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MONTEREY COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MONTEREY COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. LAKE 83-68-R Citation No. 2200849; 4/28/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Monterey No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 83-52 A.C. No. 11-00726-03522
v.	Docket No. LAKE 83-61
MONTEREY COAL COMPANY, RESPONDENT	A.C. No. 11-00726-03524 Docket No. LAKE 83-67 A.C. No. 11-00726-03527 Docket No. LAKE 83-78 A.C. No. 11-00726-03529 Docket No. LAKE 83-87 A.C. No. 11-00726-03532 Docket No. LAKE 83-94 A.C. No. 11-00726-03533 Docket No. LAKE 84-17 A.C. No. 11-00726-03539 Monterey No. 1 Mine

DECISIONS

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Carla K. Ryhal, Esq., Monterey Coal Company, Houston, Texas, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

All of these cases were heard in St. Louis, Missouri, on October 25, 1983. Dockets LAKE 83-68-R and LAKE 83-87, were consolidated for hearing and decision, and the remaining civil penalty cases were heard after the conclusion of that hearing. The cases concern civil penalty proposals filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for certain alleged violations of mandatory standards promulgated pursuant to the Act. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of these decisions.

Issues

Consolidated Dockets LAKE 83-68-R and LAKE 83-87, concern a citation served on Monterey Coal Company for an alleged violation of mandatory safety standard 30 CFR 75.1403-5(g). Although the inspector found that that the violation was not "significant and substantial," and MSHA assessed it as a "single penalty assessment" of $20, Monterey Coal Company contested the violation on the ground that the cited standard applies only to belt conveyors used in the transportation of men and materials, and not to conveyors used to transport coal. Since Monterey contends that its underground belt conveyors are used only to transport coal, it believes that MSHA's reliance on this standard to support its citations is improper.

Dockets LAKE 83-94, LAKE 83-67, and LAKE 83-78, all involve citations issued for alleged violations of Section 75.1403-5(g), three of which were "non S & S" $20 single penalty assessments. One citation (Docket LAKE 83-78), Citation No. 2199892, is a "significant and substantial" violation which was assessed at $241.

Dockets LAKE 83-52 and LAKE 83-61, concern "significant and substantial" violations issued by the inspector for violations of mandatory safety standards 30 CFR 75.316, and Monterey Coal Company takes issue with the inspector's special findings.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator

was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.
Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.

2. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated that the respondent owns and operates Mine No. 1, that it is subject to the Act, and that the Commission has jurisdiction in these proceedings. In addition, the parties stipulated as to the issuance of the following safeguard notice which served as the basis for the citations alleging a violation of mandatory safety standard 30 CFR 75.1403-5(g):

> On September 4, 1975, Notice to Provide Safeguards No. 1 WHW was issued by an authorized representative of the Secretary to Monterey as operator of the Mine ("Notice"). The Notice provided that "Notice is hereby given that the undersigned authorized representative of the Secretary of the Interior upon making an inspection of this mine on September 4, 1975, directs you to provide the following specific safeguard(s)--24 inch clear travel ways along all belt conveyors each side--pursuant to Sec. 75.1403, Subpart C, of the Regulations promulgated under authority of Section 101 of the Federal Coal Mine Health and Safety Act of 1969 (P.L. 91-173).'
>
> Under the heading "Specific Recommended Safeguards" the Notice alleged that "A clear travel way at least 24 inches wide on each side of the main north belt-conveyor was not provided at the following locations. Between cross cuts Nos. 21 and 23 (coal and rock), between cross cuts Nos. 93 and 94 (Rib), and between cross cuts Nos. 108 and 109 (coal, Rock, and Rib).'
>
> A clear travel way at least 24 inches wide shall be provided on both sides of all belt conveyors installed after March 30, 1970.

> Where roof supports are installed within 24 inches of a belt conveyor, a clear travel way at least 24 inches wide shall be provided on the side of such support farthest from the conveyor.

The parties stipulated that MSHA Inspector Jesse B. Melvin issued the following citations pursuant to Section 104(a) of the Act:

Docket No. LAKE 83-78

On April 13, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2199892. The Citation cites a significant and substantial violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway of at least 24 inches wide was not provided along the 4th Main East belt conveyor on the South Side starting at 99 cross-cut and extending inby to cross-cut No. 125, I.D. 000-0. Belt was rubbing coal at 99, 100, 101, 102 and 112 cross-cuts, and belt rubbing frame for rope at 99 cross-cut and it was warm. A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated September 4, 1975."

Docket No. LAKE 83-67

On April 14, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2199897. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along the South Side of the 4th Main East belt conveyor entry starting at cross-cut No. 33 and extending inby to 10th North track switch. I.D. . . . A clear travelway of 24 inches along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated 9-4-75."

On April 19, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2199899. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along the 3rd Main East belt entry on the South side from the head rollor [sic] of No. 1 belt drive inby to the tail rollor [sic]. A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated 9-4-75."

Docket Nos. LAKE 83-68-R and LAKE 83-87

On April 28, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2200849. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along both sides of the Main North coal conveyor belt starting at the No. 1 belt drive unit and extending inby to head rollor [sic] of the 3rd East belt unit approximately 205 cross-cuts. A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguards No. 1 WHW, dated 9-4-75."

Docket No. LAKE 83-94

On June 21, 1983, Inspector Melvin conducted an inspection at the Mine and issued Citation No. 2202728. The citation cites a violation of 30 C.F.R. 75.1403-5(g) and, under the heading "Condition or Practice," alleges that "A clear travelway at least 24 inches wide was not provided along the East side of the Main North belt conveyor starting at 236 cross-cut inby to 4 East belt head rollor [sic] approximately 40 cross-cuts. The following material was along the east side of the belt. Large rock, coal, roof bolts and roof blocks, concrete block and roof bolt plates. I.D. 000-0 . . . . A clear travelway of 24 inches wide along both sides of the belt is required by a notice to provide Safeguard No. 1 WHW, dated 9-4-75."

Docket No. LAKE 83-52

On December 28, 1982, Inspector Melvin conducted an inspection at the mine and issued Citation No. 2036802, purportedly pursuant to Section 104(a) of the Act. The citation cites a significant and substantial violation of 30 C.F.R. 75.316 and, under the heading "Condition or Practice," alleges that "the dust control plan for this mine was not being followed in the No. 3 entry where the continuous mining machine was loading coal in 3 South off 1 East Unit I.D. 007 in that the exhaust tubing was 22 feet outby the face. The plan states that the exhaust tubing [is] to be maintained within 10 feet of the face as the face is advanced."

Docket No. LAKE 83-61

On February 3, 1983, Federal Coal Mine Inspector Harold Gully, a duly authorized representative of the Secretary, conducted an inspection at the Mine. During the inspection, the inspector issued Citation No. 2063916, purportedly pursuant

to Section 104(a) of the Act. The citation cites a significant and substantial violation of 30 C.F.R. 75.316 and, under the heading "Condition or Practice," alleges that "the section and face ventilation system was not followed in the 4 North off 3 Main East in that the quantity of air in the 18-inch tubing (390 feet from fan) in No. 3 entry to crosscut right, when coal was being cut with a continuous miner, was only 1900 CFM when measured with a magnehelic and Pitot tube. . . . The section and face ventilation system Page 4 states ". . . . in situations where an excess of 370 feet of tubing occurs and then the minimum quantity shall be 5000 CFM in the working faces where coal is being mined.' "

Discussion

The parties presented the following testimony in Dockets LAKE 83-68-R, LAKE 83-67, LAKE 83-78, LAKE 83-87, and LAKE 83-94:

MSHA's Testimony

MSHA Inspector Jesse B. Melvin testified as to his background and experience. He confirmed that safeguard notice 1 WHW was issued on September 4, 1975, by Inspector Willis Wrachford and Mr. Melvin explained the procedure for issuing such a safeguard and the application of the safeguard once it is issued (Tr. 8-10). He stated that the safeguard notice was issued pursuant to section 75.1403-5(g), which requires that clear travelways at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970 (Tr. 11).

Inspector Melvin stated that except for one citation issued in Docket LAKE 83-78, all of the other citations were "non-S & S," and that in those instances he made no negligence, gravity, or good faith findings on the face of the citations because those were his instructions by his district office (Tr. 17). He explained his "S & S" finding on the one citation as follows (Tr. 18):

> THE WITNESS: In the body of the citation, it will say that it was also an accumulations [sic] of coal and that the coal was up to the bottom of the belt. It will also tell you in there that the belt was rubbing the framework stands that developed, ropes and rollers it was attached to, and it was worn, which could set off the coal dust. The loose coal and coal dust in the citation extended into the 24-inch walkway is why it was all combined into one.

> In my opinion, when they cleaned the walkway up the 24 inches, they would also clean this up. That is why that S & S was S & S, that is why it was marked in negligence in the gravity.

In explaining Citation No. 2200849, April 28, 1983, and Citation No. 2199899, April 19, 1983, which simply state that clear travelways of at least 24 inches were not provided along both sides of certain conveyor belts, Inspector Melvin explained that portions of the walkways concerned him because roof falls had occurred which obstructed the travelways (Tr. 29-31). He conceded that if the walkways contained tripping hazards, had coal accumulations present, or presented hazards at unguarded belt roller or pinch point locations, he could have issued citations citing the specific mandatory standards which apply to those situations rather than relying on the safeguard notice (Tr. 32-36).

Mr. Melvin testified that the cited conveyor belts were in active workings and they were required to be examined. He also indicated that belt examiners are required to walk the belts, and that they usually travel the "best side" of the belts. However, if the travelways are obstructed by rock falls or coal accumulations, the belt examiners will not inspect those sides of the belt because they do not have ready access to the areas (Tr. 37-41).

Inspector Melvin confirmed that all of the cited belt conveyors are used only to transport coal and that none of them are designated as mantrips. He also confirmed that the hazards that the citations address concern people who happen to be walking along the travelways. He identified these individuals as three belt examiners who walk the belts daily, and two individuals who take care of the head rollers (Tr. 49-50).

On cross-examination, Inspector Melvin stated that mine personnel continuously shovel at the belt conveyor head or dumping point (Tr. 58). He confirmed that there is no requirement that belt examiners walk both sides of the belt (Tr. 59). With regard to the one "S & S" citation, Mr. Melvin explained his rationale as follows (Tr. 68-69):

> Q. My last questions had to do with significant and substantial. I am still not entirely clear. Was the coal accumulation actually extending on to the walkway?

A. The 24-inch walkway is included for where they start out is from the belt roller--from the ropes, the steel ropes that holds the belt conveyor out 24 inches. The accumulations of the coal was partially into the 24 inches from the belt. I wouldn't say it was all the way out to the rim or I wouldn't say it was away onto the other side. If I had of, I would have put it in my citation.

Q. Now, to the extent that it only extended from the ropes onto the walkway, that by itself, without the accumulation under the belt, would you have cited that significant and substantial?

A. If it had been just from the ropes into the walkway, no, ma'am, if it hadn't had the hot rollers there or the hot--

Q. So your primary concern was the danger of fire?

A. Yes, ma'am. If it had been into the walkway itself, it would have been non-S & S, it would have been just the possibility of a person going by there, stumbling, tripping, causing an injury to his body in some form.

Q. Earlier on, you mentioned figures from eight to thirty people who were exposed to the danger exhibited in this significant and substantial violation. Those thirty people that you mentioned are primarily people who would have been in danger because of a fire or explosion?

A. Yes, ma'am.

Q. It would not have been 30 people who would have been endangered by walking that walkway?

A. No, ma'am, it was possibly two people. It would only be about two people that would be down through that walkway. Like I said, it would be on each shift, two people on the first shift. If possible, the men that was working in that neighborhood, if they could have a person working along the belts to clean up, he would be on that side. The examiner, if he was on that side, it could possibly be him.

Q. But at the time of the citation, it was probably how many people?

A . At the time of the citation, there was three of us. There was me, the company personnel, and the union personnel that walked it, that was passing by.

Respondent's Testimony

Dick Mottershaw, respondent's safety coordinator, testified that in 1975 he was the safety supervisor at the No. 1 Mine. He explained the circumstances surrounding the issuance of the safeguard notice as follows (Tr. 71-73):

The notice was issued by Willis H. Wrachford to Ted Spicher who reported directly to me. It was served to Ted. We went into the mine at that time and looked at some of the conditions that Willis had described. Basically, the conditions were that a 42-inch conveyor belt was installed in an entry, in the middle of an entry that was 15 feet, six inches wide, which is the cutting head of our miner, installed in the middle, and some loose walls or ribs as we call them in mining had fell into the walkway on the right-hand side or the east side of the belt areas on our main north type belts.

Willis wanted the entire belt cleaned on both sides and wanted 24 inches or more clearance maintained continually on both sides. We had quite a heated discussion over it and did for several months afterward. We did abate the notice. We only cleaned up one side of the belt up to where there would be an accumulation of coal and we do clean that up. All of our belts are at least 15-feet, six-inch wide entry, some are 24's and our height is average about seven foot. This is basically what happened.

Q. So we did express our disagreement at the time the notice was sent in?

A. Yes, and we have expressed it since. This seems to be an exclusive of maybe two mines in Illinois or three. We have the same ideal mining whisk, many--basically the same ice and the same conveyor belts 50 miles down the road have never had that requirement, except from the Hillsboro office.

Q. O.K. Now, back to the day that the notice was issued. You say there is a 42-inch wide conveyor belt in a 16--15-foot, six-inch wide entryway. Was it in the middle, to one side? Was there any problem with actually having 24-inch clearance, 24-inch distance between the edge of the conveyor belt and let's say, the rib?

A. No, there would have been 24-inch clearance on both sides. It would be highly improbable, except we had a large pile of roof not to have 24 inches, 24-inch clearance. When you've got seven feet, it doesn't block up and when you've got approximately six feet on each side, it doesn't block up.

Now, you may have a rib that slushes down and there's tripping and stumbling going on there and where you could stumble going over some materials; we have had instances of falls on belts where the examiner in his examination could walk to this point, mark it out, do the bad roof timbers, large rocks that couldn't be moved, he'd walk to the next cross-cut which would be on 75-feet centers and look both ways on the belt there, go to the next one. But you can't require a certified examiner to go in a place that could present him a hazard. He is not required to do that and he does not.

Q. When the notice was issued, it was primarily directed at the fact that although there was a travelway on both sides of the belt that there was foreign material that was just blocking the travelway itself, it was not requiring us to actually cut a travelway?

A. No. The space, the height, the width is there. We have not maintained a stumblefree environment on the opposite of the walkway side of the belt. We will perform some work there if there is an accumulation of coal that we will clean up, but the normal rock falls have maybe a piece of heather board that's fell out, we don't clean that, because our examiners--the belt being 48 inches wide and 36 inches wide, surely you can see across that far across the belt.

Mr. Mottershaw did not dispute the fact that on the "dirty side" of the belt there is debris that would interfere with one easily walking that side (Tr. 74). He stated that he was thoroughly familiar with the mine belt system, and he indicated that there is no problem in examining the belt (Tr. 75).

In response to further questions, Mr. Mottershaw testified as follows (Tr. 76-79):

> JUDGE KOUTRAS: Am I to understand, then, that in your view the sole reason for MSHA issuing the safeguard notice back in '75 and Inspector Melvin's issuance of the citations in '83 is to attempt, through this process, to have both sides of the conveyor system, both travelways maintained in a stumble free environment so as to facilitate the inspection of both sides of the belt, do you feel that is the--
>
> THE WITNESS: I feel that is the only reason, because there's no legal reason that the examiners need to go up either side. There is no reason that they cannot see either side or examine either side. It seems to be the quirk of the field office, because in the subdistrict, I know in the other subdistricts, we have absolutely had the same system, the same conveyor belt, the same width entries and have never had a safeguard in any other area.
>
> JUDGE KOUTRAS: You mean in some of your other mines?
> THE WITNESS: Yes, which are within a 50- or 60-mile radius.
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> JUDGE KOUTRAS: Have you ever asked the district manager why is it in this mine they require this and in your other mines they don't and if so, with what response?
>
> THE WITNESS: I have not.
>
> JUDGE KOUTRAS: You haven't asked?
>
> THE WITNESS: No, sir, I have not.

JUDGE KOUTRAS: It seems to me you should have been asking long ago if you disagreed with it in '75 and here we are as of today trying to convince me, Judge, look are they treating us unfairly here because at the other mines they don't require it.

THE WITNESS: Could I answer that?

JUDGE KOUTRAS: Sure.

THE WITNESS: Long ago, when it was issued, I didn't have the authority to do that, to call a district manager. I did write a strong note in 1978 when we received a violation suggesting that it was illegal and sent it to the legal staff in Houston.

JUDGE KOUTRAS: Well, aside from the illegalities of it, maybe your reluctance to answer was out of fear of the response, yes, or no.

Well, clearly, though, assuming that this belt was a designated mantrip, carried men and materials, and you obviously wouldn't disagree with Inspector Melvin's position here, I mean with MSHA's position that both sides of those belts should be maintained stumble free, right?

THE WITNESS: If it was transporting men or materials, I would have no problem at all maintaining it. I think you'd be unloading from both sides of the belt, both men and materials, and I think it would have to be clean, the same as our track entry. We maintain clearance on that when we transport men and materials.

JUDGE KOUTRAS: I take it that you are in agreement, at least you subscribe to the proposition advanced by Monterey here as a defense that this safeguard notice, Section 75.1403 only applies to transportation of men and materials on belts and that since you transport only coal, that doesn't fall into either of those categories?

THE WITNESS: I've felt that way since '75. I think the intent of Congress was men and materials.

In response to further questions, Mr. Mottershaw stated that the term "materials" as he knows it in his mining experience relates to such items as roof bolts, tubing,

concrete blocks, tracks, roof supports, etc. He also indicated that these items are transported by cars on separate tracks and are loaded and unloaded manually by hand. In his view, the coal which is mined is the "product" and is not "material" within the meaning of the cited standard. The coal is loaded out of the mine on the belt conveyors in question and "it goes straight on top of the coal mine" (Tr. 90).

Dockets LAKE 83-61 and LAKE 83-52

In Docket No. LAKE 83-61, the respondent conceded that the conditions or practices as stated by MSHA Inspector Harold Gulley in the citation which he issued are accurate and that they do in fact constitute a violation of mandatory standard 30 CFR 75.316 (Tr. 3).

Mr. Gulley was not present at the hearing. Respondent's counsel stated that the citation was contested because the respondent did not believe that the violation was "significant and substantial" (S & S).

In Docket No. LAKE 83-52, the respondent conceded that the conditions and practices cited by the inspector were accurate, and that those conditions constituted a violation of the cited mandatory standard. Respondent contested the citation because it did not believe that the cited conditions presented a "significant and substantial" violation (Tr. 6-7).

MSHA Inspector Jesse B. Melvin confirmed that he issued citation no. 2036802 because he found that coal was being mined in the No. 3 entry and the ventilation exhaust tubing was found to be 22 feet from the face area where the coal was being loaded. The approved ventilation plan requires that the exhaust tubing will be no greater than 10 feet from the face at any time coal is loaded at the face.

Mr. Melvin stated that it is important to keep the exhaust tubing 10 feet from the face so as to ventilate the face and prevent an accumulation of dust, explosive gases and methane. He confirmed that he took a methane reading at the face and found from one to two-tenths of one percent of methane and that this "was not too high." He took his reading at the last line of roof supports where the continuous miner operator is located, approximately 20-22 feet outby the face. He could not test the methane at the face, and he estimated from the places which were cut that the ventilation tubing which he observed was at that location for approximately 25 to 30 minutes. He also indicated that he had previously cited the respondent for the same condition in other sections of the mine (Tr. 8-10).

Inspector Melvin stated that the mine is considered a gassy mine, that methane bleeders can be encountered any time, and that proper exhaust ventilation is required to dispel such gases. He confirmed that the mine is on a "Section 103 five-day spot inspection" cycle because of the amount of methane liberated (Tr. 11). He confirmed that the highest concentration of methane that he has detected in the mine was "about a half per cent of one" (Tr. 13).

Mr. Melvin indicated that in the event of a methane ignition, the resulting fire would travel in the direction of the machine operator who is seated on the right side of the machine. Mr. Melvin confirmed that the machine operator was loading coal at the time of the inspection. He also confirmed that the machine has a methane detector on it and that he found nothing wrong with it (Tr. 20).

Mr. Melvin stated that the presence of respirable dust can result in, or contribute to, black lung if allowed to continue, and if the ventilation plans are not followed (Tr. 22).

Mr. Melvin stated that the respondent was negligent because it was readily observable that the continuous miner was approximately 22 feet from the face, and that the ventilation tubing was at that same location and distance from the face (Tr. 23). When asked why he believed the violation was "significant and substantial," Mr. Melvin responded as follows (Tr. 23-25):

> THE WITNESS: I believe if the condition would continue to exist it would cause a serious injury to a person, cause them lost time from work, or could be restricted duties, or could be permanent disability.
>
> BY MR. CARMONA:
>
> Q. In what way?
>
> A. The significant and substantial is the condition continues to exist at this mine, or continued to exist around, it could be--well, it could be a buildup of just about anything you could have. If it continues to happen you could have a buildup of methane at the mine, you could have the buildup of respirable dust. The condition was to

continue, based on--if the condition exists and continues to exist, someone will sooner or later be injured from it.

Q. Did you take into consideration in your conclusion that it was significant because of the fact that you found the same condition before in the same mine, is it?

A. Yes, sir. I have found it.

Q. Was this a factor in your conclusion or not?

A. The factor in my conclusion is that any time a gassy mine, and they're not following the ventilation plan, there's a possibility of having an ignition or explosion at the face.

Q. Suppose you had found this condition only once, and you knew that this was the only time that it had been found by the Mine Safety Administration, would you have rated this as significant?

A. That would be hard to say. If it was the first time it ever happened at a mine, you'd have to weigh all the evidence. The first time, if it's the first time it ever happened at this mine, they had never had that before, you'd give them the citation--I'm not saying you wouldn't, but weighing it down to where you would give them an S and S on it, if it was the first time and I found methane there I'd give it to them. If it was the first time at the mine and it was so dusty in there you couldn't see the operator I would give it to them. You'd have to weigh it for the first time. He has violated these plans by not keeping his tubing up, but I really don't know if he had other things in there it would fall into it, but just having the tubing back from the face 22 feet and I didn't find no gas and no dust, and it's the first time and they weren't making a habit of it, I really don't know if I would or not. I really couldn't say.

On cross-examination, Mr. Melvin confirmed that while he detected no excessive amounts of methane at the time of his inspection, he did not know the amount which may have been

present at the face. He also conceded that he did not know whether any respirable dust which may have been present exceeded the allowable limits since he took no dust samples (Tr. 28-29). He believed that the ventilation tubing was exhausting some of the dust, but by being 22 feet from the face it was half as effective as it would be if it were located at the required 10 feet from the face (Tr. 31).

Mr. Melvin stated that when the continuous miner was cutting coal at the face the ventilation tubing was probably less than 10 feet from the face, but that when the operator pulled the machine back he did not extend the ventilation tubing from the time he was cutting until he pulled back to the 22 foot distance. In Mr. Melvin's opinion, the tubing was not within 10 feet of the face for any considerable length of time before he arrived on the scene (Tr. 32). He then stated that the area was out of compliance for approximately 15 to 20 minutes (Tr. 34). He reiterated his concern that in the event a methane bleeder is encountered while the mining machine is cutting coal, an ignition could occur without warning (Tr. 36).

In response to further questions, Mr. Melvin confirmed that he found nothing wrong with the continuous mining machine, and he issued no other violations (Tr. 38). He further explained his "S & S" finding as follows (Tr. 39-44):

> JUDGE KOUTRAS: Now when you find, for example, that one of the primary tools for maintaining the levels of dust and methane at or below the hazardous level as the exhaust tubing, then it goes without saying that in all of those similar situations you would find all of them S and S, wouldn't you? Any time you found a tubing that's 22 feet when it's supposed to be 10, you would more than likely find that Significant and Substantial, wouldn't you?
>
> THE WITNESS: No. If he cited the plan--I cited his plan for not following his plan there, and it was maybe at all times that you cite the plan maybe he's not 22 feet out there. Maybe it would be--
>
> JUDGE KOUTRAS (interrupting): No, what I'm saying is, could you give me a hypothetical when you--let's assume you found a ventilation tubing that was 22 feet, given the same circumstances as this case, give me an example as to how you would consider that to be Non-S and S.

THE WITNESS: You couldn't if it was out there 22 feet. You'd have to run S and S.

JUDGE KOUTRAS: So what I'm saying is, is the fact that you found this tubing 22 feet when it should have been 10, without further ado you found that to be significant and substantial, did you not?

THE WITNESS: Well, yes and no. You weigh the other conditions, but 22 feet out is that he's not following his plan, and it's not effective when it's that far out.

* * * *

JUDGE KOUTRAS: Now what I'm driving at is that the factors that you consider in determining whether or not a violation is S and S, is it a specific circumstance of the situation that you are faced with at that time?
THE WITNESS: At that time, yes, sir.
JUDGE KOUTRAS: Or is it the fact that it's in your mind, a serious violation of the ventilation plan for failure to have the tubing where it's supposed to be?
THE WITNESS: At that time it's not the seriousness of the tubing, it's the seriousness of the tubing being back there.

JUDGE KOUTRAS: Well, the problem here is, though, if there's no methane and there's no dust test, and we don't know what the level of dust is. If we don't know the levels of dust and we don't know if the methane is down, and if the situation only existed for 15 minutes, why, on those particular facts do you think this is significant and substantial?

* * * *

THE WITNESS: The way that I see it when I go in on the place is if they don't care when I'm on the section whether they follow the plan or not, are they going to follow it when you're not there? So you've got to weigh it. If you're

> sitting there watching them, or standing there watching or walk up there and watching them load coal and they know you're there and they don't make no effort, then they are not doing it when you're not there. So it will, if not corrected, sooner or later, cause an effect on a person's life, health.
>
> JUDGE KOUTRAS: But you have no reason to believe that this is the case, though? Just like you were telling me about the jumping out of the methane monitors? I mean, even though you may know that as a former miner, and now as a mine inspector, and even though you may know that human frailties and people being what they are, may not comply when you're not there, this could be true of any violation you write in a mine, isn't it?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: So theoretically, every citation you issue should be S and S, without further ado?
>
> THE WITNESS: It's what they call a judgment call on that, and my feeling at the time I issued the citation it was to continue to happen that will cause serious illness or permanent injury to the person that's in that atmosphere.

Mr. Melvin was shown a copy of a citation he issued 25 days after the one at issue in this case (exhibit R-1), and he was asked to explain why he did not mark it "S & S" since it involved a similar ventilation violation. He explained his reasons, and emphasized that when he observed the conditions no coal was being mined and that he had no way of proving what had occurred on the previous shift (Tr. 54-56).

Respondent's testimony

Dick Mottershaw, respondent's safety coordinator, testified that the purpose of the ventilation exhaust tubing is to remove methane and respirable dust from the mine, and he believed that the primary purpose of the tubing is to control the dust (Tr. 58). He explained the procedure used at the mine to install and maintain the proper ventilation tubing distances (Tr. 58-61).

Mr. Mottershaw conceded that the violation issued by Mr. Melvin resulted from the fact that the ventilation

tubing was not extended forward to the required location at the face (Tr. 61). He stated that the actual time that the violation existed here was 15 minutes, but that in any case the maximum time would have been 30 minutes (Tr. 62).

Mr. Mottershaw stated that his records reflect that the No. 7 unit had been previously cited for excessive respirable dust levels. One citation was issued in 1981, and one in 1982. Both citations were "non-S & S" (Tr. 64). He also confirmed that in the 12 years he has been at the mine, no citations have ever been issued for excessive levels of methane (Tr. 64).

With regard to the citation issued by Inspector Gulley in Docket LAKE 83-61, Mr. Mottershaw stated that an air reading measurement in the ventilation tubing itself indicated over 6,000 cubic feet per minute, which met the required air velocity requirements. Unit 11 was previously cited on February 3, 1982, and for the year preceding the citation issued by Mr. Gulley, no citations were issued for exceeding the allowable respirable dust levels (Tr. 68).

Mr. Mottershaw stated that with regard to both citations in question, the water sprays on the continuous miner were operating to minimize the dust at the face, and the mine fans exhaust approximately 700,000 cubic feet of methane per minute. He also stated that the required air currents are maintained to insure adequate fresh air in the working places (Tr. 70).

With regard to the air velocity measurement made by inspector Gulley in LAKE 83-61, respondent's counsel stated that she did not dispute the 1,900 measurement taken by the inspector to support his citation. Counsel pointed out that 10 to 15 minutes before the inspector arrived, mine personnel measured over 5,000, and that the inspector's low reading resulted from the fact that rock dust bags were pulled into the fan and restricted the air flow. The restricted air flow was short-term, and a new reading would have been taken during the next coal cycle. Counsel pointed out that when the bags were removed from the fan, and the fan moved closer to the face, the required air velocity was exceeded (Tr. 81-83).

Jack Lehmann, General Mine Manager, Monterey No. 1 Mine, testified that regular methane readings are made at the mine by the section foreman every two hours during an eight hour shift, and the results are recorded in his preshift and on-shift books. The machine operators take readings every 20 minutes, and preshift examiners take readings during their examinations (Tr. 84-85).

Mr. Lehmann stated that according to the mine record books, the methane readings for the entire month of December 1982, and the entire month of February 1983, for the No. 7 and No. 11 units reflected "zero levels of methane" (Tr. 86).

In response to further questions, Mr. Lehmann stated that water sprays to control the dust are standard equipment in all of the respondent's mines. With regard to the citation issued on December 28, 1982, for failure to extend the ventilation tubing, Mr. Lehmann conceded that the violation occurred because of the failure by the equipment operators to extend the tubing. With regard to the walkway citations, Mr. Lehmann was of the opinion that the cited standard does not apply to both sides of the walkways in question. He conceded that the walkways where there were falls presented a situation where they were not maintained, but that they were all cleaned up to abate the citations. He also conceded that if the safeguard notice is upheld, respondent would be required to insure that both sides of all conveyor walkways be cleaned up and maintained in that condition (Tr. 86-89).

Findings and Conclusions

LAKE 83-67--Fact of Violations

Citation No. 2199897, issued on April 14, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the south side of the 4th main east belt conveyor entry, beginning at crosscut No. 33 and extending inby to the 10th north track switch. Inspector Melvin's citation does not further explain or specify any conditions supporting the conclusion that the travelway was not maintained clear for at least 24 inches wide along the cited areas.

Citation No. 2199899, issued on April 19, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the 3rd main east belt entry on the south side from the head roller of the No. 1 belt drive inby to the tail roller. Inspector Melvin's citation does not further explain or specify any conditions supporting the conclusion that the cited travelway was not maintained clear for at least 24 inches wide along the cited areas.

LAKE 83-87 and LAKE 83-68-R--Fact of Violation

Citation No. 2200849, issued on April 28, 1983, cites the failure by the respondent/contestant to maintain a clear travelway of at least 24 inches wide along both sides of

the main north coal conveyor belt starting at the No. 1 belt drive unit and extending inby to the head roller of the 3rd east belt unit for approximately 205 crosscuts. Inspector Melvin's citation does not specify or explain any conditions supporting the conclusion that the cited travelway was not maintained clear for at least 24 inches wide in the cited area.

When asked to explain the circumstances under which he issued Citation No. 2200849, Inspector Melvin replied "there was something there that concerned me and portions of it was walkways and just portions of it there would be an accumulation." He also alluded to certain roof falls which had occurred, and which were timbered over or marked out by the belt examiners (Tr. 29-30).

When asked to explain the circumstances under which he No. 2299849, Inspector Melvin stated "again they would have falls, the roof falls, %y(3)5C and I couldn't tell you off hand how many crosscuts out there, about halfway down through there they have falls" (Tr. 30). He also alluded to some bad top, and the fact that when bad is encountered "they are supposed to either cross over or under that belt" (Tr. 31).

Inspector Melvin conceded that he failed to detail the conditions he observed in his citations, and he agreed that this should have been done (Tr. 31). He explained that since "company people and union people" travel with him on his inspections, he assumes they know what he has in mind, and he stated that "we all see this and we don't take it offhand that somebody is going to read the citation that don't know what we are talking about" (Tr. 31). When asked whether or not the respondent knew what the inspector was citing, counsel stated "I would imagine a company person, walking around with them, was able to determine exactly what was disturbing the inspector" (Tr. 32). During a bench colloquy regarding the question of specificity of the citations, petitioner's counsel stated "well, they understood what it was" (Tr. 47).

Section 104(a) of the Act requires an inspector to issue a citation with reasonable promptness when he believes that a mine operator has violated the Act, or any mandatory health or safety standard promulgated under the Act. The law also requires an inspector to state and describe in writing with particularity the nature of the violation. I construe this statutory language as a condition precedent to any citation, and an inspector is obligated to at least specify on the face of his citation the specific condition or practice that he observes which leads him to believe that a mine operator has violated the law.

In the instant proceedings, insofar as Citation Nos. 2199897, 2199899, and 2200849 are concerned, Inspector Melvin's citations do not recite any conditions that would, on their face, support the conclusion that the respondent failed to maintain clear travelways on both sides of the cited belt conveyor in question. Further, in support of these citations, his testimony only generally alludes to certain concerns that the travelways were somehow obstructed by roof falls or coal accumulations.

Given the extent of the areas cited by Inspector Melvin, it is simply impossible to decipher the particular conditions or practices which may apply to each of the citations in question. For example, in Citation No. 2200849, while he asserts that the respondent failed to maintain a clear travelway on both sides of the belt conveyor for a distance of "approximately 205 crosscuts," there is absolutely no evidence or testimony to support such a conclusion. His testimony that there was something present "that concerned him," and that "portions of his concerns" dealt with coal accumulations, and "portions" dealt with obstructed travelways, is simply insufficient or totally lacking as credible evidence to support a citation.

After careful consideration of the record in this case, including close scrutiny of Inspector Melvin's testimony, I conclude and find that he has failed to support his conclusions that the respondent failed to maintain clear travelways of at least 24 inches wide at the cited areas. I also conclude and find that Inspector Melvin failed to follow the requirements of Section 104(a) of the Act that any alleged violative conditions or practices be described with particularity.

While it is true that the citations were abated, and that the abatement process itself suggests that the respondent may have had knowledge of the conditions or practices which concerned the inspector, on the facts here presented, there is absolutely no testimony as to what was done to achieve abatement. The termination notices simply state that "clear travelways were provided." Coupled with the fact that Inspector Melvin failed to clearly articulate any conditions or practices which led him to believe that the cited travelways were not maintained as required by the safeguard notice in question, as well as his failure to describe with any semblence of particularity the conditions or practices supporting any of these citations, I simply have no basis for finding that the petitioner has carried its burden of proof in establishing the alleged violations.

Since I am vacating the three citations in question in Dockets LAKE 83-67, LAKE 83-87, and LAKE 83-68-R, I see no reason to address the question as to whether or not section 75.1403-4(g) is applicable to the belt conveyors in question. Even if I were to find that it is, I would still vacate the citations for the reasons articulated herein.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has failed to establish the fact of violations by a preponderance of any credible testimony or evidence with respect to Citation Nos. 2199897, 2199899, and 2200849. Accordingly, they ARE VACATED. Contestant/respondent's contest challenging Citation No. 2200849 IS GRANTED.

Findings and Conclusions

LAKE 83-94--Fact of Violation

Citation No. 2202728, issued on June 21, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the east side of the main north belt conveyor starting at the 236 crosscut inby to the No. 4 east belt head roller for approximately 40 crosscuts. Inspector Melvin's citation described materials such as "large rock, coal, roof bolts, roof blocks, concrete block, and roof bolt plates," as being present along the cited belt conveyor. Inspector Melvin concluded that the violation was not significant and substantial, and he did so because he did not believe that the accumulated materials which he found to present a tripping hazard posed a real threat of a mine fire such as that posed by accumulations of loose coal and coal dust rubbing or touching the belt conveyor. In short, his theory is that "if they build a 24 inch walkway there, and later put material there, they obstruct the people walking there" (Tr. 25).

LAKE 83-78--Fact of Violation

Citation No. 2199892, issued on April 13, 1983, cites the failure by the respondent to maintain a clear travelway of at least 24 inches wide along the 4th east belt conveyor along an area encompassing some five crosscuts. Inspector Melvin's citation states that the "belt was rubbing coal" at the five crosscut locations, and that at one of the crosscuts the belt was "rubbing frame for rope" and that "it was warm."

Inspector Melvin found that the violation was "significant and substantial." In its posthearing brief, at pages 7-8,

respondent does not dispute the fact that the belt conveyor, as well as the belt rope frame, were in fact rubbing or touching the accumulations of coal as described by the inspector. As a matter of fact, the respondent stipulated that the combination of loose coal and coal dust described did in fact reach up to the conveyor belt and the bottom belt roller. Further, the respondent stipulated that dry loose coal and coal dust ranging in scope from 8 to 10 inches deep, six to eight feet long, and two to three feet wide were in fact present along the cited belt locations, and that the cited areas were not rock dusted.

Given the aforementioned stipulations and admissions by the respondent, it seems clear to me that had the respondent been charged with a violation of mandatory standard section 75.400, which proscribes such accumulations, I would be constrained to find a violation of that section. Further, given the fact that respondent stipulated that the belt rope frame "was warm," and given the fact that the belt rollers were running in coal accumulations which were not rock dusted, I would also be constrained to find that the violation was "significant and substantial." However, respondent's defense is that the cited section 75.1403-5(g), is inapplicable because the conveyor belt in question is not one used to transport "men and materials," and even if it were used for that purpose, the conditions which prevailed did not amount to a "significant and substantial" violation.

Inspector Melvin testified that the accumulations of loose coal and coal dust on one side of the belt conveyor extended out into the walkway, and he indicated that these accumulations should have cleaned up when the walkway was cleaned. He confirmed that he considered the violation to be "significant and substantial" because the coal accumulations under the belt which were touching and rubbing the belt framework presented a fire hazard (Tr. 18). He conceded that these accumulations should have been cited under section 75.400 (Tr. 21). He also alluded to certain accumulations on the other side of the belt which were not touching the frame, and he considered these to present a tripping or slipping hazard if one were walking by the belt, and he also considered the possibility of someone falling into a belt roller if they tripped or slipped over the accumulations (Tr. 18).

When asked to explain the circumstances under which he would cite an operator with a violation of section 75.400 for coal accumulations, and when he would cite the walkway

standard section 75.1403-5(g), he stated that he could cite either or both standards, and the difference lies in whether or not the accumulations presented a tripping or walking hazard, as opposed to a fire hazard (Tr. 28-29; 41-42).

In its defense to this citation, respondent concedes that had it been charged with a violation of section 75.400, the cited coal accumulations would have violated that section, and would in fact have constituted a "significant and substantial violation." However, respondent argues that it has not been cited with a violation that is clearly intended to minimize the hazards of a fire, but rather, has been charged with a violation of a standard seemingly intended to protect miners from hazardous walking conditions.

Respondent argues that the petitioner should not be permitted to elevate the gravity of a citation to a "significant and substantial" status because of the existence of a condition or practice which has no relation to the hazard addressed by the cited standard. To do otherwise, suggests the respondent, would allow the petitioner to penalize a mine operator for a condition or practice addressed by a standard different from the one actually cited, even if the condition or practice did not amount to a violation of that standard. Respondent insists that the question of "significant and substantial" must be determined in the context of the specific standard allegedly violated, as stated in the specific notice of violation.

The parties have stipulated that the safeguard notice referred to by Inspector Melvin to support his citations was issued on September 4, 1975, by MSHA Inspector Willis H. Wrachford. This Notice to Provide Safeguards No. 1 WHW, states as follows:

> Notice is hereby given that the undersigned authorized representative of the Secretary of the Interior upon making an inspection of this mine on September 4, 1975, directs you to provide the following specific safeguard(s)--24 inch clear travelways along all belt conveyors each side--pursuant to Sec. 75.1403, Subpart C, of the Regulations promulgated under authority of Section 101 of the Federal Coal Mine Health and Safety Act of 1969 (P.L. 91-173).

Under the heading Specific Recommended Safeguards the Notice alleged that:

> A clear travelway at least 24 inches wide on each side of the main north belt-conveyor was not provided at the following locations. Between crosscuts Nos. 21 and 23 (coal and rock), between crosscuts Nos. 93 and 94 (Rib), and between crosscuts Nos. 108 and 109 (coal, Rock, and Rib).
>
> A clear travelway at least 24 inches wide shall be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide shall be provided on the side of such support farthest from the conveyor.

Although Inspector Wrachford did not testify in these proceedings, petitioner's counsel was permitted to file his affidavit posthearing as part of his proposed findings and conclusions, and the affidavit is included as exhibit P-1 to counsel's brief. In his affidavit, Inspector Wrachford states that he issued the safeguard notice after observing that a clear travelway at least twenty four inches wide was not provided at several locations on the west side of the main north belt conveyor at the No. 1 Mine. He also states as follows:

> 1. I explained to the operator why MSHA requires a clear travelway at least twenty four inches wide on both sides of all belt conveyors.
>
> 2. The operator abated the condition described in the above mentioned notice in compliance with said notice.
>
> 3. To consummate the abatement the operator cleaned one side of the belt to provide a clear twenty four inch travelway on that side. The other side of the conveyor already had a clear twenty four inch travelway at the time the notice was issued.
>
> 4. The operator was informed that it was in compliance, but no termination form was issued because no form existed for that purpose in 1975.

30 CFR 75.1403 provides 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.

Section 75.1403-1 provides:

> (a) Sections 75.1403-2 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 section 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 section 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.
>
> (c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

In support of Citations 2199892 and 2202728, Inspector Melvin relied on the previous safeguard notice issued by Inspector Wrachford, and also cited a violation of the criteria applicable to belt conveyors found in section 75.1403-5(g), which states as follows:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

In its posthearing brief, Monterey argues that Section 75.1403-5(g), is governed by the introductory provision found in Section 75.1403, which clearly limits its applicability to the transportation of men and materials. Since, according to Section 75.1403-1(a), section 75.1403-5(g) is simply a criterion to be used as a guide in implementing section 75.1403, Monterey suggests that although section 75.1403-5(g) employs the phrase all belt conveyors, its applicability is limited to belt conveyors used in the transportation of men and materials.

Monterey asserts that its aforementioned interpretation is generally carried out within the subsection found in Section 75.1403-5. Subsections (a), (b), (c), (d), and (e) refer to belt conveyors that are used to transport persons. Subsections (f) and (i) refer to belt conveyors that are used to transport supplies and persons. Subsection (h) refers to belt conveyors that are not used to transport persons. Only subsections (g) and (j) refer to belt conveyors without any mention of their use.

Monterey points out that it is not disputed that the belt conveyors in question transport mined coal only, and that supplies and personnel are not transported on such conveyors. Since coal is not included within the term "men," Monterey states that the question becomes whether coal is included within the term "materials." Citing a dictionary definition of the term "material" as "the substance . . . . of which anything is composed or may be made," Monterey points out that section 75.1403-5 does not use the term "materials," but uses the word "supplies," indicating that the Secretary, too, interprets the word "materials" to mean "supplies." Monterey concludes that in a coal mine, coal is a product, and is not a material or supply.

Monterey asserts that there is a legitimate distinction between belt conveyors which transport men and materials, and those which transport coal only. Personnel must work on a regular basis around belt conveyors which transport men and materials (e.g., loading and unloading materials, getting on and off the belts themselves, etc.). In contrast, few personnel work around belt conveyors which transport coal only, and their work consists primarily of inspecting and maintaining the belt. The nature of one type of belt conveyor necessitates safe and easy means of access along both sides of it, while the other type of belt conveyor is satisfactorily served by safe and easy access along only one side of it.

Monterey asserts further that it is evident that the Secretary's purpose in "requiring" 24 inch clear travelways along both sides of Monterey's coal-carrying conveyor belts is to facilitate walking along both sides of the belt (Tr. 49-50), and that his motive in such purpose is to encourage examiners to walk down both sides of the belt in their examinations (Tr. 57-61).

Citing mandatory safety standard section 75.303(a), which requires preshift examination of the active workings of a coal mine, as well as onshift examinations of coal-carrying belt conveyors, Monterey points out that the extent of such onshift examinations of coal-carrying belt conveyors is not specified in the standard, and that it is not mandatory that an examiner conducting such an examination walk down both sides of the belt. Monterey concludes that for an examiner to perform his obligation it is enough that a clear travelway is maintained on only one side of the belt, and that if it is the Secretary's position that such an examination is inadequate, he should adopt, by formal rulemaking, the requirement that examiners walk both sides of coal-carrying belt conveyors and that operators provide clear travelways on both sides of such beltlines.

Monterey goes on to note that Congress also distinguished between man-carrying beltlines and coal-carrying beltlines for purposes of examination. Preshift examination is required for man-carrying belts, but only onshift examination is required for coal-carrying belts. Citing a Commission ruling in Secretary of Labor v. Jones & Laughlin Steel Corporation, 2 MSHC 2201, PENN 81-96-R, July 15, 1983, Monterey asserts that the Commission ruled in that case that coal-carrying conveyor belts per se are not "active workings."

Monterey concludes that because coal does not fall within the category "men and materials," a coal-carrying conveyor belt is not subject to section 75.1403, nor to section 75.1403-5(g). In support of this conclusion, Monterey asserts that the provisions authorizing the Secretary to require additional safeguards on a mine-by-mine basis to minimize hazards with respect to transportation of men and materials does not authorize the Secretary to require additional safeguards, such as 24 inch clear travelways, with respect to belt conveyors which carry coal only. The Secretary's authorized representative was without power to issue the Notice in question to Monterey; in the absence of such authority, the Notice is invalid. Consequently, the citations alleging violations of 30 C.F.R. Section 75.1403-5(g) for failure to comply with the Notice are also invalid.

With regard to its right to challenge the application of the safeguard notice in question, as well as the legality of the citations in question, Monterey states that the fact that it may have failed to contest two citations issued subsequent to the Wrachford Safeguard Notice in the eight years since it was issued does not foreclose its contests here, nor does it amount to an admission that the safeguard is valid. To conclude otherwise, suggests Monterey, would deprive it of its right to due process.

MSHA takes the position that the term all belt conveyors found in criteria subsection 75.1403-5(g), literally applies to all belt conveyors, regardless of whether or not they were used to transport men and materials or only coal. MSHA asserts that the term "materials" should be interpreted to include coal, and even though the parties have stipulated that the cited belt conveyors in question are not designated mantrips for the transportation of mine personnel, and that they are used solely to transport the coal which is mined out of the mine, they nonetheless must comply with the safeguard, as well as the requirements of subsection (g).

MSHA asserts that all coal conveyor belts in the mine must be provided with travelways 24 inches wide, and that such travelways must at all times be maintained "clear" on both sides of the belt conveyors. Further, on the facts of these cases, and in support of its interpretation, MSHA is of the view that both sides of all such conveyor belts must be maintained "clear" to insure ready access to both sides of the belts by belt examiners, and to preclude accumulations of loose coal which may present tripping or fire hazards, and to preclude general mine clutter which may present tripping and slipping hazards.

The "safeguard notice" authority found in section 75.1403, accords substantial power to an inspector to issue a citation on a mine-by-mine basis, for conditions or practices which are in effect transformed into mandatory health or safety standards by the inspector who may have initially concluded that a particular event or set of circumstances constituted a situation that required to be addressed in that mine. Since the practical result of an inspector's application and enforcement of a safeguard notice is to impose a mandatory safety or health requirement on the mine operator, separate and apart from any of the published mandatory standards, I believe that careful scrutiny must be given to such notices to insure proper notice and even-handed enforcement. In my view, indiscriminate or arbitrary use of such notices as "catch-alls," with little or no regard as to whether or not the asserted

violative practices or conditions sought to be addressed may constitute a violation of other specific standards, should not be tolerated. In short, I believe that due process requires that such safeguard notice be strictly construed.

In my view, the citations at issue here are a classic example of an inspector relying on a general, broad-based safeguard notice to remedy hazardous concerns which could have been cited and addressed by specific mandatory safety standards. On the facts of these proceedings, faced with accumulations of loose coal and coal dust which presented alleged fire or tripping hazards, the inspector opted to rely on a safeguard notice issued some seven years earlier by another inspector to achieve compliance which could have directly and effectively been dealt with by citing the specific mandatory standards intended to cover those particular conditions.

The Secretary's Inspector's Manual, March 9, 1978 edition, at pages II-583, states the following policy interpretation for an inspector to follow when relying on a safeguard notice issued pursuant to section 75.1403:

> These safeguards, in addition to those included as criteria in the Federal Register, may be considered of sufficient importance to be required in accordance with section 75.1403.
>
> It must be remembered that these safeguards are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not covered by a mandatory regulation, the authorized representative must issue a safeguard notice allowing time to comply before a 104(a) citation can be issued. Nothing here is intended to eliminate the use of a 107(a) order when imminent danger exists. (Emphasis added).

Sections 75.1403-2 through 75.1403-11 set out the criteria by which an inspector will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Criteria 75.1403-2, deals with brakes on hoists and elevators used to transport materials. Criteria 75.11403-3 deals with drum clutches on man-hoists, and hoist ropes and cage construction on devices used to transport mine personnel. Criteria 75.1403-4 deals with automatic elevators, including requirements for an effective communication system. Although the criteria do not mention materials or personnel, one can logically assume that given the appropriate circumstances, they apply to both.

The criteria found in section 75.1403-5(a) through (f), and (h) through (j), all specifically include a reference to the transportation of personnel on belt conveyors. Subsection (f) provides that after supplies have been transported on belt conveyors, they are to be examined for unsafe conditions prior to transporting men on regularly scheduled mantrips, and that they are to be clear before men are transported. The only specific reference to conveyors that do not transport men is found in subsection (h) which requires that such belt conveyors be equipped with properly installed and accessible stop and start controls installed at intervals not to exceed 1000 feet.

Subsection (g) of the criteria found in section 75.1403-5, require clear travelways at least 24 inches on both sides of all conveyor belts installed after March 30, 1970. It also contains a provision that "where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor." Thus, while the first sentence seems to require clear 24 inch wide travelways on both sides of all conveyors, the second sentence seemingly contains an exception where roof supports are installed within 24 inches of a belt conveyor. In such a situation, the second sentence seems to require that only the outby side of the belt conveyor be provided with a clear 24 inch wide travelway. Given this somewhat confusing exception, I would think that in cases where it is established that roof supports are present within 24 inches of a belt conveyor, an operator would only be required to maintain one side of the belt as a clear travelway of 24 inches in width. It would further appear to me that the question as to whether which side of the belt conveyor has to be maintained as a clear travelway would depend on the location of the roof supports.

The statutory requirements found in mandatory section 75.303, for the conduct of preshift examinations includes a requirement for examination of "active roadways, travelways, and belt conveyors on which men are carried, ... and accessible falls . . . . for hazards." This section mandates that the examiner examine for such other hazards and violations of the mandatory health of safety standards, as an authorized representative of the Secretary may from time to time require.

With regard to the preshift requirements for examination of belt conveyors on which coal is carried, section 75.303 mandates that they be examined after each coal-producing shift has begun. This section also mandates that if the examiner finds a condition or practice which constitutes a violation of a

mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such areas, he is required to post any hazardous area with a "danger" sign, and then proceed to take corrective action.

The Secretary's Inspector's Manual, edition of March 9, 1978, pgs. II-241-242, containing the policy interpretation for enforcement of section 75.303, has absolutely no reference to a requirement that conveyor belts have 24 inches of clear walkways. As a matter of fact, the reference to examination of travelways states that "every foot of roof along the entire length of the travelway" is not required to be tested. It goes on to state that roof and ribs along travelways "shall be examined visually," and "doubtful places" are to be tested to assure corrections of hazardous conditions.

The Secretary's policy inspection guidelines found at pgs. II-244 and II-245 with respect to section 75.304 onshift examinations for hazardous conditions, while including travelways, do not contain any requirements for 24 inch clear travelways. However, the policy does require an inspector to cite violations of mandatory health or safety standards when observed by citing section 75.304, in addition to the specific mandatory standard covering the specific hazard.

Taken as a whole, the statutory, regulatory, and policy interpretations which address belt conveyor travelways specifically distinguish between belt conveyors which transport men and supplies from those which transport only coal. In addition to the specific criteria previously discussed, I take note of the fact that the criteria dealing with mantrips (75.1403-7) specifically address supplies or tools (subsection (k)), tools, supplies, and bulky supplies (subsection (m)), extraneous materials or supplies (subsection (o)), and that the criteria dealing with track haulage, 75.1403-8(b), specifically deals with the maintenance of continuous track haulage clearances of at least 24 inches from the farthest projection of normal traffic. Viewed in contest, and taken as a whole, I believe that the clear Congressional intent in promulgating the safeguard requirements found in section 75.1403 was to do precisely what that section states, namely to minimize hazards with respect to the transportation of men and materials other than coal. It occurs to me that had Congress had in mind coal, it would have simply included the transportation of coal as part of the regulatory language, and MSHA would have included this as part of its regulatory criteria. Since Congress and MSHA failed to do so, I reject any notion that I should include this interpretation as part of my findings in this matter.

On the facts of this case, MSHA seeks to address certain perceived tripping and fire hazards which may have resulted from the failure by the mine operator to clean up coal accumulations resulting from the normal mining process, or roof falls, or by the failure by the operator to remove general mine materials from the travelways. Given these concerns, I believe that it is incumbent on MSHA to either promulgate specific standards to address these concerns, or to amend its criteria to state precisely what it has in mind. Requiring this particular mine operator to maintain 24 inch wide clear travelways along both sides all of its belt conveyors under the guise of a safeguard notice issued eight years ago, with no credible evidentiary support for its position is simply unsupportable.

The citations which are at issue here (2202728 and 2199892), charge the respondent with a failure to maintain a clear travelway on the east side of the cited belt conveyors in question. This leads me to conclude that it was altogether possible that the south side of the conveyor belts were in compliance, and what really concerned Inspector Melvin was the fact that failure to maintain the east sides of the belts did not comport with the safeguard requirements that both sides of the belt conveyor be maintained clear of coal accumulations and other debris. However, given the confused testimony and evidence presented by MSHA to support its case, I simply cannot conclude that MSHA has proven its case. This is particularly true when it seems obvious to me that the inspector's concerns over accumulations of loose coal and extraneous material could have been addressed by specific citations of the mandatory requirements dealing with those specific hazards. In short, Inspector Melvin should have followed MSHA's policy directives to cite the specific mandatory standards dealing with coal accumulations and tripping or guarding hazards, rather than relying on a safeguard notice issued some eight years earlier.

While one may conclude that the presence of the materials described by Inspector Melvin in Citation No. 2202728 (rocks, roof bolts, concrete blocks, etc.), and Citation No. 2199892 (loose coal which may have spilled over on to the travelway), support a conclusion that the cited travelways were not maintained "clear," unless it can be shown that these conditions constituted a violation of the cited regulations, the citations must be vacated.

After careful consideration of all of the testimony and evidence adduced in these proceedings, including the arguments

advanced by the parties in support of their respective positions, I conclude and find that Monterey has the better part of the argument as to the application of section 75.1403-5(g) to the cited belt conveyors in question. Accordingly, I conclude and find that the overall statutory and regulatory intent of the cited section is to address hazardous conditions connected with belt conveyors which transport men and materials other than coal, and that any logical interpretation of this section necessarily excludes coal as a "material" within the scope of the cited criteria. I accept and adopt Monterey's proposed findings and conclusions with respect to the interpretation and application of this section as my findings and conclusions, and I reject those advanced by MSHA. The citations are VACATED.

Findings and Conclusions

LAKE 83-52--Fact of Violation

In this case, Citation No. 2036802, issued by Inspector Melvin on December 28, 1982, charges the respondent with a "significant and substantial" violation of mandatory standard section 75.316, for failure by the respondent to follow the applicable provision of its mine dust control plan. Inspector Melvin found that certain exhaust ventilation tubing located in an area where a continuous mining machine was loading coal was extended 22 feet outby the face. The applicable dust plan requires such exhaust tubing to be maintained within 10 feet of the face as the face is advanced.

Mandatory safety standard section 75.316, requires a mine operator to adopt a suitable mine ventilation and dust control plan for its mine. Once approved by MSHA, that plan becomes the applicable plan required to be followed until such time as it is revised, revoked, or otherwise changed. It is clear that a violation of the plan is a violation of the requirements of section 75.316.

The respondent has stipulated to the conditions cited by the inspector, including the fact that the continuous mining machine was loading coal at the cited location, and that the exhaust tubing was approximately 22 feet outby the face. Respondent has also stipulated to the applicable dust and ventilation provision which requires that such tubing be maintained within 10 feet of the face, and in its posthearing brief "does not deny that this condition existed in the cited section of the mine" (pgs. 2-3, brief). Respondent also admits that the violation occurred (pg. 1, brief), and only challenges the inspector's "significant and substantial" (S & S) finding.

In view of the foregoing, I conclude and find that the petitioner has established the fact that a violation of section 75.316 occurred, and to this extent the citation IS AFFIRMED.

LAKE 83-61--Fact of Violation

In this case, Citation No. 2063916, issued by Inspector Gully, charges the respondent with a "significant and substantial" violation of mandatory standard section 75.316, for failure by the respondent to follow a specific provision of the applicable mine ventilation plan in that at the cited location detailed in the citation where a continuous miner was cutting coal, the amount of measured air was only 1900 CFM. The ventilation tubing provided at this location was 390 feet from the fan. The applicable plan provision requires a minimum air quantity of 5000 CFM where the ventilation tubing is in excess of 370 feet.

Mandatory safety standard section 75.316, requires a mine operator to adopt a suitable mine ventilation and dust control plan for its mine. Once approved by MSHA, that plan becomes the applicable plan required to be followed in the mine until such time as it is revised, revoked, or otherwise changed. It is clear that a violation of the plan is a violation of the requirements of section 75.316.

The respondent has stipulated to the conditions cited by the inspector, including the fact that the continuous mining machine was cutting coal, that the tubing length was 390 feet, and that the air measurement made by the inspector in support of the citation was in fact 1900 CFM. Respondent also stipulated as to the applicable ventilation plan requirements, and in its posthearing brief "does not deny that the condition existed in the cited section of the mine at the time the citation was issued" (pg. 2, brief). Respondent does not deny that the violation occurred (pg. 8, brief), and only challenges the inspector's "significant and substantial" (S & S) finding.

In view of the foregoing, I conclude and find that the petitioner has established the fact that a violation of section 75.316 occurred, and to this extent the citation IS AFFIRMED.

Significant and substantial issue

During the course of the hearings in these proceedings, I raised the issue as to the reviewability of "special findings," such as an alleged "significant and substantial" violation,

in a civil penalty proceeding. In a prior proceeding now on review with the Commission, Secretary of Labor v. Black Diamond Coal Mining Company, SE 82-48, April 20, 1983, I refused to review such findings. In Secretary of Labor v. Glen Irvan Corporation, PENN 83-27 and PENN 83-146, November 3, 1983, I rejected any notion that the Secretary's Part 100 "single penalty" assessment regulations were binding on a Commission Judge. In rejecting a "non-S & S" $20 penalty assessment, I considered the facts and circumstances surrounding that particular violation de novo, and assessed an increased civil penalty on the basis of my gravity findings. In short, I considered the matter of "S & S" in the context of gravity.

In its posthearing brief, Monterey cites a plethora of precedent cases decided by Commission Judges in which special "S & S" findings were reviewed. Counsel states that my Black Diamond decision, and a decision by Judge Melick in Windsor Power House Coal Company v. Mine Workers, 1 MSHC 2484, WEVA 79-199-R and WEVA 79-200-R, July 3, 1980, stand "in stark contrast" to the other decisions holding that special findings may be reviewed within the context of a civil penalty contest. I am overwhelmed by this "weight of authority," and while I realize that consistency dictates that I rule otherwise, I will consider the special findings made by Inspector Melvin in these proceedings.

As I have noted in several prior decisions concerning the application of the Commission's holding in Cement Division, National Gypsum Co., the issue of reviewability of special findings in the context of civil penalty proceedings was not directly raised or addressed by the parties in that case. The parties apparently assumed that such findings could be reviewed, and the Commission itself noted that its interpretation of the phrase "significant and substantial" was made "in the context of a civil penalty proceeding." It did not specifically rule on the issue of reviewability because that issue was apparently not specifically articulated on the record. In any event, I take note of the following interpretation of the term "significant and substantial" made by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), aff'd in Secretary of Labor v. Consolidation Coal Company, decided January 13, 1984, WEVA 80-166-R, etc. affirming a prior holding by a Commission Judge, 4 FMSHRC 747, April 1982:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts

> surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In its most recent holding in Consolidation Coal Company, WEVA 80-116-R, etc., January 13, 1984, the Commission stated as follows at pg. 4, slip opinion:

> As we stated recently, in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984).

In its posthearing brief, Monterey cites the National Gypsum holding that a violation is "significant and substantial" if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Relying on this interpretation Monterey asserts that the requirement in section 75.316 of a ventilation, methane and dust control plan is intended to minimize the risks of lung disease such as pneumoconiosis due to prolonged exposure to excessive levels of respirable coal dust, and of explosion or ignition due to the buildup of methane or other gasses. Conceding that there is no question that pneumoconiosis or injuries resulting from an explosion would be "of a reasonably serious nature," Monterey states that the proximity of such injury or illness is the issue here. It concludes that in order for a violation of the required plan to be significant and substantial, the Secretary must show by the particular facts surrounding the violation that it was reasonably likely to result in pneumoconiosis or in an explosion.

In support of its conclusion that the violations are not "significant and substantial," Monterey asserts that the Secretary has failed to satisfy the burden of proof required

by the National Gypsum holding and has established nothing more than the fact that violations of section 75.316 occurred. Monterey asserts that the Secretary has not shown that the violations of its dust and ventilation plan resulted in any excessive level of respirable dust or in any accumulation of methane, nor has the Secretary even alleged any other facts which might indicate that contraction of pneumoconiosis or an explosion was reasonably likely to result from the violations.

Monterey points out that respirable dust and methane limits are specifically set in other standards. The limit for respirable dust is found in section 70.100(a), which provides that "each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere . . . . at or below 2.0 milligrams of respirable dust per cubic meter of air . . . ." The limit for methane is found in section 75.316-2, which provides that "the methane content in the air in active workings shall be less than 1.0 volume per centum." Monterey states that neither of these limits was exceeded in the cited areas of the mine at any relevant time.

Monterey suggests that it would be a legal anomaly for a violation of ventilation, methane and dust control plans required by section 75.316, the purpose of which is to control respirable dust and methane levels, to be significant and substantial in spite of the fact that the specific limits for these substances established by sections 70.100(a) and 75.316-2 were not exceeded. Such a conclusion would totally disregard the fact that in adopting said standards the stated limits were deemed to be not unsafe, and would be tantamount to superseding the formally-adopted safety or health standards.

Monterey cites Judge Melick's decision in Consolidation Coal Company v. Secretary of Labor, 2 FMSHRC 1896, August 18, 1982, in which he ruled that two alleged violations of the respirable dust standards found in section 70.100(a), where a production unit had respirable dust levels of 2.5 and 2.7 milligrams per cubic meter of air, were not significant and substantial. Judge Melick's ruling was based on his finding that in the absence of medical or scientific evidence correlating exposure of miners to violative respirable dust levels of 2.5 and 2.7, he could not conclude that the violations were significant and substantial. Monterey asserts that with respect to the citations issued by Inspector Melvin, there is no evidence that the respirable dust levels in the cited areas of the mine at the relevant time ever approached

2.5 or 2.7. Further, Monterey states that the Secretary has proffered no medical or scientific evidence that the exposure of miners to the actual respirable dust level existing at the cited areas at the relevant times is correlated to pneumoconiosis, which evidence is required by Consolidation Coal for a violation to be significant and substantial.

In addition to its Consolidation Coal arguments, Monterey maintains that on the facts of these citations, there are other factors to consider in support of its conclusion that the violations were not significant and substantial. These include the fact that the miners were not, in fact, exposed to any hazardous levels of respirable dust or methane. The duration of the violation would have been negligible, even if the citations had not been issued; normal operating procedures would have led to the detection and correction of the violations in a short period of time. The number of people "exposed" was low. A number of redundant safeguards continued to control respirable dust and methane. The mine history itself indicates that Monterey has been very successful in controlling respirable dust and methane.

In conclusion, Monterey asserts that the Secretary's inferences are too speculative to serve as a basis for a finding that the violations in question were significant and substantial. As an example of the speculativeness of the Inspector's finding that Citation No. 2036802 (LAKE 83-52) was significant and substantial, counsel attaches a copy of a citation issued three weeks later alleging nearly identical facts but not finding the alleged violation to be significant and substantial. The citation (exhibit R-1), was issued by Inspector Melvin on January 20, 1983, No. 2036818, and it charges a violation of section 75.316 for failure to follow the mine dust control plan. Inspector Melvin found that in the cited mine area where a continuous mining machine had been loading coal, the ventilation exhaust tubing was extended 20 feet outby the face, and that this violated the plan requirements that such tubing be maintained to within 10 feet of the face.

Monterey also cites a May 19, 1981, MSHA Policy Memorandum, which states that in determining whether a violation is significant and substantial, "it is not enough to find that an injury or illness is only possible." Monterey then concludes its arguments by asserting that it is inescapable that the designation of the violations in question as significant and substantial is both unsupported by the particular facts surrounding the violations and legally erroneous.

In support of its position on the question of "significant and substantial," MSHA relies on the National Gypsum Commission decision definition. With regard to the specific facts surrounding Citation No. 2036802, MSHA quotes the condition described by the inspector on the face of the citation, and points out that the parties have stipulated to the accuracy of these findings. In this regard, I take note of the fact that the citation merely states a conclusion that positioning the exhaust tubing 22 feet outby the face violated the applicable dust control plan provision which requires that such tubing be maintained within 10 feet of the face as the face is advanced.

Turning to the testimony of the inspector in support of his conclusion that the violation was "significant and substantial," MSHA points to the inspector's testimony, supported by a witness for Monterey (Mottershaw), that the purpose of maintaining the tubing within 10 feet of the face is to keep respirable dust away from the face and to remove methane gas. The inspector stated that locating the tubing 22 feet from the face is not half as effective as is maintained within the required 10 feet, and he believed that the tubing remained at the 22 feet distance for approximately 20 minutes. The inspector also stated that he was told by certain miners that the tubing is initially placed where the cutting of coal is begun, and that it is not extended until the cutting is finished. However, since he believed these statements to be hearsay, he discounted issuing a "willful" citation, but believed they were truthful because none of the miners made any effort to place the tubing in the proper position even though they knew he was inspecting the area.

MSHA suggests that the inspector's belief that not moving the tubing in question was the usual procedure at the mine was also based on his testimony that he had issued other citations in the past at the mine for the same violations. Although he stated that he had previously cited the same conditions in other sections of the mine "more than once," no additional evidence or testimony was forthcoming to support this assertion. However, as part of his posthearing arguments, MSHA's counsel cites 18 prior violations of section 75.316 from January 8, 1981 to November 16, 1982, as reflected in the history of prior violations attached to the stipulations, to support a conclusion that Monterey has not been greatly concerned with the enforcement of its ventilation and methane plans.

In response to Monterey's assertion through testimony of its witnesses that the mine has water equipment and other

equipment to control the dust; that the continuous miner has a device that stops that machine when the level of methane is high; and, that the level of methane was low at the time of the inspection, MSHA's counsel points out that this equipment is standard equipment found in every mine and is not a substitute for the proper placement of the exhaust tubing near the face. Counsel concludes that Monterey creates a dangerous situation when it decides to relax enforcement of its dust and methane plans because it is confident that the methane level is low and that some devices in the mine are going to control the respirable dust, methane, and other gases.

MSHA points out further that the mine was on a five-day section 103(i) spot inspection cycle the time the citation issued, and that this was because it was liberating extremely high quantities of methane or other explosive gases in excess of one million cubic feet during a 24-hour period. Although a witness for the Monterey testified that at the time of the hearing the inspections had been changed to 1-day spot inspections, counsel argues that to assume that an ignition is not going to happen because the methane level is low at a particular moment is to rely on a false sense of security. Counsel maintains that it is a fact that in a mine that liberates an excess of one million cubic feet of methane in a 24-hour period the methane level can go up at any time, significantly increasing the likelihood of an ignition and resulting in serious injuries or death.

MSHA asserts that the facts in this case prove that the methane levels could have increased due to improper positioning of the exhaust tubing, and that excessive amounts of respirable dust could have increased because of this condition. MSHA suggests that it is a well known fact that serious injuries or death could result in case of a fire or explosion caused as a consequence of high levels of methane, and that pneumoconiosis can be caused by exposure to respirable dust. MSHA concludes that while it has no burden to prove the existence of an imminent danger situation, this would have been the case if at the time of the inspection the methane level had reached the explosion level and the device to detect that gas had not been in operation.

MSHA suggests that the facts presented at the hearing clearly prove that an injury or an illness of a reasonable serious nature could have resulted as a consequence of the hazard presented by the condition described in this citation, and that this meets one of the tests required to prove the existence of a significant and substantial condition. The other test to prove the existence of the significant and

substantial element in a violation is to show that a reasonable likelihood exists that the injury or illness in question would occur. MSHA concedes that we are dealing here with a probability factor, but states that the test does not require an absolute certainty that the injury or illness must occur.

In addition to the evidentiary support for its position, MSHA relies on the past history of violations at the mine and question and considers that history as an important factor in the evaluation of the probability of an accident. MSHA maintains that it is reasonable to assume that the probability of an accident is increased by the increase of the exposure of the miners to a specific condition, and that the exposure is increased by the number of violations involving that same condition that occurs in a particular mine. Recognizing that the definition of significant and substantial requires that the likelihood of an accident be based on the particular facts surrounding the violation, MSHA's position is that the history of violations of a specific standard is a fact which surrounds the violation of such standard, and that this fact cannot be separated from the violation when an evaluation is made to determine the likelihood of an accident as a result of said violation.

In support of the "S & S" finding made by Inspector Gulley with respect to Citation No. 2063916, MSHA relies on his posthearing affidavit, which in pertinent part states as follows:

> I determined that the cited condition was of a significant and substantial nature because a reasonable likelihood existed that injuries of a reasonably serious nature would have occurred as a result of said condition for the following reasons.
>
> (a) The methane level was 0.2% 15 feet out-by the face on the right side and 0.3% on the left side. However, it could have been higher at the face where I did not measure it because the roof was unsupported.
>
> (b) Monterey Mine No. 1 liberated more than one million cubic feet of methane or other explosive gases during a 24-hour period as of February 3, 1983.
>
> (c) Monterey Mine No. 1 was under a five day spot inspection under Section 103(i) of the Act as of February 3, 1983.

(d) The methane level could have built up at the face at any time causing an ignition and resulting in burns on the body and face of the two operators of the continuous miner.

(e) The injuries produced by a gas ignition could have resulted in lost work days or restricted duty.

(f) The amount of air found at the time of the inspection was 1900 cubic feet per minute where 5000 cubic feet per minute was required by the operator's ventilation plan. This lack of air contributed to the increase in methane gas and respirable dust and increased the exposure of miners to the hazards caused by high methane levels and respirable dust.

(g) I was informed by the operator that the air quantity had been measured before the inspection and found to be adequate. However, I found that the air had been measured with an anemometer and that the miner who measured it was not familiar with air measuring procedures.

(h) Based on the history of many prior violations by the operator of 30 CFR 75.316, I considered that the likelihood of an accident caused by an increase in the methane level as a result of poor enforcement of the operator's ventilation plan was augmented.

MSHA points out that Monterey's witness Mottershaw testified that the decreased airflow measured by Inspector Gulley was the result of a rock dust bag being sucked into the tubing, thereby interrupting the airflow, and that empty rock dust bags are used to repair and patch ventilation leaks in the tubing. Coupled with the history of prior violations, MSHA suggests that this practice of using rock dust bags to repair ventilation leaks establishes poor enforcement of the mine ventilation and dust control plans. MSHA points out that no one knows how long the rock dust bag may have interrupted the ventilation, and that the 1900 cubic feet of air found by Inspector Gulley was not a minor decrease, particularly where the required 5000 cubic feet is only a minimum requirement. Coupled with the prior history of poor enforcement of section 75.316, MSHA concludes that a reasonable likelihood existed that an injury or illness of a reasonable serious nature would have resulted as consequence of the condition cited.

Monterey's history of prior violations is in the form of computer print-outs attached as Exhibit B to MSHA's post-hearing arguments. The print-out detailing Monterey's prior history for the period December 28, 1982 to June 21, 1983, lists five citations for violations of section 75.316. Two of the listed violations are the ones contested in these proceedings. The three remaining ones concern violations issued on January 20, February 1, and April 19, 1983. In each instance, the print-out reflects that Monterey paid the "single penalty" assessment of $20 for each of the violations. I take note of the fact that these "single penalty" assessments are based on findings that they are "non-S & S" violations.

A second computer print-out, also identifled as Exhibit B, covers the period December 28, 1980 through December 27, 1982. It lists 18 prior violations of section 75.316, and the penalty assessments range from a low of $20 to a high of $275. Three of the citations were "single penalty assessments" of $20 each, and according to the computer "codes," the remaining penalty assessments were "regular assessments," as distinguished from assessments related to injuries, fatalities, or unwarrantable failures. Further, all of the citations were section 104(a) citations, and did not involve withdrawal orders or imminent dangers. Taken as a whole, the computer print-outs reflect that for a period spanning December 28, 1980 through June 21, 1983, Monterey was assessed for 21 violations of section 75.316, six of which were $20 "single penalty" "non-S & S" assessments.

Absent any testimony or documentation as to the specific conditions or practices which prompted the prior citations, I cannot conclude that they involved the same conditions cited in these proceedings. Given the fact that section 75.316 is a general standard requiring a mine operator to adopt a ventilation system, and methane and dust control plans approved by the Secretary, unless MSHA produces the specific citations, as well as the particular plan provisions which may have been applicable at the time these prior citations were issued, I cannot conclude that they involved a failure by Monterey to follow the plan provisions dealing with ventilation tubing or the maintenance of air velocity at the level at issue in these cases.

On the facts of these proceedings, MSHA's reliance on the history of prior violations to support a conclusion that Monterey has somehow engaged in a practice of deliberately flaunting its own dust and ventilation plans is rejected. Given a two and half year period of 21 violations of section 75.316 violations, six of which were "non-S & S" violations, and given the fact that Monterey is a large mine operator, I

cannot conclude that MSHA's conclusions are supportable. This is particularly true where MSHA has produced absolutely no facts to indicate precisely what the conditions or practices cited in these prior violations were all about. As an example, I cite Monterey's reference to Inspector Melvin issuing a subsequent "non-S & S" citation for precisely the same conditions for which he now claims constitute a significant and substantial violation.

In my view, if it can be established that a mine operator has a practice of deliberately flaunting the law, this should be addressed by the issuance of closure orders or the institution of criminal proceedings. The issuance of inconsistent and unexplained section 104(a) citations, some of which are "S & S," and some of which are not, all based on identical factual situations, simply does not make sense. Further, reliance on unevaluated prior histories of violations, with no documentation, also do not make sense.

If MSHA is of the view that past history violations, as well as information of asserted practices which may suggest a lack of attention to dust and ventilation plans, may support a theory of "significant and substantial" violations, it is incumbent on MSHA to support those conclusions by credible evidence, rather than by speculative unsupported theories. As an example, I cite Inspector Melvin's testimony that certain miners told him that as a matter of routine or practice, the exhaust tubings are not advanced to within 10 feet of the face as mining advancing. Where are the miners to support this conclusion? I also cite MSHA's reliance on computer print-outs, with absolutely no testimony or evidence to indicate the particular facts or circumstances which prompted those citations.

Turning to the record evidence to support MSHA's assertion that Citation No. 2036802 was significant and substantial, I take note of the fact that Inspector Melvin testified that his methane readings taken 20 to 22 feet from the face at the time the citation issued ranged from .1 to .2, and that these were "not high" (Tr. 8). He also indicated that while readings of .5 may have caused him concern, gas is generally not detected at the face in the mine (Tr. 11). He conceded that even though the mine is classified as a "gassy mine," and even though methane may be encountered when the coal is actually cut, he has not detected methane levels in excess of the prohibited standards (Tr. 12-13). Further, he did not rebut the testimony of Monterey's witness Mottershaw that in all the years he has worked at the mine, the mine had never been cited for excessive levels of methane, and he conceded that at the time he issued the citation, he detected

no excessive methane (Tr. 26). Nor did the inspector rebut the testimony of mine manager Lehmann that his examination of the preshift examiner's books for the cited mine unit for the entire month of December 1982, reflected "zero methane readings" (Tr. 85).

With respect to the methane monitor on the cutting machine in question, Inspector Melvin stated that he found nothing wrong with it, and his concern was with the possible build-up of methane (Tr. 20,22). He candidly stated that he made his "S & S" finding on the ground that "if it continues to happen you could have a build-up of methane" and "sooner or later someone will be injured" (Tr. 24). He also expressed reservations about finding an "S & S" violation for such a condition "if it were the first time" (Tr. 26). He also confirmed that he found nothing wrong with the cutting machine, and issued no other violations (Tr. 38), and that at the most, the ventilation tubing would have been at the 22 foot location for no more than 20 minutes.

With regard to the question as to whether the respirable dust levels in the mining unit which he cited exceeded the permissible levels, Inspector Melvin testified that he could not state what those levels were, and that he did not take any samples, nor did he check any sample results which may have been taken by Monterey (Tr. 28). Further, even though Monterey's history of prior citations, as reflected by the computer print-outs, reflect prior citations for violations of the respirable dust requirements of section 70.100(a), no testimony or evidence was forthcoming as to any of the details of those violations.

In view of the foregoing findings and conclusions, I cannot conclude that MSHA has established that the violation in question was significant and substantial. Given the short duration that the exhaust tubing was 22 feet from the face, as well as the fact that the low level of methane and the condition of the methane monitor and machine were in compliance with other applicable standards, a finding of significant and substantial is unsupportable. Accordingly, that portion of the citation alleging a significant and substantial violation IS VACATED.

With regard to Citation No. 2063916, I conclude and find that MSHA has established that it was a "significant and substantial" violation. I agree with MSHA's arguments that the interruption to the ventilation flow resulted in a significant decrease in the amount of air required to be maintained where coal was being cut. This marked decrease in air presented a substantial hazard to the miners working

in the cited area, particularly where the facts here show that the interruption to ventilation was caused by a rock dust bag used to make repairs to the ventilation tubing. Given the fact that the ventilation tubing was 390 feet from the fan, the practice of using such rock bags to make such repairs presented a reasonable likelihood that ventilation would be interrupted at those points where such bags were used, and that if sucked into the tubing, it would go undetected.

The practice of repairing the tubing by the use of empty rock dust bags was established by Monterey's own witness, and he apparently was aware of the fact that miners would often make repairs in this manner. While I recognize that the methane readings found by Inspector Gulley outby the face were low, and that he took none at the immediate face, the fact is that the violation occurred while coal was being cut, and the interrupted ventilation caused by the practice of using rock bags to make repairs to the tubing, presented a significant and substantial hazard to miners. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

The parties have stipulated that Monterey is a large mine operator and that the payment of the assessed civil penalties will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

Monterey's history of prior violations has been previously discussed. Aside from MSHA's failure to present any specific information concerning prior violations of section 75.316, MSHA presents no arguments dealing with Monterey's overall compliance history, and whether or not that history warrants any additional increases in the penalties to be assessed in these proceedings.

I note that MSHA's computerized print-out for the two-year period of 1980-1982, reflects approximately 347 violations, and that for the prior 1982-1983, the print-out reflects 98 violations, all issued at the No. 1 Mine. I have considered this information in assessing the penalties in these proceedings. However, I believe it is incumbent on MSHA to establish any correlation between an operator's past track record and an increase in civil penalties on the basis of that record. MSHA's continued practice and reliance on unevaluated computer print-outs, with no further supporting arguments, should be reexamined if the Secretary seriously expects any increased civil penalties on the basis of continued noncompliance.

Good Faith Compliance

The parties have stipulated that Monterey demonstrated good faith in abating the conditions cited in Citations 2036802 and 2063916, and I adopt this stipulation as my finding and conclusion as to these citations.

Gravity

I conclude and find that Citations 2036802 and 2063916, were both serious violations. Although the exhaust tubing violation was found to be "non-S & S," and while it was unlikely that an accident would have occurred within the relatively short period that the tubing was 22 feet from the face, these are factors which go to the degree of the severity of the situation, and may not serve to establish that the violation was nonserious. In short, I find that while Citation 2036802 did not involve a significant and substantial violation, noncompliance with the cited standard was serious.

With regard to Citation 2063916, I conclude and find that this was a serious violation in that the air present where the machine was cutting coal was substantially reduced due to the interrupted air flow in the ventilation tubing. Such an occurrence could easily reoccur and go undetected because using rock dust bags to make repairs on the tubing could easily result in the bags being sucked into the tubing without anyone knowing it.

Negligence

Citation No. 2036802

Monterey concedes that it violated the applicable dust and ventilation provision which prompted the inspector to issue the citation in question. A mine operator is presumed to know the contents of his own plans, and the facts in this case establish that Monterey knew or should have known of the conditions cited by the inspector. Accordingly, I conclude and find that the violation resulted from a high degree of negligence and this is reflected in the civil penalty assessed by me for this violation. As an aside, had MSHA produced any credible testimony that the miners made it a practice not to advance the ventilation tubing as required by the plan, I would find gross negligence and would have increased the penalty assessment substantially.

Citation No. 2063916

In this case, Monterey concedes that the use of empty rock dust bags for makeshift repairs to ventilation tubing is often done by the workmen on the section. Mr. Mottershaw's testimony indicates that rock dust bags, rather than plastic material manufactured for the specific purpose of making such repairs, are routinely used by miners. Monterey's counsel stated during the hearing that "its probably not a one time only occurrence." Under the circumstances, I conclude and find that this violation resulted from gross negligence. Routinely making such repairs with empty rock dust bags rather than the materials specifically manufactured for such purposes indicates to me that Monterey in this instance failed to exercise the slightest degree of care. While it is altogether possible that mine management was unaware of this practice, I cannot conclude here that this is the case. Mr. Mottershaw is the company safety coordinator, and his testimony indicates prior knowledge of this practice.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Docket LAKE 83-52

Citation No.	Date	30 CFR Section	Assessment
2036802	12/28/82	75.316	$300

Docket LAKE 83-61

Citation No.	Date	30 CFR Section	Assessment
2063916	2/3/83	75.316	$850

ORDER

Respondent Monterey Coal Company IS ORDERED to pay the penalties assessed by me, as shown above, within thirty (30) days of the date of these decisions and Order, and upon receipt of payment by MSHA, the cases are dismissed.

Findings and Conclusions

Docket No. LAKE 84-17

This case involves a "non-S & S" Section 104(a) Citation No. 2319281, issued by MSHA Inspector George J. Cerutti

on August 9, 1983. The citation charges respondent Monterey Coal Company with a violation of 30 CFR 75.1403-5(g), and the inspector cited the September 4, 1975, Safeguard Notice issued by Inspector Wrachford. The "condition or practice" cited is as follows:

> A clear travelway at least 24 inches wide wasn't provided along the Main North Belt Conveyor on the east side of the belt at the following location of Rock and Clay at these crosscuts. 198 to 202, 194-193, 192-193, 190-191, 188-189, 186-180, 177-178, 176-175, 171-170, 165-164, 161, 160, 158-159, 156-157, 154-153, 154-153 [sic], 151-150, 148-149, 147-146, 151-150 [sic], 148-149 [sic], 146-147, 140-139, 130-131, 112-109, 110-108, 107-106--west side 99-100, 93-94, 90.

Respondent's motion to consolidate this case with the preceding cases concerning basically the same factual and legal issues was granted by me by Order issued on January 3, 1984. Respondent does not dispute the conditions or practices described by the inspector, waived its right to a hearing, and agreed that all prior stipulations and agreements concerning the preceding dockets are equally applicable in this case. Further, respondent advances the same legal defenses in this case as it did in the prior cases, and I assume that MSHA's position would also be the consistent with its arguments in the prior cases.

ORDER

My findings and conclusions with respect to the interpretation of section 75.1403-5(g), as well as the application of that standard and the safeguard notice to the belt conveyor walkways in question in the prior dockets are equally applicable in this case. Accordingly, they are incorporated herein by reference as my findings and conclusions in this case. Under the circumstances, Citation No. 2319281 IS VACATED.

George A. Koutras
Administrative Law Judge