

CCASE:  
RANDY ROTHERMEL V. SOL (MSHA)  
DDATE:  
19871209  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

RANDY ROTHERMEL/TRACEY  
PARTNERS,  
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 87-121-R  
Citation No. 2840770; 2/12/87

Docket No. PENN 87-122-R  
Order No. 2840771; 2/12/87

Docket No. PENN 87-124-R  
Citation No. 2840772; 2/19/87

Tracey Slope

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

v.

TRACEY & PARTNERS,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 87-176  
A.C. No. 36-01836-03524

Docket No. PENN 87-235  
A.C. No. 36-01836-03523

Tracey Slope

DECISIONS

Appearances: James P. Diehl, Esq., Williamson, Friedberg  
& Jones, Pottsville, Pennsylvania, for the  
Contestant/Respondent;  
Susan M. Jordan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests  
filed by the operator against MSHA pursuant to section 105(d) of  
the Federal Mine Safety and Health Act of 1977, 30 U.S.C.  
815(d), challenging the legality of two section 104(a) citations  
and one section 104(b) order issued to the

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operator in February, 1987. The operator is charged with alleged violations of section 103(a) of the Act, because of its refusal to permit an MSHA inspector to conduct spot inspections pursuant to section 103(i) of the Act. A hearing was held in Reading, Pennsylvania, and while the parties were afforded an opportunity to file posthearing briefs, they have not done so. However, I have considered the oral arguments made by counsel on the record during the hearing in these proceedings.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq
2. Sections 103(a) and (i) of the Act, 30 U.S.C. 813(a) and (i); and section 110(i), 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Issues

The issues presented in this matter include the following:

1. Whether the operator violated section 103(a) of the Act by denying entry to the inspector for the purpose of conducting a section 103(i) spot inspection, and if so, the appropriate civil penalties to be imposed for the violations.
2. Whether the facts and evidence adduced in this matter support MSHA's contention that the operator has not been subjected to any illegal or discriminatory inspections pursuant to section 103(i) of the Act.
3. Whether the facts and evidence adduced in this matter support the operator's contention that no valid or legal basis exists at this time for MSHA's continuing its mine on an indefinite section 103(i) spot 5-day inspection cycle.
4. Whether the statutory language found in section 103(i) of the Act with respect to an occurrence of a methane ignition or explosion "during the previous five years," automatically

terminates MSHA's authority to keep the mine on a 5-day spot inspection status at the expiration of 5 years, during which time no further methane ignitions or explosions within the meaning of section 103(i) have occurred.

5. Whether the aforesaid statutory language authorizes or requires MSHA to continue its 5-day spot inspections of the mine ad infinitum subsequent to the expiration of 5 years from the date of the methane ignition and explosion which initially placed the mine in that status.

6. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

#### Stipulations

The parties stipulated to the following (Joint Exhibit 2; Tr. 7):

1. Randy Rothermel is the Managing Partner of Tracey Slope.
2. The mine is subject to the Federal Mine Safety and Health Act of 1977.
3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to section 105 of the Act.
4. The citations, orders, and modifications, involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the operator at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
5. The parties stipulate to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.
6. The operator had a multiple nonfatal methane explosion accident at its Tracey Slope Mine on February 10, 1982, which resulted in serious injuries to three miners.

7. Following this incident, the operator was put on a 5Äday spot inspection series under section 103(i) of the Act by MSHA. The basis for this action was that a "methane ignition or explosion had occurred which resulted in serious injury."

8. This mine has been subject to 5Äday spot inspections at irregular intervals since that time.

9. There has been no methane ignitions or explosions at this mine resulting in serious injury since the accident on February 10, 1982. The mine has not liberated "excessive quantities of methane" as that term is defined in section 103(i).

10. On February 12, 1987, MSHA Inspector Victor G. Mickatavage of the Shamokin Field Office arrived at the mine to conduct a section 103(i) spot inspection. Mr. Randy Rothermel, an owner of the mine, stated that he was denying entry to the mine to conduct a section 103(i) spot inspection. Mr. Rothermel stated, however, that he would permit any inspection other than an inspection pursuant to section 103(i).

11. At 11:45 a.m., the MSHA inspector issued Citation No. 2840770 under section 103(a) of the Act for the denial of entry, allowing 45 minutes to abate.

12. At 12:30 p.m., the MSHA inspector issued a section 104(b) withdrawal order, Order No. 2840771, under section 103(a) of the Act for failure to abate Citation No. 2840770, which order did not prohibit entry into the mine.

13. On February 13, 1987, the MSHA inspector returned to the mine and issued a Modification to Citation No. 2840770 and Order No. 2840771, and entry to perform a section 103 (i) inspection was again denied.

14. On February 19, 1987, the MSHA inspector was again denied entry to the mine to conduct a section 103(i) spot inspection. The MSHA inspector issued Citation No. 28040772 for failure to comply with the section 104(b) Withdrawal Order No. 2840771 as modified Order 2840771A01.

15. A letter dated September 15, 1986, Exhibit "CÄ1," is a true and correct copy of a letter sent by Randy Rothermel to the then acting District Manager, Joseph Garcia, the District Manager of Coal Mine Safety and Health, District No. 1.

16. During the 24Ämonths preceding the date of the contested citations and order, the operator received a total of 24 citations and was subject to a total of 142 inspection days.

17. The operator is a small underground anthracite mine operator, employing three to five people underground, and two people on the surface, and has an annual coal production of approximately 4,000 tons (Tr. 33, 170).

#### Discussion

The citations and order issued in these proceedings, all of which allege violations of section 103(a) of the Act, are as follows:

Section 104(a) non-"S & S" Citation No. 2840770, February 12, 1987 (Docket Nos. PENN 87Ä121ÄR, and PENN 87Ä235).

On 2Ä12Ä87, Randy Rothermel, partner and mine foreman, refused to allow Victor G. Mickatavage, an authorized representative of the Secretary, entry into the Tracey Slope Mine for the purpose of conducting an inspection of the mine pursuant to section 103(a) of the Act. Mr. Rothermel stated that the inspector (Federal) could not enter the mine to conduct the 103(i) inspection.

Section 104(b) "S & S" Order No. 2840771, February 12, 1987 (Docket No. PENN 87Ä122ÄR):

Randy Rothermel, partner and mine foreman, continued to deny Victor Mickatavage, authorized representative of the Secretary, the right of entry into the Tracey Slope mine for the purpose of conducting an inspection of the mine in accordance with the requirements of section 103(a) of the Act on 2Ä12Ä87 after the expiration of a reasonable time allowed for Mr. Rothermel to comply.

Section 104(a) "S & S" Citation No. 2840772, February 19, 1987 (Docket Nos. PENN 87Ä124ÄR, and PENN 87Ä176).

The operator failed to comply with 104(b) order of withdrawal No. 2840771 dated 2Ä12Ä87 and modified 2Ä17Ä87, issued for failure to abate a 104(a) Citation No. 2840770 dated 2Ä12Ä87, issued to section 103(a) of the Act. One gunboat of coal was observed being hoisted from underground.

The essential facts in these proceedings are not in dispute. On February 10, 1982, at approximately 8:10 p.m., a methane gas explosion occurred at the mine, and three laborers working in the mine received burn injuries. As a result of this incident, which occurred over 5Äyears ago, the mine operator has been subjected to spot inspections by MSHA once during every 5 working days at regular intervals in accordance with section 103(i).

On February 12, 1987, the mine operator, believing that MSHA's rights of inspection pursuant to section 103(i) had expired and lapsed, denied entry to MSHA Inspector Victor Mickatavage for purposes of conducting a section 103(i) inspection. At the time of the denial of entry, the operator advised the inspector that he would permit any form of inspection other than an inspection pursuant to section 103(i) of the Act. As a result of the operator's failure to allow the inspector entry to conduct a section 103(i) inspection, the inspector issued the citations and order in question.

During opening statements at the hearing, MSHA's counsel stated that the citations and order resulted from the operator's denial of entry to its mine by MSHA inspectors on different occasions. The inspectors sought entry for the purpose of conducting section 103(i) inspections, and they did so in the exercise of their right of inspection pursuant to section 103(a) of the Act. Recognizing the fact that MSHA's right of

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inspection may not be exercised illegally or in a discriminatory manner, counsel asserted that MSHA has an absolute right of warrantless entry, and that the inspectors were attempting to exercise that right pursuant to section 103(i). MSHA's view of the issue presented in these proceedings is whether or not the operator was being subjected to illegal or discriminatory inspections pursuant to section 103(i) of the Act as alleged by the operator.

MSHA's counsel pointed out that the operator contends that the attempted section 103(i) spot inspections were illegal because 5 years have passed since the operator was initially put on notice that its mine was on a section 103(i) spot inspection cycle because of a methane explosion which resulted in serious injuries. Contrary to the operator's contention, MSHA takes the position that there is no automatic termination of section 103(i) spot inspections after the passage of 5 years from the event which initially placed the mine in that inspection posture. MSHA's position is that it has discretion, based on the particular conditions present in a mine, to determine whether or not the mine should exit or remain subject to continued section 103(i) 5-day spot inspections. MSHA asserted that its evidence establishes that the decision to maintain the mine on the spot inspection cycle was based on MSHA's continued fear of the presence of methane gas in the mine. Under the circumstances, MSHA concludes that it has acted well within its statutory authority to continue the section 103(i) spot inspections to the present time (Tr. 8A9).

The operator's counsel stated that section 103(i) sets forth certain criteria for the conduct of spot inspections every 5 days, namely; (1) liberation of excessive quantities of methane gas as that term is defined by the Act, (2) a methane ignition or explosion resulting in death or serious injury within the previous 5 years, or (3) the existence of other hazardous mine conditions. Counsel contended that in the case at hand, the only mining activity tested during any of the section 103(i) inspections was a test for methane, and on one occasion, ventilation testing. Counsel asserted that the sole purpose advanced by MSHA to the operator for its desire to conduct the inspections was the opinion by MSHA's district office that it could continue its inspections without any of the necessary criteria found in section 103(i) of the Act.

Counsel pointed out that it is uncontroverted that the operator has allowed MSHA entry to its mine for the purpose of conducting any other type of inspections, including regular spot inspections, and has only resisted MSHA's attempts to

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continue with section 103(i) spot inspections every 5 days. Counsel contended that the mine has been subjected to 142 inspection days in a period of less than 24 months, and that taking into account the number of days the mine has been closed, MSHA's inspections have amounted to a substantial interference with the operator's mining activity (Tr. 9-11).

Counsel stated that by letter dated September 15, 1986, (Exhibit C-1), the operator wrote a letter to MSHA's Acting District Manager, Joseph Garcia, Wilkes-Barre, Pennsylvania, advising him of all of the facts incident to the prior methane ignition which triggered the 5-day spot inspection cycle, and requesting a ruling as to whether or not the mine could be removed from its spot inspection status, but that the letter remains unanswered. Counsel suggested that since MSHA did not respond to the operator's letter, it believed that the only way it could resolve the question was to create a circumstance under which a violation would be issued, thereby providing a forum in which to decide the propriety of the section 103(i) spot inspections (Tr. 11).

Conceding that the operator's letter was not answered, MSHA's counsel asserted that while no formal response was forthcoming, numerous meetings have been held between MSHA personnel and the operator to discuss the matter, and that these discussions would constitute a verbal response to the operator's letter (Tr. 11). MSHA's Shamokin Area Field Office Supervisor James Schoffstall confirmed that Acting District Manager Garcia has since returned to his regular duty station in the Pittsburgh area, and that the operator's letter may have been mislaid or misrouted. Mr. Schoffstall confirmed that he has not seen the letter, and the operator's counsel confirmed that there was some dialogue between Mr. Randy Rothermel, the operator, Mr. Schoffstall, and the inspector, but that no responsive written reply has ever been received by Mr. Rothermel with regard to his letter (Tr. 14-15). Mr. Schoffstall also confirmed that he has consulted with his supervisor in the district office, Edward Connor, Acting District Manager, who in turn consulted with MSHA's headquarters in Arlington, Virginia, and that Arlington's answer "was that this five years is a minimum, and there is no time limit" (Tr. 16).

MSHA's counsel confirmed that MSHA still has under consideration the seeking of a court injunction to allow it to gain entry to the mine for the purpose of continuing its section 103(i) spot mine inspections every 5 days, but that it has not done so as of the time of the hearing. Counsel pointed out that the violations in issue in these proceedings were abated

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after a period of time when the operator permitted entry to the inspectors for the purpose of conducting section 103(i) spot inspections, and that MSHA abandoned any recourse to injunctive action. However, the operator has again started to turn away its inspectors, and injunctive relief is again being considered by MSHA. The operator's counsel confirmed that this was true, but stated that the operator is no longer permitting entry to the inspectors because of the instant litigation, and MSHA's counsel confirmed that another series of citations are likely to be issued because of the operator's renewed and continued refusal to permit section 103(i) spot inspections (Tr. 12-14).

MSHA's counsel confirmed that the operator at the present time is not only refusing entry for spot inspections, but is also refusing any type of entry to MSHA inspectors, even for regular inspections. The operator's counsel asserted that "we are not working the mine" (Tr. 17).

#### MSHA's Testimony and Evidence

James E. Schoffstall, Supervisor, MSHA District No. 1 Shamokin Field Office, confirmed that he has been in that position since November, 1980, and that his duties include the supervision of a staff of 13 MSHA inspectors. He testified as to his background and experience, including the management of two mines as a superintendent, and he confirmed that he holds mine foreman papers issued by the State of Pennsylvania (Tr. 19-22).

Mr. Schoffstall confirmed that the mine in question has been within his enforcement jurisdiction since February, 1985, when it was taken over from MSHA's Pottsville or Schuylkill-Haven office. He confirmed that he has been in the mine numerous times, and that he was familiar with the citations and orders issued by MSHA Inspector Victor Mickatavage (joint exhibit 1). Mr. Schoffstall confirmed that he discussed the circumstances surrounding the issuance of the violations with Inspector Mickatavage, who works under his supervision, and that Mr. Mickatavage issued the violations because he was denied entry to the mine for the purpose of conducting section 103(i) inspections, and was hindered in his attempts to conduct the inspections (Tr. 22-24).

Mr. Schoffstall confirmed that the mine is also subject to annual and quarterly inspections, including follow-up inspections in connection with the issuance of any citations or orders. He also confirmed that the mine became subject to the section 103(i) spot inspections after a multiple nonfatal

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methane explosion accident which occurred at the mine on February 10, 1982, and he identified exhibit GÄ1 as the official MSHA accident investigation report of that incident which he obtained from MSHA's District No. 1 office in Wilkes-Barre (Tr. 25).

Mr. Schoffstall was of the opinion that section 103(i) was enacted "for the sole reason of troubled mines. Mainly, Number 1, was excessive amount of gases; Number 2, if a mine experienced an explosion; and then also you have another category for special hazards" (Tr. 34). He also believed that section 103(i) mandates that inspections "be made under periodic time limit," namely once every 5-working days at irregular intervals in this case, "to see that they are complying with the law, and to see that the conditions are being controlled" (Tr. 36).

With regard to the language of section 103(i) concerning methane or other gas explosions which have resulted in death or serious injury during the previous 5 years, Mr. Schoffstall was of the view that this stated time frame is a minimum amount of time that the mine must be placed on the section 103(i) spot inspection cycle, and that it is not a maximum time limitation. Mr. Schoffstall was of the further view that MSHA could continue its section 103(i) spot inspections if it "feels that the mine is on the borderline or it is subject to a condition happening again in that mine" (Tr. 36).

Mr. Schoffstall confirmed that since the 1982 ignition, the mine experienced another methane ignition in 1985 in the Number 4 Level West Gangway Section where some methane was ignited as a cut of coal was fired from the base. That ignition did not result in any injuries or death, and the incident was investigated by MSHA's Pottsville office (Tr. 40). He identified exhibit GÄ2 as a copy of the official MSHA investigation report of that incident (Tr. 43).

Mr. Schoffstall confirmed that he considered Mr. Rothermel's verbal requests made to Inspector Mickatavage 2 or 3-weeks prior to the denial of entry to be removed from the section 103(i) spot inspection series because the 5-year period has expired. Mr. Schoffstall stated that after discussing the request with his superiors, "we feel that the mine still should be considered within the 103(i) category." Mr. Schoffstall stated that the reasons for this included "the condition that the mine is in with the unlimited amount of ventilation, and the irregularity of the ventilation-and also, the immediate area where they are now working has a condition of roof control along with a new area that they intend

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to development which is to the east which allows an additional taxation on the ventilation system" (Tr. 50Å51).

Mr. Schoffstall confirmed that the decision to deny Mr. Rothermel's request to be removed from the section 103(i) spot inspection cycle was a "joint decision" made by himself, Acting District Manager Edward C. Connor, and Inspector Mickatavage, and that the decision was communicated verbally to Mr. Rothermel who was "basically" informed of the reasons for the decision (Tr. 51Å53). MSHA's counsel confirmed that the decision in question was not formalized in writing, and Mr. Schoffstall confirmed that his office has never informed an operator in writing that he would be removed from any section 103(i) inspection cycle because MSHA has never been challenged in this regard (Tr. 51Å54).

Mr. Schoffstall stated that three other mines in his district are presently on a section 103(i) spot inspection cycle, for reasons other than a methane ignition, and that two mines are on that cycle because of impounding water (Tr. 55). In the instant case, Mr. Schoffstall could think of no reason why the operator has not been advised in writing as to the specific reasons why MSHA is keeping him on the section 103(i) spot inspection cycle (Tr. 56), and that "we've never done it any other way in the district except verbally" (Tr. 57).

Mr. Schoffstall stated that immediately after the denial of entry in this case, a meeting was held in MSHA's office with the operator's counsel Diehl present, and the matter was discussed. At that time, Mr. Rothermel was advised of MSHA's decision to keep the mine on a section 103(i) cycle (Tr. 61). Mr. Schoffstall could not confirm whether Inspector Mickatavage informed Mr. Rothermel of these reasons during their discussions prior to the refusal of entry (Tr. 61).

Mr. Schoffstall testified to the specific reasons previously alluded to as to why the decision was made to keep the mine on the section 103(i) cycle. Referring to a mine map (exhibit GÅ7), he alluded to certain air measurements made during past inspections, some purported roof problems necessitating retimbering, and an unplanned roof fall within the past 4 months in an escape route. He believed that any roof fall in either the main intake or return presented the possibility of blocking the entrance and possibly restricting ventilation. However, he confirmed that the unplanned roof fall was addressed by developing a new area to go around it, and that no injuries resulted from that fall (Tr. 61Å65).

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Mr. Schoffstall further alluded to air measurements taken along the haulage slope indicating 8 to 10 thousand cubic feet of air in the main intake and return resulting from air short-circuiting through some old stoppings, and other areas of possible air leakage through an area which is planned for development in an easterly direction. He also alluded to citations which were issued for air leakage through some temporary stoppings, and indicated that the air at that location was "just a minimal amount" to meet the requirements of the law (Tr. 66).

Mr. Schoffstall discussed the operator's intentions to install overcasts at the gangway level as it developed to the east, and he indicated that this may place an additional burden on the ventilation system caused by air leakage which may be created by crosscuts and openings which need to be stopped off (Tr. 67). In response to questions concerning the operator's intentions to mine to the east, Mr. Schoffstall confirmed that the operator is required to file ventilation plan changes as it develops or anticipates to develop new mine areas, and he confirmed that a new ventilation plan has been filed. He also confirmed that in this case, MSHA has approved the operator's ventilation plan to meet the minimum standard of 3,000 cubic feet of air at the face, and 5,000 at the last open crosscut (Tr. 68). However, he indicated that MSHA is not certain whether the existing ventilation system is enough to cover the area being developed to the east, and that this is part of the reasons why it wants to keep the mine on a section 103(i) inspection cycle (Tr. 68).

Mr. Schoffstall confirmed that MSHA wishes to keep the operator on the section 103(i) inspection cycle in the newly developed area because of its "pending development." He conceded, however, that MSHA will still have to review the adequacy of the ventilation in 3 or 6 months intervals, and he conceded that such an evaluation of the ventilation could be done independently of any section 103(i) inspection. He further conceded that if the mine had not experienced a prior methane ignition, any perceived ventilation problem would not necessarily be reason enough to place the mine on a section 103(i) inspection cycle (Tr. 69). He confirmed that the mine is located in a gassy vein, and that coupled with the asserted bad roof, these conditions are inherent to the mine (Tr. 70).

Mr. Schoffstall confirmed that while he believed that the mine has a "borderline" ventilation system, MSHA nonetheless has approved the ventilation plan, and keeping the mine on a section 103(i) inspection status will facilitate MSHA's monitoring of the ventilation (Tr. 73).

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In further explanation of the decision to keep the mine on a section 103(i) inspection cycle, Mr. Schoffstall stated as follows (Tr. 75-76):

A. Okay. The basis was, Number 1, was the ventilation system, the irregularities of the ventilation system; the problems that they were having with the roof control, holding the return entries open; and the constant pressure on the main intake; 3, was the ventilation system to the east, will it be effective enough to be able to liberate the methane that they're going to encounter; and Number 4 is, that they're going towards an uncharted area that's filled with water, which we will require a bore hole plan.

JUDGE KOUTRAS: A bore hole plan?

THE WITNESS: Yes. In other words, when they get within two hundred feet of the uncharted workings that we have no mapping on, then they must start drilling in advance to locate this water.

BY MS. JORDAN:

Q. If it's

JUDGE KOUTRAS: But, that would be required, independent of any 103(i)?

THE WITNESS: That's right. That will go under special inspection.

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A. All right. What it is is the inconsistency of the ventilation puts a borderline on the amount of ventilation available at the working faces to sweep away the noxious gasses. Number 2, is the possible blockage, due to an unplanned roof fall in the returns could cause a restriction of ventilation, that would also cause a buildup of methane at the faces. And, then the area in which they're going to tax additional efforts out of the ventilation system to the east, all in conjunction with it

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puts the mine at an area where we feel it's borderline as to the abilities of keeping the faces clean of methane.

Mr. Schoffstall identified and reviewed copies of citations issued to the operator for violations of the roof control requirements of mandatory safety standard section 75.200, the ventilation air requirements of section 75.301, and the ventilation plan requirements of section 75.316 (exhibits GÄ3 through GÄ5, Tr. 87Ä94; 98Ä102; 117Ä118; 119Ä122).

Mr. Schoffstall confirmed that he did not issue any of the citations, and that he was not present when they were issued (Tr. 122Ä123). He also confirmed that he retrieved the copies from MSHA's files in response to the operator's prehearing interrogatories, and while he may have previously reviewed the citations after they were issued as part of his supervisory duties, he would only have reviewed those issued by Inspectors Donn Lorenz and Victor Mickatavage, from his Shamokin office, but not those issued by inspectors from MSHA's Pottsville office (Tr. 124Ä125). He confirmed that the citations in question have all been abated (Tr. 155).

Mr. Schoffstall further confirmed that when he assembled the copies of the prior citations, he did not include copies of any extensions which may have been issued, nor did he include copies of any abatement or termination notices unless the abatement was shown on the face of the citation itself (Tr. 144). MSHA's counsel stated that any terminations and extensions relevant to the citations were included with her responses to the operator's discovery requests, and that they are a matter of record (Tr. 146Ä147).

On cross-examination, Mr. Schoffstall reiterated that he did not conduct any of the prior inspections or issue any of the citations previously referred to. With regard to any methane tests conducted in the mine, Mr. Schoffstall confirmed that he has never personally conducted any such tests, but has accompanied an inspector when he did it. With regard to his prior testimony speculating to a 50 percent loss of air in the ventilation circuit, Mr. Schoffstall conceded that he performed no test to support any such statement (Tr. 154Ä155).

Mr. Schoffstall confirmed that he was present at a conference with counsel Diehl during which he stated to counsel that the sole basis for the section 103(i) inspections was the prior methane ignition which resulted in injury to two men. When asked whether that was still his position, Mr. Schoffstall

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responded "Because of the explosion, because of the conditions of the explosion, yes" (Tr. 154-155). With regard to the 1985 ignition incident, Mr. Schoffstall confirmed that it was reported to MSHA by the operator (Tr. 158).

#### Contestant's Testimony and Evidence

Randy Rothermel, the operator of the mine, confirmed that MSHA Inspector Victor Mickatavage was at the mine on February 12, 1987, and requested entry for the purpose of conducting a section 103(i) inspection. Mr. Rothermel acknowledged that he informed the inspector that he could conduct any other kind of an inspection except for a section 103(i) inspection. As a result of his refusal to permit the inspector to conduct a section 103(i) inspection, the inspector issued him a citation, but did not prohibit him from proceeding with his mining activities (Tr. 160-161). At the expiration of a half an hour, the inspector then served him with an order, and that too did not prohibit him from continuing with his mining activities. He received another order some 5 days later (Tr. 162). Mr. Rothermel confirmed that he had written a letter to MSHA's Acting District Manager Garcia approximately 4 to 6 months earlier, but has received no response from Mr. Garcia or anyone else (Tr. 163).

On cross-examination, Mr. Rothermel acknowledged that he has often discussed with MSHA inspectors, including Mr. Mickatavage, the matter concerning section 103(i) inspections, and that they never advised him that he could not at the present time be removed from the section 103(i) spot inspection cycle. When asked what the inspectors may have told him, Mr. Rothermel responded "They said, if you think that's the law, you have to fight it. So that's what we're doing here today" (Tr. 164).

In response to further questions, Mr. Rothermel stated that he was prompted to write his letter after first receiving a copy of the Act, and that prior to that time "I didn't know what a 103(i) was." In addition, he stated that he spoke with Mr. Garcia by telephone before writing the letter, and that Mr. Garcia told him to write to him. His refusal to permit the inspector to conduct a section 103(i) inspection was based on the fact that he received no response to his letter (Tr. 165-166).

Mr. Rothermel stated that another mine operator who operates a mine adjacent to and behind his (Wolfgang Brothers), was in a section 103(i) inspection status for 7 years for experiencing the same type of ignition as that which occurred

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in his mine, but was taken off by MSHA. Since that operator was taken off, Mr. Rothermel acknowledged that his curiosity was aroused as to why his mine was still in a section 103(i) status (Tr. 167). Mr. Rothermel indicated that the adjacent mine operator was taken off after he wrote his letter to Mr. Garcia (Tr. 168). After consulting with Mr. Schoffstall at counsel table, MSHA's counsel confirmed that the mine operator referred to by Mr. Rothermel was in fact in a section 103(i) status, but was removed after 7 years (Tr. 167).

Mr. Rothermel stated that his mine has operated on an average 4½ day weekly basis for the past 5 years, and that he spends approximately 4 hours a week with a Federal inspector during a section 103(i) inspection. He also stated that his mine has been subjected to four AAA regular MSHA inspections, and that the time spent on those inspections ranged "from four days straight, to some mix with the AAA or the 103(i)" (Tr. 169). He estimated that during each work week, he has had one and a half-days of inspections (Tr. 169).

Mr. Rothermel stated that the section 103(i) inspections have interfered with his operation of the mine, and he explained as follows at (Tr. 170-171):

THE WITNESS: With only three to five guys there, one guy is with an inspector, well, there's only two working, and I'm usually the guy, and I'm the foreman to start with. It usually consists of going out of the mine, talking to an inspector, seeing what he wants to see, or whatever, then we go down. The inspection actually lasts maybe a half an hour.

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THE WITNESS: It's not only the inspections themselves, there's so much other business to go with it. Roof control plans, ventilation plans, all kinds of other stuff, it's really getting to be time consuming.

JUDGE KOUTRAS: Are you also regulated by the state?

THE WITNESS: Yes.

JUDGE KOUTRAS: Are you on any kind of a spot inspection?

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THE WITNESS: No.

JUDGE KOUTRAS: Cycle with the state?

THE WITNESS: One inspection day every two months.

JUDGE KOUTRAS: One inspection day every two months.

THE WITNESS: Yes.

Mr. Rothermel confirmed that although the mine works 4 days a week, people may be at the site on the other 3 days running pumps, cutting timber, or doing repair work. In 1984, at the time some of the citations were extended, the mine worked 2 days a month, and an inspector was there on each day. During regular inspections when an inspector is there for four straight days, he usually spends 3 days underground and 1 day doing surface inspections or reviewing mine records. On some AAA inspections, an inspector may be at the mine for 6 days in a row, or less, in order to complete the inspection (Tr. 172-176).

Mr. Schoffstall was recalled by the Court to explain the circumstances under which the other mine operator referred to by Mr. Rothermel was taken off the section 103(i) cycle, and he testified as follows (Tr. 177-178):

THE WITNESS: All right. The operator had a ventilation and gas liberating mine which was put on, initially, because of an explosion. The operator requested that he be taken off, you know, which is the same thing Mr. Rothermel had done. We reviewed it. We reviewed the circumstances, and we recommended he be taken off because the conditions in the mine had changed. He had adequate air. He didn't have the methane liberations any more at the face areas. So, we felt it secure. We were very comfortable in taking him off the 103(i).

JUDGE KOUTRAS: What distinguishes that case from this one in your mind?

THE WITNESS: Well, actually, two things. The liberation content. They dropped their liberation content. They went into another section of the mine and lost their methane. They

didn't have near the amount of methane being liberated out of that mine as to what they did prior. Number two was, they had established a better airway system and a better ventilation system. In other words they were on a retreat, a mining process which didn't involve as much face ventilation as what they had prior. And we seen no reason, the roof was good, their ventilation was good, and we seen no reason to keep them on.

JUDGE KOUTRAS: Do you know what the frequency of their citations has been since they were taken off?

THE WITNESS: I would say a normal small mine, not that many. I couldn't count as number-wise, but I would say very few.

JUDGE KOUTRAS: How do they compare in size to this operator, do you have any idea?

THE WITNESS: About the same size.

JUDGE KOUTRAS: About the same size.

THE WITNESS: This mine here is developed a little bigger. It's more to maintain than what they have. They're not down as deep or extended as far. But, size-wise, manpower about the same.

#### Findings and Conclusions

Section 103(i) of the Act provides as follows:

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operation, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this

subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two-hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

Although section 103(a) of the Act gives MSHA a right of entry to the mine for inspection purposes, it seems clear to me that MSHA's authority to conduct spot inspections every 5 days pursuant to section 103(i) is subject to the following limitations:

- Äa mine which liberates excessive quantities of methane or other explosive gases during its operations, namely, more than one million cubic feet of methane or other explosive gases during a 24-hour period.
- Äa mine which has experienced a methane or other gas ignition or explosion resulting in death or serious injury at any time during the previous five years.
- Äa mine where there exists some other especially hazardous condition.

Section 103(a) of the Act requires the Secretary to "develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws." The only relevant guidelines that I can find with respect to the interpretation and application of the spot inspection requirements of section 103(i) of the Act, are those found in Volume 1, page 17, of

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the Secretary's Coal Mine Inspection Manual, effective November 1, 1982, which states as follows:

Spot inspections made relative to Section 103(i) should be made with respect to the hazard(s) that caused the mine to be placed in this category. For example, if the mine is being inspected because there exists some "other especially hazardous conditions(s)," such as serious problems with the haulage system, then the inspection activities should be directed toward the haulage system.

The operator wrote a detailed letter to MSHA's Acting District Manager Joseph Garcia, Wilkes-Barre, Pennsylvania, on September 15, 1986, some 6 months before its refusal of entry, requesting MSHA to consider removing the mine from the section 103(i) spot inspection cycle. In support of its request, the operator asserted that during the past 4 years its ventilation system had greatly improved, greater quantities of air were being generated at working faces, and that recent testing by MSHA inspectors indicated that at the maximum there was 87,000 cubic feet of methane liberated in a 24-hour period at the mine. The letter was not answered.

MSHA's Shamokin Field Office Supervisor Schoffstall testified that he did not see the letter and speculated that it was either mislaid or lost. I would venture a guess that Mr. Schoffstall did not see the letter because he was in Shamokin and Mr. Garcia was in Wilkes-Barre. Mr. Schoffstall confirmed that he "basically" verbally informed Mr. Rothermel of his decision not to remove the mine from the 5-day inspection cycle, and that his office has never informed a mine operator in writing of such decisions because MSHA has never been challenged in this regard in the past. Mr. Schoffstall also confirmed that he consulted with his supervisor, who in turn consulted with MSHA's headquarters, and apparently received a brief oral opinion by telephone. While I find this advisory process to be rather loose, it is apparently in keeping with the theory that nothing is reduced to writing for fear of challenge. However, I believe that MSHA has a responsibility and obligation to respond in writing to an operator's request of this kind, and its failure to do so prompted the operator here to take a stand and initiate the litigation in question.

Mr. Rothermel indicated that he was prompted to write the letter in question when he learned that another mine operator near his operation who had been in a section 103(i) spot inspection status for 7 years after experiencing a gas explosion was

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taken off that status after writing to MSHA requesting that this be done. Mr. Schoffstall confirmed that this was true, and he explained that MSHA terminated the spot inspection status of that mine after reviewing the circumstances and finding that the mine conditions had changed. The changed conditions included a reduction in the amount of methane liberated at the face areas and the establishment of a better airway and ventilation system. Mr. Schoffstall was of the opinion that these two factors distinguishes Mr. Rothermel's mine from his neighbor's mine.

I take note of the fact that MSHA's report of investigation concerning the February 10, 1982, methane ignition concluded that the accident occurred because of the operator's failure to follow proper blasting procedures, which contributed to the ignition source, and that it failed to follow proper ventilation practices which permitted an explosive mixture of methane to accumulate in the accident area. Other contributing factors noted by MSHA included the failure to install adequate ventilation controls, such as an overcast, regulators, and stoppings, to direct the intake air current, and the failure to properly check for methane before blasting (Exhibit GÄ1, page 6).

Assuming the correctness of MSHA's position that the passage of 5 years without an ignition or explosion resulting in death or serious injury does not automatically terminate its discretionary right to continue to inspect the mine every 5 days, MSHA nonetheless recognizes the fact that its continued inspections must be based on the particular conditions present in the mine. In this case, MSHA has taken the position that it must continue to exercise its perceived discretion to continue to conduct spot inspections every 5 days because of its continued fear of the presence of methane gas in the mine.

The record in this case reflects that during MSHA's investigation of the ignition which occurred in 1982, the operator was cited for a violation of section 75.309(b), after 5.0 percent methane was detected in a return split of air, and was also cited for having an inoperative methane detector. However, there is no evidence that the operator has ever been cited for violations of any of the mandatory safety standards dealing with weekly examinations for hazardous conditions (75.305); weekly ventilation examinations (75.306); methane examinations (75.307); methane accumulations in face areas (75.308); and methane monitors (75.313).

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In the course of opening arguments, the operator's counsel asserted that subsequent to the February 10, 1982, incident which placed the mine on a 5 day section 103(i) spot inspection cycle, the only mining activity tested during any of the subsequent 103(i) inspections was one test for methane, and one occasion when the ventilation was tested.

MSHA has stipulated that no methane ignitions or explosions resulting in serious injury have occurred in the mine since the accident of February 10, 1982, and that the mine has not liberated "excessive quantities of methane" as that term is defined by section 103(i). Further, in response to the operator's discovery requests with respect to any tests performed showing the presence of excessive quantities of methane or other explosive gases in the mine, MSHA responded as follows at page 2 of its May 7, 1987, responses:

ÄThere is no record of methane liberations of more than 1,000,000 cubic feet in 24 hours.

ÄThere is no record of methane liberations of more than 500,000 cubic feet in 24 hours.

With respect to the answer to an identical question concerning the presence of methane liberation of more than 200,000 cubic feet in 24 hours, MSHA made reference to an analysis of air samples collected on February 11, 1982, as part of its investigation of the methane ignition which occurred on February 10, 1982. That report reflects a methane liberation level of 237,000 cubic feet in 24 hours on that day, and 4.98 percent methane. Copies of the results of additional bottle samples apparently collected by MSHA during its investigation during February 11 through 19, 1982, reflect methane levels of 0.13, 0.04, 1.34, 0.35, 0.46, 0.15, 0.34, 0.38, 0.20, 0.37, 0.33, 0.18, and 0.41 at the places tested.

The only evidence of any face ignitions which have occurred at the mine subsequent to February 10, 1982, is an incident which occurred on July 23, 1985, and the details are discussed in an MSHA Memorandum of July 26, 1985 (exhibit GÄ2). The facts show that the ignition which was reported by the operator, did not result in any death or serious injury, and MSHA concedes that this ignition incident is not within the statutory definition of "ignition or explosion" found in section 103(i), and that such an occurrence, standing alone, would not trigger a section 103(i) spot inspection cycle. MSHA's memorandum report of this incident reflects that a citation was issued pursuant to section 75.301 for inadequate face ventilation, and the record reflects that the operator took

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immediate action to abate the violation. The memorandum also reflects the presence of .6 percent methane at the face, and that all ventilation controls were in compliance with MSHA's regulations. The test results taken to support the citation reflected .23 percent methane in the immediate return off the face, and .10 percent methane in the main return. It also reflects 17,000 cubic feet of methane liberation in 24 hours at the first noted return location, and 43,000 feet at the second.

Mr. Schoffstall confirmed that the mine does liberate methane. However, this is true of practically all underground coal mines. MSHA has concluded that the mine has an ongoing problem with methane liberation in the mine, yet the only witness it presented was Mr. Schoffstall. Except for two air measurements taken in October, 1986, and one air sample taken in March, 1987, there is no credible evidence in this case that MSHA has ever conducted a detailed methane or ventilation system survey at the mine to support its generalized and speculative conclusions that methane liberation is in fact a hazardous problem in the mine. Mr. Schoffstall admitted that MSHA has not monitored the mine to find out how much methane has been liberated in the mine (Tr. 140).

In view of the foregoing, and for the reasons discussed in my findings and conclusions which follow, I conclude and find that MSHA has failed to present any credible probative evidence to support a conclusion that the mine has any ongoing hazardous methane problems warranting mine inspections every 5 days pursuant to section 103(i) of the Act.

Although MSHA's counsel confirmed that MSHA's reason for keeping the mine on a 5 day section 103(i) inspection cycle is out of concern for the presence of methane in the mine, counsel indicated that the general mine problems as evidenced by the abated violations which have been introduced in this case, generally constitute "other especially hazardous conditions" which impact on the presence of methane in the mine (Tr. 95). A discussion of these alleged hazardous conditions follows.

The record in this case establishes that from February 10, 1982, the date the mine was placed on a section 103(i) 5 day inspection status, until February, 1985, a period of 3 years, the mine was under the enforcement jurisdiction of MSHA's Pottsville or Schuylkill-Haven Field Office, and that for the past 2 years, it has been under the jurisdiction of Mr. Schoffstall's Shamokin Field Office.

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MSHA presented no testimony concerning the prevailing mine conditions during the 3-year period that the mine was inspected before Mr. Schoffstall's office assumed jurisdiction of the mine. The only "evidence" produced by MSHA covering that period of time was a copy of a section 104(a) citation issued on June 6, 1984, for a roof control violation, and a citation issued on June 7, 1984, for a violation of section 75.1704, for failure to install ladders at an escapeway (Exhibits GÄ3 and GÄ6). MSHA produced none of the inspectors who issued these citations.

With regard to MSHA's inspection and enforcement actions subsequent to February, 1985, MSHA produced copies of nine section 104(a) citations issued during the period March 3, 1985 through October 22, 1986, for violations of the roof control requirements of section 75.200 (exhibit GÄ3); six section 104(a) citations issued during the period July 23, 1985 through August 14, 1986, for violations of 75.301, because of inadequate air ventilation in the last open crosscut (exhibit GÄ4); two section 104(a) citations issued on April 10 and August 14, 1986, for violations of section 75.316 because of missing permanent stoppings (exhibit GÄ5); and four section 104(a) citations issued during March 10, 1985 through October 16, 1985, for violations of section 75.1704, because of failures to provide ladders at certain escapeway locations, and failure to clean up debris from escapeways (exhibit GÄ6). One section 104(b) order was issued on March 10, 1986, for failure to abate an escapeway violation which was issued on June 7, 1984 (exhibit GÄ6).

MSHA also failed to produce for testimony any of the inspectors who issued the post-February, 1985, citations. However, I note that in each instance, the inspectors made gravity findings of "reasonably likely," and negligence findings ranging from "moderate" to "low" on the face of the citation forms. Further, although Mr. Schoffstall reviewed and identified the citations during the course of the hearing, he conceded that he did not issue any of the citations, and that he was not present during any of the inspections which resulted in the issuance of the citations. Consequently, MSHA has presented no credible or reliable probative testimony concerning the prevailing mine conditions at the time these citations were issued.

I have reviewed the copies of the abatement and termination notices concerning all of the aforementioned citations which MSHA produced in response to the operator's pretrial discovery requests, and I find that with the exception of the one section 104(b) order for failure to abate a violation of

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section 75.1704, which MSHA had extended for over a year and a half, all of the remaining violations were timely abated within the initial or extended time fixed by the inspectors for abatement. I also find that in the case of one of the violations issued on July 24, 1985, for a violation of section 75.301, MSHA noted that the operator took immediate action to abate the violative ventilation conditions, and in another violation issued on June 11, 1986, for a violation of section 75.301, MSHA vacated the violation after finding that sufficient ventilation was in fact provided.

In response to the operator's pretrial discovery requests for an identification and description of any "especially hazard condition" which MSHA maintains exists at the mine, and the dates on which these conditions were discovered and communicated to the operator, MSHA's counsel provided a narrative summary suggesting that the mine has methane problems, roof control problems, an inconsistent ventilation system, and a need to monitor a projected development toward impounded water (See Addendum #6 Answer to Interrogatories).

The aforementioned summary makes reference to certain air measurements made on the ventilation intake system on October 22 and 30, 1986, and March 23, 1987, and one sample taken in an immediate return on March 24, 1987. It also contains a number of undocumented conclusions concerning the mine ventilation and roof control, and there is no indication as to who may have prepared the summary.

MSHA's response identifies October 22 and 30, 1986, and March 24, 1987, as the dates that the alleged "especially hazardous conditions" were discovered, and it refers to the previously issued citations concerning violations of sections 75.316, 75.301, 75.1704, and 75.200, in support of the alleged "especially hazardous conditions." These particular citations have previously been discussed. However, MSHA has presented no testimony or evidence documenting the October, 1986, and March, 1987, air ventilation tests, and there is no evidence that any citations were issued as a result of the air measurements MSHA has characterized in the summary as "especially hazardous conditions" existing in October, 1986, and March, 1987.

MSHA failed to produce any of the inspector's who may have conducted any methane or ventilation tests or surveys subsequent to the February 10, 1982, ignition incident. Mr. Schoffstall confirmed that he personally never conducted any such tests in the mine, and while he asserted that he has accompanied other inspectors when they took such tests, no

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details were forthcoming, and MSHA produced none of the inspectors. Although Mr. Schoffstall alluded to some nebulous loss of 50 percent of air in the mine ventilation circuit, his assertion in this regard remains unexplained, and he conceded that he performed no test to support any such statement. Mr. Schoffstall also conceded that absent the prior ignition of February 10, 1982, his perceptions that the mine may have some ventilation problems would not necessarily be reason enough to place the mine in a section 103(i) spot inspection status.

Mr. Schoffstall confirmed that MSHA wishes to keep the operator on a section 103(i) spot 5 day inspection cycle because of alleged adverse roof conditions, ventilation problems, and excessive methane liberation in the mine. Although he is not identified as the source of MSHA's "especially hazardous conditions" discovery summary, since he was the only MSHA witness called to testify in this case, I assume that the information in the summary came from him. As indicated earlier, Mr. Schoffstall admitted that he has never conducted any air ventilation tests, did not issue any of the prior citations produced by MSHA, and that he was not present when those citations were issued. I believe that Mr. Schoffstall's opinions, conclusions, and speculations concerning the roof, ventilation, and methane conditions which MSHA has identified as the "especially hazardous conditions" warranting continuous section 103(i) inspections every 5 days, are based on his review of the prior citations and the overall mine compliance record, rather than personal experience. Under the circumstances, I find his testimony to be of little credible or probative value.

With regard to the alleged mine ventilation "problems," although Mr. Schoffstall was of the opinion that the mine ventilation system was "borderline," he admitted that the ventilation system under which the mine has operated has MSHA's approval. Further, the record in this case reflects that in the most recent past 2 years, the operator has been cited only two times for violations of the ventilation plan requirements of section 75.316, because of some missing stoppings, and the violations were timely abated.

With regard to the air ventilation requirements of section 75.301, Mr. Schoffstall confirmed that the last time he was in the mine to discuss some temporary stoppings, he found that the operator was meeting the minimum air ventilation requirements of the law (Tr. 66), and that during MSHA's recent review of the operator's ventilation plans covering developing and anticipated development areas, MSHA has

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approved the minimum requirements of 3,000 cubic feet of air a minute at the working face and 5,000 cubic feet of air a minute at the last open crosscut (Tr. 68). While it is true that the operator has received six citations in the past 2 years for violations of section 75.301, all of the cited conditions were timely abated, and in one instance, the operator immediately corrected the conditions, and in another, MSHA vacated the citation.

In view of all of the forgoing circumstances, and absent any other credible or probative testimony, I cannot conclude that MSHA has established that the mine ventilation system constitutes an "especially hazardous condition" warranting continuous MSHA inspections every 5 days pursuant to section 103(i) of the Act. Mr. Schoffstall admitted that any such ventilation monitoring may be accomplished by MSHA through its regular and follow-up inspections independent of section 103(i) (Tr. 69, 72). Although Mr. Schoffstall was of the opinion that the mine ventilation system is "borderline" and "inconsistent," there is no evidence that the operator has consistently violated its approved plan. If MSHA believes that this is the case, then it should seriously reflect on why it has continued to approve the operator's plans in the face of what it believes to be borderline and inconsistent conduct on the part of the operator.

With regard to the alleged adverse roof conditions in the mine, apart from the abated citations which have been issued for violations of section 75.200, I find no evidence that the operator has otherwise consistently failed to adhere to the requirements of its approved roof-control plan. Mr. Schoffstall confirmed that the operator inherited some problems when he took over the mine, and that some of the roof problems in the development areas are inherent to the present natural roof conditions in the mine. However, Mr. Schoffstall confirmed that the operator has constantly timbered and re-timbered mine areas where the roof is taking weight. He alluded to a recent unplanned roof fall which did not result in any injuries, and he confirmed that the operator addressed that problem by developing a new area to go around the fall, and establishing a new escapeway from that area (Tr. 64).

With regard to the operator's planned development in an area where there is impounded water, Mr. Schoffstall confirmed that when the mining cycle approaches to within 200 feet of the uncharted workings, the operator must start drilling in advance to locate the water. However, there is no evidence that the operator will not perform the advance work required by MSHA's regulations, and Mr. Schoffstall admitted that any

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such requirements are independent of section 103(i), and that this situation would be addressed by MSHA by means of a special investigation to insure that proper procedures are followed (Tr. 75).

With regard to the four prior escapeway citations for violations of section 75.1704, I take note of the fact that three of the citations were timely abated, one was a non-S & S citation, and the abatement time for the remaining citation was extended by MSHA for over a year and a half. Mr. Schoffstall expressed some concern that a roof fall could block an escapeway, and MSHA's pretrial discovery summary pointed out that a recent unplanned fall left the escapeway impassable. However, the fact is that the operator immediately addressed and abated the problem by mining around the fall and providing another escape route. Although one may agree that a roof fall at an escapeway may prevent a miner from exiting the mine by that particular route, unless it can be shown that an operator regularly is out of compliance with section 75.1704, or has consistently allowed such conditions to exist to the point where it becomes an ongoing hazard in the mine, I cannot conclude that isolated and sporadic escapeway citations which are timely abated constitutes an "especially hazardous condition" warranting inspections every 5 days.

In view of the foregoing, I cannot conclude that MSHA has established that the escapeways, roof conditions, and the projected future development which may approach some impounded water constitute "especially hazardous conditions" warranting continuous MSHA inspections every 5 days pursuant to section 103(i).

As previously noted, MSHA's guideline published in the 1982 Inspector's Manual, states that inspections conducted pursuant to section 103(i) of the Act should be made with respect to the hazard(s) that caused the mine to be placed in this category. Mr. Schoffstall confirmed that two other mines in his district are on section 103(i) 5-day inspection cycles because of water impoundment problems, which he considered to be a readily identifiable ongoing hazard (Tr. 55). I assume that once the water problem is cured, those mines will be removed from their section 103(i) status. With regard to the other mine operator whose mine is in close proximity to Mr. Rothermel's, and which was on a section 103(i) status for 7 years, because of a methane ignition or explosion, Mr. Schoffstall confirmed that it has been removed because of improvements in the air ventilation system and a decrease in the amount of methane liberated at the face.

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On the facts of this case, MSHA has suggested that the "other especially hazardous conditions" which are present in the mine, and which authorizes it to continue to inspect the mine every 5 days pursuant to section 103(i), include not only ventilation problems, but problems with roof control, escapeways, and a potential future water impoundment problem. However, the basis for placing the mine on the 5-day inspection cycle in the first place was the fact that a methane ignition or explosion occurred on February 10, 1982. MSHA concluded that the ignition was the result of improper blasting procedures, and the failure to follow proper ventilation practices. The improper ventilation practices were identified as inadequate ventilation controls such as overcasts, regulators, and stoppings, and the failure to properly check for methane before blasting. I find nothing in MSHA's investigative report to suggest that any adverse roof conditions, or the lack of inadequate escapeways, played any role in the accident. As a matter of fact, item #26, at page 5 of the report reflects that after the ignition, all employees were out of the mine in 10 minutes.

On the facts of this case, there is no question that the mine was initially placed on a section 103(i) 5-day inspection cycle because of the methane ignition which occurred on February 10, 1982. MSHA has tacitly admitted that were it not for that incident, the mine would not be on a section 103(i) inspection cycle. Mr. Schoffstall admitted that the mine was not placed in that category because of any other "especially hazardous conditions," and while he conceded that MSHA could place the mine in such a "spot inspection hazard" category, it has not done so in this case because "he was already in a section 103(i) situation" (Tr. 95). Mr. Schoffstall was of the opinion that MSHA "was locked into" that situation and stated that "we can't quit no more than the operator can quit for the five year period" (Tr. 107-108). Mr. Schoffstall was of the opinion that the 5 year reference in section 103(i) is "automatic," and MSHA's counsel was of the view that once an operator is placed in that position, the Act mandates that MSHA inspect the mine every 5 working days. When asked how long the operator would remain in that inspection cycle, MSHA's counsel responded "until it is taken off," and Mr. Schoffstall responded "for five years" (Tr. 108). Although I consider these responses to be contradictory, MSHA's counsel took the position that 5 years is only a minimum time frame, and that MSHA could continue to inspect the mine every 5 days beyond 5 years until it was satisfied that it no longer posed a potential hazard for a methane explosion.

Mr. Schoffstall conceded that his concerns with the mine deal with potential hazards (Tr. 55). He expressed concern over possible blockage of escapeways and restriction of ventilation due to roof falls (Tr. 64). He also expressed concern that given the present mine ventilation system, there may be insufficient quantities of air available at certain locations which are scheduled for development, and whether or not the ventilations system may be sufficient to carry away methane which may be encountered. Yet, the mine continues to operate under MSHA approved roof-control and ventilation plans.

Mr. Schoffstall conceded that roof control or ventilation control problems could develop in a mine at any time due to unknown facts and uncertainties, particularly in this mine which he claims has a "borderline" ventilation system. In my view, Mr. Schoffstall's concerns are based on speculative possibilities of events which may or may not occur, rather than on any credible evidence establishing the existence of any definitive "especially hazardous conditions" in the mine. All mines pose a potential for hazards connected with restricted ventilation and escapeways due to roof falls, and inadequate air ventilation due to some breakdown in the ventilation system. However, I find nothing in section 103(i) which authorizes MSHA to keep a mine on a continuous 5-day inspection cycle because of potential problems, subsequent isolated abated violative conditions which were not directly related to the event which initially placed in the mine in a section 103(i) posture, or MSHA's subjective undocumented judgments that the mine poses a "problem."

During closing arguments in this case, MSHA asserted that because of the multitude of hazards that are presented in the mining industry, especially in cases of small operators such as the one in this case, MSHA has discretion to maintain the operator here on a protracted 5-day inspection cycle and it need not wait until another methane explosion has occurred in the mine. Recognizing the fact that its perceived discretion may not be exercised in an unreasonable or illegal manner, and that it must establish good cause for keeping the operator on a continuous ongoing 5-day inspection cycle, MSHA concludes that it has established such good cause and has exercised its discretion in a reasonable manner. I disagree. I conclude and find that the only thing that MSHA has established is that the mine experienced a methane or gas explosion on February 10, 1982, which resulted in serious injuries to miners, which in turn triggered the placement of the mine on a 5 day section 103(i) inspection cycle.

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I further conclude and find that MSHA has produced no credible or probative evidence to establish that the mine liberates excessive quantities of methane or other explosive gases during its operations, or that there presently exists in the mine "other especially hazardous conditions" justifying or warranting the continuation of the mine on a section 103(i) 5-day inspection cycle for as long as this particular operator stays in business. In short, I conclude and find that MSHA has failed to establish good cause or reasons for maintaining the operator in such a position. I further conclude and find that on the facts of this case, MSHA's unreasonable insistence on inspecting the mine every 5 days supports the operator's contention that such inspections have interfered with its right to operate its mine without undue interference from MSHA. I believe that MSHA has other available enforcement means at its disposal to insure that the operator here stays in compliance with its safety standards short of what I believe to be a rather arbitrary application of the requirements of section 103(i) of the Act.

In view of the foregoing findings and conclusions, I conclude that the operator's refusal to allow the MSHA inspectors entry to his mine for the purpose of conducting section 103(i) inspections was justified and does not constitute a violation of section 103(a) of the Act. Accordingly, the contested citations and order served on the operator ARE VACATED.

ORDER

IT IS ORDERED THAT:

1. Section 104(a) Citation Nos. 2840770 and 2740772, and section 104(b) Order No. 2840771, ARE VACATED.
2. MSHA's proposals for assessment of civil penalties ARE DENIED AND DISMISSED.

George A. Koutras  
Administrative Law Judge