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

PYRO MINING COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. KENT 84-87-R Order No. 2338185; 1/24/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. KENT 84-88-R Order No. 2338186; 1/24/84
	Pyro No. 9 Slope William Station

DECISION

Appearances: William M. Craft, Assistant Safety Director, Sturgis, Kentucky, for Contestant; Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on February 28, 1984, in Evansville, Indiana, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. I consolidated for hearing with the issues raised by the notices of contest the civil penalty issues which will be raised when the Secretary of Labor files a proposal for assessment of civil penalty with respect to the two violations of 30 C.F.R. 75.200 alleged in Order Nos. 2338185 and 2338186. No decision by me on the civil penalty issues will be made, however, until the operator has had an opportunity to participate in the civil penalty procedures described in Part 100 of Title 30 of the Code of Federal Regulations, as hereinafter explained.

At the conclusion of presentation of evidence by both parties, I rendered a bench decision, the substance of which is set forth below:

The parties stipulated at the beginning of the hearing that each order, No. 2338185 and No. 2338186, issued on January 24, 1984, properly alleged a violation of section 75.200, and that the inspector had correctly noted in each order that

the violation was "significant and substantial". (FOOTNOTE 1) Having made the aforesaid stipulation, the contestant stated that the only point which was being contested at the hearing was whether the violations should have been cited under section 104(d) of the Act in unwarrantable failure orders, rather than in citations, written under section 104(a), which could also have been used to designate the violations as being "significant and substantial". (FOOTNOTE 2)

The parties' stipulation enables me to skip from a detailed consideration of the first three findings, namely, (1) that violations occurred, (2) that they did not cause an imminent danger, and (3) that they were "significant and substantial", which have to be made before an order can be issued under section 104(d)(1), to the ultimate question of whether the violations were caused by an unwarrantable failure of the operator to comply with section 75.200.

My conclusion as to whether there was an unwarrantable failure will be based largely on the findings of fact which are set forth below:

1. Inspector James E. Franks went to the Pyro No. 9 Slope, William Station Mine on January 24, 1984, to check on a roof fall which had occurred. While he was in the mine, he went to the No. 5 Unit and specifically to the last open crosscut between the Nos. 4 and 5 entries. At that time, he issued two unwarrantable-failure orders. The first one was Order No. 2338185 which described the violation of section 75.200 as follows (Exh. 1):

> The approved roof-control plan (dated 8/12/83, page 4, par 12(C)) was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby spad No. 1380, #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

2. The provision in the operator's roof-control plan which the inspector believed was violated was paragraph 12C which reads as follows (Exh. 2, page 4):

> All places where the roof is not supported shall have conspicuous markers or signs or reflective sticks suspended from the roof placed outby the unsupported roof.

3. The inspector also wrote Order No. 2338186, pursuant to section 104(d)(1) of the Act, describing a second violation of section 75.200 as follows (Exh. 3):

> The last open crosscut between Nos. 5 and 4 entries (100 ft. inby spad No. 1380 #5 entry) No. 5 Unit, ID No. 005, was cut through in the middle and cleaned up, and the area (15 ft. long by 20 ft. wide) was unsupported and the evidence indicated crosscut had been rock dusted, cable for the roof bolter was all the way through the unbolted crosscut, and the tire prints of a piece of equipment,

probably the roof bolter, was present in the rock dust all the way through the unbolted (unsupported) crosscut, one or more persons had traveled through the unsupported area.

4. The inspector testified that there was a roof-bolting machine in the crosscut between the Nos. 4 and 5 entries. He stated that the fact that the roof-bolting machine was in the entry at the time he wrote both withdrawal orders was immaterial in determining whether there was a violation of paragraph 12C of the roof-control plan because the inspector's interpretation of that paragraph is that the company is required to hang the specified warning devices as soon as a place is cleaned up, regardless of whether the roof-bolting machine and its operator are immediately available to go into the place that has been cleaned up, for the purpose of installing roof bolts. The inspector believed that the warning devices were required even if an ongoing production shift is in progress. The inspector believed that it was especially bad that the warning devices had not been placed in the crosscut in this instance because no active production was going on in the No. 5 Unit at the time he wrote the order, although some maintenance or nonproductive work was being performed.

5. Contestant presented three witnesses, but the testimony of two of them is especially noteworthy. The first one was a mechanic named Henry Michael Dennis who had been asked by Ken Reed, a boss on the third shift, to do some work on a roof-bolting machine in a crosscut between the Nos. 4 and 5 entries. When Dennis went to the place to do the work, he found that the roof-bolting machine was being used in the crosscut, but it was situated under what Dennis characterized as unstable-looking rocks in the roof. Therefore, Dennis asked that the roof-bolting machine be backed towards the No. 5 entry. At that point, Dennis went to the repair shack to get some parts. When he returned, he found the roof-bolting machine closer to the No. 4 entry than it was to the No. 5 entry, although when he had left the roof-bolting machine, it had been closer to the No. 5 entry than it was to the No. 4 entry. Since Dennis had not seen the roof-bolting machine moved, he did not know whether it went under unsupported roof to be on the side closest to the No. 4 entry. In any event, he did the work on the brakes and the torquing device of the machine that he had come there to perform.

6. The other significant witness presented by the company was Ronnie Presley who was normally assigned to the group of miners who clean up roof falls. On the morning of January 24, 1984, the day on which the orders were issued, Presley had been requested by John Greenwell, a day-shift foreman, to go to Pyro No. 5 Unit and perform any roof bolting which needed to be done in any area which had been cleaned up but left unsupported.

Presley first installed bolts in the face area and then moved down to the crosscut between the Nos. 4 and 5 entries. After he had installed two rows of bolts in the crosscut, Dennis, as indicated in Finding No. 5, supra, asked Presley to move the roof-bolting machine back towards the No. 5 entry. When Presley did so, he observed some places in the roof at the new location which did not look particularly stable for the performance of maintenance work under them. Without thinking about the safety factor involved, he inadvertently pulled the roof-bolting machine the remainder of the way through the crosscut. In doing so, he passed under unsupported roof. Because of Presley's inadvertent act, the roof-bolting machine was near the No. 4 entry in the crosscut when Dennis came back to work on the machine.

7. Presley admitted during his testimony that he had violated the roof-control plan, or section 75.200, by going under unsupported roof. He stated that when he came out of the mine that same day, he was reprimanded for his violating the roof-control plan and company policies. He was also suspended for 1 day because of the violation.

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At the conclusion of the evidentiary presentations, contestant's representative reiterated his belief that while violations, as the company had conceded, had occurred, he did not think that the company's complicity rose to the level of negligence which is required to support a finding of an unwarrantable-failure violation. The company's representative placed in the record as Exhibits B through O references to various administrative law judges' decisions. I have no disagreement with those decisions which seem to follow acceptable definitions of unwarrantable failure. I am not aware of a Commission decision which provides any changes in the definition of unwarrantable failure given by the former Board of Mine Operations Appeals in its decision in Ziegler Coal Co., 7 IBMA 280 (1977), in which the Board defined the identical provision of unwarrantable failure in section 104(c) of the Federal Coal Mine Health and Safety Act of 1969 as follows (7 IBMA at 295-296):

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence,

> or because of indifference or lack of reasonable care. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable.

In applying the above definition to the first order, No. 2338185, the Secretary's counsel stated that there was a violation of a mandatory safety standard since there is a provision in contestant's roof-control plan which states that there must be a posting of conspicuous marking devices. He further noted that a violation of the roof-control plan is a violation of a mandatory standard, or a violation of section 75.200 because that section requires each operator to file and follow the provisions of a roof-control plan.

I have no reason to disagree with the aforesaid portion of the Secretary's argument, but some refinement should be made in his conclusion to the effect that any time there is a violation of a safety standard, the violation in and of itself constitutes ordinary negligence. In Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission distinguished between relying upon the acts of a rank and file miner for the purpose of finding that a violation occurred as opposed to relying upon the acts of a rank and file miner for the purpose of imputing negligence to the operator. In other words, an operator is liable for the occurrence of a violation without regard to fault (U.S. Steel Corp., 1 FMSHRC 1306 (1979)), but the negligence of a rank and file miner should not be imputed to the operator for the purpose of assessing penalties.

In any event, the above observations do not quite reach the point that I must make a ruling upon because I must determine whether the facts in this proceeding show that contestant's failure to hang the required warning devices was caused by a lack of due diligence or because of indifference or lack of reasonable care. Contestant's representative made an argument based upon the provisions of paragraph 12 of the roof-control plan which reads as follows (Exh. 2, page 4):

> 12. Before the side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan. Except where old workings are involved, mine openings shall not be holed through into unsupported areas. Before a mine opening holes through into a permanently supported entry, room, or crosscut, it shall be examined from both sides. The intersection so created shall be considered unsupported and be immediately dangered off with conspicuous markers or signs suspended from the roof at

each end of the crosscut and no work shall be done in or inby (except for setting two temporary supports and making a gas check) such intersection until either;

A. The newly created opening is permanently supported or

B. The newly created opening is timbered off with at least one row of timbers installed on not more than 5 foot centers across the mouth of the open crosscut. Where crosscuts are driven from both sides and holed through, it will not be considered an intersection but conspicuous signs shall be suspended from the roof. Once set, the jacks or posts shall not be removed until other supports are installed in the area.

C. All places where the roof is not supported shall have conspicuous markers or signs or reflective sticks suspended from the roof placed outby the unsupported roof.

Contestant's representative argues that paragraph 12 requires warning devices to be installed "immediately" in the circumstances described in the first part of paragraph 12, but contestant contends that the word "immediately" is not used in subparagraph C relied upon by the inspector. Contestant's representative asked the inspector about the lack of the word "immediately" in subparagraph C and the inspector agreed that the circumstances described in the first part of paragraph 12 did not exist at the time Order No. 2338185 was written. Therefore, the inspector said that the word "immediately", as used in the first part of paragraph 12, did not apply to the violation of subparagraph C which the inspector believed was violated. In the inspector's opinion, the installation of the warning devices was required by the roof-control plan irrespective of whether the word "immediately" appeared in that subparagraph.

The Secretary's counsel contradicted contestant's argument by pointing out that subparagraph C clearly states that "[a]ll places where the roof is not supported shall have conspicuous markers, or signs, or reflective sticks suspended from the roof." The Secretary's counsel contended that as soon as the company sees an unsupported place, no matter where it is, the company is required to hang the markers. He argued that it is the existence of the unsupported roof which requires the markers and that they are required even if the word "immediately" does not appear before the provision requiring the warning devices to be installed.

I think that the Secretary's counsel is probably correct in making the aforesaid argument because subparagraph C definitely

requires installation of the warning devices at "all places where the roof is not supported". Despite the discussion above, I was impressed by the fact that contestant's representative is an experienced person in dealing with procedures in underground mines, and he stated that it is simply not the practice, for example, if they are working at the face, to install warning devices. In fact, he said that at the face, there is no way that a person would be likely to walk under unsupported roof when there is a roof-bolting machine engaged in putting up roof bolts.

The important aspect of contestant's argument is that a roof-bolting machine was being used in the crosscut at the time the inspector wrote the order. Contestant's argument is that the roof-bolting machine was there with its lights on and the operator was working on the machine. The existence of the roof-bolting machine and its operator would, contestant claims, have served as a warning that there was unsupported roof in the area or the roof-bolting machine would not have been there.

The inspector's testimony controverted the above argument by pointing out that the order was written with respect to a different situation from that which prevails at the face because a person can walk through a crosscut, but cannot walk through the solid coal which one encounters at the face. Consequently, the possibility does exist, according to the inspector, that even if the roof-bolting machine is operating in a crosscut, some miner may walk past the machine without considering whether or not the roof-bolting machine is doing actual supporting work in a place which has been cleaned up but which has not yet been permanently supported. The roof-bolting machine operator himself is engaged in important and dangerous work and he is not paying any particular attention to other persons in the mine who might be ordered to do work which could cause them to go past his machine under unsupported roof before he would notice that they had exposed themselves to the hazard of a possible roof fall.

The inquiry as to whether contestant showed a lack of due diligence or a lack of reasonable care has to be decided on the narrow question of whether contestant should have hung the required conspicuous markers in the crosscut as soon as the coal was loaded out. The evidence shows that contestant did not intend to send the roof-bolting machine into the crosscut immediately for the purpose of installing permanent supports. The work of supporting the roof was eventually done on an idle shift and the foreman who sent the miner to do the roof supporting treated it as "catch-up" work. The evidence shows, therefore, that contestant did not with due diligence hang the conspicuous markers which were required to be installed by paragraph 12C of its roof-control plan.

It is true that there was no foreman on the section when the inspector wrote the order, but I think that there must have been a foreman on the section when the crosscut was cleaned up and when the coal was removed from the mine. It was under that foreman's jurisdiction that the required conspicuous markers should have been hung. So he was the one who showed a lack of due diligence in seeing that the markers were hung. The duty of hanging markers should not have been left to the preshift examiner who apparently did hang some warning devices, or at least Exhibit C shows that he did some dangering off in the No. 5 Unit. The point is that before the preshift examination was made, the conspicuous markers should have been installed.

The language used by the former Board was failure to do something because of indifference or lack of reasonable care. I do not like to say that contestant has indifference because other evidence indicates that contestant is not generally indifferent about safety, but I think that there was a lack of due diligence and of reasonable care on the part of the foreman in this instance. Therefore, I agree with the inspector that an unwarrantable failure occurred when contestant failed to put up the conspicuous markers described in Order No. 2338185 which will hereinafter be affirmed.

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The next matter to be considered is whether the violation cited in Order No. 2338186 was properly alleged in an unwarrantable failure order because contestant has already stipulated that the violation of section 75.200 alleged in the order did occur. Therefore, it is again necessary to consider whether contestant showed a lack of due diligence or a lack of reasonable care with respect to the inspector's claim that one or more persons went under unsupported roof.

Originally this case raised the question of whether the inspector had properly inferred that there was a violation of section 75.200 because he saw that a cable had been dragged through a crosscut and that tracks of a roof-bolting machine appeared in a crosscut under an area of unsupported roof. The inspector concluded from his observations that there was no way the machine could have gone through the crosscut having unsupported roof without passing beneath the unsupported roof.

If contestant had not presented its witnesses in this case, I would have been confronted with the aforesaid preliminary question of whether the inspector's inferences had been properly drawn. Contestant's presentation of Ronnie Presley as a witness, however, eliminated any need to decide any question about inferences because Presley, as noted in Finding Nos. 6

and 7, supra, testified that he, without giving proper consideration to safety regulations or company policy, did inadvertently tram the roof-bolting machine through the crosscut beneath unsupported roof. That same day Presley was reprimanded and suspended for 1 day for having violated both section 75.200 and company policy. Presley testified that he had been warned not to go under unsupported roof, but that in an effort to get the roof-bolting machine into a secure place for maintenance work to be performed on it, he had inadvertently forgotten about the fact that he was passing under roof in which permanent roof bolts had not yet been installed.

In the circumstances described above, it would be improper for me to conclude that management showed a lack of due diligence or that the second violation of section 75.200 occurred because of indifference or lack of reasonable care. In this instance, I am reminded of the Commission's decision in Nacco Mining Co., 3 FMSHRC 848 (1981). In that case, the Commission held that no negligence should be imputed to the operator when a section foreman who had always followed safety regulations and who had always been a very careful foreman, for some reason acted in an aberrant fashion, and went under unsupported roof which fell and caused his death. The Commission stated in that case that it could not hold the company to have been guilty of negligence because the company could not have anticipated that the foreman would act as he did.

I believe that the events leading up to the writing of Order No. 2338186 are very similar to those which existed in the Nacco case because in this case Presley acted in a wholly unexpected manner by tramming his roof-bolting machine through an unsupported area without giving due thought. Contestant reprimanded him for his careless act and suspended him for it on the same day that it happened.

Contestant's evidence shows that it did not condone Presley's action. If the inspector had known all the facts now in the record of this proceeding, he would perhaps not have cited the violation in an unwarrantable-failure order. In any event, I believe the facts given above support a conclusion that the violation of section 75.200 cited in Order No. 2338186 did not occur because of a lack of due diligence or because of indifference or a lack of reasonable care. Therefore, the violation of section 75.200 cited in Order No. 2338186 was improperly alleged as an unwarrantable-failure violation pursuant to section 104(d)(1) of the Act. Order No. 2338186 will hereinafter be modified to a citation.

Civil Penalty Issues

Contestant filed a motion for an expedited hearing in this proceeding. The motion was granted and a hearing was held on

February 28, 1984, which was as early as the parties' schedule would permit. The bench decision could not be issued in final form until the transcript was received and the transcript was not received until May 1, 1984. During the period between the hearing and receipt of the transcript, MSHA's Office of Assessment proposed penalties of $1,000 each for the violations of section 75.200 cited in Order Nos. 2338185 and 2338186. A copy of contestant's answer to the proposed assessment was received by me on April 3, 1984. In that letter contestant stated that "* * * Order No. 2338185 was vacated and Judge Steffey indicated he would assess the penalty on Order No. 2338186."

On April 13, 1984, I received a copy of the Assessment Office's reply to contestant's interpretation of the outcome of the hearing held in this proceeding. The pertinent part of the Assessment Office's reply is set forth below:

> As the Administrative Law Judge (ALJ) has vacated Order No. 2338185, the civil penalty will be voided. Your letter of March 29, will be considered a request to contest the civil penalty on Order No. 2338186 so that the ALJ has jurisdiction to decide on the civil penalty. In the future, you should file a separate request (blue card) for a hearing on the civil penalty, even though you have previously contested the validity of the order or citation.

It is obvious from contestant's letter to the Assessment Office that contestant did not understand my rulings with respect to the civil penalty issues. My order providing for hearing issued on February 17, 1984, explained on page 2 that the civil penalty issues were being consolidated for purpose of receipt of evidence pertaining to the six criteria, but that order and my opening remarks at the hearing stated as follows (Tr. 2):

> * * * I have consolidated for hearing with the issues raised by the notices of contest the civil penalty issues which will be raised when and if the Secretary of Labor files a proposal for assessment of civil penalty with respect to the two violations of section 75.200 alleged in Order Nos. 2338185 and 2338186. No decision by me on the civil penalty issues, however, will be rendered until such time as the operator has had an opportunity to participate in the civil penalty procedures described in Part 100 of Title 30 of the Code of Federal Regulations.

My bench decision contained the following discussion of the civil penalty issues (Tr. 156-157):

> I don't normally in one of these cases convert orders to citations because I simply find that no unwarrantable failure occurred and therefore it's an invalid order. But in this case, the civil penalty portion of the case is still pending because the proposal for assessment of civil penalty hasn't been filed yet. I want the company to have the benefit of conference before I assess the penalty. Therefore, in this instance, when my decision comes out, I shall convert the Order 2338186 to a citation, checking the S and S portion of the citation. Therefore, unless the Department of Labor appeals my decision and gets me reversed on the conversion of the order to a citation, the Secretary will propose a penalty for a citation in this instance, instead of an order.

I shall hereinafter explain for contestant's benefit what procedures should be followed with respect to the civil penalty aspects of the proceeding. Since this was probably contestant's first exposure to a consolidated notice-of-contest and civil penalty proceeding, I am not surprised that some confusion exists as to what my bench decision held, particularly when it is realized that contestant did not have a copy of the transcript or bench decision when it wrote its letter to the Assessment Office.

The first aspect of contestant's letter to the Assessment Office which needs to be corrected is the fact that my bench decision stated that I would vacate Order No. 2338186 and would convert the order to a citation because the violation survived the vacation of the order (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)). The length of the hearing was considerably reduced by contestant's having stipulated at the commencement of the hearing (Tr. 4) that both violations had occurred and that both could appropriately be considered as "significant and substantial" violations. In such circumstances, it is especially true in this proceeding that the violation would survive my finding that no unwarrantable failure existed with respect to Order No. 2338186.

The quotation from the Assessment Office's reply to contestant's letter shows that the Assessment Office was under the erroneous impression that my bench decision had not only vacated Order No. 2338185 but had also held that no violation of section 75.200 had been proven. The Assessment Office's reply is correct, however, in stating that it is necessary for a proposal for assessment of civil penalty to be filed with the Commission before I have a case before me which gives me jurisdiction to assess a penalty on the basis of the record made in this proceeding.

In order that no confusion will continue to exist with respect to the civil penalty issues, I shall further explain the procedure which I would expect the Assessment Office and contestant to follow in order to dispose of the civil penalty issues. The Assessment Office has already proposed penalties with respect to Order Nos. 2338185 and 2338186 under Assessment Control No. 15-13881-03520, but that proposed assessment included proposed assessments for Citation Nos. 2074792, 2074793, and 2338327. If the Assessment Office fails to sever the proposed assessments for Order Nos. 2338185 and 2338186 from the other three citations, the civil penalty case may end up before me with three alleged violations to be considered which were not the subject of the hearing held with respect to Order Nos. 2338185 and 2338186. Therefore, I would suggest that the Assessment Office propose penalties for the violations of section 75.200 alleged in Order Nos. 2338185 and 2338186 under an assessment control number which would include only those two orders. Additionally, the proposed assessment should refer to No. 2338186 as a citation issued under section 104(a) of the Act instead of an order issued under section 104(d)(1) of the Act. The new citation designation would be with the "significant and substantial" block checked on it.

If the Assessment Office is agreeable to the above suggestion, the amended proposed assessment should be resubmitted to contestant for its consideration. Contestant should bear in mind that it is entitled to ask for a conference with respect to Order No. 2338185 and Citation No. 2338186 just as it would with respect to any other proposed assessment. If contestant, however, wishes to have me assess a penalty for both Order No. 2338185 and Citation No. 2338186, it should file a "blue card" with respect to both the order and the citation. Contestant is also free to pay the proposed penalty for either or both the violations. If contestant elects to pay the penalty for one violation, it may do so, and then file a blue card with respect to the violation for which it wishes to have me assess the penalty. After the Solicitor's Office has filed a proposal for assessment of civil penalty with respect to one or both of the violations which contestant did not elect to pay at the Assessment Office level, contestant should, as usual, file an answer to the proposal for assessment of civil penalty. In that answer, contestant should state that a hearing has already been held by me with respect to the violations alleged in Order No. 2338185 and Citation No. 2338186 and that the civil penalty case should be forwarded to me for the purpose of assessing a penalty (or penalties) on the basis of the hearing record made in this proceeding.

I believe that the discussion above should enable the Assessment Office and contestant to dispose of the procedural steps required for dealing with all civil penalty issues.

WHEREFORE, it is ordered:

(A) The notice of contest filed by Pyro Mining Company in Docket No. KENT 84-87-R is denied and Order No. 2338185 issued January 24, 1984, pursuant to section 104(d)(1) of the Act, is affirmed.

(B) The notice of contest filed by Pyro Mining Company in Docket No. KENT 84-88-R is granted and Order No. 2338186 issued January 24, 1984, under section 104(d)(1) of the Act, is vacated insofar as it purports to have been issued as an unwarrantable-failure order and is modified to a citation issued under section 104(a) of the Act with a designation of a "significant and substantial" violation.

(C) The civil penalty issues are severed from this consolidated proceeding for disposition under Part 100 of Title 30 of the Code of Federal Regulations, with the understanding that if Pyro Mining Company files a request for hearing (or blue card) with respect to either or both violations alleged in either Order No. 2338185 or Citation No. 2338186, the proposal for assessment of civil penalty with respect to the request for hearing will be forwarded to me for assessment of a penalty (or penalties) based on the record in this proceeding.

Richard C. Steffey
Administrative Law Judge

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~FOOTNOTE_ONE

1 The phrase "significant and substantial" comes from section 104(d)(1) of the Act which reads as follows:

"(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [Emphasis supplied.]

~FOOTNOTE_TWO

2 The Commission recently sutained the Secretary of Labor's practice of issuing citations with an indication on the face of the citations that the violations being cited are "significant and substantial" (Consolidation Coal Co., 6 FMSHRC 189 (1984)). Section 104(a) reads as follows:

"Sec. 104. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."