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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

YOUGHIOGHENY & OHIO COAL
CO.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 84-98
A.C. No. 33-00968-03568

Nelms No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio,
for Petitioner
Robert C. Kota, Esq., St. Clairsville, Ohio,
for Respondent

Before: Judge Kennedy

Foreword

Without passing on the sufficiency of the findings of fact and conclusions of law set forth in the bench decision of May 31, 1985 as confirmed and incorporated in the final order issued August 8, 1985, 7 FMSHRC 1185, the Commission by its order of September 17, 1985, 7 FMSHRC 1335, remanded this matter to the trial judge for issuance of his bench decision as a written decision as required by Rule 65 or issuance of a new decision setting forth the trial judge's findings on all the material issues of fact, law or discretion presented by the record.

Thereafter, the trial judge issued an order dated October 4, 1985, setting forth in a signed writing the tentative bench decision together with his reasons for declining to sit as a board of review on the sufficient of the record made by MSHA in support of its Part 100.5 special assessments. The trial judge found that since the Commission had refused to acquiesce in the proposition that its trial judges are bound by the penalty point formula of

penalty assessment set forth in Part 100, it was unnecessary to make findings for determination of penalty amounts as outlined in 30 C.F.R. 100.3 and 100.5. See Sellersburg Stone Company, 5 FMSHRC 287, 2 MSHC 2010 (1983), aff'd sub nom. Sellersburg Stone Company v. FMSHRC, 736 F.2d 1147, 1150Ä1153 (7th Cir.1984), rehearing en banc denied July 24, 1984; United States Steel Mining Company, Inc. 6 FMSHRC 1148, 3 MSHC 1362 (1984).

Ignoring the fact that (1) the operator's reliance on Allied Products v. FMSHRC, 666 F.2d 890, 894Ä896 (5th Cir.1982) was misplaced, if not frivolous, and (2) that the operator had failed to avail itself of the opportunity to challenge the sufficiency of the trial judge's findings on any other ground, the Commission refused to treat the written transcript of the judge's bench decision, which contained his findings of fact, conclusions of law and the bases therefor, as part of his final order and remanded the matter for the insufficiency of the final order which adopted and confirmed the findings and conclusions set forth in the written transcript of the bench decision.

Accepting the Commission's curious remand in good grace, the trial judge included in his order of October 4, 1985, a direction to the parties to file post-hearing briefs, including their proposed findings of fact, annotated to the record, with respect to the material issues of fact, law and discretion presented by the record. On October 31, 1985, one day before its post-hearing brief was due, counsel for the operator filed a second petition for review with the Commission seeking vacation of the trial judge's order to file a post-hearing brief. The only ground asserted was the "futility" of attempting to attack the trial judge's bench decision. On November 1, 1985, the Commission denied Youghiogheny & Ohio's second petition for interlocutory review and thereafter on November 25, 1985, the trial judge issued an order to show cause why counsel's failure and refusal to file a post-hearing brief should not be deemed a default and a summary order entered assessing as final the penalties assessed in the bench decision of May 31, 1984. Counsel for Youghiogheny & Ohio made no response and offered no excuse for his contemptuous refusal to file a post-hearing brief.

The premises considered, therefore, it is ORDERED that the operator be, and hereby is, determined to be in DEFAULT. It is FURTHER ORDERED that the penalties assessed in my decision of May 31, 1985 as adopted and confirmed in my final order of August 8, and my supplemental order of

October 4, 1985 in the amount $1,950 be, and hereby are, deemed final and directed to be paid.

Finally, I find the penalties assessed were not arbitrary, capricious, excessive or an abuse of discretion for the reasons set forth in the findings and conclusions contained in the written transcript of my bench decision of May 31 as adopted and confirmed in my final order of August 8, 1985 and reiterated in my supplemental order of October 4, 1985.

Under section 557(c) of the APA and Commission Rule 65 a judge's decision must be in writing and must "include findings of fact, conclusions of law, and the reasons and bases for them, on all the material issues of fact, law or discretion presented by the record." The written transcript of May 31, 1985 and my supplemental order of October 4, 1985 both set forth in writing the findings, conclusions and reasons in support of my penalty assessments, including (1) the fact of violation, which in each instance was never disputed, and (2) the six statutory criteria which, except for gravity and negligence, were the subject of stipulations and/or undisputed documentary evidence.

In Sellersburg Stone, supra, the court held that a judge's decision complies with the APA and Rule 65 if it considers a contention and discusses it, whether or not the judge makes a specific finding on it. Further, the court held that the Commission should not overturn or remand a case if the judge's position on a contention is "reasonably to be discerned." Indeed, the court commended to the Commission the practice of modifing a judge's decision to include undisputed record evidence. In Sellersburg the Commission did this as to four of the statutory criteria on which the judge had made no findings. The undisputed record evidence here showed that Youghiogheny & Ohio is a medium sized coal operator and that its ability to continue in business would not be impaired by any penalty found appropriate. The other four criteria (1) prompt abatement, (2) gravity, (3) negligence and (4) history of prior violations are all set forth in the findings, conclusions, and discussion of the tentative bench decision which the operator declined the opportunity to challenge. What more the Commission may want is impossible for me to discern at this time.

To insure compliance with the order of remand and because the circumstances of this case provide a unique

opportunity to consider what a trivial, if dangerous, pursuit MSHA's $20 penalty assessment program has become, I provide the following supplemental findings and conclusions.

Ventilation at Nelms #2

For years, ventilation has been a problem at the Nelms #2. More specifically, between March 14, 1982 and March 13, 1984, the mine was cited for 83 ventilation violations, for an average of 3.5 violations a month. If the violations found by the UMWA safety committeemen were included the rate would be even higher. Despite the dangerous pattern established, 87 percent or 72 of the cited violations were allegedly harmless and assessed single penalties of $20. Ten others were assessed penalties that averaged approximately $100 and one was vacated.

Ventilation problems continued throughout 1984 and up to the time of the hearing in May 1985. In the areas that are the subject of this case, this was principally due to the fact that the sections being developed were almost a mile, 4,000 feet, from the main air shaft and because the air had to travel over or around many obstacles and obstructions to reach the working faces. A new air shaft was under construction but its completion was not expected until late 1985 or early 1986. Because MSHA had been tolerant of the problem and the Union had not pressed the matter, most, approximately 90 percent, of the violations were treated as minor and insignificant.

It came as a distinct shock therefore that within a period of less than 30 days MSHA suddenly decided to upgrade enforcement and specially assess the recirculation violations that occurred on March 14, and April 5, 1985. Upset over this crackdown, Youghiogheny & Ohio took both citations to conference. When the district manager held fast and refused to rescind or vacate his staff's recommendations for special assessments and when they were later assessed a total of $1,800 Youghiogheny & Ohio filed a notice of contest.

Youghiogheny & Ohio admitted the existence of both violations. Its contest was bottomed on the claim that because the violations were not serious the special assessment determination was clearly erroneous and the amounts assessed excessive, arbitrary, capricious and an abuse of discretion. Citing Allied Products v. FMSHRC, supra, counsel for the operator insisted that the penalties were assessed erroneously because the District and Assessment Offices failed to make the findings required by Part 100 or that such findings

as were made were not supported by the evidence. Counsel wanted a de novo review of only the MSHA administrative (Part 100) record not a de novo determination of the merits based on the evidence adduced at the hearing. Counsel obdurately refused to recognize that under Rule 29(a) and section 110(i) of the Mine Act the Commission and its trial judges exercise their independent judgment in applying the six criteria and are in no way bound by the determinations made by MSHA.

More specifically, however, the operator's challenge was to the time allowed for abatement of Citation #2203748; to its special assessment since the inspector had initially characterized it as non-S & S; and, most importantly, to the finding that a special assessment was warranted because of management's negligent failure to prevent a recurring recirculation problem in the northern sections of the mine. Nothing causes management to send its legal gladiators into the adversarial arena faster or with greater forensic ferocity than a finding that top management was guilty of negligence, especially a "high" degree of negligence, with respect to a safety violation.

Cognizant of the sensitivity of this issue, the Commission early on decided to assiduously avoid making findings as to the degree of management's culpability. Penn Allegh Coal Co., Inc., 4 FMSHRC 1224, 1127, 2 MSHC 1781, 1783; Monterey Coal Company, 7 FMSHRC 996, 1002, 3 MSHC 1833, 1836 (1985). This refusal to "quantify the degree of the operator's negligence," no matter how great, tends to minify violations in a way that is contrary to the intent of Congress.

With respect to Citation #2327363, issued April 5, 1985, the operator specifically challenged the findings of negligence, gravity, S & S, and the alleged failure to give it the 30 percent discount allowable for prompt abatement. Finally there was the bold assertion, summarily denied, that despite the record made at the hearing the judge must remand the matter to the Assessment Office for reassessment because the narrative findings were not in accord with Part 100.5.

The Youghiogheny & Ohio Coal Company

Youghiogheny & Ohio, a subsidiary of Panhandle Eastern Corporation, is a medium sized coal operator with production of approximately 900,000 tons of bituminous coal a year. Its home office is in St. Clairsville, Ohio. The Nelms #2 Mine is located in Hopedale, Harrison County, Ohio. It is the only mine operated by Youghiogheny & Ohio. At the time

of the violations in question, the mine employed 312 contract miners and 57 management or supervisory employees. Youghiogheny & Ohio's counsel agreed that any penalty found warranted would not adversely affect its ability to continue in business.

Walking the 013 Section

Because of recurring complaints and problems with the recirculation of return air in the northern part of the Nelms #2 Mine, two MSHA inspectors, Robert Cerena, a ventilation specialist, and Mark Eslinger, a supervisory mining engineer and ventilation expert, were sent to make a ventilation technical inspection of the mine on March 14, 1984. Both worked out of District 8 in Vincennes, Indiana. Both were experienced underground coal mine inspectors.

Cerena and Eslinger arrived at the mine at 0745 hours, and at 0800 hours, went underground accompanied by Larry Ward, a UMWA safety committeeman, and Lawrence (Ozzie) Wehr, a member of Youghiogheny & Ohio's safety compliance staff. The four men traveled to the 013 section. The inspectors picked this section because recirculation citations had been written on this section in January and February. Nine miners worked the section with a continuous mining unit. Other electrically energized machinery on the section consisted of ram cars, a roof bolting machine, a battery powered scoop, and an auxiliary ventilation fan.

The inspection party approached the face area through the "A" entry. Mr. Wehr testified the mathane reading at the working face was one to two tenths of one percent, well within safe limits. The mine emitted 1.5 million cubic feet of methane every 24 hours which put it in the category of a gassy mine with a pervasive extrahazardous condition. The party then proceeded through the last open crosscut to the "B" entry. In the "B" entry Cerena found a ram car with a permissibility violation. After the citation for the permissibility violation was abated, the party inspected the face of the "B" entry where a continuous miner was producing coal in the last crosscut to the left off the "B" entry. Exhaust tubing was installed on the right rib. The tubing extended from the working face down the right rib and outby the "B" entry into the last open crosscut between the "B" and "C" entries. At this point the exhaust tubing was attached to an auxiliary fan.

Intake air which came down the "A" entry became return air once it swept across the working face. The return air was then exhausted through the last open crosscut, the vent

tubing and the auxiliary fan across the inactive faces in the "C" and "D" entries and out the "D" entry. In the last open crosscut between the "B" and "D" entries Eslinger and Cerena could see float coal dust in suspension and at this point suspected a recirculation problem. Proceeding outby in the "C" entry the inspectors and the others observed perceptible amounts of float coal dust in the "C" entry. At the first man door along the return stoppings Cerena made a smoke tube test and confirmed that return air was coming through the cracks in the man door. This air was then being drawn up the "C" entry to the check curtain and diverted through the second crosscut (8 plus 28) outby the face area and drawn up the "B" entry where it was recirculating across the working face to be vented out the tubing through the auxiliary fan and once again into the return.

At this time, 1015 hours, Cerena advised the section foreman, Clifford Bolen, that a recirculation condition existed for which a citation would be written. Since no methane was detected in the "C" entry or along the stopping line, Cerena, following standing instructions, permitted coal production to continue and considered the violation not reasonable likely to result in a serious injury or illness if abated within the time set, 1215 hours. Because this was the third recirculation violation cited in as many months and others had been reported on this and other sections, Eslinger and Cerena believed management should have been more alert to discover the problem, had failed to exercise the high degree of care imposed by the Mine Act, and could point to no mitigating circumstance. They also believed that if the hazards against which the standard is directed occurred they could result in permanently disabling injuries.

Because at 1015 hours Cerena and Eslinger were not aware of the total extent of the recirculation and did not consider the condition an immediate hazard they did not press for rapid abatement. They apparently believed that allowing 2 hours and 15 minutes for abatement would permit the section foreman to mesh his production with his abatement effort without undue interruption of production. All the members of the inspection party agreed that abatement should have been accomplished within 45 minutes to 1 hour.

The inspection party continued to walk outby in the "C" entry. Recirculation was discovered again at the next two man doors outby. The man doors were installed at every five crosscuts along the stopping line. Thus, the recirculation problem extended over an area of 10 or more crosscuts outby the last open crosscut along the stopping line.

The float coal dust encountered, while clearly visible and palably perceptible, was not so dense as to impair vision. It apparently resembled a fine mist and was determined to be filtering through all three man doors and some of the permanent stoppings. It was steadily accumulating on the surface of the rock dust. Because the standard prohibits "any recirculation of air at any time," neither Eslinger nor Cerena nor the operator made any attempt to measure the actual volume or velocity of air recirculating. 30 C.F.R. 75.302Ä4(a). Eslinger, when pressed, estimated the volume at up to 3,000 cfm which would be approximately half the amount of air, 6,700 cfm the operator's engineer calculated to be sweeping the working face.

The estimate of the amount of air recirculating seems reasonable, because, as the inspection party later discovered, return air was also recirculating over two battery charging stations in the "C" entry at the 3 plus 50 station. The air vents for the battery chargers measured 8 x 8 or 9 x 9 inches. It is obvious that a considerable volume of air could recirculate through these large vents. A citation was written for this condition because impermissible battery chargers located on intake air must be ventilated through return air vents to remove any hydrogen gas fumes and to preclude the circulation of any noxious gases, including carbon monoxide, to the face area in the event of a fire or explosion. Overall Cerena estimated the area affected by recirculation extended from the working face in the "B" entry across the other two face areas and down the "D" entry outby and back to the working face for a distance of approximately 1,300 feet.

The inspection party completed its observations and returned to the face area around 1100 hours. At that time, they found that Bolen, the section foreman had been unsuccessful in his attempts to abate the recirculation. Bolen said he first tightened the check curtain in the "C" entry and when this did not help installed a tail tube on the exhaust end of the auxiliary fan and extended it down the crosscut into the return. The effort was designed to reduce the auxiliary fan pressure and keep it from overriding the mine pressure. At the time, the intake air was measured at 14,000 cfm and the return at 19,800 cfm.

As Eslinger pointed out, a system wide deficiency in the amount of air available to the section markedly contributed to the problem. This had been corrected previously by adjusting the regulators so as to rob air from one section to make up for a deficiency in another. This is a temporary

and, at times, a very dangerous solution. The immediate problem here, however, was caused by the fact that the auxiliary fan which was exhausting air at a velocity of 5,000 feet per minute in an ambient air atmosphere of 170 feet per minute was "robbing" or short circuiting intake air from the "B" and "C" entries. This created a negative air pressure or vacuum along the return stoppings line of the "D" or return entry. As Eslinger explained:

> ". . . there was a higher pressure in the return entry, which is the "D" entry than the "C" entry and what was causing the higher pressure in the "D" entry than the "C" entry was due to the velocity pressure or the velocity of the air exiting from the fan. Okay.
>
> That pressure created a higher pressure in the "D" entry than the "C" entry; therefore air flows from a high pressure to a low pressure, it was flowing from the "D" entry to the "C" entry. Once back in the "C" entry, the fan was wanting air and, therefore, it was drawing it from the "B" entry. Well, air that's in the "C" entry fills into the "B" entry and, therefore, part of the [recirculated] air was going back through the tubing." Tr. 157.

Wehr pitched in trying to help Bolen. The fan was repositioned and the tail tubing changed twice. All curtains were tightened and curtains were hung in the crosscuts where the return air was leaking through the man doors. But nothing seemed to work. Bolen believed he asked Cerena if he could suggest a solution. Cerena said he was not asked but that in any event he would not have known of a solution. Eslinger, the most expert of all present, said he was never asked for a suggestion and did not believe he should volunteer. Operators, of course, are rightly jealous of their perogative of managing their mines. An inspector who volunteers a plan of abatement can find himself compromised if the plan does not work. Since the section was reasonably clean, dry and rock dusted and the methane readings remained within a safe tolerance there was no reason, the inspectors believed, not to permit the abatement effort to proceed as the operator saw fit.

For reasons not disclosed by the record, the section foreman did not seek assistance from his shift foreman. He said he was not authorized to contact anyone else. Finally, when the abatement time expired, the section foreman advised Eslinger and Cerena he had exhausted his knowledge and resources and had given up trying to abate the condition. At this point, the inspectors decided the only thing they

could do was issue a 104(b) closure order. The section foreman did not ask for an extension of the time to abate and testified he believed the time given was reasonable and issuance of the closure order proper. Mr. Wehr agreed and immediately called out to his supervisor, Mr. Wood, who apparently communicated the problem to the mine foreman and the mine superintendent.

Shortly thereafter the mine foreman and superintendent arrived on the section. Mr. Wurschum, the mine superintendent and a former MSHA inspector, immediately recognized that the recirculation problem was resulting from the venturi effect of the auxiliary fan. He had discussed such a problem with Mr. Jay Haden of MSHA's district office in Pittsburgh in February. Haden told him the solution was to install baffle curtains between the exhaust end of the fan and the return entry to deflect and slow the velocity and negative pressure on the air along the stopping line. With this done, the recirculation abated and the closure order, written at 1230 hours, was conditionally terminated at 1330 hours. The conditional termination allowed production to resume pending an evaluation of the adequacy of the operator's ventilation plan for the entire section. This evaluation never occurred as the operator idled the section on March 16, 1984 and the order was terminated unconditionally on April 4, 1984.

Negligence

I find the mine superintendent was negligent in failing to pass on to the section foreman and his safety compliance staff the information given him in February by Mr. Haden of MSHA. Both Bolen and Wehr testified they had never been told that baffle curtains could be used to decrease the negative pressure caused by an auxiliary fan. In view of the number and frequency of citations and complaints of ventilation problems, including recirculation problems, the mine superintendent should have promptly disseminated all the corrective action information available to him and directed the holding of training sessions to insure section foreman and other line personnel were capable of detecting, recognizing, and abating hazardous recirculation conditions.

Mr. Ingold, the operator's mine engineer, indicated Mr. Wurschum sought a solution to localized negative pressure problems because the condition was fairly pervasive in the mine. He further stated that as of the time of the hearing the operator was still experiencing problems with diffusing the pressure from its auxiliary fans and building baffles on its fans to diffuse the pressure on its return

airways. The preponderant evidence clearly established that in failing to train its section foreman in the methods and practices for abating a venturi effect on a return airway top management at the Nelms #2 was highly negligent.

Gravity

The operator claims the inspector's evaluation of the violation as non-S & S and the gravity as "unlikely" as of the time it was discovered, 1015 hours, is conclusive of the fact that the violation was not serious, indeed was harmless, and any penalty in excess of $20 unwarranted.

This, of course, is nonsense, but dangerous nonsense because it finds support in MSHA's practice of treating violations that do not pose an immediate or imminent danger as insignificant and insubstantial. Both inspectors testified they initially considered the recirculation condition a non-S & S violation because the concentration of methane, one to two tenths of one percent, was well within safe limits. Both realized, of course, that if normal mining operations continued, as they did, and the condition remained unabated, as it did, it could make a significant and substantial contribution to a mine fire or explosion. What MSHA's training apparently overlooks is the provision of the law that makes even a nonserious or seemingly harmless conditions S & S if, as must be assumed, mining operations were to continue with the condition ignored or undiscovered and unabated.

Thus, despite the fact that the citation in question reflected the inspectors' belief that if unabated the condition "could reasonably be expected" to result in "permanently disabling" injuries to the nine miners working on the section, the controlling finding, absent the closure order, insofar as the penalty assessment was concerned was the erroneous non-S & S finding.

Many violations, considered in isolation, are not serious in the sense that they present no immediate or imminent danger of a permanently disabling or fatal injury. But that does not mean that, if not detected and abated, they could not in the course of continued mining operations "significantly and substantial contribute to the cause and effect of a mine safety or health hazard." The Commission has made clear that if a violation is of such a nature as to create a recognizable health or safety hazard that in the course of continued mining operations could reasonable be expected to contribute to a serious injury or fatality it should be classified as S & S, regardless of the seriousness

of the condition or practice "at the precise moment of inspection." United States Steel Mining Co., Inc. 6 FMSHRC 1573, 1574, 3 MSHA 1445 (1984); United States Steel Mining Co., Inc. 6 FMSHRC 2058, 2069Ä2070, 3 MSHC 1622 (1984).

Thus, all violations are to be evaluated in terms of the probable consequences of the continued existence of the violation under normal mining operations, without any assumptions as to the time of abatement. In other words, for a violation to be deemed significant and substantial, S & S, it need not be one. The sole requirement is that its "contribution" be S & S. United States Mining Co., Inc. 7 FMSHRC 1125, 1129, 3 MSHC 1871, 1872 (1985).

The corollary of this interpretation is that an operator is entitled to mitigation for prompt abatement but not for getting caught. An operator is not to be accorded leniency because the inspector found the violation before it made a possibly lethal contribution to a fatal hazard but only to consideration for moving quickly and effectively to abate the condition found and cited. United States Steel Mining Co., Inc., supra 7 FMSHC 1130, 3 MSHC 1974.

The passage of time and the failure to abate while mining operations continued increased the inspectors' apprehension over what at first blush and under the erroneous standard applied appeared to be an inconsquential violation. At 1215 hours, Cerena and Eslinger reevaluated the situation and, as noted, at 1230 hours issued a 104(b) closure order. This, of course, guaranteed the safety of the section until the condition was corrected and the order terminated. It also had the effect of superseding the non-S & S finding and making the violations immediately eligible for a regular or special assessment. 30 C.F.R. 100.4. Counsel apparently overlooked the fact that one of the circumstance that justifies special assessment of a citation designated as non-S & S is the failure to abate the condition cited within the time set by the inspector.

Belatedly, if inadvertently, sensing this hole in its non-S & S defense to the amount of the penalty, the operator asserted but never proved that the time allowed for abatement was unreasonable and the issuance of the closure order arbitrary, capricious and unwarranted. To the contrary, neither the mine superintendent nor the mine foreman protested issuance of the closure order and both the section foreman and the operator's walkaround, Mr. Wehr, testified that in their opinion the time for abatement was reasonable and issuance of the closure order proper.

The rapidity of the attention given the problem by top management after issuance of the closure order demonstrates the striking difference between the tokenism of the $20 single penalty enforcement scheme and meaningful enforcement. The comparison in reaction was not unlike that which Mark Twain made between lightning and lightning bug. The mine superintendent, who almost never appeared underground, and the mine foreman appeared on the scene within a very short period of time and quickly directed installation of the three baffle curtains. By 1330 hours the curtains had been installed, the fan restarted and the air along the return stoppings tested to show that the pressure was now positive from the intake to the return.

Inspector Eslinger remarked upon the aclarity with which top management gave its time and attention to the condition after the closure order issued. While he considered the means adopted a mere "band-aid" upon a problem endemic to the operator's entire ventilation system, he believed the closure order much more "attention getting" than allowing the operator to "eat $20 penalties" indefinitely while largely ignoring the gravity of the systemic problem.

The operator's history of prior violations shows that during the 2Äyear period March 1982 to March 1984 only 92 out of 552 violations were designatd S & S. In other words, for 83 percent of the violations cited during this period the operator got off with a $20 penalty. As noted, during this same period the operator was cited for 83 ventilation violations 87 percent of which were designated non-S & S and assessed only $20. Of these 83 violations 9 involved recirculation problems 7 or 75 percent of which were designated non-S & S and assessed at $20. At least five additional recirculation violations occurred in 1984, only one of which was designated S & S. A recirculation violation was also cited on February 5, 1985. The record shows no further specifics but the testimony by Mr. Ward, the Union safety committeeman, indicated recirculation violations were frequent and expected to continue until the new air shaft was completed.

As Inspector Eslinger noted the ease with which operators "eat" $20 penalties shows it is not a credible deterrent. When coupled with MSHA's misapplication of the non-S & S designation, enforcement becomes a largely trivial pursuit. Top management was well aware of the ventilation problem in the northern sections of the mine. But top management also knew it was more cost effective to just pay the $20 fines and get on with producing coal than to train

the work force in the procedures necessary to insure safe production methods.

The recirculation ceased when the baffle curtains were installed. These curtains were available to the section foreman but he had never been trained in their use. Management's failure to train the section foreman in the use of this device for abating a serious reciculation problem was negligence clearly and directly imputable to the mine superintendent. It measureably increased the gravity of the violation as every hour of delay in abatement measureably contributed to the risk of a major mine hazard.

On gravity, therefore, I find that by the time the closure order issued the likeihood of a major mine hazard if mining operations continued was high and the severity of the consequences for the nine miners, two inspectors, and two walkarounds serious to extreme.

The Special Assessment

The operator's attack on the MSHA's special assessment procedures is without merit. The Commission has repeatedly held that the procedures by which penalty assessments are proposed by the Secretary of Labor are irrelevant and immaterial to a penalty assessment by the Commission or its trial judges. Black Diamond Coal Company, 7 FMSHRC 1117, 1121Ä1122, 3 MSHC 1889, 1892Ä1893 (1985). Had counsel done his homework he would have known that his reliance on Allied Products Company v. FMSHRC 666 F.2d 890 (5th Cir.1982) was misplaced. As the court pointed out in Sellersburg Stone Company v. FMSHRC, 736 F.2d 1147, 1152 (7th Cir.1984), rehearing en banc denied, the reasonableness of penalties assessed in Commission penalty proceedings are not measured by the penalty point formula set forth in Part 100. I note in passing, however, that a special assessment in the amount of $850 for a ventilation violation that significantly and substantially contributed to hazards similar to those involved in this violation was made and upheld in Monterey Coal Company, 7 FMSHRC 996, 999, 3 MSHC 1833, 1834 (1985).

The violation in this case was S & S. In addition a closure order was necessary to get sufficient attention from top management to bring about abatement. Short of issuing a closure order there was no way to do this. By 1230 hours, the inspectors knew they had a serious problem on their hands, especially since the section foreman stated he had exhausted his resources for abating the condition. At this point, and to their credit, Cerena and Eslinger concluded

that enough was enough and that management's recidivism justified the closure. As Eslinger testified,

> ". . . the frequency of occurrence . . . was probably the key factor . . . the fact that it was a reoccuring problem that seemed to be happening again and again and only band-aid type solutions were being applied to it." Tr. 165.

On March 29, 1984, Eslinger wrote a memorandum to the District Manager in which he made an independent evaluation of the violation and concluded that to overcome the operator's "reluctance" to provide sufficient intake air and encourage compliance a special civil penalty assessment was in order.

My only disagreement with the inspectors is over the degree of the operator's culpability. They found "high" negligence. I find the operator's failure to provide the necessary preventive training and instruction to the section foreman when, as the record shows, the mine superintendent was possessed of that information demonstrated a reckless disregard for safety that warrants an increase in the penalty from $850 to $1,000.

Walking the 021 Section

Three weeks later, on the morning of April 5, 1984, Inspector Cerena accompanied by a union walkaround and company escort, made another ventilation technical inspection in the 021 section of the Nelms #2 Mine. The undisputed facts show the inspector found a recirculation violation that involved the last open crosscut and two crosscuts outby in the "B" entry involving an area of about 300 feet. The recirculation resulted from the removal of a tail tube from the auxiliary fan. The methane reading at the working face was .5 percent. Recently an outburst of 1.8 percent had occurred.

The inspector issued a 104(a), S & S citation because he believed the potential for a methane buildup was reasonably likely if mining operations continued and therefore the condition could significant and substantially contribute to the hazard of a mine fire or explosion. He also believed the amount of float coal dust in suspension presented a respirable dust hazard that could significantly and substantially affect the health of miners working or traveling in the area.

The inspector believed the section foreman was negligent in failing to discover the condition; that he had alerted the foreman to watch for a recirculation problem when a mean air violation was corrected by removing the tail tube; and that the mine superintendent was "highly" negligent in failing to instruct and train the section foreman in the use of baffle curtains to diffuse the venturi effect caused by the high velocity of air coming from the exhaust fan.

Because this was the fourth occurrence of a serious recirculation violation in as many months, and followed closely after the closure order issued on March 14, Inspector Eslinger recommended the violation be specially assessed. In his judgment the mine superintendent was highly negligent in failing to give his ventilation problems the time and attention they deserved; was applying only band-aid remedies to a systemic problem of considerable magnitude; and had aggravated the problem by his failure to train and instruct his section foreman in the use of baffle curtains to relieve the negative pressure created by use of high velocity auxiliary fans.

The operator admitted the violation but claimed the special assessment, $950, was, in view of mitigating circumstances, excessive. The record shows the condition was timely, but not rapidly, abated only because the inspector told the foreman to use baffle curtains. Counsel failed to prove the existence of any mitigating circumstances.

I find the preponderant evidence supports the inspector's finding that the violation was serious and could significantly and substantially contribute to a mine health or safety hazard.

Gravity and Negligence

With respect to the special finding, the record shows the hazards associated with inadequate ventilation, of which recirculation is a symptom, are among the most serious encountered by the mining industry. A basic reason for the total prohibition on recirculation of return air is the danger of an ignition of an explosive concentration of methane, either alone or mixed with coal dust, liberated at the face during mining operations. When coal is freshly cut, methane can be liberated in dangerous amounts in short periods of time. Although methane itself becomes explosive at a 5 percent concentration, even a smaller percentage concentration of the gas mixed with float coal dust can generate an explosion. Crickmer and Zegeer (ed.), Elements

of Practical Coal Mining, 264Ä265, 296Ä298, 312Ä315 (1981); R. Lewis & G. Clarke, Elements of Mining 695 (3d ed. 1964).

The legislative history of the Mine Act shows Congress was acutely aware of these, and related, dangers associated with inadequate ventilation. S.Rep. 181, 95th Cong., 1st Sess. 41 (1977). The Nelms #2 is a gassy mine that liberates excessive amounts of methane and is under the extrahazardous inspection cycle required by section 103(i). The citation was issued at a working face where coal was being cut. The discrete hazard contributed to by the recirculation of return air was a potential buildup at the face of methane and coal dust that could result in a possible methane ignition or that could propogate a dust explosion.

I further find that if the hazards contributed to occurred it was reasonably likely that one or more miners would suffer fatal or disabling injuries. As the inspector testified, methane in an explosive concentration could have been liberated at any time and with the turbulence caused by the recirculation could have achieved an explosive concentration within a relatively short time. The continuous mining machine, the operation of which may cause arcing and sparking, was a ready and potential source of ignition. I conclude MSHA carried its burden of showing a discrete safety hazard contributed to by the violation, namely the possible accumulation of mathane and coal dust in the presence of a potential ignition source.

Finally, I find the inaction of the mine superintendent in the face of the recurring recirculation problems at the Nelms #2 demonstrated a reckless disregard for the safety of the miners. Indeed, management of the Nelms #2 developed a pattern of ventilation violations which fully warranted application of the sanctions provided in section 104(e) of the Mine Act. As the Senate Committee Report observed, "The existence of such a pattern should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient." Sen.Rep., 95Ä181, 33 (1977).

Under section 104(e) of the Act, the Secretary of Labor was authorized to issue a pattern of violations notice to a mine operator if the mine showed a pattern of S & S violations. Congress established this provision to address the problem of mine operators who have recurring violations of health and safety standards. The principle expressed was that a 104(e) pattern of violations notice should be available as

an enforcement tool against chronic violators. Congress made clear that chronic violators demonstrate a reckless disregard for the safety and health of miners by allowing the same mine hazards to occur again and again without addressing the underlying problems. Id, at 32Ä33. That describes this case precisely.

Had the sanctions of 104(e) been applied, a pattern of violations notice would have been issued to Youghiogheny & Ohio long before March 14 or April 5, 1984. Consequently, by that time the chronic ventilation deficiency would either have been abated or 104(e) closure orders would have brought the condition forcefully to the attention of management.

This did not and could not happen because section 104(e) of the Mine Act is a dead letter. For the past 8 years, since its enactment and through the administrations of two Presidents, four Secretaries of Labor, and four Assistant Secretaries of Labor for Mine Health and Safety, the Executive Branch's duty to "take care that" section 104(e) "be faithfully executed" and enforced has been ignored.

After considering the other statutory criteria as set forth in my findings and as stipulated to by the parties, I find the amount of the penalty warranted for this violation is $950.

ORDER

To impress upon the operator the need to address in a more urgent and resolute manner chronic problems with the ventilation system at the Nelms #2 Mine it is ORDERED that the operator pay the penalties assessed in the total amount of $1,950, on or before Friday, February 21, 1986.

Disciplinary (Rule 80) Reference

Rule 80 of the Commission's rules provide for the imposition of disciplinary sanctions for violations of the standards of professional conduct. Except as provided in Rule 80(e), however, a trial judge is required to refer such matters to the Commission which, by majority vote, determines whether the circumstances reported warrant disciplinary action. Having carefully reviewed the record in this matter, I find the following circumstances warrant reference:

1. Counsel for the operator refused to comply with the trial judge's order to file a post-hearing brief

and persisted in that refusal even after the Commission denied his appeal from the judge's order.

2. Before, during, and after the trial, counsel for the operator persisted in citing Allied Products v. FMSHRC, supra, as the controlling precedent on the issue of the alleged excessiveness of the penalties, ignoring and failing to distinguish in any way controlling precedent to the contrary.

3. Throughout the trial of this matter, counsel for the operator persistent in badgering the witnesses and the trial judge with the totally erroneous claim that Part 100.3 of the Secretary's penalty assessment formula was controlling of the amount of the penalties properly to be assessed.

4. Throughout the trial of this matter, counsel for the operator persisted in badgering the witnesses and the trial judge with the clearly erroneous claim that MSHA misapplied Part 100.5 when reasonable inquiry would have demonstrated that by virtue of issuance of the closure order on March 14, 1984, special assessment of the citation in question was mandated by Part 100.5.

5. Throughout the trial of this matter, counsel for the operator persisted in ignoring controlling precedent on the definition of an S & S violation.

6. Counsel for the operator persisted throughout the trial of this matter in advancing frivolous arguments and claims with respect to both the facts and the law as the findings on the merits demonstrate.

With respect to specification 1, Disciplinary Rule 7Ä106 of the Code of Professional Responsibility provides:

"(A) A lawyer shall not disregard . . . a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such . . . ruling."

Despite this clear injunction, counsel for the operator failed and refused, after denial of his appeal, to comply with the trial judge's order to file his post-hearing proposals and brief. While, under appropriate circumstances, it is not uncommon for a party to waive the filing of a

brief, Bradford Coal Company, 7 FMSHRC 862, 3 MSHC (1985), in this case counsel's appeal from the trial judge's order requiring a brief was denied. While the basis for the denial was not stated, it followed closely upon the Commission's earlier grant of counsel's appeal from the trial judge's claimed failure to consider the arguments he wished to present in support of his position.

As Ethical Consideration 7Ä22 notes, "Respect for judicial rulings is essential to the proper administration of justice." By failing to comply with the trial judge's order, counsel not only showed his disrespect for this tribunal but failed in his duty to protect the interests of his client by pressing his argument, if legitimate, that the tentative bench decision was erroneous. If, on the other hand, he had no legitimate argument to present he should have accepted the bench decision and avoided waste of the Commission's time and resources by filing a frivolous appeal. The Preamble to the Code of Professional Responsibility states that the Disciplinary Rules are mandatory in character and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

With respect to specifications 2 through 6:

Rule 1.1 of the Model Rules of Professional Conduct impose a duty of competence on a lawyer that includes a duty to make thorough and adequate preparation for the trial of a matter. The record in this proceeding shows that counsel for the operator failed to make the necessary inquiry and analysis of the factual and legal issues controlling of the outcome with the result that much time, effort, and expense was incurred by both parties and the Commission in disposing of a matter that should never have been contested.

Rule 3.1 of the Model Rules provides that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . ." An action is "frivolous" if it cannot be supported by a "a good faith argument for an extension, modification or reversal of existing law." Counsel for the operator never advanced a legitimate argument for modifying or reversing the law governing the assessment of civil penalties in Commission proceedings. An advocate has a duty to use legal procedure to the fullest benefit of a client's cause, but also a duty not to abuse legal procedure, including the Commission's administrative process. The litigation process may, of

course, be abused for reasons other than delay. See Advisory Committee Note to amended Rule 11 of the FRCP (1983).

Rule 3.3 of the Model Rules provide that "A lawyer shall not knowingly . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." The record shows that with the exercise of reasonable diligence, as required by Rule 11 of the Federal Rules of Civil Procedure, counsel for the operator should have known that Allied Products, supra, was not controlling precedent in this Commission proceeding.

Under the circumstances presented, the trial judge recommends that if the Commission finds the unprofessional conduct alleged warrants disciplinary action, Robert C. Kota, Esq., a member of the bar of the State of West Virginia, be publicly reprimanded for contempt of the Commission and suspended from practice before the Commission for 6 months.

The premises considered, therefore, it is ORDERED that the actions heretofore specified as violative of the standards of professional conduct by Robert C. Kota, Esq., a member of the bar of the State of West Virginia, be, and hereby are, REFERRED to the Commission pursuant to Rule 80 for such disciplinary action as the Commission deems appropriate.

Joseph B. Kennedy
Administrative Law Judge