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SOL (MSHA) V. PRICE RIVER COAL
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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 PROCEEDINGS Docket No. WEST 80-83 A.C. No. 42-01202-03021 V Docket No. WEST 80-135 A.C. No. 42-01202-03024
v.	
PRICE RIVER COAL COMPANY, FORMERLY BRAZTAH CORPORATION, RESPONDENT	Price River No. 5 Mine (formerly Braztah No. 5 Mine)

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Petitioner
Stanley V. Litizzette, Esq., Price River Coal Company formerly Braztah Corporation, Helper, Utah, for Respondent

Before: Judge Vail

Statement of the Cases

These cases are before me upon petition for assessment of civil penalties by the Secretary of Labor pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). In Docket No. WEST 80-83, captioned above, respondent (Price River Coal Company, formerly Braztah Corporation) is charged with violation of safety standard 30 C.F.R. 75.400 in citation No. 789581. The citation alleged that the violation at respondent's Price River Coal Co. No. 5 Mine (formerly Braztah No. 5 Mine) was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard and that there was an unwarrantable failure on the part of respondent justifying action pursuant to section 104(d)(1) of the Act. Within 90 days of the issuance of that citation, respondent was charged with an unwarrantable failure to comply with 30 C.F.R. 75.200 in withdrawal order No. 789596, also issued pursuant to section 104(d)(1) of the Act.

In Docket No. WEST 80-135, captioned above, respondent was charged in citation No. 789961 with a safety violation pursuant to section 104(a) of the Act and 30 C.F.R. 75.1403.

Upon agreement by the parties, the cases were consolidated for hearing and decision. Following notice to the parties, a hearing on the merits was held in Salt Lake City, Utah. No jurisdictional issues were raised. Both parties filed post-hearing briefs.

Issues

1) Did respondent violate safety standard 75.400, and if so, is a review of special findings related to the citation appropriate? If the alleged violation occurred, what civil penalty should be assessed?

2) Was respondent properly charged with a violation of safety standard 75.200 in a withdrawal order, and if so, may the special findings issued in conjunction with the charged violation also be reviewed? If the alleged violation occurred, what civil penalty may properly be assessed?

3) Was respondent properly charged with violation of safety standard 75.1403, and if so, what civil penalty should be assessed?

Additional issues raised during the proceeding are identified and disposed of where appropriate in the course of this decision.

STIPULATIONS

At the outset of the hearing, the parties stipulated to several facts relevant to the assessment of penalties. It was agreed that: (1) respondent's Price River No. 5 mine is a large operation; (2) the total number of assessed violations for the mine in the 24 months prior to May 14, 1979 was 223; and (3) payment of penalties would not impair respondent's ability to continue in business.

DOCKET NO. WEST 80-83

Citation No. 789581

On May 14, 1979, MSHA inspector Donald B. Hanna conducted an inspection of respondent's Price River Coal Co. No. 5 Mine (formerly Braztah No. 5 Mine). During the inspection, Hanna issued citation

No. 789581, pursuant to section 104(d)(1) of the Act.(FOOTNOTE 1) Respondent was charged with an unwarrantable failure to comply with safety standard 30 C.F.R. 75.400, which provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The citation also alleges that the violation was "significant and substantial."

Hanna stated in the citation that combustible materials had been allowed to accumulate in the mine's 6th West working section along the No. 1 belt. Float coal dust was deposited on rock-dusted surfaces along the operating belt conveyor which was transporting coal. The float coal dust ranged in color from gray to black, affected an area 20 feet wide in the entry and up to 40 feet wide at the crosscut intersections, and extended a distance of approximately 400 feet from the belt tail-piece outby five crosscuts. In addition, combustible materials, loose wood, pieces of brattice, fine dry coal dust and loose coal cuttings had been allowed to accumulate along both sides of the belt conveyor. The coal dust and loose coal was approximately one inch deep in the entry, and at a depth ranging from approximately two to twelve inches in the area of one side of the five crosscuts. The No. 1 belt entry had been reported dark and in need of rock dusting prior to the day shift in the mine's pre-shift examination book. The report had been signed by the mine foreman.

No action to abate the condition was detected by the inspector at the time he issued the citation (Exhibit P-1).

Hanna repeated such observations during the hearing (Tr. 188, 190-196). In addition, he testified that at the time of his inspection he noted that loose coal had accumulated between the belt's tail-piece roller and a safety guard. He observed that the coal was being ground by the operating belt into coal dust and float coal dust, was then carried by air currents and deposited at an "overcast" at the 5th crosscut (Tr. 188, 194).

The time for abatement of the conditions was set for 4:00 p.m. on May 14, 1979. The abatement period was subsequently extended until 11:00 p.m. due to the extent of accumulations and abatement work required. When Hanna returned to the area at 9:05 a.m. on May 15, 1979, the abatement work was approved; the combustible materials had been removed, and the area had been dusted with 200 pounds of rock dust (Tr. 184, 199-200, 207, 208. Exhibit P-1). Hanna estimated that it took crews of at least six men working during the day and night shift between ten and fifteen hours to abate the condition.

On December 10, 1979, the Secretary filed a petition for the assessment of a civil penalty against respondent predicated on the issuance of the citation charging violation of safety standard 75.200. The Secretary proposed a penalty of $1,000.00. Respondent duly contested the proposed assessment of penalty.

Respondent failed to rebut Hanna's findings. In fact, John Tatton, respondent's safety inspector who accompanied Hanna on his underground inspection of the coal mine, admitted during the hearing that fine dry coal dust (varying in color from gray to black), loose coal cuttings, wood, and pieces of brattice had accumulated at spot locations in the cited area (Tr. 167-169).

Since Hanna's findings were not rebutted by respondent but instead were actually corroborated in part by respondent's own witness, I accept as fact the evidence and testimony presented by the petitioner. I therefore find that respondent allowed combustible materials to accumulate in the mine's 6th West working section along the No. 1 belt and that such accumulations constituted a violation of safety standard 75.400.

I shall next address issues raised by the parties involving the special findings that such a violation was "significant and substantial," and represented respondent's "unwarrantable failure" to comply with a mandatory safety standard. Such findings are necessary in order to support Hanna's issuance of a citation pursuant to section 104(d)(1) of the Act. Petitioner contends that the accumulation of combustible materials constituted a "significant and substantial" violation. Hanna testified that an explosion of float coal dust in the area of the 6th West working section along the No. 1

belt was possible if sufficient ignition charge existed. Hanna further stated that potential ignition sources included electrical components and cables, and frictional heat being generated by coal being ground at the tail-piece of the No. 1 belt (Tr. 189, 211, 217). He believed that the possibility of fire and explosion posed a threat of serious and fatal injury to miners (Tr. 180).

Respondent denies that the accumulations of combustible materials represented a "significant and substantial" violation. Respondent in its post-hearing brief suggests that the condition was not significant because the "inspector admitted that the condition did not require shutting the production down and that it "wasn't that bad' ... p. 241." Upon reviewing the transcript, I find that Hanna did not make such a statement. Instead, Hanna testified that although the condition was not an imminent danger, the float coal dust represented a serious violation having significant and substantial possibility of ignition (Tr. 109, 110).

The finding of whether a violation is "significant and substantial" depends on whether there existed a reasonable likelihood that the hazard contributed to or would have resulted in an injury of a reasonably serious nature. Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981) (ALJ). The test involves two considerations: the probability of resulting injury and the seriousness of the resulting injury. Upon analysis of the testimony at the hearing and the facts surrounding the violation, I am convinced that at the time the citation involved here was issued there was a reasonable likelihood that the hazard of float coal dust ignition would have resulted in serious or fatal injury to miners in the area of the 6th West working section. Respondent's seeming confusion between a finding of "significant and substantial" violation and "imminent danger" does not disturb such a finding. Imminent danger is defined in the Act as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated," 30 U.S.C. 802(j), emphasis added. For a hazard to be termed significant and substantial, no determination need be made that an accident may reasonably be expected to occur before the condition can be abated.

Accordingly, I conclude that the violation of standard 75.400 was "significant and substantial." A determination must next be made of the issues related to Hanna's finding that the violation was the result of respondent's "unwarrantable failure" to comply with the mandatory safety regulation.

The standard by which an "unwarrantable failure" is determined was established in Zeigler Coal Company, 7 IBMA 280 (1977). That

se stated that a violation is the result of an unwarranted failure if the violative condition is one which the operator knew or should have known existed, or which the operator failed to correct through indifference or lack of reasonable care. In support of the issuance of a 104(d)(1) citation charging "unwarrantable failure," Hanna testified to his belief that the combustible materials had accumulated over more than one shift (Tr. 209), and that an agent of the respondent (the mine foreman, Marinos) knew of the violative condition due to reports made in the mine's pre-shift book by the fire boss. Hanna testified that the violative condition along the No. 1 belt had been reported in the pre-shift book by the fire boss on the day of the inspection, and on numerous times over the period of a month (Tr. 186), 206-207, 212).

Despite Hanna's testimony citing "unwarrantable failure," the Secretary takes the position that under Windsor Power House Coal Company, 2 FMSHRC 1739 (July 1980) (ALJ) the special finding of "Unwarrantable failure" is not at issue and need not be proved in a penalty proceeding on a 104(d)(1) citation (petitioner's brief at 4).

In arguing against the finding of "unwarrantable failure," the respondent charges that the inspector based the finding only on the fact that the condition had been reported in the pre-shift book. Respondent further states that:

> Under the facts of the case there was no evidence that the operator intentionally, knowingly, or recklessly permitted accumulations of combustible materials. The mere fact that the operator was aware of the condition (emphasis added) is not sufficient to constitute an unwarrantable citation. See Freeman Coal Mining case ... (respondent's brief at 2).

In addressing the arguments of the parties, I first reject petitioner's claim that a finding of "unwarrantable failure" need not be proved in a penalty proceeding involving a citation issued pursuant to section 104(d)(1) of the Act. In Windsor Power, supra, Judge Melick found that the Act's provisions allow an operator to challenge the existence of a violation charged in a citation in a civil penalty proceedings. However, he found no authority under the Act to consider the special findings of "significant and substantial" and "unwarrantable failure" in civil penalty proceedings; failure to timely file a notice of contest to the citation within 30 days after its receipt foreclosed the operator from challenging such special findings. 2 FMSHRC at 1741.

Upon reviewing a more recent Commission decision, I find that both the existence of a violation and the special findings charged in a citation may properly be reviewed in a civil penalty proceeding. In National Gypsum, supra, the Commission found that the validity of special findings is in issue in a penalty proceeding. Review of special findings charging an operator with "significant and substantial" violation and "unwarrantable failure" to comply with federal regulation was found by the Commission to be important due to the effect of such findings in triggering the possible issuance of subsequent withdrawal orders under appropriate provisions of the Act.

In accord with the Commission decision, I therefore reject petitioner's contention that the special finding of "unwarrantable failure" is not at issue in the present civil penalty proceeding. Instead, I find that the charge of respondent's "unwarrantable failure" to comply with safety standard 75.400 must be reviewed.

A finding of unwarrantable failure on respondent's part is supported by Hanna's undisputed testimony that combustible material had accumulated during more than one shift. Furthermore, the evidence shows that the violative condition had been reported at least once in the pre-shift book prior to Hanna's inspection (Exhibit R-1). Respondent did attempt to rebut Hanna's testimony that he observed that the cited condition had been reported in the pre-shift book numerous times in the month preceding his inspection. However, I find such an attempt to be unsuccessful. Respondent produced three non-consecutive pages and reports from the pre-shift book, showing two pre-shift reports with no mention of the violative condition (Exhibit R-1). However, respondent had not preserved the actual pre-shift book. Such selective production of evidence is ineffective in rebutting Hanna's charge that respondent had notice of the violative condition.

I therefore conclude that respondent knew or should have known of the violative condition, and that it failed to correct such a condition. Its violation of safety standard 75.400 therefore constituted unwarrantable failure to comply with the law. In making such a finding, I reject respondent's claim that under Freeman Coal Mining Company, 1 MSHC 1209 (December 1974), mere awareness of a hazardous condition is not enough to constitute an "unwarrantable failure." Respondent misreads the cited case, which provided in pertinent part that under the Federal Coal Mine Health and Safety Act of 1969:

> The issue of "unwarrantable failure" in an "accumulation" case presents the question of whether the operator intentionally or knowingly or recklessly permitted the accumulation of or failed to clean up the particular masses of combustible materials ... It does not concern the question of whether the operator was at fault for not being

> aware generally that the Act proscribes and requires cleanup of "accumulations." 1 MSHC at 1211.

In summary, both special findings of "significant and substantial" and "unwarrantable failure" are affirmed, as is citation No. 789581.

PENALTY

As previously noted at the outset of this decision, the parties stipulated to the mine's size, history of violations and financial status. Further criteria that need to be discussed in determining the appropriate civil penalty to be assessed are the respondent's negligence, the gravity of the violation, and good faith abatement efforts.

In addressing the issue of negligence, I accept inspector Hanna's testimony that the combustible materials had accumulated over a period longer than one work shift, and that in fact Hanna observed that the violative conditions had been reported numerous times over the period of a month in the mines pre-shift book. In view of such testimony, I conclude that respondent had adequate notice of a hazardous condition and yet failed to correct it. I therefore find that respondent's failure to remove combustible materials and adequately rock dust in the area of the No. 1 belt amounts to gross negligence.

The evidence in this case shows that the gravity of the violation was serious. The accumulations of combustible materials, in combination with significant accumulations of float coal dust, created a serious hazard of explosion and consequently the threat of serious or fatal injury to miners. Safety inspector for the mine, John Tatton, testified that in the event of an explosion, the 6th West and 4th West crews (each consisting of approximately seven people) would be involved, as well as several other mine employees having duties in the area (Tr. 178, 179).

Finally, respondent demonstrated good faith in the abatement of the violative conditions. Two crews were assigned to perform abatement duties and after continuous work, abatement was completed within ten to fifteen hours.

On balance, I find that the penalty of $1,000.00 as proposed by the Secretary to be appropriate.

Withdrawal Order No. 789596

Inspector Hanna returned to the Price River Coal Co. No. 5 Mine on June 14, 1979 (within 90 days of the issuance of citation No. 789581) to conduct an inspection. At 12:38 a.m., Hanna issued withdrawal order No. 789596 pursuant to section 104(d)(1) of the Act, alleging that respondent had failed unwarrantably to support the roof in the areas of the No. 4 entry and the No. 3 crosscut. Section

104(d)(1) provides that if during any mine inspection, an MSHA inspector finds a violation of any mandatory health or safety standard, and further finds that such violation could significantly and substantially contribute to a mine hazard and is due to an operator's unwarrantable failure to comply with the standard, such findings shall be included in a citation issued to the operator. Furthermore: 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. Specifically, Hanna cited respondent with violation of 30 C.F.R. 75.200 which provides in pertinent part as follows:

> The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The order also alleges that the violation was "significant and substantial." Following abatement of the cited condition, the order was terminated on June 14, 1979.

On December 10, 1979 the Secretary filed a petition for the assessment of a civil penalty on the issuance of withdrawal order 789596 for a violation of 75.200. The Secretary proposed a penalty of $1,500.00. Respondent duly contested the proposed assessment of penalty. However, respondent did not file a "notice of contest" to withdrawal order No. 789596, pursuant to section 105(d) of the Act.(FOOTNOTE 2)

The undisputed evidence establishes that the mine's roof control plan required that any roof having a width greater than 20 feet be supported by timbers (Tr. 271). However, in the mine's No. 4 entry, main North working section, no mine posts had been installed for a distance of 39 feet although the entry had been driven from a width of 20 feet, six inches up to 25 feet wide. In addition, the No. 3 crosscut between the No. 3 and No. 4 entries had been driven to a width of 21 feet, eight inches; and again no mine posts had been installed (Exhibit P-4). Hanna made all measurements with a standard measuring tape (Tr. 279). The condition had been reported by the night shift foreman on June 13, 1979 in the mine's on-shift book (Exhibit R-3, Tr. 283). The mine foreman's report noted that the "top was working" in the area so that hydraulic jacks could not be set (Tr. 283).

While the area had been adequately roof bolted within four hours after the mine foreman's report, no timbering had been performed in the twelve hour interim between the time the report was made and that of the inspection (Tr. 293, 295, 302, 304). Timbers were available for installation, and installed within twenty minutes after issuance of the withdrawal order.

Further unrebutted evidence presented by petitioner at the hearing established that respondent's failure to adequately support the roof exposed miners to the potential hazard of a roof fall (Tr. 288). At the time of the inspection, Hanna observed signs that the pressure in the area was building up. The signs included excessive sloughage, roof fracturing, and flooring being pushed up (Tr. 287). In addition, Hanna experienced a "bounce" (quick jarring of the ribs and roof) while writing the citation (Tr. 286). In the event of an accidental roof fall, two miners and an on-shift inspector might have been exposed to serious or fatal injury (Tr. 290).

While respondent failed to rebut the Secretary's charge of hazardous roof conditions, it nevertheless urges that the withdrawal order be dismissed and that the proposed penalty be disallowed. In support thereof, respondent claims that citation No. 789581 was invalid. As a consequence, withdrawal order No. 789596 is claimed to be invalid also, since the order was triggered by the citation's previous issuance pursuant to section 104(d)(1) of the Act.

Lengthy discussion of respondent's contention is unnecessary. I have affirmed citation No. 789581 (issued May 14, 1979) and the associated violation and "unwarrantable failure" to comply with a mandatory standard. I therefore find that the citation created a proper predicate under the Act for issuance of a 104(d)(1) withdrawal order.

I therefore turn next to the legal arguments presented by the Secretary.

Petitioner contends that since this is a penalty proceeding, the validity of the withdrawal order is not at issue. The Secretary argues that as a consequence, the Administrative Law Judge is limited to a determination of (1) the existence of a violation; (2) whether the violation of standard 75.200 was "significant and substantial;" and (3) an appropriate penalty. The Secretary contends that under such case law as Windsor Power House Coal Company, 2 FMSHRC 1739 (July 1980) (ALJ), respondent is estopped from contesting the special finding of "unwarrantable failure" due to its failure to timely contest the withdrawal order (petitioner's brief at 7, 8).

Commission decisions arising under the old 1969 Act have established the precedent that the validity of a withdrawal order is not an issue in a penalty proceeding. Pontiki Coal Corporation, 1 FMSHRC 1476 (October 1979); Wolf Creek Collieries Company, 1 FMSHRC _____ (March 1979). However, the existence of a violation itself and penalty assessment are still at issue in such a case. Whether the validity of special findings that accompany a cited violation may also be challenged in a penalty proceeding is not so easily settled. To my knowledge, the Commission has not dealt squarely with the right of an operator to question special findings in a penalty case. Decisions of administrative law judges dealing with the issue are in conflict. Both Windsor Power, supra, involving a 104(d)(1) citation, and Black Diamond Coal Mining Co., 5 FMSHRC 764 (April 1983) (ALJ), involving 104(d)(1) withdrawal orders, have suggested that the failure to contest a 104(d)(1) citation or withdrawal order accompanied by special findings within 30 days of issuance estops an operator from challenging such findings during a civil penalty proceeding. However, Administrative Law Judge Carlson held in CF&I Steel Corporation, 4 FMSHRC 1777 (September 1982) (ALJ), that an operator who fails to contest a withdrawal order issued pursuant to section 104(d) of the Act may nevertheless challenge the validity of accompanying special findings in a subsequent penalty proceeding arising from the same violation. The judge in that case stated that "special findings are merely incidents of the violation, not the withdrawal order." 4 FMSHRC at 1786.

I accept such reasoning as a rational extension of the Commission decision in National Gypsum, supra, which allowed for the review of special findings charged in a citation during a civil penalty proceeding. I therefore find CF&I Steel Corporation to be

determinative in dealting with the issues at hand. Accordingly, I conclude that the present discussion of withdrawal order No. 789596 must include a ruling on the special findings accompanying the 104(d)(1) order, as well as a determination of a violation and assessment of a civil penalty.

Turning to the unrebutted evidence and testimony of this case, I find that the evidence establishes that substantial portions of the roof in the mine's No. 4 entry and associated No. 3 crosscut were inadequately supported in violation of safety standard 75.200. I further conclude that the violation was "significant and substantial" under the definition of National Gypsum, supra. The unstable and inadequately supported roof made a roof fall reasonably likely. In the event of such a collapse, serious or fatal injury to miners under the fall was almost inevitable.

I turn finally to the issue of respondent's "unwarrantable failure" to comply with standard 75.200. "Unwarranted failure" occurs where the violative condition is one of which the operator had knowledge or should have had knowledge, or which the operator failed to correct through indifference or lack of reasonable care: Zeigler Coal, supra.

Respondent argues that under the rule of Eastern Associated Coal Corporation, 3 IBMA 331 (1974), the violation charged in the withdrawal order was not caused by the operator's unwarrantable failure, since the evidence does not show that the operator intentionally, knowingly, or recklessly allowed the hazardous roof condition to exist (respondent's brief at 4). The Interior Board of Mine Operations Appeals, in reviewing a violation under the 1969 Federal Coal Mine Health and Safety Act, did use such criteria in discussing the requisite degree of fault necessary to support a finding of unwarrantable failure. However, the Board also cited the Act's legislative history as defining unwarrantable failure as:

> ... the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of lack of due diligence, or because of indifference or lack of reasonable care, on the operator's part. 2 IBMA at 356.

Such a definition is not significantly different from the definition expressed in Ziegler Coal and now commonly cited in Commission decisions. Using the Ziegler Coal definition, I therefore find that the evidence in the case before me shows that violation was the product of respondent's "unwarranted failure" to comply with standard 75.200. It is apparent that respondent had notice of the hazardous roof condition due to an on-shift report made by the night shift foreman approximately twelve hours before Hanna's inspection. Although the area had stabilized sufficiently within four hours to allow roof-bolting, no timbers were installed as required by the mine's approved roof plan.

In summary, I find that violation of standard 75.200 did occur as charged in withdrawal order No. 789596, and that special findings of "significant and substantial" violation and "unwarrantable failure" are supported by the evidence in the case.

PENALTY

The mine's size, history of violations, and financial status were stipulated by the parties.

From the evidence, I must conclude that the operator was negligent in failing to install timbers in the cited areas of the mine. Since the condition had been reported in the mine's on-shift book, respondent had notice of the hazard and violation, and yet failed to abate it in the twelve hours preceding the inspection. I therefore find that respondent's failure to correct the hazardous condition amounts to gross negligence.

The evidence in the case shows that the gravity of the violation was severe. In failing to properly support the roof in the area of the No. 4 entry and associated No. 3 crosscut, respondent exposed at least three miners to the hazard of a roof fall. In the event of such a roof fall, serious or fatal injury to the miners was highly probable.

Respondent demonstrated good faith in abating the violative condition. Timbers were installed in accord with the mine roof plan within twenty minutes of the issuance of the withdrawal order.

On balance, I find that the penalty of $1,500.00 as proposed by the Secretary is appropriate.

DOCKET NO. WEST 80-135

This case involves the issuance of a section 104(a) citation No. 789961(FOOTNOTE 3) for a violation of 30 C.F.R. 75.1403 which provides

in part as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

That general statement is followed by 11 subsections. Subsection 75.1403-1 provides in pertinent part as follows:

> 75.1403-1 General criteria.
>
> (a) Section 75.1403-1 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under 75.1403. Other safeguards may be required. (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

The undisputed evidence establishes that Hanna inspected respondent's Price River Coal Co. No. 5 Mine on July 18, 1979 and at that time observed the operation of a scoop-tram without its batteries being protected by cover plates secured to the battery tray. At that time, Hanna issued citation No. 789577 pursuant to standard 75.1403 as notice to respondent that Hanna was "requiring that all cover-plates be secured to mobile equipment when such equipment is being operated." The condition was abated within 40 minutes after issuance of the citation when the cover plates were secured to the battery trays (Exhibit P-6).

However, upon returning to the mine on July 19, 1979, Hanna observed that the scoop-tram was once again being operated without the cover plates being secured to the battery trays. As a consequence, Hanna issued citation No. 789961. The condition was abated within six minutes (Exhibit P-16). On February 4, 1980, the Secretary filed a petition for the assessment of a civil penalty predicated on the issuance of citation No. 789961 for a violation of Hanna's safety requirement issued pursuant to 30 C.F.R. 75.1403. The Secretary proposed a penalty of $305.00. Respondent duly contested the proposed assessment of penalty.

Respondent does not deny continued operation of its scoop-tram without having secured the battery cover plates, despite having been provided with notice in citation No. 789577 that such condition was considered by Hanna to be a safety violation. Respondent does however

contend that citation No. 789961 is invalid due to lack of long-term notice regarding the requirement that the battery covers be secured when operating the machine in the mine from the area of the portal to the first open crosscut. Respondent claims that neither Hanna nor any other inspectors had required such a practice before the issuance of the citation presently contested. In contrast, Hanna testified that during previous inspections of the mine, he must not have observed the condition or he would have issued the same safety requirement (Tr. 334).

Upon reviewing such arguments, I find respondent's claim to be unsupported by case law. Generally, an operator's reliance on prior inspections does not estop the Secretary from bringing an action on newly discovered safety violations. Midwest Minerals, Inc., 3 FMSHRC 251 (January 1981)(ALJ); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981)(ALJ); Servtex Materiala Company, 5 FMSHRC 1359 (July 1983) (ALJ). I therefore conclude that the failure of previous inspections to result in the issuance of a citation for the safety violation charged in this case does not indicate that citation No. 789961 is automatically invalid.

Respondent further contends that the citation is invalid because operating the scoop-tram in the area between the mine portal and the first open crosscut without having the battery cover plates secured did not constitute a safety hazard. Such an area of the mine is claimed by respondent to be a "significant safety area" (respondent's brief at 2). In contrast, Hanna testified that the unprotected battery could be damaged by a roof fall or collision while operating in the area. Should the battery be damaged, battery acid might burn the unshielded machine operator. In addition, the batteries might burn, releasing toxic fumes and seriously or fatally injuring miners (Tr. 326, 327).

Hanna also noted that in the event that the scoop-tram should have a wreck while going down the steep incline from the portal into the mine, the unsecured covers could become flying objects causing broken bones or fatal injury (Tr. 325, 327).

I find Hanna's testimony of the hazard involved in operating the scoop-tram without secured battery covers to be convincing. I therefore reject respondent's contention that citation No. 789961 is invalid due to lack of a safety hazard.

Respondent also argued that the citation was invalid because an MSHA inspector cannot write specific mandatory requirements under standard 75.1403 and issue a citation for violation of such a requirement, but can write citations only for violations of standards specifically stated in subsections 75.1403-2 through 75.1403-11. In contrast, the Secretary asserts that both statutory construction and case law support the position that an MSHA inspector can write a

valid, mandatory requirement, and issue a citation for violation of such a requirement, pursuant to standard 75.1403 (petitioner's brief at 1).

I accept the Secretary's arguments. Section 75.1403 requires that an operator provide other safeguards which are adequate to minimize hazards relating to the transportation of men and materials. The standard explicitly defers to the judgment of an inspector, as an authorized representative of the Secretary, as to what other safeguards may be necessary. Section 75.1403-1(a) explains the regulatory scheme for the provision of safeguards. It states that 75.1403-2 through 75.1403-11 are the criteria which will guide an inspector on other statutory requirements, but also states that other safeguards may be required. I interpret such a statment as giving an operator notice that safeguards in addition to those specifically named in 75.1403-2 through 75.1403-11.

Section 75.1403-1(b) states that the inspector must advise an operator in writing "of a specific safeguard which is required pursuant to 75.1403." Such a requirement serves to give an operator notice that a specific safeguard will be required. Only after written notice to provide a safeguard has been given may an inspector issue a citation (or "notice") pursuant to section 104(a) of the Act.

The MSHA inspector complied with the requirements of standard 75.1403 when he issued citation No. 789577 on July 18, 1979. When he returned the next day and found that respondent continued to allow the violative condition, he issued citation No. 789961 pursuant to section 104(a) of the Act.

Prior decisions of the Commission have upheld such actions taken pursuant to standard 75.1403. In Consolidated Coal Company, 2 FMSHRC 2021 (July 1980)(ALJ), Judge Cook stated as follows:

> 30 C.F.R. 75.1403 accords substantial power to a Federal mine inspector in that it authorized him to write what are, in effect, mandatory safety standards on a mine-by-mine basis to minimize hazards with respect to transportation of men and materials in that mine. Failure to provide the safeguard within the time specified and the failure to maintain the safeguard thereafter renders the mine operator susceptible to the issuance of a withdrawal order and to the assessment of civil penalties. 30 C.F.R. 75.1403-1(b). In short, the operator must comply with the requirements of a de facto mandatory safety standard promulgated without the protections or the opportunity to submit comments afforded in the rule making process applicable to the promulgation of industry wide mandatory safety standards. 2 FMSHRC at 2035.

Furthermore, the Commission has upheld application of a safeguard notice issued under standard 75.1403-1 to an operator's mine by affirming an administrative law judge's determination that the safeguard notice had been violated and that a civil penalty might appropriately be assessed. Penn Allegh Coal Company, Inc., 4 FMSHRC 1218 (July 1982).

I therefore conclude, upon consideration of the undisputed evidence in this case, that respondent violated the safety requirement or notice issued by inspector Hanna pursuant to standard 75.1403. Accordingly, I affirm citation No. 789961.

PENALTY

Respondent stipulated that the Price River Coal Co. No. 5 Mine is a large operation and had 223 assessed violations in the 24 months preceding May 14, 1979. Payment of a penalty was also stipulated as not impairing respondent's ability to continue in business.

From the evidence I conclude that respondent was negligent in allowing the scoop-tram to be operated without having cover plates secured over the battery. Since respondent was provided with notice one day before the citation's issuance that battery cover plates were required to be secured, it should have known of the hazard and violation. On balance, I find the degree of negligence to be moderate.

Petitioner stipulated to respondent's good faith abatement of the violative condition. Respondent's good faith is further indicated by the fact that abatement was completed within twenty minutes of the citation's issuance.

Finally, I find the gravity of the violation to be moderate. Although the violation may have resulted in serious or fatal injury, the number of miners exposed to the hazard appears to be limited to the machine operator and any other miners in the immediate vicinity of the operation of scoop-tram.

After applying the criteria of section 110(i) of the Act to the facts of the case, I find the penalty proposed to be appropriate. I therefore assess a penalty of $305.00 for respondent's violation of a safety requirement issed pursuant to 30 C.F.R. 75.1403.

CONCLUSIONS OF LAW

Based upon the entire record of these consolidated cases, and consistent with the narrative portions in this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent violated 30 C.F.R. 75.400 as charged in citation No. 789581. The violation was "significant and substantial" and was the result of an "unwarrantable failure" to comply with the cited standard. The appropriate civil penalty for the violation is $1,000.00.

(3) Respondent violated 30 C.F.R. 75.200 as charged in withdrawal order No. 789596. The violation was "significant and substantial" and was the result of an "unwarrantable failure" to comply with the cited standard. The appropriate civil penalty for the violation is $1,500.00

(4) Respondent violated a safety notice or requirement issued pursuant to 30 C.F.R. 75.1403 as charged in citation No. 789961. The appropriate civil penalty for the violation is $305.00.

ORDER

1. In Docket No. WEST 80-83, Citation No. 789581 and order/citation No. 789596 are affirmed and civil penalties of $1,000 and $1,500 respectively are assessed against the respondent.

2. In Docket No. WEST 80-135, Citation No. 789961 is affirmed and a civil penalty of $305 is assessed against the respondent.

Respondent is therefore ORDERED to pay civil penalties in the total sum of $2,805.00 within forty (40) days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 104(d)(1) of the Act provides in pertinent part as follows:

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

2 Section 105(d) of the Act provides in pertinent part as

follows:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 ... 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.

3 Section 104(a) of the Act provides in pertinent part as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.