition had entered into the explosion. It was felt no final determination could be made so he asked Robert A. Elam (MSHA's chief investigator) to remove the box for testing (Tr. 233-234, 340, 344). At the time of the investigation Master Mechanic Meraz had strong feelings about the switch box being the ignition source. At the time of the hearing he was baffled. Why would this box suddenly absorb this great amount of methane waiting for someone to light it (Tr. 370, 371).

The trapped wire was in a four and a half inch spacing. The wire was not bare when it was exposed but it was lying like a gasket between two bolts (Tr. 345, 374, 375, 380). Master mechanic Meraz felt that whoever put the cover on had been in a great hurry. It is Meraz's policy that when you remove such a cover you check for permissibility (Tr. 376, 377). On another occasion Meraz sought to have an electrician fired for performing unsatisfactory work (Tr. 378, 379). [That worker was not near this section in April, 1981 (Tr. 383)].

A copy of Mid-Continent's permissibility book reflects that "E.G." (Eugene Guthrie) examined the 12CM on April 9, 1981 (R1).

The full extent of the actual gap was never ascertained. That fact would make a difference in establishing whether or not the trapped wire was the source of ignition (Tr. 235, 236). MSHA tested the box (Tr. 236, P1 at Appendix N4). In the various tests no flames or external ignitions occurred up to a 50/1000 of an inch gap; at 62/1000 of an inch gap ignition occurred six out of six times (Tr. 237). At 40/1000 of an inch it was doubtful if the gap would propagate a flame to initiate an explosion outside of the enclosure (Tr. 239). In the manager's opinion everything [in MSHA's report] hinges on whether the switch box could cause an explosion (Tr. 242). There are various theories as to how the ignition occurred (Tr. 243-244). The MSHA report mentions and eliminates certain sources (Tr. 243).

The knob on the switch was new and turned easily (Tr. 348). In the investigation, according to Meraz, no one checked the position of the "on/off" handle as to whether it was "on" or "off" (Tr. 347).

A flame safety lamp could have ignited the methane (Tr. 245, 246). Many explosions are caused by improperly assembled flame safety lamps (Tr. 246). After the explosion a flame safety lamp was found 210 feet outby the face in the 102 section. The lower asbestos washer was broken. This defect destroys the integrity of the glass enclosure of the lamp (Tr. 247-251, P4). MSHA's report concluded that the force of the explosion damaged the flame safety lamp (Tr. 247-248, P1 at Appendix N-5).

DISCUSSION

Citation 802486 alleges that electrical work on the Joy 12CM was not performed by a qualified person nor under the direct supervision of a qualified person. It is further alleged that the electrical work consisted of the installation of a cover on an explosion proof compartment and the wiring of the two pole light switch.

From the record I conclude that the switch box cover was not installed by a qualified person. But no evidence supports the allegation that the wiring of the two pole light switch [in 1978] was not performed by a qualified person. Accordingly, that portion of the citation is vacated.

Mid-Continent's post trial brief addresses this citation (Brief at 84-89).

I agree with Mid-Continent that the burden of proof of this violation rests with the Secretary. That proof lies with the evidence that foreman John Cerise stated to MSHA inspector Cecil Lester that the cover "was probably installed by Mrs. Marge Thiel, who was not a qualified person" (Tr. 389). The foregoing evidence is uncontroverted. Mid-Continent's defense does not address it.

Mid-Continent argues that there were an adequate number of qualified maintenance personnel at its mine (Brief at 87). I agree Mid-Continent offered extensive evidence of that fact.

Mid-Continent's evidence further establishes that it is the custom and practice at Dutch Creek Mine No. 1 that only certified personnel perform occupational tasks which require special qualifications. Exhibits R23 through R28 clearly reflect those requirements. In many situations an operator's custom and practice could be persuasive.

Inasmuch as I rule this credibility issue against Mid-Continent, a detailed review of the evidence is in order. First of all is the uncontroverted evidence of the admission by foreman John Cerise to Inspector Lester as stated above. Namely, Cerise thought Marge Thiel installed the cover. Cerise stated nothing to MSHA about the custom and practice at Mid-Continent. The admission by Cerise to Inspector Daniels is similar but not quite as strong (Tr. 57-58). He stated to Daniels that he "didn't know but he thought it was Marge Thiel" (Tr. 57-58). The record here clearly establishes that Marge Thiel was not a qualified

person to make this installation. When MSHA interviewed Marge Thiel she did not state something to the effect that the custom and practice at Mid-Continent required that only a qualified person perform such work. To the contrary she merely stated she "couldn't remember whether she put the lid on or not" (Tr. 57-58).

In view of the foregoing evidence I reject Mid-Continent's defense of custom and practice.

As previously indicated, the Secretary does not offer any evidence as to the identity of the person who wired the two pole light switch. His evidence, as discussed in the previous citation, establishes the fact that the wiring was defective. To restate the finding: The McJunkin add-on lights were not wired in accordance with the manufacturer's specifications. But the mere fact that the wiring was defective does not prove that the installer was not a qualified person. In other words, even a qualified person can make a mistake. Accordingly, the second allegation in the citation is vacated.

On this point the Secretary's post trial brief (at 9-11) does not advance any fact that would lead to a different conclusion.

CITATION 802487

This citation, alleging a violation of 30 C.F.R. 75.313-1, provides as follows:

> A definite maintenance program for keeping methane monitors operative was not established and adopted. A written description of such program was not available for inspection and had not been made available to the qualified persons responsible for maintenance of the methane monitors. This violation was determined during an inspection as part of the accident investigation of the April 15, 1981, explosion.

The standard allegedly violated provides as follows:

> 75.313.1 Methane monitors, maintenance. The operator of any mine in which methane monitors are installed on any equipment shall establish and adopt a definite maintenance program designed to keep such monitors operative and a written description of such program shall be available for inspection. At least once each month the methane monitors shall be checked for operating accuracy with a known methane-air mixture and shall be calibrated as necessary. A record of calibration tests shall be kept in a book approved by the Secretary.

SECRETARY'S EVIDENCE

Clarence J. Daniels, James Smith, and Cecil Lester, all MSHA supervisors, testified for the Secretary.

During the investigation the inspectors asked Master Mechanic Jesus Meraz and three maintenance foreman whether Mid-Continent had a written maintenance program. Meraz and foreman John Cerise stated they did not have a written program but had adopted the program of the monitor manufacturer, BACHARACH (Tr. 86, 87 100, 395). Foreman Heater said he didn't know of any program. Foreman Cardova said the only program he knew was in the regulation (Tr. 86, 131, 132, 395).

Both Heater and Cerise further stated that while they didn't know of any written maintenance program they use the BACHARACH Manual in repairing and calibrating the monitor (Tr. 131-134). Maintenance is bigger than repair (Tr. 137).

All of the mechanics knew of the BACHARACH Manual and the testing kit (Tr. 103).

Mid-Continent now [at MSHA's insistence] has a good maintenance program (Tr. 88, 89, R2). Under the regulation there must be a program and it must be in writing to be examined (Tr. 95). The new program wouldn't help at all on repairing or calibrating the monitor (Tr. 89).

It is important to have a written program to know how the methane monitors are to be maintained (Tr. 87). Three of the maintenance supervisors were aware that when something went wrong they went to the BACHARACH instructions (Tr. 87).

The maintenance workers didn't use the manual for preventative maintenance but they used it as a troubleshooter guide (Tr. 101). The purpose of the methane monitor maintenance program is to let everyone know what is required of them to insure daily maintenance and to be sure they are doing what they are supposed to be doing (Tr. 96, 103-104).

If the MSHA inspector was working on the monitor he would use the BACHARACH instruction manual (Tr. 90) as evidenced by Exhibit R3. BACHARACH also furnishes a test kit including a bottle containing a methane mixture to apply to the sensor head of the system (Tr. 91, 92, 100, 101, R4, R4A).

RESPONDENT'S EVIDENCE

M.J. Turnipseed and Jesus Merez testified concerning this citation.

Mid-Continent has an extensive maintenance program (Tr. 331-332). Preventive Maintenance personnel cannot be diluted by other supervisors at Mid-Continent (Tr. 174, 332, 333).

In March, 1979, Mid-Continent published and distributed 200 copies of a booklet entitled "Mid-Continent Resources, Inc., Preventive Maintenance Program" (Tr. 173, R5). The booklet is broken down into several sections including the longwall, the miner, other equipment, and lubrication information.

The 12CM Miner section of Mid-Continent's book is broken down into subparts including daily maintenance and lubrication, points to be greased (with diagrams), points to be checked and filled as needed, and parts to be checked by operating. Monthly maintenance checks on the 12CM include lubrication, oil change, and various other checks including "calibrate methane monitors" (Tr. 168-172, R5). The charts in the maintenance book showing the work performed correspond with a larger record sheet posted in the master mechanic's office at each mine. There was such a chart as part of the preventative maintenance program on April 15, 1981 (Tr. 169, 175, 176, 353). It lists the daily preventative maintenance to be done for all the equipment in the mine (Tr. 351). Portions of the maintenance manual do not describe the action to be taken but do list the methane monitor as something to be checked daily, weekly, and monthly (Tr. 363).

The duties of the company preventative maintenance engineer is to carry out the maintenance duties. Bernie Fenton, who has three or four workers, is the Preventive Maintenance Engineer at the Dutch Creek No. 1 Mine (Tr. 170, 358).

Mid-Continent's preventative maintenance program was in effect on April 15, 1981 and was still in effect at the time of the hearing (Tr. 174).

As the various maintenance duties are performed the Preventative Maintenance Engineer marks the larger charts (Tr. 175). Weekly permissibility checks are kept in a separate book, as required by MSHA (Tr. 176, R1). The maintenance books were available at the time of the inspection (Tr. 176-177).

Mid-Continent also uses a BACHARACH kit to test the monitor. The back of the kit bottle has a complete set of instructions concerning its use. This was in use before April 15, 1981 (Tr. 177, 178, 336, 337). The test bottle injects gas into the monitor. In turn the machine reacts as if methane gas is present in the atmosphere (Tr. 186, 187).

Mine manager Turnipseed was present during the questioning of salaried employees Meraz, Cerise, Heater, and Jerome concerning the methane monitor maintenance program (Tr. 252-253). MSHA appeared to be spending a good deal of time attempting to prove that Mid-Continent fostered the proposition that someone tampered with the methane monitor (Tr. 252-253).

The questioning was confusing about what the foremen were being asked. Further, the workers were confused about what the government investigators wanted as a definite program. No questions were asked along the lines of how does Mid-Continent comply with the law in this particular section (Tr. 255).

Master mechanic Jesus Meraz keeps one BACHARACH manual in his desk and one in his files. The manual is wrapped around the BACHARACH test bottle (Tr. 336). Meraz taught his foreman Cardova and Heater how to adjust, check, and maintain the methane monitor. He used the manual to instruct them (Tr. 337). Mid-Continent's personnel would perform daily, bi-weekly, monthly examinations in accordance with the manuals instructions (Tr. 363).

At the time of the explosion Meraz kept a large maintenance chart for all of the equipment in the mine (Tr. 349-350). The equipment is listed in vertical columns with the dates for maintenance noted horizontally (Tr. 350, 351). If the chart would be behind, it would be obvious and Reeves, (Meraz's supervisor) would be irate (Tr. 151).

The BACHARACH book covers more maintenance detail than MSHA's program (Tr. 291, 292).

The BACHARACH methane monitor is represented by squares on the master mechanic's chart to show what work has been done and also to remind people to do monthly checks (Tr. 353). Monitor examinations would be done by various qualified and certified electricians (Tr. 364). The Mid-Continent maintenance program was in effect before the explosion (Tr. 356). It was a practice to use the books. Meraz taught Cardova and Heater how to use them. John Cerise knew how to use the book (Tr. 356-357). It never occurred to the master mechanic to show the manual to the investigator (Tr. 366).

## DISCUSSION

The gist of the regulation, 30 C.F.R. 75.313-1, requires the operator to adopt a definite maintenance program and to have such a written description available.

Mid-Continent fully complied with the regulation. At the time of the explosion I find that the program consisted of the Preventative Maintenance booklet (R5), the BACHARACH Manual (R3), the BACHARACH test kit (R4A), as well as the wall charts described in the evidence.

The Secretary's post trial brief addresses this citation

(Brief at 11-14).

The Secretary contends he carried his burden of proof because his evidence shows that the maintenance foremen, one or more, didn't even know the company had a written program.

I am not persuaded. I credit the uncontroverted testimony of mine manager Turnipseed that there was confusion about what the MSHA investigators were seeking in their investigation (Tr. 230, 231). Further, and in resolving this issue, I note what is obvious in this record: Mid-Continent fully cooperated in MSHA's post explosion investigation. In short, I refuse to sustain the Secretary's position. It would amount to ruling that for some unknown reason Mid-Continent kept hidden its preventative maintenance book, its BACHARACH book, its test kit, and its wall charts.

The Secretary argues that the Mid-Continent program is not covered by the manufacturer's handbook or its preventative maintenance program. He contends Mid-Continent's materials do not contain the procedures contained in the present maintenance program. He asserts these materials are not a description of a maintenance program but merely aids to be used in carrying out the program.

The Secretary relies on what he considers to be a proper maintenance program. This was the program later adopted by Mid-Continent. The Secretary's methane monitor maintenance program contains five directives (R2). To answer the Secretary's contentions it is necessary to review what MSHA considers to be a proper program and compare those directives with Mid-Continent's program in effect at the time of the explosion. The Secretary's first directive:

> Check to assure that all system compartments and associated components are securely attached to the frame of the machine (R2).

Mid-Continent's program on this point uses different words to arrive at the same result. With the 12CM Miner daily duties include:

> 11.13 Check and operate as indicated:
>
> Visual inspection - Check Each Body of machine
> - all bolts tight
> - all guards in place and secured
> (R5 at 11.13).

The Secretary's second directive:

> Check meter assembly lenses protecting lights to assure that they are not cracked or broken and the lights are operating properly and in proper sequence (R2).

Mid-Continent's program on the electrical system states:

> 11.13 Check and operate as indicated:
>
> Electrical System
>
> All lights operating properly
> All lights secure and properly sealed
> All electrical connections in good shape
> Check cable for damage or wear - from machine to power center
> Operate cutter head motors
> Operate high, medium, and low tram - forward and reverse
> Operate conveyor - forward and reverse
> Operate gathering arms
> Check all motors for excessive heat, noise, or vibration
> Check cable conduit at machine
> Check that light conduit is secure and not damaged
> Check methane monitor - zero and operation.
> (R5 at 11.13).

The Secretary's third directive is that the operator should:

> Check vent holes and filters of the sensing device to assure they are open to permit an adequate circulation of the atmosphere (R2).

The BACHARACH instruction book used by Mid-Continent specifically addresses the daily maintenance of the Detector Head. It provides:

> 7.1. DAILY MAINTENANCE
>
> An excessive build-up of "fines" or float dust, in and around the Detector Head, may reduce the response of the sensing element. Free circulation of air, in and around the Detector Head is necessary for optimum performance. The main air path for convective flow which allows sensing of gas is located in the center of the base casting. Vent holes are also located in the top cover casting under the deflector plate, and in the sidewall. The opening in the center of the base casting also serves as a moisture drain hole and must be kept free of obstruction. The following maintenance schedule is recommended to prevent the buildup of float dust and "fines" around the Detector Head.
>
> a. Remove any accumulation of materials around the Detector Head.
> b. With the use of compressed air or medium water pressure, hose down the area around the Detector Head.
> c. Use a small metal rod (or screwdriver) and check that the vent holes are free of obstruction.

After the Daily Maintenance has been performed, allow approximately 5 minutes for sensor temperature to stabilize. Then actuate the Test Switch at Remote Meter Housing to Check alarm lamp circuits and machine power cutoff relay. Adjust meter to zero (0%) with Zero Adjust Control if necessary.

(R3 at 7.1).

The Secretary's fourth directive requires the operator to:

> Actuate the test control device to assure the proper sequence of the alarm lamp illumination and the operation of the remote relay by the deenergization of the machine. (R2).

Only a minimal benefit can be derived by reciting it here in haec verba but the BACHARACH manual and the instructions on the BACHARACH calibrating gas container received in evidence address this subject in a much more comprehensive fashion than the Secretary's proposal (R3 at 11-12, R4A). In addition, one of the functions listed on the weekly 12CM chart concern the "remote control sequence of operation" (R5 at 11.20).

The Secretary's fifth directive is that:

> At least once each month the methane monitors shall be checked for operation accuracy with a known methane-air mixture and shall be calibrated as necessary (R2).

Mid-Continent's more stringent program requires that the calibration test with a known quantity of gas be performed "at least every 2 weeks and more often if experience and application conditions dictate" (R3 at 7.2).

On the basis of the foregoing facts I conclude that Mid-Continent did not violate 30 C.F.R. 73.313-1. The Secretary's position has required that the respective programs be weighed. As a collateral matter I necessarily reject the Secretary's evidence that the BACHARACH Manual does not include the requirements in MSHA's program as evidenced by R2 (Tr. 96). Mid-Continent had a definite maintenance program. It was written. It was available.

Citation 802487 and all proposed penalties should be vacated.

## CIVIL PENALTIES

Concerning Citation 802484 and 802486, it is necessary to assess a civil penalty for the foregoing violations.

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The record shows that respondent had 1701 violations assessed against it in five different mines from April 15, 1979 to April 15, 1981 (P2, P3 as limited by stipulation at Tr. 412). At the Dutch Creek No. 1 mine 482 violations were assessed against Mid-Continent between those dates (P2). This is obviously an adverse prior history of severe proportions.

As to the criterion of whether payment of penalties will affect Mid-Continent's ability to continue in business the record is silent. But existing case law indicates that where respondent fails to introduce any financial data a judge may presume that the payment of penalties will not adversely affect respondent, Secretary v. Buffalo Mining, 2 IMBA 226 (1973), Secretary v. Associated Drilling, Inc., 3 IBMA 164 (1974).

The facts arising in Citation 802484 (methane monitor did not deenergize McJunkin lights) would indicate respondent was negligent and the gravity was serious in that this condition permitted a source of ignition to exist in a gassy mine.

The facts arising in connection with Citation 802486 (non-qualified person performing electrical work) indicate respondent was negligent for permitting such an event to occur. The gravity of such a practice is particularly severe since it was permissible equipment upon which the work was performed. MSHA's policy requires that all equipment that goes inby the last open crosscut in the mine must be permissible (Tr. 119).

Considering all of the statutory criteria I conclude that the Secretary's proposed penalties respectively of $4000 and $10,000 for the violations of the first two citations are appropriate and I adopt said penalties on behalf of the Commission.

Since no violation of Citation 802487 occurred the proposed penalty of $4000 for that citation should be vacated.

The Solicitor and Mid-Continent's counsel filed detailed briefs which have been most helpful in analyzing the record, defining the issues, and deciding the case. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 802484 for the violation of the Act and 30 C.F.R. 75.313, as modified herein, is affirmed and a civil penalty of $4000 is assessed.

2. Citation 802486 for the violation of the Act and 30 C.F.R. 75.511, as modified herein, is affirmed and a penalty of $10,000 is assessed.

3. Citation 802487 for the alleged violation of 30 C.F.R. 75.313-1 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE-

1 BACHARACH INSTRUMENTS: UNITED TECHNOLOGIES BACHARACH.

2 There is no question but that a permissibility violation existed which was found during the investigation. This violation was the subject of Citation 802485 (P-1 MSHA Investigation Report, Appendix 0). The citation was admitted and settled by Mid-Continent in Assessment Case No. 05-00301-03096F, (Tr. 346, Exhibit to Petition, Respondent's Brief at 87).