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SOL (MSHA) V. BETHLEHEM MINES
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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 Docket No. WEVA 83-93 A.C. No. 46-03887-03505
v.	
BETHLEHEM MINES CORPORATION, RESPONDENT	Mine No. 108

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Thomas W. Ehrke, Esq., Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing on the operator's notice of contest of a 104(d)(1) citation and a 104(a) S & S citation issued in connection with a fatal roof fall accident. During the recess between the first and second day of the hearing, the parties negotiated a settlement which, after adducing further evidence, they asked the trial judge to approve.

Because the record disclosed some unusual and troubling aspects of the operator's compliance procedures and MSHA's enforcement procedures, I deem it advisable to set forth the following findings and conclusions as a preamble to confirmation of my bench decision.

Anatomy Of An Institutional Failure

On the afternoon shift of Monday, August 2, 1982, a massive roof fall occurred in the No. 3 entry, 1 Left Section of Mine No. 108. The fall resulted in the death of Louis N. Hodges

who, at the time, was performing the duties of a continuous-miner operator helper (FOOTNOTE 1) and the temporary entrapment of William D. Singleton, continuous-miner operator. Mr. Singleton was protected by his canopy and extracted himself from the fall without injury. (FOOTNOTE 2) Mr. Singleton had 12 years mining experience of which 7 were as a continuous-miner operator. The section foreman was Thomas J. Binns. Mr. Binns had 11 years mining experience of which 7 1/2 years were as a foreman.

The accident occurred while the operator was engaged in a full pillar recovery operation. (FOOTNOTE 3) More specifically, while Singleton was making his initial or "A" cut of 18þ x 10þ in the No. 3 Pillar from the No. 3 Entry he noticed a slip crack running diagonally across the roof from the left rib. He ignored or did not appreciate the significance of the condition and when he finished the "A" cut, backed the miner into the entry to position it to make the "B" run and square up the split.

Both Binns and Singleton as well as their superiors were aware of the fact that to make the "B" cut a full 10 feet in width would require the removal of coal from the No. 3 Pillar on a line immediately adjacent to or under a clay vein six inches in width that ran at a right angle across the roof of the No. 3 entry and into the pillar. The clay vein was plainly visible to anyone who looked and had been supported with 2 by 8 headers and bolts since the entry was originally developed in 1975. (See attached sketch.)

Singleton knew of should have known that it was highly likely that the crack running from the left rib might intersect the clay vein if he made a full cut on the "B" run. Further, Binns and Singleton both knew that when a clay vein was encountered the "B" cut should be shortened so that sufficient coal would be left to support the roof until permanent additional support could be supplied. Despite this Binns did not tell Singleton to shorten the "B" cut and made no preparations to provide additional roof support.

While Binns and Singleton denied knowledge of the existence of the clay vein,(FOOTNOTE 4) Singleton admitted he knew of the crack and counsel for the operator judicially admitted that "the clay vein just inby the head of the continuous mining machine (as shown in the sketch) was visible to the crew well in advance of the fall." I find that because cracks and clay veins are very common in the Redstone Coal Seam and Mine No. 108, neither Binns nor Singleton considered the crack or the clay vein's presence unusual.(FOOTNOTE 5) Both men visually observed the roof conditions in the No. 3 Entry and Binns may have drummed it once or twice. Neither man drummed the entry or the split in the area of the crack in the "A" cut before the "B" cut was begun. Both miners knew, of course, that cracks and clay veins are signs of an abnormal or dangerous roof condition and that when encountered they should be carefully evaluated and supported before proceeding to mine coal.

After Singleton loaded two shuttle cars of coal from the "B" run a large piece of draw slate (18" x 6" x 4") fell from the roof near the rib through which the clay vein ran. It hit the continuous miner and startled Singleton and the other miners in the area. Singleton stopped the miner and

got out of the cab to observe the roof. He saw some flaking and dribbling of the roof near the clay vein but quickly decided the roof was not working and without advising Binns of the incident started cutting coal again.

After taking one or two more shuttle cars of coal, Norman Woods the roof bolter who was standing with Hodges inby the miner near the right rib of the pillar split watching the clay vein observed the roof commence to work violently. He shouted a warning and ran down the right rib behind the miner and looked at the roof on the left rib. It was creaking, groaning and starting a heavy dribble of rock, slate and clay. He yelled to Hodges and Singleton that the roof was coming down and to get out. Singleton, following his standing instructions, put the miner in reverse and started to back out. Hodges started to run, but stopped to lift the trailing cable from where it had jammed at the corner of the split and was cut down and crushed by a massive fall of rock before he could get to the crosscut.

Lanny Rauer, the mine superintendent, testified he believed both Singleton and Binns acted in accordance with the operator's standing instructions and good mining practice. He said Singleton's instructions were to cut down loose roof, wherever encountered, and therefore he could not fault Singleton for proceeding with the "B" run even in the presence of clear evidence of an abnormal roof condition. He also believed Binns adequately checked the roof in the entry before the shift began and while the pillar recovery was in progress. He admitted, however, that his standing instructions on how to handle loose roof in the presence of clay veins might have contributed to the roof fall.

Mr. Crumrine, a roof control expert for MSHA, said Singleton should have backed the miner out of the "B" cut as soon as he saw the rock fall from the area of the clay vein. At that point, Binns should have been advised and should have taken action to provide additional roof support as required by safe mining practice, the mandatory standards and the roof control plan. He was, however, sympathetic to Mr. Rauer's claim that Mr. Binns should not be stigmatized with an unwarrantable failure violation and agreed, as conference officer, to change the (d)(1) citation to an (a) citation.

As a result of its investigation, the West Virginia Department of Mines found that all persons should have been withdrawn from the area when the roof was first observed to

be working, i.e., when the draw slate fell and hit the continuous miner.

The UMWA Safety Committee issued a statement saying that "after hearing the testimony of the people involved, we feel that [the roof fall fatality of August 2, 1982] was an unavoidable accident and that Management, the Section Foreman or any one else involved was in no way responsible."

The Manager of the Bethlehem Mines Division as well as MSHA's accident investigation found the immediate cause of the roof fall was the undermining of the intersection of the crack running diagonally across the split from the left rib with the clay vein running down the right rib of the split. Neither investigation expressed any doubt about the presence and visibility of the clay vein or the crack. The clay vein was six inches in width and the crack at least 1/64th of an inch. The area was well illuminated and Singleton saw the crack while making the "A" run.

It was not until Singleton undercut the intersection of the crack and the clay vein that the former's significance became apparent to him and by then it was too late. Singleton's failure to appreciate the significance of the crack can only be attributed to a lack of adequate training in the evaluation of abnormal roof conditions. Singleton's and Binn's failure to appreciate the significance of the clay vein was inexcusable. Binn's failure to supervise the operation and to instruct Singleton to shorten his cut in the presence of the clay vein was responsible for the creation of an imminent danger. Rauer's instructions to cut down loose roof, wherever encountered was contrary to safe mining practice. Further, for Rauer to permit partial pillaring on the left side of the section was, as the Division Manager found, a factor that contributed to override pressure on the roof.

Responsibility for the roof fall must be attributed to the entire chain of command--from the mine superintendent to the continuous miner operator. What occurred was not an act of God nor an unavoidable accident. Both Mr. Singleton's and Mr. Binns's evaluation of the situation was deplorable. And if Mr. Rauer is to be believed, their training and instructions were fatally deficient. Mr. Rauer's sharp disagreement with his own Division Manager over the contributing causes of the fall indicates a disarray on the part of top management that is hardly reassuring. Based on the evidence considered as a whole, I would have to agree that as MSHA found:

> The accident occurred due to the failure of management and the workmen to properly evaluate

the roof where a clay vein and roof crack existed and was intersected.

The Rounded Corner Violation

As a result of the accident investigation a 104(a) S & S citation was issued for creating an excessive width (23þ) in the mouth of the pillar split. The evidence clearly supported MSHA's determination that under accepted practice as well as the drawings attached to the roof control plan the operator was allowed to round or notch the corner of a pillar split and thereby widen the mouth to more than 20þ and narrow the outby fender to less than the 12.5 feet for a distance of 12 to 18 inches in order to get the continuous miner positioned to make the "A" run. The technical violation involved did not contribute to the roof fall. Accordingly, the motion to vacate this citation was approved as part of the overall settlement of this matter.

The District Conference

Shortly after the investigative report issued, this matter came on for a conference at the District Office in Morgantown, West Virginia. 30 C.F.R. 100.6. (FOOTNOTE 6) The District Manager designated Robert L. Crumrine, an experienced CMI and roof control expert, to act as the Conference Officer. Present at the conference was Larry Rauer, the mine superintendent, and later John Dower the inspector responsible for the citations and investigative report.

Mr. Dower was about 45 minutes late for the conference and by then Mr. Crumrine had made up his mind about the matter.(FOOTNOTE 7) This was not unusual as in 9 out of 10 cases the issuing inspector is not permitted to attend the conference.(FOOTNOTE 8)

While Mr. Rauer had a copy of the fatal roof fall accident report approved and signed by the District Manager, Mr. Keaton, and reviewed, approved and issued by headquarters of MSHA in Arlington, Virginia two weeks earlier, neither Mr. Crumrine nor Mr. Dower had a copy of the report at the time of the conference. Mr. Crumrine said he did not need to read the report to decide the matter. He made his decision on the basis of his discussion with Mr. Rauer and after reading a statement by Mr. Binns. Mr. Binns statement claimed he sounded the roof in the No. 3 entry in the area where the "B" cut was to be started while Mr. Singleton was positioning the continuous miner for the "B" run. He did not deny that he left the area after sounding the roof instead of staying to supervise and control the dimensions of the "B" cut.

Mr. Crumrine said he was satisfied there was a violation of 75.205 but felt the charge of an unwarrantable failure to sound the roof was unfair to Mr. Binns.(FOOTNOTE 9) Mr. Crumrine believed Binns had adequately sounded the roof in the No. 3 entry before the "B" run was started. Since he left the area immediately thereafter and was not present when Singleton encountered the loose roof, Crumrine did not think he could be held accountable for Singleton's failure to properly evaluate the situation.

With respect to Mr. Singleton's actions, Mr. Crumrine said it is against MSHA policy to hold an operator responsible for unwarrantable failure violations attributable to contract miners.(FOOTNOTE 10) Thus when he concluded that Mr. Binns, the section foreman, had sounded the roof adequately and was not responsible for the failure to provide additional roof

support in the face of an obviously abnormal roof condition he advised Mr. Rauer and Mr. Dower that the (d)(1) citation would be converted to a 104(a) S & S citation.

Mr. Rauer was satisfied with this disposition as it removed the stigma of the unwarrantable failure finding both as to Mr. Binns and the operator. Mr. Dower on the other hand felt that he had not had a fair opportunity to be heard especially in view of Mr. Crumrine's haste to convene and conclude the matter without considering the report and findings, so recently approved by the District Manager and MSHA, with respect to management's responsibility for the fatality. He protested Mr. Crumrine's decision to his supervisory inspector Mr. Vasicek. Mr. Vasicek, after consultation with Mr. Lawless, assistant to the District Manager, told Mr. Dower that Mr. Crumrine's ruling would not be adopted by the District Manager and that the citations were affirmed as issued. This was confirmed by letter of October 14, 1982 from the District Manager to Mr. Rauer.

To placate the operator, Mr. Vasicek told the assessment office on December 14, 1982 that "The negligence of both the foreman and the machine operator (Binns and Singleton) contributed to the accident. The machine operator should have backed out all the way and stayed out when he saw the roof was "working.' The penalty should be fairly low." (Emphasis supplied.)

Why the supervisory inspector undertook to suggest the assessment office ignore the inspector's evaluation of the operator's negligence is puzzling. Especially since the inspector who wrote the citations and the investigative report was, until the hearing, never told that his supervisor, whom he was led to believe supported his evaluation, had sought to persuade the assessment office to let the operator off with a "fairly low" penalty.(FOOTNOTE 11)

Following the suggestion from the District Office, MSHA's assessment office in Arlington, Virginia wrote a special assessment that found that while the violation resulted from management's negligence and was serious the amount of the penalty warranted was only $2,000. Prior to the era of nonadversarial enforcement such a violation would have been specially assessed at $5,000 to $10,000. Compare, Southern Ohio Coal Company, 4 FMSHRC 1459 (1982).

Bethlehem, not satisfied with this "fairly low" assessment, filed a notice of contest. In due course, the solicitor filed the Secretary's proposal for penalty with the Commission. After assignment, the trial judge issued a pretrial order. In response, the operator raised as a defense, Mr. Crumrine's ruling at the conference of October 6, 1982.

On or about May 19, 1983, the solicitor called the trial judge to seek a postponement for compliance with Part B of the outstanding pretrial order on the ground the District Manager had decided to settle the matter by reinstating Mr. Crumrine's ruling of October 6, 1982 and accepting a penalty of $500. To expedite the matter, the District Manager directed the inspector, Mr. Dower, to issue the modifications necessary to effect a reduction of the charge in the (d)(1) citation and to vacate the 104(a) citation. Mr. Dower followed orders but the modifications were rescinded when the trial judge refused to approve the settlement.

Thereafter the matter came on for trial of the operator's defense, inter alia, that Mr. Crumrine's ruling of October 6, 1982, as confirmed by the District Manager on May 19, 1983, was res judicata and therefore the Commission had no authority to adjudicate the matter de novo. This defense dissolved in the light of disclosures that, to say the least, reflected poorly on the independence, objectivity and neutrality of the district conference procedure.

As pictured in this record, the district conference procedure has a potential for seriously undermining the deterrent effect of the civil penalty provisions of the Mine Safety Law. (FOOTNOTE 12) In this case, the conference officer on the basis of an informal discussion with a representative of the operator chose to dismiss the unwarrantable failure charges on the roof fall violation because he did not want to stigmatize a member of supervisory management. This myopic view of what actually occurred was then used to justify a reduction in the amount of the civil penalty warranted for the institutional failure responsible for the fatality. Without even reading the official MSHA fatal accident report, Mr. Crumrine, based solely on what the operator's mine superintendent told him, concluded that because Mr. Binns was not alone guilty of an unwarrantable failure violation and Mr. Singleton was not, under MSHA policy, chargeable with such a violation Bethlehem, as operator, was responsible only for a strict liability, no fault violation to which no culpability would attach. The District Manager sub silencio, followed through on this evaluation by indicating to the assessment office that the negligence of Binns, Singleton and the operator be considered

"low" and the penalty "fairly low." As we have seen, the District Manager thought "fairly low" meant $500. Under the circumstances, I believe it would have been shockingly low.

The solicitor was compelled to seek approval of the settlement only because Congress, in its wisdom, changed the law in 1977 to require approval of penalty settlements by the Commission's judges. The legislative history of section 110(k) of the Act shows that Congress felt the public interest in vigorous enforcement is best served when the process by which penalties are assessed is carried out in public, "where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process." S.Rpt. 95-181, 95th Cong. 1st Sess. 44-45 (1977). As the Senate Report continued, "the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." Id.

The conference procedure permits MSHA to circumvent the statutory protection against the abuses found by Congress. Recent studies show that the average penalty assessed has dropped from $177 to $80, a reduction of some 45%, since the conference procedure was inaugurated. The disturbing conclusion is that the philosophy of deregulation made manifest in the conference procedure has led to a marked reduction in the deterrent effect of the civil penalty and thereby encouraged operators to flout the law.(FOOTNOTE 13)

The civil penalty assessment was designed to encourage management at all levels to respond positively to health and safety concerns. The legislative history of the Mine Safety Law shows Congress intended to place responsibility for compliance with the Act on those who control or supervise the operation of mines as well as on those who operate them on a day-to-day basis. S.Rep. 91-411, 91st Cong. 1st Sess. 39 (1969); S.Rep. No. 95-181, 95th Cong. 1st Sess. 40 (1977). Upper level management decisions such as those

affecting capital expenditures, the basic nature and scope of corporate safety and health programs, the hiring of top mine management officials, and other policy matters have a profound effect upon safety and health conditions at individual mines. Civil penalties should therefore be structured to influence all levels of decisionmaking. An average penalty of $80 for serious violations provides no incentive to voluntary compliance, and does violence to the principle of proportionality. Further, the single or de minimis penalty assessment of $20 is a positive disincentive to management's commitment to safety and a triumph of expediency over effective enforcement.

As a recent report by the National Academy of Sciences found, top managements' commitment is of primary importance in achieving compliance with safe mining practices and must be constantly reinforced by strict and effective enforcement at the federal level. The movement toward compromise and dilution of the federal enforcement effort reflected in this record indicates the forces of change may have shifted too far in the direction of deregulation. (FOOTNOTE 14)

The Problem With the Mandatory Standard

The (d)(l) Citation charged a violation of section 302(f) of the Act, 30 C.F.R. 75.205, Roof testing. The standard provides:

> Where miners are exposed to danger from falls of roof face and ribs the operator shall examine and test the roof, face and ribs before any work or machine is started, and as frequently thereafter as necessary to insure safety. When dangerous conditions are found they shall be corrected immediately.

By contrast, the approved roof control plan provides:

> Where miners are exposed to danger of falls of roof, face and ribs the workmen shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as necessary to insure safety. The roof shall be examined visually and by the sound and vibration method. Except the sound and vibration method shall not be conducted where adverse roof conditions (slips, clay veins, etc.) are detected during visual examinations. When dangerous conditions are found, they shall be corrected immediately. (Emphasis supplied.)

Inspector Dower testified that his understanding of the mandatory standard and the roof control plan was that the continuous miner operator, Singleton, who denied knowing of the existence of the clay vein in the right rib of the "B" cut, was required to examine the roof visually and by the sound and vibration method when he observed the large rock (18" by 6" by 4") fall on his machine during his first cut of the "B" run and that his failure to do so was unwarrantable. Mr. Dower felt the standard made no exception for the "adverse roof conditions" referred to in the roof control plan but recognized that it might be unsafe to use the sound and vibration method to "test" a roof as loose and dangerous as that encountered in the "B" cut.

Mr. Crumrine, MSHA's roof control expert, said that when visual observation such as the falling rock and/or the flaking and dribbling from the clay vein signalled the presence of a loose roof condition the safe and prudent course of action was to withdraw the machine to a position under supported roof and then set such roof support as would be necessary to insure the hazardous condition was abated. He cautioned against drumming or sounding the roof until some temporary support was provided as this might in itself trigger a roof fall.

He did not subscribe to Mr. Rauer's instruction which was to cut down loose roof wherever encountered at the face with the continuous mining machine. Mr. Crumrine said the reason the roof control plan differs from the mandatory standard is because the standard, literally applied, is hazardous to the safety of the miners. MSHA, he explained, was aware of the ambiguity but, he said, repeated efforts to have the standard modified or amended were to no avail. The language added to the safety precaution in the roof control plan was intended to ameliorate, if not resolve, the conflict. It is intended that the language of the precaution take precedence over the standard and to say, in effect, that notwithstanding the provisions of the mandatory standard a roof should not be "tested" by the sound and vibration method in the presence of a dangerous, hazardous or adverse condition such as a slip or clay vein.

A further difficulty that should be clarified is the fact that the Inspection Manual states that "The word "Operator' in this provision [75.205] means the operator as defined in Section 3(d) of the Act. However, roof tests can be made by persons designated by the operator." Inspection Manual II-219 (1978). If this means what I think it means, Singleton may not have been the individual designated by the operator to make a sound and vibration test of the roof. At least no evidence was offered by MSHA to show that he was. The evidence shows only that Binns the section foreman made the tests. And certainly if Singleton and the other facemen were not qualified to make a sound and vibration test there is reason to question their competency to correctly evaluate a hazardous roof condition on the basis of visual observation alone--a much more difficult task.

The roof control plan, on the other hand, authorizes "workmen" to "examine and test" the roof which may mean that Singleton, as a faceman, was presumably qualified to test the roof. Thus we have another inconsistency between the standard and the roof control plan which makes for difficulty in assigning individual responsibility for the alleged unwarrantable failure to evaluate properly the roof condition.

On September 2, 1983, MSHA issued a preproposal draft of revisions to the roof control standards. 48 F.R. 40165. The standard on roof testing has been redesignated as 75.210 and in pertinent part provides:

75.210 Roof Testing and Scalin

(a) A visual examination of the roof, face and ribs shall be made in all underground areas immediately before any work or machine is started and thereafter as conditions warrant. If the visual examination does not disclose a hazardous condition in areas that are not permanently supported, sound and vibration roof tests shall be made. The sound and vibration test shall:

(1) Be conducted after the ATRS system is pressured against the roof inby the area to be tested; or

(2) Begun under permanently supported roof and progress no more than 5 feet into the unsupported area. This test shall be made only for the purpose of preparing to manually install roof support when an ATRS system is not required by | 75.207.

(b) When a hazardous condition is detected, the condition shall be corrected immediately or a danger sign posted at a conspicuous location prior to leaving the area.

(c) Overhangs and loose roof, faces and ribs shall be taken down or supported.

(1) A bar for taking down loose material shall be provided on all face equipment, except haulage equipment.

(2) Each bar used to take down loose material shall be of a length and design that will enable a person to perform work from a location that will not expose the persons to injury from falling material.

(3) Loose material shall be taken down from an area supported by permanent roof supports or an ATRS system. If an ATRS system is not required by | 75.207 and the loose material cannot be taken down from a permanently supported area, at least two temporary supports on not more than 5 foot centers shall be set between any person and the material being taken down.

Adoption of this revision would do much to clarify and resolve the confusion that attends the present roof testing provision. Some provision should be made, however, for assigning responsibility to either the section foreman or his designee for making roof tests. Designations of contract or day rate miners should be in writing and furnished to MSHA to be kept as part of the operator's records.

A review of the proposed revision confirms that Mr. Rauer's instructions for cutting down loose roof with the mining machine does not accord with commonly accepted safety standards. (FOOTNOTE 15) It confirms Mr. Crumrine's view that the existing standards do not contemplate using the sound and vibration test under unsupported roof for more than 5 feet into the unsupported area. It also establishes that once the rock fell Singleton should have withdrawn his machine, set temporary supports, tested the roof, "discovered" the clay vein, traced the slip crack, consulted with Binns and, if necessary Rauer, and then on the basis of a considered judgment decided whether to go for the coal or abandon the pillar as too risky. Instead Singleton on the basis of faulty training and instructions made a snap judgment to go for production and subordinate safety that cost Hodges his life and put several other lives at risk. And in the long run, as Rauer testified, the operator had to abandon the coal in the entire pillar line. Once again the teaching is that a safe operation is the most productive operation.

Since enactment of the Coal Act in 1969 over 1200 miners have died in the nation's underground mines--42% of them as the result of roof or rib falls. MSHA's studies show that fatalities due to roof and rib falls are attributable to two main reasons: (1) failure to follow safe procedures, and (2) hazardous conditions that went undetected until too late. Both of these reasons were present in the case of Mr. Hodges' death.

Summing Up

Summing up I conclude there was more than enough blame to go around. The contract miners had the last clear chance to prevent the roof fall; instead they triggered it. The

section foreman failed in his responsibility to supervise and oversee an operation which he knew or should have known was hazardous. The mine superintendent failed to provide the training, instruction and leadership that would have instilled in his subordinates an attitude toward safe mining practices and procedures that would have prevented the accident. Lastly the division manager took no steps to discipline the mine superintendent for his failure to supervise his subordinates properly or to provide the training and instructions that would insure a safe operation.

The real problem at the #108 mine, of course, was attitudinal. At every level the supervisors and workers had been indoctrinated with the need to subordinate safety to production. How else explain such a take-a-chance policy as that embodied in the superintendent's instructions to cut down loose roof in the presence of clay veins and slip cracks. Mr. Crumrine's sympathy for Mr. Binns notwithstanding, it is beyond doubt there was an institutional failure here that demands immediate correction.

The collective failure of management and the contract miners warranted the imposition of a penalty that underscores the gravity of the institutional failure--a failure that resulted from faulty engineering, poor training and lax enforcement. Such a disposition is fairer than singling out Mr. Binns. While it is natural to seek a scapegoat for disaster, the institutional responsibility in this case transcends the individual responsibility of Mr. Binns.

For these reasons, I approved a settlement that involved the payment of a $5,000 penalty and vacation of the unwarrantable failure charge as to Mr. Binns.

Accordingly, it is ORDERED that the bench decision approving settlement of this matter be, and hereby is, CONFIRMED and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 Mr. Hodges was a 23 year-old miner with five years underground experience. This was the second roof fall fatality at the #108 Mine in 1982.

~FOOTNOTE_TWO

2 Where continuous-miner operators are protected by canopies, their instructions are to stay in their cabs and to try to tram their machines out from under imminent roof falls. While this may be good for production, it is hard on helpers if the CMO does, as was shown in this case, and cuts down loose roof that triggers a massive roof fall. In the last nine years 435 miners

have been killed on the job as a result of roof falls. Thus, on the average 4 miners a month die as the result of roof falls.

~FOOTNOTE_THREE
3 Pillar removal is inherently dangerous--perhaps one of the most hazardous operations conducted in the underground mining environment. To accomplish it safely requires special training and rigid adherence to the safety precautions set forth in the mandatory standards, including the operator's roof control and pillar recovery plans.

~FOOTNOTE_FOUR
4 I find Binns position on this incredible. He should have seen the clay vein during his onshift roof check of the entry on August 2 and during his preshift examination of the area on Friday, July 30, 1982, just two days before the accident occurred. Why Binns chose to absent himself from the face during the time Singleton was making the "B" cut was never explained.

~FOOTNOTE_FIVE
5 Nevertheless every properly trained miner knows that "a clay vein area is very hazardous and must be treated with extreme caution." Guide to Geologic Features Affecting Coal Mine Roof, MSHA Information Report 1101 (1979).

~FOOTNOTE_SIX
6 The conference procedure is a method of informal adjudication not specifically provided for under the Act. Under this procedure, District Managers are encouraged to eschew the role of vigorous enforcers and become "cooperative regulators."

~FOOTNOTE_SEVEN
7 Mr. Dower said he was late because he was not alerted to the fact that his presence was requested until shortly before the conference convened on the morning of October 6, 1982. He said he was delayed by his unsuccessful efforts to obtain copies of the citations and his notes which were locked up in his supervisor's office.

~FOOTNOTE_EIGHT
8 While the governing instructions provide that "MSHA inspectors will participate in the review of the citations and orders," this is subject to the discretion of the District Manager. 47 F.R. 22293 (1982).

~FOOTNOTE_NINE
9 The graveman of the case presented by the solicitor turned on the failure of Binns and Singleton to provide additional roof support in the presence of the dangerous condition revealed by the initial working of the roof near the clay vein with knowledge, by Singleton, of the crack observed while making the "A" run.

~FOOTNOTE_TEN
10 This policy fails to take into account situations where the contract miner's actions are properly imputable to the operator because of faulty training or instructions. Whether

miners acting as adjudicators under the informal procedures that prevail at district conferences can be expected to apply the nuances of the law of vicarious liability seems doubtful.

~FOOTNOTE_ELEVEN
11 If this account accurately reflects MSHA's policy of conferencing in action, it is small wonder there are widespread reports of how the new enforcement philosophy has demoralized rank-and-file inspectors. Such behind-the-scenes manipulation of MSHA's ostensible role as chief enforcer of the Mine Safety Law can lead to the perception that cooperation is being used as a cloak for capitulation. A recent report by the International Health and Safety Committee of the UMWA expressed concern over "the frequency with which MSHA supervisors cave in to operator pressure and downgrade citations that have been issued by the inspectors in the field." The same report also noted that:

> Unfortunately, these days, it seems that the MSHA inspectors who are not afraid to enforce the Act wind up having to defend themselves, not only against the operators but also against their own supervisors. Committee members related conversations with MSHA inspectors that confirmed the view that the weakened enforcement approach we have seen in the field results from the message that has been sent down from the top agency heads. Vigorous enforcement of mandatory health and safety standards has been viewed as "nit picking" and the message to the inspector in the field has been clear: back off, and if you cite a condition at all, cite it as a non s & s (nonserious) violation.

~FOOTNOTE_TWELVE
12 While a new administration has the right to try a new philosophy of enforcement implicitly endorsed by the democratic process, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are also products of democratic decisionmaking. Unless this administration can convince Congress to change those provisions of the Mine Safety Law it finds objectionable, it is its duty to enforce the statutory mandate in a manner consistent with the original Congressional intent. A new administration may not refuse to enforce a law of which it does not approve. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., --- U.S. ---- 77 L.Ed2d 443 n. June 24, 1983) (Rhenquist, J. in concurring). Prosecutorial discretion does not extend to nullifying or recreating law without changing it through the legislative process. There are statutory and constitutional limits on the discretion of policy makers to disavow the will of Congress.

~FOOTNOTE_THIRTEEN
13 Since May 1982, approximately 75% of all violations charged have been assessed at $20. A recent study shows that the policy of cooperative enforcement has resulted in a sharp upturn in fatality rates in underground and surface bituminous coal mines. Weeks and Fox, Fatality Rates and Regulatory Policy in Bituminous Coal Mining, United States, 1959-1981, 73 AJPH 1278 (1983).

~FOOTNOTE_FOURTEEN

14 Thought should be given to returning enforcement to its traditional role. Experience under the Coal Act demonstrated that confusion of the policing or enforcement function with the consultative and adjudicatory functions is bad policy and detrimental to both effective enforcement and fair adjudication.

I thought that in 1977 Congress made a conscious decision to structure the regulatory scheme so as to preclude trade-offs to vigorous safety enforcement. The legislative history of the Mine Act shows the enforcement function was transferred from the Department of the Interior because of its conflict with that Department's responsibility for maximizing production of the nation's coal resources. It was felt that "no conflict could exist if the responsibility for enforcing and administering the mine safety and health laws was assigned to the Department of Labor since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions." Sen.Rep. 95-181, supra, 5. A safe mining operation is not a function of the art of the cost accountant. It requires a strong, almost a "religious," commitment by management, labor, and the regulatory agency. BNA Interview With David A. Zegeer, Assistant Labor Secretary for Mine Safety and Health, December 9, 1983, published in Current Report, Mine Safety & Health Reporter, December 26, 1983, at 605.

~FOOTNOTE_FIFTEEN

15 See also, Bureau of Mines Instruction Guide 17, Roof and Rib Control; Programmed Instruction Book, Roof and Rib Control, National Mine Health and Safety Academy.

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ATTACHMENT
TABLE