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

THE HELEN MINING COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. PENN 83-200-R Citation No. 2111715; 5/25/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 83-201-R Citation No. 2111718; 6/1/83
	Docket No. PENN 83-202-R Order No. 2111719; 6/1/83
	Docket No. PENN 83-203-R Order No. 2111720; 6/1/83
	Homer City Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
v.	Docket No. PENN 83-232 A.C. No. 36-00926-03532
HELEN MINING COMPANY, RESPONDENT	Homer City Mine

DECISION:

Appearances: Thomas C. Means, Esq., Crowell & Moring, Washington, D.C., for Contestant/Respondent; Catherine O. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings were heard in Pittsburgh, Pennsylvania during the term November 8-9, 1983. The civil penalty docket concerns proposals for assessment of civil

penalties filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking penalty assessments for four alleged violations of certain mandatory safety standards promulgated under the Act. The contests were filed by the contestant to challenge the legality of one citation and three orders issued pursuant to section 104(d)(1) of the Act.

Issues

The issues presented in Dockets PENN 83-200-R, 83-201-R, 83-202-R, and 83-203-R, are whether the conditions or practices cited by the inspector constituted violations of the cited mandatory safety standards, and whether or not the violations were "unwarrantable" and "significant and substantial."

Assuming that the fact of violation is established in each of the above dockets, the remaining Docket, PENN 83-232, concerns the appropriate civil penalties to be imposed for each of the violations after taking into account the requirements of Section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-165, 30 U.S.C. 801 et seq.

2. Commission Rules, 29 CFR 2700.1 et seq.

Docket No. PENN 200-R

This docket concerns a Section 104(d)(1) Citation No. 2111715, issued by MSHA Inspector Lloyd D. Smith at 9:10 a.m., on May 25, 1983. He cited a violation of mandatory safety standard 30 CFR 75.1722(c), and the condition or practice is described as follows on the face of the citation:

> A portion of the guarding provided at the 6 East Crossover belt drive on the clearance side was laying on the mine floor and the lower half of the fan blades on the drive motor were exposed because part of the protecting shroud had been broken off exposing the moving fan blades.

Inspector Smith found that the violation was "significant and substantial," and that the negligence by the mine operator was "High."

Inspector Smith fixed the termination date for the citation as May 25, 1983, 10:00 a.m., and he stated that it was terminated at 9:55 a.m. that day, and that "The guarding was put back in place securely."

Docket No. PENN 83-201-R

This docket concerns a Section 104(d)(1) Order No. 2111718, issued by MSHA Inspector Lloyd D. Smith on June 1, 1983. He cited a violation of mandatory safety standard 30 CFR 75.500(a), and the condition or practice is described as follows on the face of the order:

> A nonpermissible switch box was being used to supply electric power to a water pump located in a working place, crosscut No. 8 to No. 9 room of the D-Butt, 040 Section. This violation occurred on a previous shift.

Inspector Smith noted that the violation was "significant and substantial," and he marked the appropriate negligence block on the citation form "Reckless Disregard." He also made reference to a previous section 104(d)(1) Citation No. 2111715, which he issued on May 25, 1983.

Docket No. PENN 83-202-R

This docket concerns a Section 104(d)(1) Order No. 2111719, issued by MSHA Inspector Lloyd D. Smith at 9:15 a.m., on June 1, 1983. Mr. Smith cited a violation of mandatory safety standard 30 CFR 75.200, and the condition or practice is described as follows on the face of the Order:

> The approved roof control plan was not being complied with in the D-Butt 040 Section in that mining operations had been completed in a crosscut No. 8 to No. 9 room, the mining machine had been removed and warning signs had not been installed to warn persons that the mine roof was unsupported in this area. The violation occurred on a previous shift.

Inspector Smith did not find that the violation was "significant and substantial," but noted the negligence as "high" on the face of the order, that "the occurrence of the event against which the cited standard is directed was unlikely, and that any resulting injury would be "no lost workdays." As for the abatement of the cited condition, Mr. Smith noted that the order was terminated at 9:25 a.m., on June 1, 1983, and that "the warning signs were installed in the affected area."

This docket concerns a Section 104(d)(1) Order No. 2111720, issued by MSHA Inspector Lloyd D. Smith at 9:17 a.m., on June 1, 1983. Mr. Smith cited a violation of mandatory safety standard 30 CFR 75.200, and the condition or practice is described as follows on the face of the order:

> It was evident that a person or persons had worked inby the permanent roof supports in a crosscut No. 8 to No. 9 room in the D-Butt, 040 Section in that a permissible type water pump had been installed 3 feet inby the last row of installed roof bolts and there were no temporary roof supports installed in this working place to permit the installation of the pump. This violation occurred on a previous shift.

Inspector Smith noted that the violation was "significant and substantial," and marked the appropriate negligence block on the citation form "High." He also made reference to his previous section 104(d)(1) Citation No. 2111715, which he issued on May 25, 1983.

Inspector Smith noted that Citation No. 2111720 was terminated on June 1, 1983, at 9:45 a.m. and that "The pump was removed by dragging it out with the discharge line cut power cable."

Stipulations

The parties stipulated to the following:

1. The Helen Mining Company owns and operates the Homer City Mine and both are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

3. The subject Citation No. 2111715 and Order Nos. 2111718 and 2111720, were properly served by a duly authorized representative of the Secretary, Lloyd Smith.

4. Copies of Citation No. 2111715, Order No. 2111718 and Order No. 2111720 (attached to the Petition for

Assessment of Civil Penalty) are authentic copies of the original citations and orders.

4a. Copies of all documents offered and received by the parties as part of the hearing record in these proceedings are authentic copies of the original documents.

5. The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

6. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based on the fact that the Homer City Mine has an annual production of 1,043,911 tons and Helen Mining Company has an annual production of 13,414,096 tons.

8. The operator demonstrated a good faith effort to comply following issuance of Citation No. 2111715, Order No. 2111718 and Order No. 2111720 by taking immediate action to correct the cited conditions.

PENN 83-200-R, Citation No. 2111715

1. A guard was not securely in place over the lower portion of the fan blades on the drive motor of a conveyor belt while the belt was being operated, in violation of 30 CFR 75.1722(c), on May 25, 1983, at the 6 East crossover belt drive of the Homer City Mine.

2. The operator demonstrated ordinary negligence in failing to detect and correct the condition described in Citation No. 2111715.

3. If an injury were to occur as a result of the violation described in Citation No. 2111715, it would be a serious injury.

PENN 83-201-R, Order No. 2111715

1. A nonpermissible switch box, which is the subject of Order No. 2111718, was located in the working place, inby the last open crosscut, No. 8 to No. 9 room, 040 Section on June 1, 1983.

2. Two electrical power cables were connected to the subject nonpermissible switch box. One of these electrical cables was connected to a pump, the other cable extended a distance of approximately 300 feet from the connection at the switch box to the power center.

3. The power cable which led to the power center was not energized at the time Order No. 2111718 was issued.

4. The power cable which led from the switch box to the power center was not "tagged out" or labelled in any manner to indicate that it should not be energized.

Docket PENN 83-200

MSHA's testimony and evidence

MSHA Inspector Lloyd Smith testified as to his background and experience, and he confirmed that he inspected the mine on May 25, 1983, and issued a Section 104(d)(1) citation for a violation of mandatory standard 75.1722(c), (exhibit G-1). He stated that he issued the citation after observing that the belting used for guarding the belt conveyor drive was lying on the floor. The belt drive was operating at the time he observed the condition, and he confirmed that he observed the protective shroud used to guard the lower half of the drive motor was broken off (Tr. 9-14).

Inspector Smith identified exhibit J-2(a) as a photograph of the missing portion of the protective shroud used to guard the motor fan blades, and he identified exhibit J-2(d) as a photograph of the guarding which was off the equipment in question. He stated that he believed the violation to be "significant and substantial" because the protective belting which was lying on the floor was wet and slippery and if someone were to slip on it they would possibly fall into the unguraded opening on the metal motor fan blades (Tr. 18). He also considered the wet belting lying on the floor to be a tripping hazard (Tr. 19), and he confirmed that the person exposed to possible injury would be the preshift or belt examiner who walked the belt (Tr. 20). Inspector Smith indicated that abatement was achieved by installing a wooden support near the motor drive and nailing the belting back up (Tr. 21).

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On cross-examination, Inspector Smith testified as to certain "cap lamps" which he observed at some distance in the No. 6 East Belt Haulage area, and he estimated that theythey were approximately 200 feet from the location of the unguarded drive motor (Tr. 24). He confirmed that the motor in question was partially guarded, and he indicated that his only concern was over the fact that the belt guarding normally used to guard the drive motor was lying on the floor (Tr. 27).

Mr. Smith conceded that production crews would not normally be in the area of the unguarded belt motor. He also conceded that a clearly defined walkway, with "very good clearance" was located adjacent to the unguarded motor area (Tr. 28). He also confirmed that there were no coal accumulations in the area around the motor in question (Tr. 33). Mr. Smith stated that a preshift belt examiner would have occasion to be in the area in question because he would place the time, date, and his initials on the belting to confirm that he had examined the area (Tr. 35).

In response to further questions, Mr. Smith testified that he observed footprints on the belting lying on the floor, and that this indicated to him that someone had walked across the belting while in that position (Tr. 37). He confirmed that the unguarded motor opening area which he was concerned about was approximately 26 inches, and he stated that he measured the distance and identified it on exhibit J-2 (Tr. 38-41).

In response to additional questions, Mr. Smith confirmed that he identified the miners who he previously observed by their "cap lamps," and that he did so after the citation was abated and terminated. He identified them as belt cleaners, and he confirmed that they informed him that they were unaware that the belt guarding was down and that they had not been in the area (Tr. 41). Mr. Smith also confirmed that while he waited around the unguarded motor area before issuing the citation, no one appeared to do any work in the area, and the last inspection entry made on the belt guarding was for the day shift on May 24, which was the 8:00 a.m. to 4:00 p.m. shift (Tr. 44). He contacted the section foreman who had made this entry, and he informed him that the belt guarding was intact when he inspected the area, and Mr. Smith had no reason to disbelieve him (Tr. 45).

In response to how long the belt in guarding was off the motor in question, Mr. Smith stated that he was informed by the safety committee that mine management was informed on May 20 that the belt guarding was off, and that the bottom

half of the protective motor shroud was missing (Tr. 47). He was also informed that a replacement for the broken shroud had been ordered, and that the belting guard was installed to keep people out of the area, and he explained the purpose of the belting as follows (Tr. 48-50):

> JUDGE KOUTRAS: My question is, if the shroud were in one piece, and wasn't broken off at the bottom, would there be a need for this belt guarding?
>
> THE WITNESS: Not in the location it's put there, no. There would be a need for guarding, but not where it is.
>
> JUDGE KOUTRAS: You mean there would be a need for an additional guarding on the motor to protect the motor blades other than the shroud?
>
> THE WITNESS: No, not the motor. The only guard on the motor would be over the coupler between the motor and the gear case drive. Maybe, if you let me walk over there, I can show you what I'm talking about.
>
> JUDGE KOUTRAS: Sure. Go ahead.
>
> THE WITNESS: If all of this shroud was intact, and there was no problem, then they would guard this area in here so a person would have no way to get in up in here. They would have to come around here. They would just guard this area right through here.
>
> JUDGE KOUTRAS: But, what I'm saying is, you issued the Citation because the blades of the motor were exposed. Right?
>
> THE WITNESS: Right.
>
> JUDGE KOUTRAS: Well, if the shroud was intact, completely over the blades of the motor, what would that belt guarding on the side do?
>
> THE WITNESS: What does this guard do? It prevents anybody from going in here, or slipping or falling in here, if that guard is up in place.
>
> JUDGE KOUTRAS: Is that belt guard there to protect other areas of that belt, or is it there simply to protect someone from falling into the exposed lower half of the motor blades?

THE WITNESS: Well, I think it's in there for both in this particular case. It's in there for both reasons.

JUDGE KOUTRAS: Ms. Murphy, do you understand my question?

MS. MURPHY: I think I do, Your Honor.

JUDGE KOUTRAS: Is there an answer?

MS. MURPHY: Whether or not he would have cited it if the shroud was on there.

JUDGE KOUTRAS: That's right.

MS. MURPHY: I think what he just testified to, Your Honor, is that there are other things there that he believes people should be prohibited, or prevented from getting in to, and that the belt guard that was not in place served that dual function. If the shroud was on, there would still be a need for a guarding in a different location to prevent entry into the moving parts.

JUDGE KOUTRAS: My question, then, is, if the shroud were on, would we have this case. We might have had some other location as not guarded, but would we have an allegation that the fan blades on this motor, which were exposed, were not guarded? If that shroud were completely on, would he have issued a Citation on the fan blades of the motor?

MS. MURPHY: From what I understand about the case, it would not with respect to the exposed moving parts on this piece of equipment.

JUDGE KOUTRAS: My next question is; if the problem was caused by the bottom half of the shroud being broken off, and if that condition were there, why was the Citation abated by simply permitting them to put this belting up rather than making the Operator put that shroud back the way it was?

MS. MURPHY: The Operator had indicated to the Inspector that they had ordered a shroud, Judge, but, in the interim, I think--

JUDGE KOUTRAS: If I walked into this mine today, would I find a shroud or a belt?

MS. MURPHY: We don't know.

JUDGE KOUTRAS: Can somebody answer that question? Have you been back to this mine since May 25, of '83, back to this section?

THE WITNESS: I would have to look in my notes.

MR. MEANS: Your Honor, if I may explain.

JUDGE KOUTRAS: Yes, Mr. Means.

MR. MEANS: We may be able to get into some of this with my witness, Mr. Turner, but the shroud had broken when the device was being installed, I believe. The shroud had been ordered from the manufacturer. It's a special part you have to purchase from the manufacturer. And, in fact, one shroud had been delivered, and it was the wrong size and couldn't be installed, and so they had to order another one. In the meantime, they erected the belt guarding to preclude access to the area.

JUDGE KOUTRAS: Okay. Now, my next question, Mr. Means, if you know, is the shroud on that motor today?

MR. MEANS: I believe it is not.

JUDGE KOUTRAS: Or is it still on order?

MR. MEANS: I believe it is not on that motor right now. I believe it is still on order.

JUDGE KOUTRAS: It is not? And, the reason it is not on is because MSHA abated the Citation, and is permitting you to use this belting as an adequate guarding, for that broken shroud?

MR. MEANS: I don't know the answer to that.

Inspector Smith explained that his concern was over the fact that if the guarding were left on the floor, anyone walking by and slipping on the wet belt guarding lying on the floor could have caught in the exposed motor blades (Tr. 53). He believed that the support post used for nailing up the belt guarding had either fallen down or was removed sometime during the immediate two preceding work shifts on the afternoon of May 24 or the morning of May 25 (Tr. 56). He further explained his reasons for issuing the citation as follows (Tr. 58-59):

JUDGE KOUTRAS: Let me ask you this question. Assuming that that belt guarding were not in place at that location, and assuming that the shroud was completely on that motor again; assume this, the shroud was in place completely over the blades of the motor, and the belt guarding was not in place, would you still have issued the Citation?

THE WITNESS: Yes.

JUDGE KOUTRAS: And the reason for that is, in your opinion, the belt guarding was put there to keep people from getting to of that belt?

THE WITNESS: Right, to the drive rollers.

JUDGE KOUTRAS: To the drive rollers, yes. Would you characterize this belt guarding, more or less, as a physical barrier to alert people to stay out, or actually as a physical guard? I'm not trying to be technical, but, what if they had a fence out there, or a couple of posts running horizontally. Is that to keep people out of there, or is it to serve as a physical guard?

THE WITNESS: In this particular case, I think it's both. You see guarding in place. That kind of takes your eye. You see a barrier set up in front of you, guarding. It's like a barrier.

JUDGE KOUTRAS: You cited them, now, with a provision of the Standard that says that, "Except when testing, guards shall be securely in place while machinery is being operated." You saw no evidence of testing?

THE WITNESS: No, I didn't.

JUDGE KOUTRAS: Do you have any idea what the Company policy is with regard to doing maintenance on such equipment? In terms of locking out, and all that sort of business?

THE WITNESS: What I've seen during my inspections there, they do lock equipment out prior to working on it.

Helen Mining Company's testimony and evidence

David Turner, testified that he has been employed by the respondent as a dust sampler since 1979. He confirmed that Mr. Smith conducted an inspection on May 25, 1983, and that he issued the guarding citation in question (Tr. 62). Mr. Turner also confirmed that abatement was achieved by installing a post in place near the drive motor in question, and nailing the belt guarding on the post (Tr. 63). He stated that Mr. Smith told him that his concern was over someone possibly slipping and falling into the moving belt motor drive blades.

Mr. Turner stated that the walkway adjacent to the area which concerned Mr. Smith was traveled by belt examiners, cleaners, or maintenance personnel, and he confirmed that the walkway was about eight feet wide (Tr. 65). He stated that any belt work is done between shifts while the belt is down, and he explained the procedures for cleaning and maintaining the belt in question (Tr. 65-67). He confirmed that a footprint was present on the belt guarding which was down (Tr. 68). However, he believed that the motor housing itself served as a "natural barrier" to the motor. He confirmed that the belt guarding was installed to take the place of the broken motor shroud, and that this was done until such time as a new shroud which had been ordered could be used to replace the broken one (Tr. 69-70). He believed that anyone slipping in the area in front of the motor would have to make a concerted effort to reach the exposed motor blades (Tr. 70).

On cross-examination, Mr. Turner stated that the mine bottom in the area in question was wet and muddy, and that it was possible for someone to stick in the mud and lose their balance (Tr. 71). He generally described the equipment in the vicinity of the motor in question, and indicated that anyone using an oil fill-up on an adjacent motor would have to make a conscious effort to reach the cited location (Tr. 74). However, he conceded that someone standing immediately in front of the cited drive motor in question could reach in and contact the exposed blades, and that if he were to get himself between the guard and blades while standing at the perimeter of the motor housing, he could come in contact with the motor blades (Tr. 76).

Mr. Turner confirmed that after the citation was issued, he ascertained that the broken motor shroud had been in that condition for at least two weeks, and while no one brought this condition to his attention, he assumed that the mine safety committee called it to MSHA's attention (Tr. 79).

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When asked to explain what Inspector Smith may have told him at the time he issued the citation, Mr. Turner stated as follows (Tr. 80-84):

> JUDGE KOUTRAS: Did Mr. Smith explain to you why he considered the violation to be unwarrantable?
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: What did he tell you?
>
> THE WITNESS: He said that a belt examiner, as part of his normal duties, in that area, should have seen the situation, determined that it needed corrected, and had it corrected. Something to that particular effect.
> * * *
>
> JUDGE KOUTRAS: But, in the two intervening shifts, someone was required to go there and make an examination.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: My question is, did anyone, either Mr. Smith or you, or the Company, during the period after the Citation was issued, determine, number 1, whether someone went there, and if so, why they didn't take appropriate action to make sure that the guarding was put back up?
>
> THE WITNESS: We did take action to try to pin that down.
>
> JUDGE KOUTRAS: And what was the result of that action?
>
> THE WITNESS: The result of that was that the two people in the two shifts making examinations prior to that could not remember if it was up or down. The person that was there on the third shift beforehand had seen it and said that it was up. And that's as close as we could pin it down.
>
> JUDGE KOUTRAS: Now, if it were down, I assume that the belt examiner is required to make some entry in the book. Is he not?

THE WITNESS: What he will do--, he would probably, if it took a post and resetting the post, he would probably do that himself. If he could not correct the situation, then he should put something in the book to that effect.

JUDGE KOUTRAS: It's obvious that nobody put the post up, or put the belting up, or you wouldn't have the citation.

THE WITNESS: Right.

JUDGE KOUTRAS: So, there's a strong inference that what? He either saw it up, or it mysteriously fell down during the time that he inspected it, or--?

THE WITNESS: It's one or the other.

* * *

JUDGE KOUTRAS: Did you determine whether or not any maintenance work was being done on this belt at any time during the intervening shifts prior to the time that the Inspector arrived?

THE WITNESS: No.

JUDGE KOUTRAS: Did you ascertain whether or not any testing was being done?

THE WITNESS: There was no testing being done during that 24 hour period.

MSHA's counsel conceded that if the motor blade protective shroud had not been broken in such a way as to expose as the bottom half of the motor blades, there would be no requirement for the belt guarding which was required to keep persons out of the area. Inspector Smith confirmed that he issued the citation for the exposed blades and nothing else (Tr. 87). He also confirmed that several days after the citation issued, the safety committee informed him that the broken shroud condition had previously been brought to mine management's attention, but that at the time of his unwarrantable failure finding he was not aware of that fact (Tr. 88). When asked to explain why he made an unwarrantable failure finding at the time he issued the citation, Mr. Smith explained as follows (Tr. 88-90):

Q. So that leads me to the next question. Why did you feel that this was an unwarrantable failure?

A. Because that's an area that should be included in the examination. Regulations require, on the belt haulage examinations, that dates, times and initials be placed in a sufficient number of places to indicate that the entire belt haulage has been examined.

Q. All right.

A. There were no dates, times and initials there for the two previous shifts. And, I stated earlier, I did talk to the day shift Foreman that did have a date up there the prior day. I stated his comments.

Q. Now, the Citation you issued was for failure to make the preshift examinations for the two shifts? Is that right?

A. No, I did not. The Citation I issued under 303(a)?

Q. Yes.

A. I cited, it was, the dates, times and initials were not evident to indicate that the area had been examined. There's no way I could say they did not examine it.

Q. All right. Well now, that's what I'm saying. That doesn't mean the same thing, does it?

A. No. I just cited them for not placing their dates, times and initials there to indicate they had been there.

Q. Now, if the place where the fellow would normally write that information was down on the ground, would he have a place to write it?

A. They were dating up right on the belt guarding. Primarily, right on the guarding between the two posts. That's where the previous day shift Foreman's date was.

Q. Did you ever determine whether or not the two fellows that are required to make the preshift actually made it?

A. Yes. I know that it was dated Fred Dobson. It was along the belt haulage going back to 7 east and 1 butt, which 1 butt didn't have a belt drive at that time. He had his dates along that entire belt haulage.

Q. So, he did, in fact, make that particular location, the preshift?

A. At 7 east he was dated up, and at the belt tail he was dated up, or crossover belt, yes.

Q. Well, what I'm saying is, for the two previous shifts prior to your arrival, were you saying that they hadn't entered any dates or initials, and you issued Citations for not doing that, for not making that mechanical entry? Do you know whether they, in fact, inspected that area?

A. Mr. Dobson stated he did.

Q. He did. How about the other fellow?

A. I don't know. I haven't been able to determine who was required to make that on the 4 to 12 shift.

Dockets PENN 83-201-R and PENN 83-203-R

MSHA's testimony and evidence. PENN 83-201-R.

MSHA Inspector Lloyd Smith confirmed that he was at the mine in question on June 1, 1983, to conduct an inspection. Upon walking into the No. 8 room located in the no. 8 to no. 9 crosscut working place he observed a nonpermissible switchbox lying along the left rib. He described the switchbox in question and stated that it was being used to supply power to a submersible pump located in the no. 8 and no. 9 crosscut. The switchbox controlled the power from the box to the pump. A power cable ran from the box to the pump, and another power cable ran outby from the box towards the power center. The pump was approximately 20 to 25 feet from the box, and the pump was not running. The pump was located in water where the place had flooded out and the roof in that area was not supported. The power cable was not energized and the switch was off, and he estimated that the box cable was located approximately 300 to 400 feet from the power center. He estimated that the cable plug was approximately two to three feet from the power center. He identified exhibit G-3 as the section 104(d)(1) Order that he issued for the violation (Tr. 103-109).

Inspector Smith stated that his conclusion that the nonpermissible switchbox was being used to supply power to the pump was based on his observation of the pump, the flooded conditions, and a pump discharge line used to move the water. He also observed the power cable going to the power center, and since there was an obvious need for the pump in that working place, he concluded that the pump was used (Tr. 110).

After making his initial observations, Mr. Smith stated that he began walking down the entry toward the power center with day shift foreman Mitsko, but was interrupted when he encountered company safety Dale Montgomery, and Mr. Mitsko continued on to the power center. Mr. Mitsko came back and informed him that the cable plug was not plugged into the power center, but that it had not been "dangered off." Mr. Mitsko informed him that he had "dangered it off" or "tagged it" so that the plug could not be used (Tr. 111).

Mr. Smith gave the following explanation for the issuance of the order (Tr. 112-115):

> Q. Inspector Smith, I want to ask you to assume, for a moment, that the pump was not energized on the previous shift. Would the conditions you observed in that area still constitute a violation of 75.500(a), in your opinion?
>
> A. Yes.
>
> Q. Can you tell the Judge why?
>
> A. .500(a), a nonpermissible distribution box, or switchbox, whatever you want to call it, was used to make physical electrical connections. And, .500(a) prohibits making power connections with nonpermissible equipment.
>
> JUDGE KOUTRAS: Well, as I read (a), it simply says that all junctional distributional boxes used for making multiple power connections inby the last open crosscut shall be permissible. That presupposes that it was used?
>
> THE WITNESS: It was used to make those connections, yes.
>
> JUDGE KOUTRAS: In other words, what you found, quite candidly and frankly, was a circumstantial case. Isn't that true? That you assumed there was a pump, there was a cable, and all this, and it was set up to pump water.

THE WITNESS: Right.

JUDGE KOUTRAS: How deep was the water?

THE WITNESS: I couldn't say, at the face.

JUDGE KOUTRAS: Everything that you saw led you to believe that that's what that pump was there for?

THE WITNESS: Right.

JUDGE KOUTRAS: So you came to the conclusion that it was used at some time to do what it was intended to do, that is, to pump the water out.

THE WITNESS: Correct.

Q. Inspector Smith, did the absence of the danger signs have any effect on your opinion that a violation of 75.500(a) would have still existed even if the pump wasn't energized?

A. No, it would still be the violation whether it was connected or not. It was used to make electrical connections in a working place. It was nonpermissible equipment.

JUDGE KOUTRAS: Wait a minute. Her question was, would the absence or the presence of the danger sign, or a tag, tagging had made any difference?

THE WITNESS: No. It would not. If it was dangered off at the power center, and that switchbox was where it was, it would still be a violation.

JUDGE KOUTRAS: On the theory that someone would disregard the danger sign and, possibly, come up and plug it in, and would use it? Or, that at one time it was used?

THE WITNESS: Well, no. Thinking that if the switchbox, itself, was lying there, no cables attached to it, nothing connected, I would say it would be no violation. A nonpermissible switchbox being there with cables connected to it, and connected to the circuit breaker within it, is a violation.

JUDGE KOUTRAS: Even though there's no power to it at the other end, from the power center?

THE WITNESS: Right. It was used to make connections.

JUDGE KOUTRAS: Okay.

BY MS. MURPHY:

Q. In your opinion, was the switchbox, or the box, available for use at the time that you cited the violation?

A. That was readily available for use.

Q. Why do you say that?

A. All they'd have to do is plug it in to the power center, go up there and turn the switch on, and run the pump. The discharge line was hooked up. Everything was there.

Mr. Smith stated that the presence of the nonpermissible pump posed a potential ignition explosion hazard because the mine liberates methane. He tested for methane in three places and found "three-tenths every place that I checked" (Tr. 117). He indicated that the mine is on a five-day spot inspection cycle because it liberates over a million cubic feet of methane in 24 hours. In the event of any interruption to the ventilation, the switchbox would be a potential ignition source, and since it appeared to him that the operator's intent was to use the pump, all that he had to do was to plug it in. In these circumstances, he believed that it was reasonably likely that an ignition would occur if the nonpermissible switchbox were to be filled with an explosive mixture of methane (Tr. 118).

Mr. Smith testified that the violation was "unwarrantable" because the preshift examiner had made an entry at the appropriate location in the area indicating the dates of his examination, and since the examiner would have been in the area where the pump was located he should have observed the violation (Tr. 119).

MSHA's Testimony and Evidence. PENN 83-200-R.

MSHA Inspector Lloyd Smith confirmed that he issued a second Section 104(d)(1) Order on June 1, 1983, charging a violation of mandatory safety standard section 75.200 (exhibit G-5). He stated that he issued the violation after

observing the water pump referred to earlier installed inby permanent roof supports. He identified a copy of the mine roof control plan (exhibit G-7), and he stated that the pump in question was approximately three feet inby the last row of roofbolts, and he measured this distance by means of a flexible tape ruler (Tr. 120-124).

Mr. Smith stated that there was a violation of "safety precaution" No. 4, pg. 5 of the roof control plan in that the installation of the pump was accomplished without installing temporary roof supports. He observed no one travel under any unsupported roof while he was at the scene, but the location of the pump as he observed it led him to conclude that someone had to take it inby permanent supports to place it where he observed it (Tr. 125). He confirmed that he observed no temporary supports inby the last row of roofbolts, and that while he was alone in the area at the initial observation of the pump, Mr. Mitsko came in and saw the condition and he informed him that he was issuing the order. He described the pump as approximately 24-30 inches high, and indicated that it had a power cable running to the switchbox, but that it was not energized (Tr. 126).

Mr. Smith stated that the violation was "significant and substantial" because a sudden collapse of a roof could occur at any time, and if that happened and someone were under unsupported roof a fatality could occur. Since he believed someone had been under unsupported roof to install the pump, and since most fatalities caused by roof falls occur within 25 feet of the face area, he believed it was "reasonably likely" that a fall could have occurred (Tr. 128). He did not know how long the unsupported roof condition existed, and he confirmed that he indicated on the face of his order that the pump had been "installed" because he observed it was placed "just right" so that the water discharge line was "pointing out of the place nice and straight" and that the power cable "was going straight over to it from the switchbox, like everything had been placed right there and lined up to get rid of the water from the pump with the hose" (Tr. 128).

Mr. Smith believed that the violation was an "unwarrantable failure" because the preshift mine examiner, who is also the section foreman, examined the place. Since he is in the area a minimum of two or three times a day, he should be aware of the fact that pumps are installed in his working section (Tr. 129).

On cross-examination, Mr. Smith confirmed that simply having a pump under unsupported roof is not a violation of section 75.200, and he confirmed that he saw no one under

unsupported roof and that no one ever has advised him that anyone walked under unsupported roof to place the pump where he found it (Tr. 130). Mr. Smith conceded that it was possible for someone to place the pump three feet inby the last row of roof bolts without going out under the unsupported roof, and he explained that someone could have "heaved it" out into the water (Tr. 131-132). He also confirmed that the most efficient use for the pump would have been to place it closer to the face where the water was the deepest. He said that the pump was not operating when he observed it, and his conclusion that someone had gone under unsupported roof was based solely on his observation of the pump in the location where he found it (Tr. 133).

Mr. Smith confirmed that at the time he issued the order he was convinced that the pump had in fact been used on the previous shift, and his assumption was based on the fact that water was present and the pump was attached to a nonpermissible switch "set up in a position in which it could have been used." He also confirmed that no one ever told him that the pump was used in that location or that anyone ever intended to use it at that location with a nonpermissible switch (Tr. 134).

Mr. Smith conceded that he subsequently became aware of the fact that the crew who worked the shift knew that the pump was not intended to be used until a permissible switchbox could be installed. He denied that at the time he issued the order that a permissible switchbox had been ordered to be brought in from the surface and that it in fact came in on the same mantrip which conveyed him to the section. He indicated that when he found the pump he did not know that it had been deenergized at the power center. He confirmed that the incoming foreman on the shift when the pump was found told him that he knew nothing about the pump or the switchbox, and although the order was issued at the beginning of the shift, the preshift examination had already been conducted. He did not examine the preshift books prior to issuing the order, but the section was reported "safe" before anyone went underground (Tr. 138-139).

In response to further questions, Mr. Smith stated that after the order was issued, mine management told him that the pump was thrown inby the roof supports. He estimated the weight of the pump at ninety pounds, but stated that he has never attempted to pick one up and swing it, and no one demonstrated the purported method of throwing it. He did say that the pump has handles and that someone explained that it was thrown and then stopped by means of jerking on the cable. He believed that this was a bad practice because the cable could be damaged. In his opinion, however, the pump was placed in the area where he found it, and he based this opinion on the fact that "everything was lined up" and the pump was not where the water would be over one's boots (Tr. 143).

Mr. Smith stated that the violation was abated by removing the pump from the location where he observed it and he confirmed that it was dragged out by means of the cable and then picked up by the handles (Tr. 144). The pump was removed so that the nonpermissible switchbox could be replaced (Tr. 145). Mr. Smith also confirmed that at the time he observed the pump, mining operations had been completed in that crosscut and all of the machines had been taken out. The pump was there just to pump water (Tr. 148). Mr. Smith further explained the term "installation" as follows (Tr. 148-149).

> JUDGE KOUTRAS: This business of installing the pump, how long would it take to do the actual installation? I mean to put in the line that takes the water out, put the pump in and plug it up, get ready to go? Approximately.
>
> THE WITNESS: Momentary. Exposure under unsupported roof, momentary. Just setp out there and set it down and stip back.
>
> JUDGE KOUTRAS: So, the term "installation" and just placing it there are synonymous. Right? The term "installation" doesn't involve a whole lot of time, does it?
>
> THE WITNESS: No. The discharge line would be attached to the pump before you put it in the water, and tighten the clamps up. Your power cable is already attached. You would just lift it up and step out there and set it down and step back out.

In response to certain bench questions concerning the general mine conditions where he issued the orders in these cases, Mr. Smith testified as follows (Tr. 148-160):

> JUDGE KOUTRAS: Did you examine the roof conditions in that area where the pump was?
>
> THE WITNESS: I did.
>
> JUDGE KOUTRAS: And what did you find?
>
> THE WITNESS: Good at that time.
>
> JUDGE KOUTRAS: Roof conditions were fine?

THE WITNESS: Were good at that time. Good visually and sound.

* * *

JUDGE KOUTRAS: Now, since that area was mined out, would there have been any reason for any miners to be in there?

THE WITNESS: No.

JUDGE KOUTRAS: Other than, possibly, the fellow--

THE WITNESS: The mine examiner?

JUDGE KOUTRAS:--that threw the pump, or placed the pump, or installed the pump?

THE WITNESS: No reason for anybody to be in there with the exception of the on-shift examiner and the preshift examiner.

* * *

JUDGE KOUTRAS: On the switchbox now. Did you make any determinations, or did you make any examination of the ventilation in that area?

THE WITNESS: The ventilation was adequate, over the switchbox and in the working place. Just like it's drawn there it was all intact.

JUDGE KOUTRAS: Okay. How were the roof conditions in there?

THE WITNESS: Good.

JUDGE KOUTRAS: Were people working in that section or in that room when you were there and found this Citation?

THE WITNESS: No. I was in there alone when I first went in there.

JUDGE KOUTRAS: Would mining have taken place in there?

THE WITNESS: Mining could not have taken place in there, no.

JUDGE KOUTRAS: Not at all?

THE WITNESS: Not until the roof was supported and the water pumped out. They would have to pump the water out, bolt the roof, and then they could mine it.

JUDGE KOUTRAS: They were working outby where those roof supports are. Right?

THE WITNESS: They were working over on the left. It's marked as #9 room, is where the machine would be working.

JUDGE KOUTRAS: Would they be working in the area where the pump switch was located? The nonpermissible pump switch.

THE WITNESS: No. I would see no occasion for them to work in there, other than to, perhaps, go in at a later time and move the pump in. That's the only reason I could see them going up in that crosscut to work. They'd have to go in there for examinations. To do other work, they wouldn't have any reason to go in there. They couldn't do any work.

JUDGE KOUTRAS: What is the significance of the three-tenths methane that you found?

THE WITNESS: Methane is being liberated on that working section.

JUDGE KOUTRAS: Well, how bad is three-tenths?

THE WITNESS: Three-tenths is bad. It's not bad as long as it's being diluted and moved.

JUDGE KOUTRAS: But was it being diluted and moved?

THE WITNESS: At that time it was, yes.

JUDGE KOUTRAS: Well now, if the methane was being diluted and moved, and there were no people working in there, and the ventilation was in good condition, if those were, in fact, the circumstances as you found them that day, you still maintain that it was significant and substantial?

THE WITNESS: I do.

JUDGE KOUTRAS: And that's based on the fact that what? That they had a nonpermissible pump inby the last open crosscut, and in the event the roof fell or they had some kind of emission in there that was the right mixture of air and methane, they could have had an explosion.

THE WITNESS: Based on the thinking that if you were to have an interruption of ventilation in that particular place. You see, what is not shown on that drawing, we talked a little when it was first put up, there are two ventilation controls that are not shown on that drawing right there. Where the arrow says, "to power center," you would have had a run through check curtain there used as a ventilation control. The pillar that the lift has been started in #7 to 8 room also has a canvas check curtain and line brattice installed as a ventilation control right next to the gob. Along that #7 room you've got your gob. You've got a fall there. You have an additional fall. Take that line brattice and check curtain down. Your air coming from 9 would go straight across. It would not go up in there where the pump switch is. It would short the air away from that, possibly.

JUDGE KOUTRAS: What led you to believe all those things would have happened?

THE WITNESS: The potential was there. That's a pillar section. They're retreating. That's a retreat section, pillar section.

JUDGE KOUTRAS: I get the impression that you found that it was significant and substantial because, if you hadn't done anything, once they started up, all these potentials could have come to pass, and they could have had some kind of an accident.

THE WITNESS: I felt the potential was there, being that close to the gob, workings.

* * *

JUDGE KOUTRAS: Did you have occasion to inspect any of those power cables, the one going to the power center, the one to the pump switch?

THE WITNESS: They were in good condition.

JUDGE KOUTRAS: You found nothing wrong with the cables insofar as any permissibility or anything like that? The cables were in good condition?

THE WITNESS: The cables were in good condition. The settings were proper for instantaneous trip at the breaker. We looked at that.

In response to further questions concerning his "unwarrantable failure" finding, Mr. Smith explained that it was his opinion that the section foreman should have been aware of what was going on in his section. When asked to explain why he attributed the violation to a "prior shift," he explained that when he issued the order he did not know who was responsible for the condition, but that he later ascertained that the shift immediately prior to the one when he found the pump had actually installed the pump. He identified this shift as the midnight to 8:00 a.m. shift on June 1, and that is when the actual violation took place (Tr. 153). When asked whether he had spoken to the previous shift foreman, he replied as follows (Tr. 153-154):

JUDGE KOUTRAS: Did you speak to the Foreman on that shift, the 12 to 8 shift, before you issued the Citation?

THE WITNESS: No. He was gone.

JUDGE KOUTRAS: He had left the mine completely?

THE WITNESS: At that time, yes.

JUDGE KOUTRAS: On a situation like this where you have some circumstantial evidence that may have occurred on the previous shift, would there have been anything to preclude you from waiting until you contacted that Foreman before you issued the Citation?

THE WITNESS: In this particular instance, with this particular violation, I would say "No." I think the facts were there. The pump was there. There were no temporary supports there. There were no warning signs there to indicate the unsupported roof.

JUDGE KOUTRAS: But the essence of the violation is, assuming all that's correct, what you just said, but the essence of the violation is that you presumed that someone had walked under unsupported roof to put the pump there.

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THE WITNESS: Right.

JUDGE KOUTRAS: The only question I'm asking you is, isn't the most logical way to determine that fact to determine who was working on that shift, who was responsible for putting the pump there, and to contact those people before you issued the Citation?

THE WITNESS: We don't generally do it that way.

When asked to further explain his "significant and substantial" finding, Mr. Smith indicated that he was concerned about the "practice" of miners working under unsupported roof. However, he candidly conceded that he had no knowledge that the operator in this case had such a "practice," and he again reiterated his concern of a potential hazard, and while it may may have extreme he indicated that it "could happen" (Tr. 161-162).

Helen Mining Company's Testimony and Evidence

George Bondra, section foreman, testified as to his background and experience, and confirmed that he was the section foreman on the 12 midnight to 8:00 a.m. shift on June 1, 1983, and he confirmed that exhibit J-3 depicts the general area where he was working on that evening. He stated that his crew was mining coal and pumping water at the working face located at the 8 to 9 crosscuts. He identified exhibit C-1 as the notes which he made in his own handwriting that evening. He confirmed that a pump of the type shown in exhibits J-3(A) and (B) which was used during his shift at the crosscut of the 8 to 9 room where his crew was working. He stated that the pump was used at the beginning of the shift in the number 9 room, and that it had a permissible switch attached to it. He then stated that when the pump and switch were moved to the number 9 room, it was determined that the switch had a broken lead inside and that this caused it to malfunction, and could not be used. Since no permissible switch was available, a nonpermissible switch, which happened to be available, was used to run the pump. However, he insisted that the nonpermissible switch was placed outby the last open crosscut in the No. 9 room to pump water in that room, and he indicated where it was placed and used by making notations on exhibit J-3. He confirmed that the nonpermissible switch was placed on two posts with a rubber mat under it to insulate it from moisture and prevent electrocution (Tr. 166-173).

Mr. Bondra stated that the pumping of the water from the No. 9 room with the nonpermissible switch was completed at approximately 5:00 a.m., and the pump was not used in any other locations during his shift. The pump was taken out of the way to permit the mining machine to move through the area, and that "towards quitting time" he dragged the pump, with the nonpermissible switch still attached, and took it to the room where it was later found by the inspector. He explained that he took it there so that the incoming foreman would have a head start on pumping the water in the area, and he (Bondra) did not intend to use the pump to pump water in that area and he expected no one else to because the pump with the nonpermissible switch could not be used at the location where it was found by the inspector (Tr. 175). He confirmed that he did not replace the nonpermissible switch after leaving it at that location, but that he did order a new one and the order was place when he first found that the permissible switch which had been on the pump had a broken wire. He identified exhibit C-2, as "a call our report" dated June 1 indicating a "breaker for a pump box was ordered," and he confirmed that the word "breaker" and "switch" means the same thing. He also indicated that the incoming foreman should have seen this report as this is part of the standard procedure (Tr. 177).

Mr. Bondra confirmed that he personally moved the pump and switch in question to its new location at the end of his shift and that he deenergized it before moving it by unplugging the cable from the power center and throwing the cable plug some 6 to 8 feet from the power center (Tr. 180). He stated that after moving the deenergized pump, he swung it out with his arms where it landed "just inby that last roofbolt" and he marked the location with an "x" mark on exhibit J-3. He denied that he went out under unsupported roof when he did this (Tr. 181). He stated that if the roof had been supported further, he would have put the pump in deeper water, but since the roof was not further supported he did not want to take the time to put up additional temporary roof support to do this because it was late in the day (Tr. 182). He confirmed that the permissible switch was not put on the pump because the one he had ordered did not arrive until the next shift, and he stated that he discussed this fact with the oncoming shift foreman Lee Mitsko. He stated that the discussion took place "outside, between the shift change," and that the conversation took place in the foreman's room. He stated that this was the usual procedure, and that he advised Mr. Mitsko that he should not use the pump until such time as the permissible switch was placed on it. Mr. Bondra stated that he did not believe that leaving the pump with the nonpermissible switch on it between shifts was not illegal because it was not plugged in or energized. He also believed that it would have been legal to change the switches at the place where he left it (Tr. 184).

On cross-examination, Mr. Bondra stated that there was an unusual amount of water present in the section, that the pumps are used to pump water, and that he did not inquire as to the availability of a permissible switch on any other section because "the other sections probably wouldn't have one. There is no water in the other sections" (Tr. 186). He confirmed that while he could have taken the nonpermissible switch off the pump before leaving it where he did, he did not do so. He conceded that this may have made it easier for the next foreman to replace the nonpermissible switch with a permissible one, but he declined to do so because he is not a qualified mechanic. Even though a mechanic was present on his shift who could have done the work, he did not have him remove the nonpermissible switchbox (Tr. 187).

Mr. Bondra did not know whether the oncoming foreman actually reviewed his "call out report," and he confirmed that his signature is not on it. Since Mr. Bondra was not present on the ensuing shift, he did not know how the permissible switch was installed. He stated that he did not tag the plug out when he unplugged it from the power center, nor did he ask anyone else to do it, because he was called away to attend to a problem with the mining machine and "I let it slip my mind" (Tr. 189). Mr. Bondra stated that in addition to Mr. Mitsko, he also informed the section maintenance foreman Greg Furey about the need for a new permissible switch. Mr. Bondra also indicated that the "call out report" is initially made to Mr. Furey before he calls out to make his report (Tr. 189-190). He confirmed that his report to Mr. Furey and the "call out report" are two separate reports because he does not know if Mr. Furey actually makes a notation of the report made to him on the section (Tr. 190).

In response to further questions, Mr. Bondra stated that he first learned about the citation from his brother later on the evening of June 1, 1983, but did not contact Inspector Smith to explain the circumstance to him. However, he did contact Mr. Skvarch and discussed the circumstances with him (Tr. 193). Mr. Bondra also indicated that he did not tell oncoming shift foreman Mitsko that he had dragged the pump and switch up the entry and left it at the location where it was found by Inspector Smith because there was not enough time to discuss it with him between shifts. However, he did speak with him after the citation was issued and Mr. Mitsko told him that he "had been raked over the coals with the inspectors" (Tr. 197). When asked whether Inspector Smith was wrong in assuming that the pump and switch had been used, Mr. Bondra answered in the affirmative and he explained that such switches are normally hung up or placed

on insulated material if they are to be used. Since the switch in question was simply lying on the floor and was deenergized, Mr. Bondra was of the view that Mr. Smith should not have concluded that it was used (Tr. 198-201).

Larry Plovetsky, mine mechanic and certified electrician, testified that he has worked at the mine for over seven years and is a member of the UMWA. He confirmed that he worked the midnight to eight shift on June 1, 1983, and that George Bondra was in charge of the crew. He confirmed that the pump in question was first used in the cross of the 8 to 9 room and that it had a permissible switch on it. It was then moved into the no. 9 room and in the process of moving it it was damaged. He then installed a nonpermissible Westinghouse switch which was available on the section, and he informed Mr. Bondra that it could only be used outby the last open crosscut. The pump was then used, and the switch was outby (Tr. 206). At the end of the shift Mr. Bondra informed him that he had disconnected the power and moved the pump up into the crosscut of the i to 9 room so that the incoming shift could install a new permissible switch and start pumping the water out (Tr. 207).

Mr. Plovetsky stated that he first learned that the citation had issued when he returned to work on his next shift on the following day. The crew met with Mr. Skvarch, and he asked them if they would make statements as to what happened. He identified copies of certain undated statements that he and several of the crew members signed (exhibits C-3(a) through C-3(d)), (Tr. 208). He confirmed that he was present when they were signed by the crew, and he indicated this took place on June 2, 1983, at approximately 4:30 p.m. (Tr. 210).

Mr. Plovetsky confirmed that the power on the section was turned off when he left on the morning on June 1, 1983, at the end of the shift, and that he saw the cable plug from the pump and switch approximately 6 to 8 feet outby the power center (Tr. 212). He stated that during his shift on June 1, he saw the pump at the crosscut in question and that it was being used to pump water. However, when he arrived early on the shift the pump was off and he had to energize the section after it was preshifted by Mr. Bondra (Tr. 213).

On cross-examination, Mr. Plovetsky stated that he did not speak with any of the incoming crew on the 8:00 a.m. to 4:00 p.m. shift about the pump and switch in question, but that Mr. Bondra spoke with his boss about the fact that the pump could not be used inby, and that he did so when he called out for a new switch (Tr. 214). Mr. Plovetsky confirmed that he was qualified to remove the nonpermissible switch and replace it with a permissible one, but that this was not done (Tr. 214).

In response to further questions, Mr. Plovetsky stated that at the end of his shift on June 1, he locked out the plug on the power center which is used for the shuttle car, but since he had only one lock he could not lock out the power center plug used for the pump and it was not tagged (Tr. 216-217). When asked whether the inspector was wrong in assuming that the pump was used, Mr. Plovetsky answered as follows (Tr. 217):

> JUDGE KOUTRAS: You heard me ask Mr. Bondra about Mr. Smith's observation when he came on this particular area. Do you have any comments on that? He assumed, seeing that thing lying there, that somebody was, either, using it or was going to use it.
>
> THE WITNESS: Well, seeing it lying there, yes, I'd say you could assume that somebody was using it. But then, if you'd have gone back and seen how far that plug was thrown away from the power center, you'd think otherwise, too.

Dale Montgomery, respondent's assistant safety director, testified as to his background and experience, and he confirmed that he accompanied Inspector Smith ahd Mr. Smith's supervisor during the inspection on June 1, 1983. He confirmed that while he was "in the area," he was not present when Mr. Smith first observed the conditions which he cited (Tr. 220). He testified as to the normal mine procedure used for "call out reports," and he confirmed that it is normal practice for the outgoing and incoming foreman to meet and talk before the oncoming shift goes underground. He confirmed that he, Inspector Smith, and Inspector supervisor Bob Nelson rode the mantrip in together with the day crew on June 1, and he stated as follows with regard to the switchbox (Tr. 220-221):

> Q. Other than the people you've indicated, was there anything else on the mantrip?
>
> A. From what I learned later on, and from what I saw being carried to the section, there was a permissible type switchbox for a pump on the mantrip.
>
> Q. So you saw it being carried to the section from the mantrip?
>
> A. I saw it being carried to the section.
>
> Q. Do you recall who was carrying it?

A. No, I do not.

Q. Do you know what the switch was for?

A. It's a typical pump switch. That's what it's used for. As far as I know, that's all it is used for, that type of a switch. Permissible type switch.

On cross-examination, Mr. Montgomery stated that he did not look at the "call out report" in question before going into the mine the day the citation was abated, and he did not know whether Mr. Mitsko had reviewed the report. He confirmed that the report does not state that a nonpermissible switchbox was located at the face or working place (Tr. 223).

In response to further questions, Mr. Montgomery confirmed that he was present when the nonpermissible switchbox was replaced with a permissible one. He indicated that the mantrip in question holds 18 men, and that he saw a permissible switch being carried from the mantrip to the section, and later found out that it was the same switch used to abate the citation. He believed that Inspector Nelson may have mentioned the fact that he saw the switch on the mantrip (Tr. 225). Mr. Montgomery did not know whether Inspector Smith saw the switch on the mantrip (Tr. 225).

Mr. Montgomery confirmed that he was not with Inspector Smith at the time he first observed the cited condition, but was with Mr. Nelson, and he explained what transpired as follows (Tr. 226-228):

JUDGE KOUTRAS: Where were you and Mr. Nelson?

THE WITNESS: We were in the crosscut. In the #8 room. Not the furthest one inby, the next one.

JUDGE KOUTRAS: And, when the mantrip stopped, and you all got off, you saw someone carrying a box?

THE WITNESS: Right.

JUDGE KOUTRAS: You didn't have the faintest idea what they were doing with that box at that time?

THE WITNESS: No.

JUDGE KOUTRAS: Sometime later in the morning, when you encountered Mr. Smith, he told you that he was issuing an Order and a Citation on

the nonpermissible switchbox, did lights start flashing all of a sudden? Did you say anything to Mr. Smith?

THE WITNESS: Well, he told me of what he was issuing. I, immediately, went up to the area and started drawing a diagram and looking around myself.

JUDGE KOUTRAS: But, I mean, did you know, at that point in time, that the switch that was on that very same mantrip was being brought in to--?

THE WITNESS: No, I didn't. I didn't realize it.

JUDGE KOUTRAS: Am I to assume that if the man that had the switchbox beat Mr. Smith to that location and made the switch with the proper switchbox, you wouldn't have got cited?

THE WITNESS: It's possible. If that's his order, yes. If he were to replace it before Mr. Smith would have got there.

JUDGE KOUTRAS: Now, when Mr. Smith issued the Order, and informed you for the first time that he was citing you for having this nonpermissible switch in that location, was there any discussion about the box that was taken off of the mantrip?

THE WITNESS: Not at that time, that I can remember, no.
JUDGE KOUTRAS: Okay. He issued his Order at 9:10, and, according to the Termination, it was terminated at 12:15, which would have been some three hours later. Right?

THE WITNESS: Right.

JUDGE KOUTRAS: When was the actual abatement done?

THE WITNESS: It was just finished just before 12:15.

JUDGE KOUTRAS: I mean, from the time that Mr. Smith informed you that there was a Citation and Order issued on that switchbox, when were the wheels put in motion to make the correction?

THE WITNESS: Immediately. But, we had a problem with that new switchbox also. We couldn't get it to seal, from what I understand. That's why it took so long.

JUDGE KOUTRAS: And were Mr. Smith and Mr. Nelson there during all this?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you explain to either one of them what the situation was?

THE WITNESS: No.

JUDGE KOUTRAS: Why not?

THE WITNESS: I didn't know.

Mr. Montgomery stated that he was not present when the pump was placed inby the roof supports, but observed it in that location and helped drag it out to abate the citation (Tr. 229).

Edward Skvarch, respondent's safety manager, testified as to his mining background, education, and job responsibilities, and he confirmed that he is aware of the orders which were issued on June 1, 1983, in these proceedings. He confirmed that he was present at a manager's conference concerning the orders, as well as a meeting at the mine concerning the "willful" aspects of those violations. The latter meeting was held on June 8, 1983, at the mine, and Inspectors Smith and Nelson, and foreman Lee Mitsko were among those present. The meeting was called to determine whether the nonpermissible switch order was a "possible willful violation," and he believed that Mr. Nelson requested the meeting to speak with Mr. Mitsko, and Mr. Skvarch identified the notes which he took at that meeting, (exhibit C-4; Tr. 245-248).

Mr. Skvarch testified that his notes of the June 8, meeting reflect that Mr. Mitsko was aware of the nonpermissible switchbox, and that he was aware of the fact that it had to be replaced (Tr. 249). Mr. Skvarch stated that he investigated the events of June 1, in connection with the issuance of the order, and that he did so in order "to determine whether there was unwarrantability on the part of the 12 to 8 shift foreman, George Bondra" (Tr. 250). Hie conclusions after investigation was that there was no "unwarrantability" on Mr. Bondra's part because the order stated that "a nonpermissible pump was used to pump water in the crosscut 8 to 9," when in fact his inquiry disclosed that the pump was not used to pump water (Tr. 251).

Mr. Skvarch stated in addition to Mr. Mitsko's statement that he was aware of the fact that the nonpermissible pump needed to be replaced, he also relied on a signed statement taken from mechanic Mark DeCarlo on the Wednesday before the hearing in this case, that Mr. Mitsko told him they had a switch to take the section, and that either Mr. DeCarlo or Mr. Mitsko placed it on the mantrip, and Mr. DeCarlo carried it to the section, (exhibit C-5; Tr. 252). Mr. Skvarch also alluded to information he received from production foreman Frank Hasychak indicating that he informed Mr. Mitsko that a nonpermissible switch was on the section and that he (Mitsko) "was to get it out" (Tr. 255).

Mr. Skvarch stated that as part of his investigation he asked Mr. Bondra to demonstrate how he threw the pump in question inby the last row of roof bolts, and that when he threw it 3 1/2 to 4 feet inby, "that proved to me that it was possible to do it" (Tr. 256). Mr. Skvarch was of the opinion that it was "highly unlikely, or a remote probability" that an accident could have occurred as a result of the cited switchbox, because a series of events, i.e., electric current, methane accumulation, would have to be present. In this case, however, the switch on the box was off, the switchbox and pump were not energized, and there was no accumulation of methane (Tr. 257).

On cross-examination, Mr. Skvarch confirmed that Mr. Bondra and Mr. DeCarlo were not present at the June 8, meeting with the MSHA Inspectors, and he conceded that it was possible that the meeting was called at the company's request, but that he was not aware that this was the case (Tr. 260).

Mr. Skvarch stated that while he was in the mine at the time the orders issued, he was not with Inspector Smith when he issued them. Although he spoke briefly with Mr. Mitsko at the time the nonpermissible switch was being replaced to abate the orders, Mr. Mitsko did not tell him that he knew the nonpermissible switch was there when he came into the mine (Tr. 267).

Mr. Skvarch testified that methane ignitions have occurred in the mine in question, but that these all occurred at the face on the mining cycle with the continuous mining machine, and no such ignitions have ever occurred with a nonpermissible pump switch (Tr. 271). He did not believe these face ignitions to be "unusual," and indicated that "it could occur with all due precautions taken. A face ignition could still occur in a mine that liberates methane" (Tr. 271). He conceded that the untagged plug could have been plugged in, and he explained why he did not believe the violation to be unwarrantable as follows (Tr. 272-273):

A. I base my opinion on unwarrantability on the basis of what was written on the Order. And that was that the pump was used,--or, the switchbox was used to supply power to that pump. And, I'm saying, based on what was written on the Order, it isn't unwarrantable because that wasn't the fact. It was not used to supply power to that pump.

Q. So, in your opinion, in order for it to be unwarrantable, it would have had to have been used on the previous shift?

A. Or, possibly, the day shift.

Inspector Smith was called in rebuttal by MSHA, and he testified that when he first observed the cited conditions he was by himself, but that he encountered Mr. Mitsko later in the shift. After advising Mr. Mitsko that orders had been issued, Mr. Mitsko advised him that he had not been on the section since the previous Thursday, and when asked by Mr. Smith whether "his buddy" had told him about the conditions, Mr. Mitsko replied "no" (Tr. 288). Mr. Smith confirmed that he made some notes about the violations, but did not indicate whether they included the asserted conversation with Mr. Mitsko (Tr. 288). Mr. Smith also confirmed that he first saw the power center plug after the orders were issued and after Mr. Mitsko tagged it out (Tr. 289-290).

When asked to comment on Mr. Bondra's testimony regarding the use of the nonpermissible switch with the pump at another location in the section, Mr. Smith stated that had he observed this, he would have issued another order. He explained that the location of that nonpermissible switchbox as noted by Mr. Bondra, while outby the pump, was still within 150 feet of the working pillar, and this would be a violation of mandatory standard section 75.1000-1 or 1000-2 (Tr. 298-300).

Mr. Smith stated that after listening to Mr. Bondra's explanation as to how the nonpermissible switch and pump came to rest at the location where he found it at the time he issued the orders, he was of the opinion that the story was credible and that "it could have happened that way" (Tr. 304). Mr. Smith also stated that he would not have issued the citation for the pump being under unsupported roof if Mr. Bondra had demonstrated to him how he threw it out from under supported roof (Tr. 311-312).

Mr. Smith confirmed that he was at the June 8 meeting or conference referred to by Mr. Skvarch, and after reviewing a notation that Mr. Mitsko knew that he had to replace "a pump starter box," Mr. Smith could not recall Mr. Mitsko making that statement. Mr. Smith said that the only thing he recalled Mr. Mitsko saying at that meeting was that he did not know that a nonpermissible switchbox was in the working place (Tr. 307).

With regard to the switchbox being brought in on the mantrip, Mr. Smith stated that he did not see it, but was later told by Mr. Nelson that he had seen it on the mantrip. Although Mr. Nelson was on the section at the time the orders were issued, he was not with Mr. Smith when he observed the conditions which caused him to issue those orders (Tr. 308). He informed Mr. Nelson about the violations after starting to walk down the entry with Mr. Mitsko, but Mr. Nelson did not mention that he had seen the switchbox on the mantrip (Tr. 308). When asked what he would have done had Mr. Nelson mentioned it to him, Mr. Smith stated as follows (Tr. 308-309):

> JUDGE KOUTRAS: Assuming that you had seen the switchbox on the mantrip, and assuming that that switchbox was, in fact, the one to replace the nonpermissible box that you found, would you still have issued the Order?
>
> THE WITNESS: Yes, sir, I would.
>
> JUDGE KOUTRAS: Why?
>
> THE WITNESS: Like I said, the way the things--. The facts that were there for me in the crosscut 8 to 9, in my mind, that pump was physically being used to pump water. There was nothing to prevent it from being used.
>
> JUDGE KOUTRAS: So, what you're saying is that you came to the conclusion, through the circumstantial evidence that you found, that that pump was, in fact, used to pump that water out. And that the switchbox was part of the pump assembly for that purpose.
>
> THE WITNESS: That's correct. I believed the pump was being used to pump water when I saw it, yes.
>
> JUDGE KOUTRAS: Now, on the Citation for the pump being inby unsupported roof, of course,

> at the time that you decided to issue the Order, the significant and substantial portion of it had long gone. Hadn't it? I mean, what was so significant and substantial about a pump just lying out there under unsupported roof?
>
> THE WITNESS: The fact that I felt a person had, physically, gone beyond permanent supported room to place that pump in there.
>
> JUDGE KOUTRAS: How was it reasonable and likely that, if nothing happened, that an injury would have occurred? If the unsupported roof was sound, and you sounded it, and visible inspected it, and the roof didn't fall, and nobody was hurt. Was it the practice that you were trying to address?
>
> THE WITNESS: More or less, yes. In that particular case. The practice of going beyond permanent roof supports to do it. Both, in fact. The pump was physically there, inby permanent supports.

Robert G. Nelson, MSHA Supervisory Inspector, testified that he was at the mine on June 1, 1983, and that he went underground by means of an elevator and mantrip. He sat next to a mechanic, and Inspector Smith was at the front of the mantrip. Mr. Nelson stated that he observed a permissible switchbox which the mechanic had with him, and they generally discussed it. The mechanic advised him that he was taking the switchbox into the D Butt Section to replace one which had gone bad (Tr. 337).

Mr. Nelson stated that he went to D Butt Section after Mr. Smith's orders were issued, and that an hour or so later he discussed the matter with Mr. Mitsko. Mr. Mitsko advised him that he had not been on the section for a week, had no knowledge of the conditions cited, and that he was surprised about the orders which Mr. Smith had issued (Tr. 339).

Mr. Nelson confirmed that he was at the June 8th meeting at the mine, and he recalled asking Mr. Mitsko some questions, but did not remember specifically what he asked. Although he couldn't recall Mr. Mitsko stating that he knew he had to replace the switchbox, Mr. Nelson stated that "he could have" (Tr. 341). Mr. Nelson denied that he called the meeting, and when asked who did, he replied "nobody" (Tr. 341). He explained that he was at the mine for another reason, but that someone advised him that Mr. Mitsko "had something to tell us" (Tr. 341).

On cross-examination, Mr. Nelson conceded that when he spoke to Mr. Mitsko the respondent had been charged with using a nonpermissible switch box to supply power in the cited crosscut (Tr. 344). He confirmed that the June 8th meeting at the mine resulted from an MSHA review of whether or not a "willful" Section 110(c) citation should be issued because of the nonpermissible switchbox situation. He also confirmed that he spoke with production foreman Hasychak, and that Mr. Hasychak expressed "surprise" over the presence of the nonpermissible switch, and indicated that he had no knowledge that it was used (Tr. 345).

In response to further questions from the bench, Mr. Nelson stated that the purpose of the June 8th meeting was to talk with the mine safety committee chairman, and that before making any decision he wanted "to make a good review" (Tr. 351). Mr. Nelson could not recall Mr. Mitsko stating that he had knowledge of the switchbox in question, but indicated that if he did he would not have given it much thought because of his prior statement on June 1 that he had no knowledge of it (Tr. 351). Mr. Nelson confirmed that he took no notes at the June 8 meeting, and the meeting was not taped or otherwise recorded. He explained that "I was not interested in the meeting" because he wanted to talk to the safety committee chairman, and he believed that the decision not to file a Section 110(c) citation may have already been made, and indicated that "we just wanted to make sure" (Tr. 353). Mr. Nelson stated that on June 8th, he met separately with the safety committee, but that they had no input and "didn't know very much about it" (Tr. 354).

Findings and Conclusions

Docket No. PENN 83-203-R

Fact of Violation

In this case, the inspector cited a violation of section 75.200, when he observed a permissible water pump located approximately three feet inby permanent roof supports. The cited standard provides in pertinent part that no person shall proceed beyond the last permanent support unless adequate temporary support is provided. The standard also requires a mine operator to comply with its approved roof control plan, and the inspector testified that the cited condition violated a safety precaution provision of the mine plan which contained language similar to that found in the standard.

At the time he observed the cited condition, the inspector saw no evidence of any temporary supports, and his order states that the violation occurred on the previous shift, and that it was evident that a person or persons had worked inby the permanent roof supports. The basis for his belief that someone had gone inby to perform some work was not only the fact that the pump was there, but that it had "been installed." He explained that water was in the area, the pump had been "set up to be used," and he candidly conceded that his citation was issued on the assumption that someone had gone beyond permanent supports on the previous shift, placed the pump where he observed it, and used it to pump water.

MSHA's counsel candidly recognizes the fact that the asserted violation is based on circumstantial evidence, and that the resolution of the matter depends on my assessment of the credibility of the witnesses. As correctly stated by counsel, the sole question as whether the section foreman's explanation for the presence of the pump inby supports is a believable one. In support of her position, counsel argues that the inspector testified that he never observed anyone throw such a pump into a flooded area and that such a practice subjects the equipment to strain which could result in damage to its internal connections.

The fact that the inspector never observed anyone throw a pump is irrelevant. In this case, the inspector conducted no experiment, did not attempt to pick up the pump, asked no one to demonstrate it for him, and he confirmed that he made no effort to contact anyone from the shift on which he believed the violation occurred because he did not believe it was necessary. It occurs to me that with a little more investigative effort, the inspector would have been in a better position to ascertain the facts. As for subjecting the pump to strain by throwing it, the pump was described as weighing 90 pounds, and I believe the word "heave" is a better description. Further, the testimony in this case is that the pump condition was abated by someone dragging it out from under unsupported roof by pulling on the power cable, and that this was done in the presence of an inspector. Since no one inspected the pump in question, and since it was permissible, there is no evidence that the pump was damaged, and the practice of pulling it out by the cable is more likely to place a strain on the connectors.

MSHA's counsel also argues that the inspector was not informed that the pump had been thrown into the area until

some time after the issuance of the order. The short answer to this is that he never asked. With respect to the argument that the area was flooded and that the individual who purportedly placed the pump where it was found ventured no further for fear of getting his feet wet is so speculative as to be rejected out of hand.

With regard to the argument that the pump was "installed," and the suggestion that it was obvious that great pains were taken to "set up" the pump and water discharge line, the inspector candidly conceded that the line is already attached to the pump, that the purported "installation" would not involve a lot of time, and that "one would just lift it up and step out there and set it down and step back out" (Tr. 149). Under the circumstances, MSHA's argument on this point is given little weight. Photographic exhibits J-4-A and J-4-B show the pump in question, and the person shown in the photograph is lifting the pump by the handles. One photograph shows the pump being held by one hand, and the second shows it being held by two hands.

Helen Mining's defense is that shift foreman Bondra heaved the pump out for about three feet, or arm's length, at the end of his shift, and that he did so to make it easier for the oncoming shift to use the pump to dispel water. Since no one observed anyone go under unsupported roof, I find Mr. Bondra's testimony as to how the pump came to rest where it did to be credible and believable. Mr. Bondra's testimony is supported by Safety Manager Skvarch who confirmed that Mr. Bondra demonstrated to him how he placed the pump inby the permanent roof supports. Further, the inspector, when called in rebuttal, conceded that Mr. Bondra's story was credible and that "it could have happened that way." The inspector also candidly admitted that had Mr. Bondra demonstrated to him how he heaved the pump beyond the roof supports, he would not have issued the violation (Tr. 312).

On the basis of all of the credible testimony in this case, I conclude and find that MSHA has failed to prove a violation. The lesson to be learned from this incident is that the failure to ask questions, or to fully develop a case when it is fresh on everyone's mind, will ultimately lead to vacation of orders and citations for failure to prove the charges by a preponderance of any credible evidence. Accordingly, the order in question IS VACATED, and the contest IS GRANTED.

Docket No. PENN 83-202-R

This contest proceeding concerns a section 104(d)(1) Order No. 2111719, issued by MSHA Inspector Lloyd D. Smith on June 1, 1983, charging Helen Mining Company with a violation of mandatory standard section 75.200. The inspector was of the view that the approved roof control plan was violated when he found that a warning sign had not been posted at an area of unsupported roof. MSHA's civil penalty proposal for this alleged violation is part of civil penalty Docket No. PENN 83-232, and MSHA initially sought an assessment of $100 for this violation. When this docket was called for hearing, the parties advised that they proposed to settle the matter by Helen Mining Company paying a penalty in the amount of $50.

The parties were afforded an opportunity to present their arguments in support of the proposed settlement on the record, and I take note of the fact that the inspector who issued the order in question was present in the courtroom and expressed agreement with the proposed settlement disposition of this matter (Tr. 234-239).

After careful consideration of the arguments presented on in the record in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to Commission Rule 30, 29 CFR 29.2700.30, IT IS APPROVED.

ORDER

Helen Mining Company IS ORDERED to pay a civil penalty in the amount of $50 in satisfaction of the section 104(d)(1) Order No. 2111719, issued June 1, 1983, and upon receipt of payment by MSHA, that portion of civil penalty Docket No. PENN 83-232, IS DISMISSED.

In view of the approved settlement, Helen Mining Company's counsel stated on the record, that he would withdraw the contest (Tr. 239). Accordingly, contest Docket No. PENN 83-202-R, IS DISMISSED.

Docket No. PENN 83-200-R

Fact of Violation

The inspector issued the citation in this case after observing that a portion of the belt guarding used to prevent entry into an area where a conveyor belt drive motor was

located lying on the floor and not nailed to a post where it normally is. The fan blades of that motor are protected by a metallic shroud which is attached to the motor housing. At the time he observed the belt guarding lying on the floor, he also observed that the lower portion of the shroud was broken off. Photographic exhibits J-2-A and J-2-C clearly show the motor shroud and belt guarding in question. Based on testimony during the hearing, it would appear that the shroud portion of the motor had broken off during transit approximately five days prior to the inspection in question, and that mine management had ordered a new shroud. While awaiting the new shroud, the belting in question was nailed across two posts as a means of keeping people out of the area.

The citation issued by the inspector specifically charges that "a portion of the guarding provided at the 6 East Crossover belt drive on the clearance side was laying in the mine floor." This seems to indicate that the citation was issued because the inspector believed that the belt guarding laying on the floor was obviously not securely in place as provided by subsection (c) of section 75.1722, and thus failed to provide adequate protection for the motor in question. However, since he also stated in the citation that the lower portion of the broken protective shroud exposed the fan to possible entry, one could infer that this condition also violated subsection (c). The inspector's explanation of precisely what he had in mind seems to indicate that the belting material nailed on the posts was placed there as some sort of "signal" to preclude entry into the area where the motor in question was located. When asked whether he would still require the belt guarding even if the shroud were not broken, the inspector suggested that the belting may be necessary to protect other unspecified areas in the proximity of the motor. When asked whether a citation would have been issued had the shroud not be broken off, MSHA's counsel stated "it would not with respect to the exposed moving parts on this piece of equipment."

The parties stipulated that a guard was not securely in place over the lower portion of the fan blades on the drive motor in question. At page three of his posthearing brief, Helen Mining's counsel states that the parties have stipulated to the fact that there was a violation of section 75.1722(c) in that the belt guarding was not securely in place. While I see a distinction in the two, since the parties are in agreement that a violation did in fact occur, I will not belabor the matter further. The violation IS AFFIRMED.

Good Faith Compliance

The parties stipulated that Helen Mining demonstrated good faith compliance in achieving abatement of the cited condition after the citation was issued, I adopt this as my finding and conclusion on this issue.

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

The parties stipulated as to the size of Helen Mining's coal mining operations, as well as the size of the mining operations as its Homer City Mine. Based on the production figures shown at page 5 herein, I conclude and find that Helen Mining Company is a large mine operator.

The parties have stipulated that the assessment of civil penalties in these proceedings will not affect Helen Mining's ability to continue in business. I adopt this as my finding and conclusion on this issue.

History of Prior Violations

The history of prior violations at the Homer City Mine is reflected in a computer print-out for the period June 1, 1981 to May 31, 1983. That print-out reflects a total of 498 violations, eight of which are prior citations for violations of section 75.1722(c).

MSHA advances no arguments concerning the mine compliance record, and does not suggest that any penalty assessments levied for the violation should be increased as a result of this compliance record. Although I am not persuaded that eight prior citations of section 75.1722(c), indicates a lack of concern for the guarding standard cited, I take note of the fact that the computer print-out also includes five prior citations for violations of guarding standard section 75.1722(a). I also take note of the fact that 498 violations over a two year span is not a particular good compliance record, and have taken this into account in assessing the penalty for the violation in question.

Negligence and unwarrantable failure

The parties stipulated that the violation resulted from ordinary negligence, and at pages 3-4, Helen Mining's counsel confirmed that this is the case. However, at one point in time during the hearing, the parties stipulated that the guarding citation was not unwarrantable (Tr. 90),

and that the violation resulted from ordinary negligence on the part of the contestant (Tr. 91). Later, contestant's counsel conceded that the violation was unwarrantable (Tr. 98-99), and MSHA's counsel was of the opinion that a showing of ordinary negligence was sufficient to establish unwarrantability (Tr. 99). Contestant's counsel concurred in this view (Tr. 100).

MSHA's posthearing arguments contain no further discussion concerning the "unwarrantable" nature of the violation. The aforementioned cited transcript pages are indicative of what I believe to be inconsistent positions taken on the question of "negligence" and "unwarrantable." In my view, these terms are synonymous, and indicate a degree of negligence, and if the parties agree that a finding of "ordinary negligence" means unwarrantable, then so be it.

In view of the foregoing, I conclude and find that the violation in question was an unwarrantable violation caused by the respondent Helen Mining Company's ordinary negligence.

Gravity

The parties have stipulated that if an injury were to occur as a result of the violation, it would be a serious injury. Accordingly, I conclude that the violation was serious.

Significant and Substantial

Relying on the Commission's decision in Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 at 825, (1981), MSHA's counsel argues that the record contains ample evidence to support a conclusion that harm or injury was reasonably likely to occur as a result of the violation in this case. In support of this contention, counsel states that the inspector issued the citation when he observed that the fan blades of the drive motor were only partially covered by a broken shroud, and that a piece of rubber belting, which had previously been nailed to a post and placed in front of the exposed moving parts, was found lying on the mine floor at the time the condition was cited. Since the inspector testified that the rubber belting was wet and constituted a "slipping hazard," and since he also testified that an employee could fall directly into the moving fan blades, MSHA's counsel concludes that she has established a "significant and substantial" violation.

Helen Mining's argument that the violation was not significant and substantial is based on the assertion that

(1) there is no evidence that any person had been or would be exposed to the violation before the operator would have discovered the condition and corrected it, and there is no reason to believe that the guard had not been in place during the previous shift; (2) few persons ever have had any occasion to be in the immediate zone of the downed belt guarding. Further, the area was not travelled by production crews, and those persons who had business in the area would use a "clearly defined" walkway which provided ample clearance; (3) of the few persons who had occasion to come into the affected area, only the belt examiner would have occasion to do so when the equipment was running, and company policy dictated that the equipment be locked out and deenergized if maintenance work were performed; and (4) even if a person were to approach the affected area when the equipment was running, it would be unlikely that he would slip, trip, or fall into the zone of potential harm.

Finally, even if somehow all of the foregoing conditions were to occur simultaneously during the narrow window of time before the condition could be discovered and corrected, Counsel suggests that would still not likely cause an injury because it is not reasonably likely that the slipping, tripping or falling person would reach and come into contact with the moving fan blades. Not only was the gap in the guarding through which a person would have to fall just 2 feet wide (26 inches) according to the inspector (Tr. 38-39), but it was another 3 feet to the edge of the shroud at a minimum (Tr. 78). Only a portion of the guard was down and the intact portion prevented a person from contacting the exposed part of the fan blades head on. The motor base restricted access to the exposed portion of the fan blades from the sides and from below, while the housing of the motor and the intact portion of the shrouding limited the likelihood that a person falling into the area would come into contact with exposed blades from the top or side. As a result, it would take a concerted effort by a person to contort himself to come in contact with the fan blades (Tr. 64, 73; see Exh. J-1, J-2).

After close scrutiny of the testimony and evidence adduced by the parties in support of their case, including their posthearing arguments, I conclude and find that Helen Mining Company has the better part of the argument that the cited guarding citation was not significant and substantial. It seems obvious to me that the citation was issued because the inspector believed that the belt guarding material was not in place at the time of his inspection. Given those facts, I cannot conclude that anyone passing outby the posts, which served to anchor the belting material could have inadvertently

fallen into the unguarded lower portion of the motor in question, thereby becoming engangled in the moving fan. The motor was located in an elevated position on a concrete platform, the upper portion was guarded by a metal guard, and the distance from the elevated concrete slab to the belt guarding in question was such, that in my opinion, would take a deliberate act to place someone in contact with the moving blades.

On the facts of this case, I am convinced that the belt guarding in question was placed there to serve as a warning that inby that area there was a motor with a guard which had been damaged, and that persons should avoid the area. In these circumstances, the actual guarding device was the metal grill work affixed to the motor itself, and not the belting material. However, the cited condition, as described by the inspector, clearly identifies the belting material, rather than the metal grill work as the guarding device. Given these circumstances, I am not convinced that the belt guarding, even if it were in place, would have served any useful purpose in preventing one from being caught in the exposed fan motor. Therefore, the fact that the belting was not in place, is not significant and substantial.

In view of the foregoing findings and conclusion, I cannot conclude that MSHA has established that the violation was significant and substantial. Accordingly, the inspector's finding in this regard IS VACATED. I agree with Helen Mining's proposed conclusion that the chain of circumstances which would have to combine to cause an injury is too attenuated and the probability of injury too remote to sustain a section 104(d)(1) citation. Accordingly, the citation is modified to a section 104(a) citation, and as previously noted, the violation is affirmed.

Docket No. PENN 83-201-R

Fact of Violation

In this case, Inspector Smith cited a violation of section 75.500(a), after observing a nonpermissible switchbox lying in a room located in a working place inby the last open crosscut. It seems clear to me that Inspector Smith issued the order in question because he believed that the nonpermissible switchbox in question had been used on the previous shift in conjunction with the pump which he found inby permanent roof supports. His citation states that the switchbox was being used to supply electric power to the pump,

and while he had no direct evidence that this was in fact the case, Mr. Smith's belief was based on circumstantial evidence.

The applicable language found in section 75.500(a), is as follows:

> (a) All junction or distribution boxes used for making multiple power connections inby the last open crosscut shall be permissible; * * *

In his posthearing brief, Helen Mining's counsel points out that there is no disagreement that the switchbox in question was nonpermissible and that the area where it was found by the inspector was in fact inby the last open crosscut. Counsel points out that where the parties disagree is whether or not the switchbox was in fact used there.

In support of its position, Helen Mining's counsel points to the fact that MSHA's evidence that the switchbox had been used was the fact that the deenergized box was found there attached to the pump at the start of the next shift (Tr. 105-109, 133-134, 308, 309). In contrast, all of the relevant testimony was that the pump had not been used there with the nonpermissible switch (E.g., Tr. 170-174, 205-207, 251; Exh. C-3).

Counsel maintains that the uncontested evidence as to the pattern of operations during the shift in question belies any such inference: all of the relevant testimony details Helen's compliance with the standard throughout the shift, first in using a permissible pump in the 8 to 9 crosscut early in the shift, in keeping the switchbox outby when using a nonpermissible switch in the 9 room, in ordering the replacement permissible switch from the surface, and in not even setting up the nonpermissible switch on the pasts and insulated mat when it was taken over to the 8 to 9 crosscut at the end of the shift (E.g., Exh. C-1, C-2, C-3, C-5; Tr. 170-171, 175-177, 202, 205-206).

Counsel also argues that credible weight should be given to the statements of the UMWA miners as to compliance with the standard at all times during the shift, and that in the absence of any evidence to the contrary, Helen Mining is entitled to the presumption of legality. Finally, counsel suggests that MSHA has not proven that the standard was violated by using the switchbox to supply power to the pump during the previous shift, and that MSHA's speculative inference is simply not enough to support the violation.

In response to MSHA's "theories" that liability should nonetheless be imposed on Helen Mining because (1) the nonpermissible switch was intended to be used there (Tr. 118); (2) it could have been used there (Tr. 115, 118); (3) even if it were not used there to supply power, it was "used" just by the fact of being there attached to the pump (Tr. 112-115), counsel states that MSHA's action must stand or fall on the basis of the reasons stated by the inspector when he issued the citation, and not by "inventive" posthearing arguments by MSHA's counsel. Even if one were to consider MSHA's post hoc arguments as legally cognizable, counsel suggest there is no evidence to support them. In support of this conclusion, counsel points to the fact that MSHA's theory rests only on the inspector's supposition, derived from the fact that the pump and switch were in the 8 and 9 crosscut and could have been used to pump the water out. Further, even if they were, counsel asserts that the inspector's supposition flies in the face of the evidence here that there was no intent to use the pump until the permissible switch which had been ordered from the surface and brought in at the beginning of the shift had been installed (Tr. 134, 174, 183-184; Exh. C-3).

Helen Mining's counsel goes on to argue that MSHA's "clever" reading of the standard to say that the very function of "making multiple power connections" in the 8 to 9 room was the proscribed use of the switchbox must fail because though multiple connections were arguably made (cable to switch, switch to cable to pump), "multiple power connections" were not made because it is abundantly clear that power was never connected by means of the switchbox in question in the cited crosscut. Further, counsel points out that the pump-switch assembly was never energized since the power plug was pulled at the power center before the unit was ever taken into the crosscut and there is no evidence that it was subsequently energized.

Finally, in anticipation of MSHA's arguments, as developed by its discovery, that its Inspector's Manual states a general MSHA policy that "A violation of section 75.500 exists whenever a unit of nonpermissible electric equipment is taken into or used in or inby the last open crosscut . . .," counsel responds that MSHA may not interpret section 75.500 in this way. Aside from the fact that the standard does not state this policy interpretation on its face, counsel cites the language of subsection (b), (c) and (d) of section 75.500, which proscribes nonpermissible equipment taken into and used inby the last open crosscut, and states that this

language "stands in stark contrast" to the language found in subsection (a) that only the use of such nonpermissible switchboxes is proscribed. Citing several court decision, counsel concludes that "where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."

In support of its case, MSHA's counsel asserts that the inspector issued the citation after observing that the pump and switchbox in circumstances which led him to conclude that the switchbox was used or was going to be used to rid the area of excess water. MSHA concludes that since the cable which led from the box to the power center had not been "tagged out" or "dangered off" in any way, the inspector further concluded that the nonpermissible switchbox was readily available for use by any employee who wanted to start the water pump.

MSHA cites the definition of "permissible" as follows, as set forth at 30 CFR 75.2(i):

> "Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment . . . (Emphasis added.)

MSHA asserts that the inspector made a reasonable inference from the conditions he observed upon entering the place that nonpermissible equipment was used in violation of section 75.500(a). Further, MSHA suggests that even if the inspector's conclusion regarding the use of the box was erroneous, the presence of the nonpermissible box inby the last open crosscut, where it was admittedly used to connect two power cables, is sufficient to establish a violation.

MSHA contends that section 75.500(a) clearly prohibits the operator from locating a nonpermissible junction or distribution box "used for making multiple power connections" inby the last open crosscut. In this case, MSHA maintains that the box was, in fact, used to make two power connections, i.e., one power cable connected to the box and leading to the pump and one power cable connected to the box and leading to a location at or near the power center. The fact that the power cables were not energized at the time the inspector saw the condition does not change the fact that both were connected to the nonpermissible box which was located inby the last open crosscut.

MSHA maintains that its position is further supported by the definition of permissibility cited above. It refers to "all electrically operated equipment taken into or used inby the last open crosscut . . . including, . . . associated electrical equipment, components, and accessories . . ." This definition goes on to state that the purpose of such permissibility requirements is:

> . . . to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed . . . to prevent, to the greatest extent possible, other accidents in the use of such equipment . . . (Emphasis added).

In response to Helen Mining's argument that there was no violation because the pump was not operating, the cables were not energized, and the pump had not been used on the previous shift, MSHA submits that this interpretation would not assure the prevention of the very hazard which the standard is designed to prevent. The condition observed by Inspector Smith posed a definite risk of mine fire or explosion because the power connections were made and management failed to insure that the improper equipment would not be energized while in the high-risk location of the working place.

Conceding that there are no reported Commission decisions interpreting section 75.500(a), MSHA suggests that the Commission has considered issues raised by operators in similar contexts which do offer some guidance in this case. Counsel cites Secretary v. Eastover Mining Co., 2 FMSHRC 1638 (1982), where the Commission considered the circumstances under which a violation of 30 CFR 75.507 occurs. That standard requires that "except where permissible power connection units are used all power-connection points outby the last open crosscut shall be in intake air." In Eastover a pump control box with nonpermissible connection points was located in return air. The operator claimed that since the equipment was not energized, a violation was not established. In upholding the violation, the Commission explained:

> . . . merely finding a (nonpermissible) power-connection point in return air does not necessarily absolve an operator simply because it is nonenergized. In such cases, a violation may occur if the equipment has been, is about to be, could be, or habitually was, operated in return air. Cf. Solar Fuel Company, 3 FMSHRC 1384 (1981) (Emphasis added).

Counsel points out that in the instant case the inspector was of the opinion that the pump had been used with the non-permissible box, and that the box could be used and in fact, was readily available for use. Counsel maintains that this was not a situation where an isolated electrical component was inadvertently placed inby the last open crosscut, unconnected to any equipment or power source. The operator did not demonstrate with any assurance that this nonpermissible box "could not or would not have been energized."

Counsel cites two Commission decisions where it was held that the word "used," when found in a mandatory standard, should be interpreted to mean "could be used" as well. Secretary v. Ideal Basics Industries, 2 FMSHRC 1243, 1244 (1981); Secretary v. Solar Fuel Company, 2 FMSHRC 1359, 1360 (1981). Counsel suggests that these decisions indicate that, in view of the very serious hazards posed by the use of nonexplosion proof equipment in locations where methane may be emitted, the standard should be interpreted in such a manner that assures prevention of the harm. Counsel concludes that Helen Mining's interpretation of the cited standard is extremely technical and would permit a result that is inconsistent with the intent of the regulation.

By letter dated February 7, 1984, Helen Mining's counsel takes issue with MSHA's posthearing arguments concerning the applicable definition of the term "permissible." Counsel argues that since the separate requirements set forth in section 75.500(b) through (d), all address equipment "taken into or used inby the last open crosscut," the cited definition of the term "permissible" as found in section 75.2(i), and as relied on by MSHA would apply to any citations for violations of those subsections. However, since Helen Mining here has been cited with a violation of subsection (a) of section 75.500, which requires that boxes used for making multiple power connections inby the last open crosscut to be permissible, counsel asserts that the definition found in section 75.2(c)(1) is applicable in defining the term "permissible" as used in section 75.500(a). That definition states as follows:

> (c) "Permissible' as applied to--(1) Equipment used in the operation of a coal mine, means equipment, other than permissible electric face equipment, to which an approval plate, label, or other device is attached as authorized by the Secretary and which meets specifications which are prescribed by the Secretary for the construction and maintenance of such equipment and are designed to assure that such equipment will not cause a mine explosion or a mine fire.

In the Eastover Mining Company case, supra, although the Commission affirmed the Judge's holding on the facts of the case, it specifically rejected the Judge's broad construction that a violation of section 75.507 always occurs whenever nonpermissible power connection points are located in return air regardless of the circumstances. The Commission emphasized the fact that the purpose of the standard was to prevent methane gas explosions caused by sources of ignition, such as arcing from power connections. The Commission observed that the arcing of power connection points is only possible if the equipment is energized or can be energized. The Commission went on to explain that a violation may occur if the equipment has been, is about to be, could be, or habitually was, operated in return air.

The facts in Eastover Mining are similar to those in the instant case, and these are explored by the Commission as follows at 2 FMSHRC 1638-1639:

> We now apply the preceding principles to the facts of this case, based on the record as developed below. There is no question that the pump control box was not energized when the inspector issued the order. The foreman who placed the equipment in the return air during the shift prior to the one during which the inspection occurred testified that there was not enough cable to connect the pump to the power center. He also testified that he was familiar with the regulation and would not have left the control box in the return air if it were engerized.
>
> In this case it is claimed that the unit was not in fact located in the return air but was simply placed there temporarily until it could be moved to intake air.

> In other words, it is contended that the location was merely an interrupted transit to another position where it would be located as required by the regulation.

> Nevertheless, the record does not contain a satisfactory explanation of why the control box was left in the return air. Nor has Eastover completely dispelled our concern that the only reason the pump control box was not energized in return air was because the connecting cable was too short--a "problem' which unfortunately suggests an original intent to energize in return air and a possible intent to "remedy' the situation by means other than moving the control box into intake air. We will not, however, indulge in speculative hypotheses. The record before us does not allow us to say with assurance that Eastover clearly showed that the equipment could not or would not have been energized in return air. Our concern is underscored by the undisputed facts that the mine had a history of methane liberation (the major danger in the event of arcing) and .1 to .2 volume percent of methane was found at the working place when the order was issued.

MSHA makes the point that the switchbox plug was not "tagged out" or otherwise "dangered off." Even if it were, I suspect that MSHA would still argue that a violation occurred. As a matter of fact, in Eastern Associated Coal, 1 FMSHRC 2209 (1979), the Commission ruled that even though a mine operator placed a "danger tag" on a piece of equipment which had been cited for an inoperable parking brake, a violation still existed since the equipment remained operable in a working area. The Commission ruled that tagging out the piece of equipment did not abate the violation because:

> We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored.

In Ideal Basic Industries, 2 FMSHRC 1242, 1243 (1980), the Commission held that:

> If equipment with defects affecting safety is located in a normal work area, fully capable of being operated, that constitutes "use'. Here, at the time of the inspection, the mobile was parked in a usual location, right next to the area where railroad cars--which the mobile is used to move--are loaded. It was neither rendered inoperable nor in the repair shop. To preclude citation because of "non-use" when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.

Although on the facts of this case, we are not dealing with equipment "defects," the construction of the term "use" is pertinent in the context of nonpermissible equipment.

In Solar Fuel Company, supra, the Commission interpreted the application of section 75.503, which requires a mine operator to maintain in permissible condition electric face equipment which is taken into or used inby the last open crosscut. The Commission reversed the Judge's ruling that the "intent" to take such equipment is not controlling, and that in order to establish a violation it must be shown that an operator did not maintain in permissible condition equipment which was taken into or used inby the last open crosscut. In reversing, the Commission emphasized the fact that the requirements for maintaining such equipment "permissible" is to assure that mine fires or explosions do not occur. Thus, the Commission reasoned that the emphasis "is not where equipment is located at the time of inspection, but simply whether it is equipment which is taken or used inby." The Commission then concluded that section 75.503 applies not only to equipment which has been taken inby the last open crosscut when inspected, but also to equipment which is intended to be or is habitually taken or used inby, even if it is inspected while located outby.

The term "face equipment" is defined at pg. 407 of the Mining Dictionary as "mobile or portable mining machinery having electric motors or accessory equipment normally installed or operated inby the last open crosscut in an entry or a room." In this case, the electric pump, powered by a motor and the switchbox in question, fits the definition of electric face equipment, and the parties concede that it is the type of equipment covered by the cited standard.

A "switch" is defined by the Mining Dictionary, 1968 Edition, at pg. 1111, as a "mechanical device for opening and closing an electric circuit." The term "connection box, electrical," is defined at pg. 251 as "a boxlike enclosure with removable face or plate within which electric connections between sections of cable may be made."

There is no credible evidence to prove that the non-permissible switchbox in question was in fact used to supply power to the permissible pump at the location where the inspector observed it. The pump was not energized or pumping water when he observed it, and he had no reason to believe that the cable plug was plugged into the power center or tagged out because he did not walk down to the power center before deciding to issue the order. His belief that the pump had been used on the prior shift, with the switchbox supplying the power, was based on circumstantial evidence, and MSHA has not rebutted Mr. Bondra's explanation as to the circumstances concerning the use of the pump and switchbox in question. Mr. Bondra's explanation is corroborated by the testimony of the electrician and mechanic (Plovetsky), and the inspector himself conceded that Mr. Bondra's explanation was plausible. Further, the circumstances surrounding the ordering and delivery of a replacement permissible switchbox lends credence to Mr. Bondra's explanation.

Although the unsworn statements of the miner's offered by Helen Mining's counsel are self-serving, the prior statement by Mr. Plovetsky is consistent with his testimony. With regard to the other statements, they were made available to MSHA in advance of the hearing as part of the discovery process, and MSHA had an opportunity to subpoena the miners if it had reason not to believe their statements. In any event, the statements concerning the actual use made of the pump and switchbox in question add nothing to the testimony of record in this case.

In this case, Helen Mining is charged with using a nonpermissible switchbox to supply power to a permissible pump purportedly used to pump water on a shift prior to the one where the cited conditions were observed by the inspector. On the basis of all of the credible evidence and testimony adduced in this proceeding, I conclude and find that Helen Mining has rebutted MSHA's circumstantial case, and has established that the switchbox and pump in question were not in fact used to pump water as charged by the inspector in this case. However, given the language found in section 75.500(a), which is different from that found in subsections (b), (c), and (d), as well as in

section 75.507, the question presented is whether these prior interpretations in the context of the cases cited herein are equally applicable to the facts presented in this case.

MSHA recognizes the fact that the prior cases considered by the Commission concern interpretations of the words "taken into or used." Had the inspector in the instant case cited Helen Mining with a standard using those words, I would be constrained to find that MSHA has established a violation in that the nonpermissible switchbox was taken into an area which was inby the last open crosscut. As a matter of fact, Helen Mining stipulated that the box in question was located in the working place, inby the last open crosscut at the time the inspector observed it.

The regulatory language found in subsection (a) mandates that boxes used for making multiple power connections inby the last open crosscut shall be permissible. Thus, the critical question presented is whether or not MSHA has established that the switchbox was used for making a multiple power connection during the prior shift, as charged in the violation. Since I have concluded that MSHA has not established that the switchbox was used to supply power to the pump on the previous shift, logic dictates that I make the same conclusion and finding with respect to this question. However, before reaching that conclusion, a review of the Commission's prior interpretations of the permissibility regulations found in the cited cases is in order.

As I read the prior Commission rulings in the cited cases relied on by MSHA in support of its case, it seems clear to me that the Commission believes that the intent of any permissibility regulation is to assure that all possible temptation to use nonpermissible equipment inby the last open crosscut be removed by an interpretation that practically prohibits the physical taking of such nonpermissible equipment inby the last open crosscut, regardless of whether "it is used," "intended to be used," "habitually used," or "ready to be used."

Helen Mining maintains that since the definition of "permissible" found in 30 CFR 75.2(i), includes a reference to electric face equipment taken into or used inby the last open crosscut, it may only be applied to citations based on subsections (b), (c), and (d) of section 75.500, because those subsections contain those very same words, while the cited subsection (a) does not. Helen Mining asserts that the proper definition for "permissible," in the context of an alleged violation of subsection (a), is that found in 30 CFR 75.2(c)(1).

On the facts of this case, the nonpermissible switchbox in question was characterized as "nonpermissible" because it was not constructed as an approved explosion proof device which has MSHA's "seal of approval." While there was some testimony that a wire or connection had become damaged when the box was dragged to another location during the beginning of Mr. Bondra's shift, that fact alone did not render the box in question "nonpermissible." Thus, on the facts here presented, regardless of which definition is applied, MSHA's arguments with respect to the intent and purpose of the permissibility regulations referred to in this case are well taken. Both definitions take into account the fact that the required permissibility parameters for the design, construction, and maintenance of such equipment are intended to assure that such equipment will not contribute to a mine fire or explosion.

Helen Mining's argument that a multiple power connection had not been made because the power cable had not been plugged into the power center is rejected. While it is true that the inspector did not know whether the power plug was actually plugged into the power source at the time he observed the switchbox and pump, Mr. Bondra confirmed that he did not tag or "danger off" the plug when he left the switchbox and pump for the next shift.

On direct examination, Mr. Bondra testified that he informed incoming foreman Mitsko that he needed a switch for the pump and that he should not use the pump until the new switch was installed (Tr. 184). He claimed that this conversation took place between the change in shifts. However, in response to my questions, Mr. Bondra testified that he did not tell Mr. Mitsko that he had left the pump with the nonpermissible switch attached to it at the location where it was found by the inspector, nor did he tell him that he had not plugged in the power. When asked why, Mr. Bondra responded that there was not enough time (Tr. 197). I find it rather incredible that section foreman Bondra could not find the time to pass on this information to Mr. Mitsko. In view of Mr. Bondra's previous explanation that he left the pump and switchbox where he did without tagging out the power plug because "he did not have time," I suggest that in the future he reexamine his priorities and take the time to carry out these supervisory details.

Mr. Bondra's testimony confirms Inspector Smith's testimony that Mr. Mitsko advised him that the power plug had not been tagged out, and since Mr. Bondra did not discuss the matter with Mr. Mitsko before the switchbox and pump were

discovered by the inspector, it also supports Inspector Smith's assertion that Mr. Mitsko had no knowledge that the switchbox and pump were left by Mr. Bondra.

Further confirmation that the power plug was not tagged out came from the mechanic, Mr. Plovetsky. He also confirmed that he could not lock out the power at the power center at the end of the shift when Mr. Bondra left the switchbox and pump because he had no lock-out device. Further, even though he was qualified to remove the nonpermissible switchbox, Mr. Plovetsky did not do so, nor did he speak to any of the incoming shift personnel to notify them that the switchbox and pump were left by Mr. Bondra, and that the power plug and power source were not locked out.

In view of the foregoing circumstances, while there is no direct evidence that the nonpermissible switchbox was used on the prior shift, I am not convinced that Helen Mining has established that the pump and switchbox could not or would not be energized and used by the oncoming shift at the location where it was left by Mr. Bondra. In addition, I am not persuaded by the self serving disclaimer statements compiled by mine management to defend the citation, and they are rejected as a defense. It seems to me that with a little more attention to their duties, Foreman Bondra and Mechanic Plovetsky could have, and should have, either removed the switchbox, or at least secured the power source by obtaining a lock-out device, or tagging out the plug. By leaving the pump and nonpermissible switchbox, with the cable untagged, and with the power source not locked out, they did precisely what the Commission expressed concern about in Eastover Mining Co., Ideal Basic Industries, and Solar Fuel Company, supra. Accordingly, I conclude that the interpretation and application of the language "used for making multiple power connections" as found in section 75.500(a), should be precisely how the Commission interpreted the word "used" in the Eastover Mining Co. case, as well as the other cases cited by MSHA in support of the violation. All that was necessary here to energize the pump and switchbox was for someone to plug in the cable to the power source, and I am not convinced that Helen Mining has demonstrated with any assurance that this was not the case. Accordingly, I conclude and find that MSHA has established a violation of mandatory standard 30 CFR 75.500(a). The section 104(d)(1) Order No. 2111718, IS AFFIRMED, and the Contest IS DENIED.

Significant and Substantial

Helen Mining agrees that if an injury were to occur as a result of the alleged violation, it could reasonably

be expected to result in a potentially serious injury. However, its defense to the inspector's "significant and substantial" findings is based on the argument that only an examiner and the person moving the pump would have any occasion to be in the area on an infrequent and brief basis, and that the possibility of an accident would be extremely remote.

At page 34 of his posthearing brief, Helen Mining's counsel cites several hearing transcript references to support his assertion that the oncoming foreman (Mitsko) and his mechanic (DeCarlo) were the only people who would energize the switchpump assembly. Counsel asserts that they had been told that they had to replace the switch before they could pump water. Mr. Mitsko is deceased and Mr. DeCarlo did not testify.

Mr. Plovetsky's testimony is that the oncoming mechanic and foreman were the only persons who should be responsible for energizing the power cable (Tr. 217-218). However, Mr. Plovetsky testified that he said nothing to anyone from the oncoming shift about the facts surrounding the power cable. Mr. Skvarch's testimony, at Tr. 249-255, simply recounts the information he developed during his investigation of the order, and it seems clear to me that he simply relied on Mr. DeCarlo's prior self-serving statement that he was to take the new permissible switchbox into the section. Further, the statements of the miners on the 12:00 to 8:00 shift, exhibits C-3-B, C-3-C, and C-3-D, attesting to the fact that the pump was not used on their shift, and that they knew that a new switch had been ordered, is not relevant to what the oncoming shift would have done. Likewise, the statements by the miners listed in exhibit C-3(e), that it was not their job to operate pumps, and that they would not energize one if they thought it was illegal to do so is not persuasive. I conclude that since the pump and switchbox were placed and located in such a position as to make them readily available for use by someone merely plugging in the power cable, the possibility of this happening was not remote. This is particularly true where it appears that the area in question was flooded, and that the pump may have previously been used to pump water in the same area where the inspector found it when he happened on the scene.

Although it may be true that the amount of methane detected by the inspector when he observed the pump and switch was not particularly substantial, given the fact that the mine does liberate a million cubic feet of methane in a 24 hour period, should there be any interruption to the ventilation,

the use of a nonpermissible switchbox would present an ignition source if the pump were inadvertently energized. Since there was a realistic potential present that someone could have inadvertently plugged in the pump and switch to begin pumping out the water which was present in the area, I conclude that there was a real potential for an accident, and Helen Mining's assertions to the contrary are rejected. I conclude and find that MSHA has established that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure

Helen Mining's arguments that the violation was not an unwarrantable failure ARE REJECTED. I agree with MSHA's posthearing proposed findings and conclusions that the facts and circumstances in this case support a conclusion that the violation resulted from Helen Mining's unwarrantable failure to comply with the cited standard. In my view, Section Foreman Bondra's actions in creating the conditions which resulted in the violation, when combined with his failure to take reasonable steps to insure that the switchbox in question was either tagged out or removed, clearly demonstrate to me that he knew or should have known of the violation, and that in these circumstances, he failed to exercise due diligence to prevent the conditions which the inspector reasonably concluded amounted to a violation. Contrary to Helen Mining's arguments, Mr. Bondra's conduct is attributable to Helen Mining, and I conclude and find that it should be held accountable for this conduct. I adopt MSHA's posthearing proposed findings and conclusions on the question of "unwarrantable failure" as my findings and conclusions on this issue, and the inspector's finding in this regard IS AFFIRMED.

History of Prior Violations

As indicated earlier, Helen Mining's history of prior violations for the period June 1, 1981 to May 31, 1983, reflects a total of 498 prior violations. However, I take note of the fact that this listing reflects no prior citations for violations of mandatory standard 30 CFR 75.500(a), and I have taken this into account in the civil penalty assessment for the violation in question.

Good Faith Compliance

The record establishes that once the order issued Helen Mining achieved timely abatement of the violation in question, and I have considered this in the civil penalty assessed for the violation in question.

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

The parties stipulated as to the size of Helen Mining's coal mining operations, as well as the size of the mining operations at its Homer City Mine. Based on the production figures shown at page 5 herein, I conclude and find that Helen Mining Company is a large mine operator.

The parties have stipulated that the assessment of civil penalties in these proceedings will not affect Helen Mining's ability to continue in business. I adopt this as my finding and conclusion on this issue.

Gravity

I conclude and find that the circumstances concerning this violation presented a reasonable likelihood of an injury or an accident, and that the failure by Helen Mining to insure that the nonpermissible switchbox was not removed from the area in question, and was permitted to remain without locking out the power source or tagging out the plug constituted a serious violation.

Negligence

I conclude and find that the failure by Section Foreman Bondra to see to it that the switchbox was removed from the area inby the last open crosscut, or to at least see to it that the power cable plug was tagged out or the power source locked out indicates a reckless disregard for the safety of the oncoming crew. It seems clear that even though Mr. Bondra and the mechanic working on his same shift (Plovetsky), had an opportunity to do so, they did not take reasonable steps to insure that the switchbox would not be used, nor did they inform the oncoming crew that the switchbox and pump were left in a location where anyone could reasonably have believed that it was ready to be energized and used to pump out the water which was in the area. In these circumstances, I conclude and find that the violation resulted from gross negligence, and this is reflected in the civil penalty assessed by me for the violation in question.

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 violations which have been affirmed:

PENN 83-200-R

Citation No.	Date	30 CFR Section	Assessment
2111715	5/25/83	75.1722(c)	$375

PENN 83-201-R

Order No.	Date	30 CFR Section	Assessment
2111718	6/1/83	75.500(a)	$2800

ORDER

Helen Mining Company IS ORDERED to pay the civil penalties assessed by me in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA, these cases are dismissed.

George A. Koutras
Administrative Law Judge