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SOL (MSHA) V. CONSOLIDATION 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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 87-69
A.C. No. 46-01453-03742

v.

Humphrey No. 7 Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

CONSOLIDATION COAL COMPANY,
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No. WEVA 86-449-R
Order No. 2713396; 7/21/86

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

Docket No. WEVA 86-450-R
Order No. 2713397; 7/21/86

Humphrey No. 7 Mine

DECISIONS

Appearances: Therese I. Salus, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner/Respondent;
Michael R. Peelish, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Case

These consolidated proceedings concern a civil penalty proposal filed by MSHA against the Consolidation Coal Company pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of \$900 for an alleged violation of mandatory safety training standard 30 C.F.R. 48.7, as stated in a section 104(a) "S & S" Citation No. 2713397, issued by an MSHA inspector on July 21, 1986, (Docket No.

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WEVA 87Ä69). Docket No. WEVA 86Ä450ÄR is the contest filed by the Consolidation Coal Company challenging the legality of the citation and the inspector's special "S & S" findings. Docket No. WEVA 86Ä449ÄR is the contest challenging the legality of a section 104(g)(1) Withdrawal Order No. 2713396, issued by the inspector on July 21, 1986, in conjunction with the aforesaid contested citation. The order was issued to withdraw an alleged untrained miner from the mine until such time that his training has been completed.

A consolidated hearing was held in Morgantown, West Virginia, and the parties were afforded an opportunity to file posthearing briefs, and they have done so. I have considered all of the arguments made by the parties in these proceedings in my adjudication of these matters.

Issues

The issues presented are (1) whether the condition or practice cited by the inspector constituted a violation of the cited mandatory safety training standard, and if so, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Also at issue is the question of whether or not the alleged violation was significant and substantial (S & S), and whether or not the withdrawal of the alleged untrained miner was justified.

Additional issues raised by the parties are identified and disposed of in the course of these decisions.
Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1 et seq.
3. 30 C.F.R. 48.7.

Procedural Ruling

MSHA's motion to amend Citation No. 2713397 to reflect an alleged violation of 30 C.F.R. 48.7 the training requirements applicable to underground mines, rather than section 47.27, the standards applicable to surface mines, was granted from the bench (Tr. 10Ä11).

Stipulations

The parties stipulated to the following:

1. The subject mine is owned and operated by the respondent/contestant.
2. The subject mine and the respondent/contestant are subject to the jurisdiction of the Act.
3. The presiding judge has jurisdiction to hear and decide these cases.
4. The citation and order issued in these proceedings were properly served on the respondent/contestant by an agent of the Secretary of Labor, and they may be admitted as part of the record in these proceedings for the purpose of establishing that they were properly issued and not for the purpose of establishing the truth of the conditions or practices stated therein.
5. The parties agree to the authenticity of their respective hearing exhibits.
6. The cited conditions or practices were timely abated by the respondent/contestant.
7. The 1986 annual coal production for the subject mine was 2,809,067 tons. The annual coal production for the respondent/contestant for all of its mines was 38,068,032 tons.
8. The assessment of a civil penalty for the violation in question will not adversely affect the respondent/contestant's ability to continue in business.
9. The respondent/contestant's history of prior violations for the 2-year period prior to the issuance of the citation in question consists of 778 violations issued during 946 inspection days, or .82 assessed violations per inspection day.

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The parties also agreed that in the event the citation is affirmed, the subsequently issued section 104(g)(1) order should be affirmed.

Discussion

The essential facts in this case are not in dispute. On July 19, 1986, an accident occurred in the mine when an employee was pinned against a coal rib by an S & S scoop operated by another employee, Brad Slaman. The accident victim was hospitalized and lost time from work. MSHA Inspector Leonidas W. Gibson conducted an accident investigation on July 21, 1986. In addition to interviewing mine personnel, Mr. Gibson reviewed Mr. Slaman's training records maintained by Consol pursuant to 30 C.F.R. 48.9. Although those records revealed that Mr. Slaman had been properly trained in the safe operation of several pieces of equipment, including a personnel carrier, shuttle car, and loader, Mr. Gibson could find no training records indicating that Mr. Slaman was trained in the operation of a scoop, and Consol's safety department could not produce any such records. Further, although Mr. Slaman advised the inspector that he had received scoop training, he too was unable to produce copies of any scoop training certificates. Consequently, the inspector concluded that Mr. Slaman had not been trained in the operation of a scoop, and he issued a citation charging a violation of 30 C.F.R. 48.7.

The citations and order issued in these proceedings are as follows:

Docket Nos. WEVA 87Ä69 and WEVA 86Ä450ÄR

Section 104(a) Citation No. 2713397, July 21, 1986, states as follows:

A scoop operator, Brad Slaman, did not receive task training in the safe procedures of operating a scoop, in LWG before transporting longwall equipment in the 7ÄButt section. A 104ÄGÄa Order No. 2713396 and a 107(a) Order No. 2711441 have been issued in conjunction with this 104(a) citation. Walter D. Hunt, Section Foreman, was in charge of this section.

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Docket No. WEVA 86Ä448ÄR

Section 104(g)(1) Order No. 2713396, July 21, 1986, states as follows:

A scoop operator Brad Slaman did not receive task training in the safe procedures of operating a scoop before transporting longwall equipment in the 7ÄButt section, which resulted in a serious accident to another miner.

This order is to remove Brad Slaman from the mine until training has been completed in the safe procedures of operating a scoop.

A 104(a) citation has been issued in conjunction with this order. Walter D. Hunt, Section Foreman, was in charge of this section.

MSHA's Testimony and Evidence

Leonidas W. Gibson, testified that he is a retired MSHA inspector, and he confirmed that he participated in an accident investigation at the mine on July 21, 1986, and as a result of that investigation he issued Citation No. 2713397, including the modifications attached thereto (Tr. 15Ä16, Exhibit GÄ1).

Mr. Gibson stated that mandatory training section 48.7 requires that a miner assigned to a particular piece of equipment such as a scoop be trained so that he is able to operate it in a safe manner. Mr. Gibson confirmed that the standards require that such training be recorded, and he confirmed that he issued the citation after determining that the operator's records did not reflect that Mr. Slaman was trained in the operation of the scoop he was operating at the time of the accident. Mr. Gibson stated that Mr. Stan Brozik, the mine safety director, produced training records which reflected that Mr. Slaman had operated several different pieces of equipment, but not an S & S scoop. Mr. Gibson produced a copy of his notes made at the time of his inspection, and he confirmed that the company records produced by Mr. Brozik indicated the types of equipment for which Mr. Slaman was trained to operate, and that it did not include a scoop (Tr. 18Ä14, Exhibit GÄ4).

Mr. Gibson stated that Mr. Slaman was operating an S & S scoop at the time of the accident. He confirmed that when he discussed the training records with Mr. Brozik, he stated that

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Mr. Slaman had been trained on the scoop. Mr. Gibson also confirmed that when he later spoke with Mr. Slaman, Mr. Slaman informed him that he had been trained on the scoop but could not find his training record to confirm this. Mr. Gibson subsequently asked Mr. Brozik again about the training records, and Mr. Brozik could not produce any record of Mr. Slaman's scoop training (Tr. 26).

Mr. Gibson confirmed that he did not issue a citation for a violation of 48.9, which requires the mine operator to keep training records, because Mr. Brozik did produce records reflecting Mr. Slaman's training. Mr. Gibson stated that his conclusion that Mr. Slaman was not following normal operating procedures while operating the scoop was based on Mr. Slaman's admission during his investigation that he did not know the location of his scoop helper and did not know that he had moved back to the corner of the machine when he placed the scoop in operation to move a piece of equipment (Tr. 31-32).

Mr. Gibson stated that the purpose of section 48.7 is to prevent accidents, and that if a person is properly trained and knows how to operate a scoop in a safe manner, he can prevent himself and someone else from being injured (Tr. 33).

Mr. Gibson confirmed that the injury to the helper resulted from Mr. Slaman's failure to know his location when he started and moved the scoop. The injured man was hospitalized, but he subsequently returned to work (Tr. 34).

Mr. Gibson stated that the operator was aware that Mr. Slaman was not trained in the operation of the scoop because it had no training record to confirm his training, and that this was the operator's responsibility. Mr. Gibson confirmed that the violation was abated after Mr. Slaman was re-trained, and he returned to work on July 23, 1986, and the citation was terminated at that time (Tr. 35).

Mr. Gibson confirmed that he issued a section 104(g)(1) order in conjunction with the citation in order to prevent anyone else from being injured, to insure that Mr. Slaman was re-trained so that he could do a better job in the future, and to remove Mr. Slaman from operating the scoop until he received training in its operation (Tr. 35-38, exhibit G-2).

Mr. Gibson believed that the gravity was highly likely to produce an injury or illness because one person was injured and others could have been injured if Mr. Slaman were not properly trained (Tr. 38-39).

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On cross-examination, Mr. Gibson confirmed that he based his citation for a violation of section 48.7 on the fact that the company had no Form 5023 in Mr. Slaman's file (Tr. 46). Mr. Gibson stated that in his experience as an MSHA inspector and investigator, it is not uncommon for a trained employee to be involved in an accident (Tr. 47). He confirmed that a gravity finding of "high" or "highly likely to happen" could be modified to "moderate" if an employee involved in an accident had received training (Tr. 48).

Mr. Gibson stated that Mr. Brozik did not advise him why he could not find a record of Mr. Slaman's scoop training, and he could not recall Mr. Brozik telling him that Mr. Slaman had previously worked at another Consol operation in the Mannington/Fairmont area (Tr. 50). He also confirmed that Mr. Brozik did not tell him that Mr. Slaman had been "grandfathered" in terms of any training requirements, or that he had worked at another Consol operation (Tr. 51).

Mr. Gibson confirmed that if a miner is trained at one mine or another company and there is a record of that training, he would not necessarily be required to be trained again when he transferred jobs to another company, but he would have to be trained on the particular type of machine that he is operating. He would also have to be re-trained if the machine is different from the one that he previously operated. If his machine controls are different or if the seating position is different, he would have to be re-trained (Tr. 51).

Mr. Gibson described the similar characteristic's and parts of a hinged scoop which articulates at a hinge point normally located at the center of the machine (Tr. 52-53). He confirmed that a scoop is a versatile piece of equipment, and that it is used to carry and move longwall equipment and pan lines (Tr. 53). Mr. Gibson stated that in his mining experience, he has never considered a Unitrac to be synonymous with a scoop. He believed that a Unitrac was a different piece of equipment and "some type of longwall equipment" (Tr. 54). Mr. Gibson confirmed that he recently learned that a Unitrac may be a scoop when MSHA's attorney informed him of this (Tr. 55).

In response to further questions, Mr. Gibson stated that during his investigation, Mr. Slaman advised him that he observed his helper in front of him, and that when he put the scoop in motion, the helper was beside him and was pinned against the rib when the scoop swiveled as he maneuvered it to move the longwall pan line. Mr. Gibson believed that there was a lack of communication between Mr. Slaman and his helper,

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and that Mr. Slaman did not determine the helper's location before moving the machine. He assumed that this was the case because the helper was pinned against the rib by the swiveling action of the scoop when Mr. Slaman put it in motion. Proper training requires that a scoop operator makes sure that his helper is in the clear before he operates his machine. Since the machine is hinged and moves quickly, the scoop operator is not supposed to have a man standing near him when he is operating the machine (Tr. 57Å60).

Respondent's Testimony and Evidence

Brad Slaman, belt motorman, testified that he has worked for Consol at the Humphrey No. 7 Mine for 8 or 9 years. Prior to that, he worked at the Consol No. 20 Mine from October, 1977, for a little over a year. He was laid off from that mine and then went to work for Republic Steel. Five or 6 months elapsed from the time he worked at the No. 20 Mine until he went to work at the Humphrey Mine. He worked at the No. 20 Mine as a general laborer shoveling belts, and delivering cribs and supplies. In performing these duties, he had occasion to operate a Unitrac. He described the Unitrac as a machine basically the same as a scoop, and he indicated that it steers the same and pivots in the middle (Tr. 61Å63).

Mr. Slaman stated that he was trained in the operation of the Unitrac at the Consol No. 20 Mine by safety supervisor Rudy Banick sometime in 1978, and that the training consisted of Mr. Banick explaining to him how the machine operated and reading him the Safe Work Instructions (SWI) for the operation of the machine, including safety items such as watching out for his helper, checking the machine over, checking the oil, and ringing the bell before putting it in operation (Tr. 64).

Mr. Slaman stated that after his initial training on the Unitrac scoop, he would operate the machine several times a year in order to stay trained in its operation, and he believed that he only had to operate it at least once in 12 months to meet MSHA's training requirements. It was also his understanding that he had to be trained if the machine was modified. Mr. Slaman was not sure that the Unitrac on which he was trained by Mr. Banick at the No. 20 Mine was a S & S model, but he believed that all of Consol's scoops were S & S models (Tr. 65).

Mr. Slaman stated that when he went to work at the Humphrey No. 7 Mine, he operated equipment similar to that which he operated at the No. 20 Mine, and that from 1978 when he was initially trained, until 1986 when the accident

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occurred, he estimated that he had operated a scoop "a couple hundred" times, and that since 1981 and 1982 he has operated a scoop "pretty continuously" (Tr. 66).

Mr. Slaman stated that while employed at the Humphrey Mine he was trained in the operation of a scoop by at least 10 individuals, including Norman Cutright, and David Hunt. He confirmed that Mr. Hunt retrained him on the scoop after the accident, and that prior to that time he observed him operating the scoop, and had retrained him several times. He also received scoop training from one Charlie Johnson. Mr. Hunt's training included a review of scoop safety topics at least three times, and instructions in the operation of a scoop while working under Mr. Hunt's supervision. Prior to assigning him a task, Mr. Hunt would inquire as to his scoop training, and Mr. Slaman informed Mr. Hunt that he was trained in the operation of the scoop (Tr. 67-69).

Mr. Slaman stated that after being trained by Mr. Hunt, he would give him a "blue retraining slip," and since they were dirty, Mr. Slaman would place them in his pocket or dinner bucket. His wife would either throw them away or launder them with his shirts and he has not retained them. He has also moved several times, and he has not been able to find any of the training slips (Tr. 70).

Mr. Slaman stated that Norman Cutright, the longwall boss at the Humphrey Mine has trained him in the operation of a scoop, and that Mr. Hunt had trained him in the operation of a Model 601 S & S scoop, the same type of scoop he was operating at the time of the accident (Tr. 71).

Mr. Slaman stated that his duties as a longwall shieldman required him to operate a scoop, and that Mr. Cutright trained him on the scoop before two longwall moves in 1983 and 1984. Since longwall moves are dangerous, experienced scoop men are necessarily assigned to this work. Mr. Slaman also operated scoops while doing work other than longwall moves, and he described this work (Tr. 72). During the 2 years that he worked under Mr. Cutright's supervision from 1983 to 1984, Mr. Slaman estimated that he operated a scoop at least 60 or 70 times (Tr. 73).

Referring to exhibit GÄ4, the inspector's notes and sketch of the accident scene, Mr. Slaman explained what happened on the day of the accident. He stated that he was in the process of moving a section of the pan line along the left rib and that the pan line was in front of the scoop. He and his helper were discussing how the pan line would be moved,

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and the helper was about 15 feet in front of the scoop and in his view. Mr. Slaman then started the machine and rang the bell and shoved the pan line against the rib with the scoop. The scoop pivoted toward the right rib and he heard a grunt and turned around and observed that he had pinned the helper against the rib. Mr. Slaman stated that his line-of-sight was toward the left-hand rib and that when he advanced the scoop to move the pan line, he could not recall where the helper was located because he was studying the pan line. He last recalled the helper being in front of him, and he believed that the helper was watching him move the pan line and was not paying attention to the scoop. Mr. Slaman stated that "I didn't watch him, so I really don't know what he did" (Tr. 73Å76).

Mr. Slaman stated that the Unitrac 488 scoop on which he was trained at the No. 20 Mine had the same center pivot point, steered the same, and had the same bucket and battery as the 601 S & S scoop. The Unitrac was "a hair smaller" than the S & S scoop (Tr. 76Å77).

On cross-examination, Mr. Slaman reviewed his prior mining work and experience, and the scoop training he received at the No. 20 Mine. He confirmed that he received initial training on the scoop at the Humphrey Mine sometime in 1980, and that the training consisted of a review of the safety aspects of the scoop, reading the SWI, and his boss observing him operating the machine and discussing specific "do's and dont's" with him. Mr. Slaman stated that he operated the scoop 20 times in 1980, 30Å40 times in 1981, 50Å60 times in 1982, 1983, and 1984, and 20Å30 times in 1985 and 1986. During these periods he operated the 601 S & S scoop, and on occasion operated an Elkhorn scoop, and a 610 scoop which were larger than the 601 (Tr. 77Å83).

Mr. Slaman described his various jobs and duties at the mine requiring him to operate scoops, and he confirmed that there is no specific job classification of scoop operator at the Humphrey Mine (Tr. 84Å86).

Mr. Slaman confirmed that on each occasion when he was trained, he received a "blue training slip," but that he no longer has them, and they were either washed in the laundry or thrown away. He stated that Mr. Hunt trained him on the 601 S & S scoop sometime between the end of 1985 and the end of 1986, and that Mr. Hunt observed him operating the machine to make sure that he was operating it safely. Mr. Slaman confirmed that Mr. Hunt gave him a "retraining slip" after he observed him operating the machine (Tr. 88Å89). Mr. Slaman

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explained that he threw away his training slips because they were "dirty and grubby you end up sticking it in your pocket or forget about them." Mr. Slaman stated that the individuals who trained him retained a copy of the training slip, and they are required to turn it in to the company, and he assumed that this was done in his case (Tr. 90).

Mr. Slaman stated that 2 or 3 weeks before the accident Charlie Johnson trained him on the scoop (Tr. 91), and that he was also trained by Norman Cutright. Mr. Cutright advised him that he turned his training slips into the safety department, and Mr. Slaman indicated that as far as he knew the safety department only had records of his training at the No. 20 Mine (Tr. 95). Mr. Slaman stated that the training he received from Mr. Johnson consisted of Mr. Johnson reading the "SWI Form" to him and reviewing the safety aspects of the scoop. Mr. Johnson wanted to insure that everyone had their training up to date in anticipation of the longwall, and he did not review the machine controls because "we were all familiar with the scoop anyway" (Tr. 96-97). Mr. Slaman confirmed that he received a scoop training certificate from Mr. Johnson, and stated that 4 or 5 days prior to the hearing, Mr. Johnson informed him that he had turned a copy in to the safety department as was his usual practice (Tr. 98).

Mr. Slaman confirmed that copies of all training slips are usually kept in his file with the safety department, and that those records do contain copies of training slips for other equipment for which he was trained (Tr. 98). He confirmed that he was trained in the operation of a 488 Unitrac at the No. 20 Mine in 1977 to the end of 1978, and that he has been in the Humphrey No. 7 Mine for approximately 8 or 9 years (Tr. 99).

Mr. Slaman stated that the 601 and 610 S & S scoops are basically the same, except that the 610 is bigger and the operator's compartment is at the rear of the machine, and the operator sits at the front of the 601 model. The controls, throttle, braking mechanisms, hydraulics, and steering are the same for both machines, but the visibility is reduced in a 610, and he did not consider it to be a good piece of machinery because of its larger size, and the fact that one needed to have a helper with him because he cannot see the blade from the operator's compartment. In his opinion, the two scoops operate the same way, and he does not have to be trained when going from one machine to the other (Tr. 104-106).

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Mr. Slaman described the 488 Unitrac scoop which he operated in the No. 20 Mine, and confirmed that it is not used at the Humphrey No. 7 Mine. He stated that S & S scoops are used in this mine, and that he was operating a standard 601 S & S scoop at the time of the accident, and that the 610 model is rarely used except for heavy work. He confirmed that the operator's compartment on the 601 model is at the front, the same as on the Unitrac, and that the controls, brakes, and tramming pedals are also the same as the Unitrac, and that Mr. Hunt, Mr. Johnson, and Mr. Cutright all trained him on the 601. He also confirmed that he operated an Elkhorn Scoop, four or five times, but could not recall when, and that his training on that model was exactly like the training he received for the 601 (Tr. 109-111).

Mr. Slaman explained that the "retraining" he received to abate the violation consisted of someone re-reading the Safe Work Instructions (SWI) to him (Tr. 117). He was then required to sign a safety training form attesting to the fact that the SWI was read to him, and that the training form is maintained by the safety department. The SWI's are kept on the section where the scoops are operated, as well as in the safety department (Tr. 124).

Norman Cutright testified that he has worked at the Humphrey No. 7 Mine for over 17 years, and has served as a supervisor for 6 years. He has served as a longwall boss and section foreman, and confirmed that he was Mr. Slaman's supervisor for approximately a year and a half until a realignment in December, 1984. He also confirmed that during this period, he trained Mr. Slaman in the operation of a scoop, using the applicable Safe Work Instructions (SWI) for scoop operators, and he identified a copy of the SWI used for this training, and explained the respondent's MSHA approved training procedures he followed (Tr. 130-134; Exhibit R-1).

Mr. Cutright stated that he trained Mr. Slaman in the operation of a scoop for the longwall move, and that during such moves "you need a real good man to run the scoop" (Tr. 136). He confirmed that he trained Mr. Slaman for one longwall move in February, 1984, using the SWI, and he explained how he did the training. He confirmed that at that time, Mr. Slaman was an experienced scoop operator, and that he observed him operating the scoop as part of his training. At the completion of this training, Mr. Cutright stated that he filled out a "5023 Form" kept in his foreman's book, gave Mr. Slaman his signed copy, and turned the remaining copies into the safety department. Mr. Cutright assumed they were placed in the company files (Tr. 136-138).

Mr. Cutright stated that subsequent to the aforementioned training, he trained Mr. Slaman again when he worked for him as a shieldman for a second longwall move which occurred sometime in September, 1984, and that he regularly observed Mr. Slaman operating a scoop during the time he worked under his supervision. This latter training consisted of the same SWI review procedures, and Mr. Cutright confirmed that he followed the same routine in documenting Mr. Slaman's training (Tr. 139). He further confirmed that on both occasions, Mr. Slaman was trained in the operation of a 601 S & S Scoop, and he considered Mr. Slaman to be a very good scoop operator. He confirmed that Mr. Slaman was selected for the longwall work because of his experience, and that this is critical due to the hazardous nature of longwall face work and that "you just don't put anybody on to run a scoop" (Tr. 141).

On cross-examination, Mr. Cutright stated that the SWI (exhibit RÅ1) pertaining to a battery-operated scoop, was the same one he used to train Mr. Slaman in 1984, and he confirmed that the scoops have not changed in the past 3 or 4 years (Tr. 142). He also confirmed that he has trained Mr. Slaman on other equipment, and that there have been no changes in the 601 S & S scoop (Tr. 143). He stated that when he trained Mr. Slaman in 1984, he did not review or verify his prior training, and that the February training was over a period of 2 days and probably not longer because Mr. Slaman was an experienced scoop operator, and the training included supervised personal scoop operational instructions and sessions, and practice sessions (Tr. 145). Mr. Slaman was again trained 6 or 7 months later as a matter of routine to insure that everyone on the longwall knew what was going on, and this training session included supervised operational sessions similar to the February training (Tr. 146). Mr. Cutright confirmed that he has never reviewed Mr. Slaman's training records (Tr. 147).

Mr. Cutright confirmed that the September, 1984, training consisted of his observations of Mr. Slaman operating the scoop, and did not include practice sessions because Mr. Slaman had been trained in that phase in February and it was "just a retraining type thing" (Tr. 148). Mr. Cutright confirmed that he was aware of the fact that there is no record in the safety department of Mr. Slaman's training, and he agreed that it was unusual not to have those records (Tr. 149). He could not further explain the absence of the records, and he confirmed that he has trained other miners, but has no idea whether or not their records are on file in the safety department (Tr. 150).

Mr. Cutright stated that a Unitrac is a scoop of a different size, and confirmed that he had never seen one. He indicated that the term "Unitrac" is not one used in his mine, and that the term is sometimes mentioned by miners from different mines. When asked whether a 601 scoop is a Unitrac, he responded "I suppose it is, depending on what mine you're working in, I guess," and that "there are different names—different mines use different names for some things" (Tr. 152). He confirmed that the scoop which Mr. Slaman was operating at the time of the accident was the same type of 601 scoop that he trained him on, and that since that training, he has not trained Mr. Slaman further because he was assigned to a different shift after the realignment (Tr. 153).

David Hunt testified that he has been employed at the Humphrey No. 7 Mine for 16 years, serves as an assistant shift foreman, and that he has been a supervisor for 10 years. He confirmed that he has supervised Mr. Slaman since the realignment in 1985, until a few months ago when he bid on a belt job. Mr. Hunt confirmed that he was Mr. Slaman's supervisor on the evening of July 19, 1986, when the accident in question occurred. Mr. Hunt confirmed that he has trained Mr. Slaman in the operation of a battery operated 601 S & S scoop, as well on other equipment. He stated that the first time he trained Mr. Slaman on the scoop was sometime in 1985 during the 6 Butt longwall move, and while he could not recall the specific dates, it may have been during the Fall of 1985. He also observed Mr. Slaman operating the scoop numerous times throughout the year while working under his supervision, and confirmed that he used the SWI, exhibit RÅ1, during his training of Mr. Slaman. He confirmed that the SWI is an MSHA approved means of task training, and that the training would have included his reviewing the SWI with Mr. Slaman, as well as his physical operation of the scoop. The review of the SWI would have taken a half-hour, and his observation of Mr. Slaman operating the scoop would have been over a period of separate days, including follow-ups until he was satisfied that Mr. Slaman could operate the scoop (Tr. 153Å159).

Mr. Hunt stated that the mine uses 601 and 610 model scoops, and that they are basically the same, except that the 610 is larger. He may have also trained Mr. Slaman on the 610, and if he did, he would follow the same training procedures which he followed when he trained him on the 601 model. He confirmed that there are no separate training instructions for the two models. Since the realignment of late December, 1984, he has observed Mr. Slaman quite a few times using the scoop while unloading cribs, and setting up and tearing down

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longwalls (Tr. 160). If an employee informs him that he has been trained on the scoop, Mr. Hunt would allow him to operate it. Mr. Hunt stated that he would be in violation of company policy if he permitted an untrained miner to perform a task for which he is not trained, and that due to day-to-day shift changes and realignments underground, training records are not readily available. In the event an employee informs him it has been 6 months or a year since he had initially training, he will fill out a basic "5023 form" or a retraining slip to be on the "safe side" (Tr. 161-162).

Mr. Hunt confirmed that Mr. Slaman was classified as a shuttle car operator when he worked under his supervision, but he was considered to be trained and experienced in operating a scoop, and the fact that he was a shuttle car operator did not forbid him from operating a scoop. Mr. Slaman was specifically assigned to the longwall because he was considered to be an experienced scoop operator, and at the time of the accident on July 19, 1986, they were in the process of another longwall move (Tr. 162).

On cross-examination, Mr. Hunt confirmed that he was on duty at the time of the accident, but was not present at the immediate scene (Tr. 164). He did not train Mr. Slaman prior to 1985, other than the one time on the 601 scoop, and his section foreman would have taken care of that. Mr. Hunt confirmed that prior to training Mr. Slaman, he asked him whether he had ever been trained in the use of the scoop, and he replied that he had. However, he did not review his training records at any time (Tr. 165). He confirmed that some of his follow-up supervision of Mr. Slaman in the operation of the scoop during longwall moves may have been on the 610 model, because it was used to unload cribs (Tr. 166). Although the 610 may have been on the section at the time of the accident, they were not being used that day, and he did not observe Mr. Slaman operating the 610 that day (Tr. 170).

Mr. Hunt stated that Mr. Slaman had the initial training indicated in the SWI for battery scoops, and it would make no difference whether he operated the 601 or 610 models, because they are basically the same machine, except that the 610 is larger (Tr. 171). He confirmed that his training of Mr. Slaman on the 601 scoop would have been follow-up training because Mr. Slaman informed him that he had previously been trained, and he believed his follow-up training occurred sometime in the Fall of 1985. Mr. Slaman was trained at that time because in all longwall moves, Mr. Hunt wants to make sure that everyone involved in the move is trained. Since he had previously observed Mr. Slaman operating the scoop, there was

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no need for initial training, but he did review the SWI with him, and observed him going over his "check" procedures and operating the machine (Tr. 174). He did not fill out any training certificate at that time, because he was under the assumption that he had been initially trained, and he had observed him, and there was no need to fill out another certificate (Tr. 175-176).

Mr. Hunt explained the procedures he normally follows with respect to the filing of training certificates with Consol's safety department at the end of the month after training his employees. He confirmed that he keeps them in his pocket as they are accumulated before the end of the month, and that his wife has on occasion laundered some of them (Tr. 177). He confirmed that he was aware of the regulations concerning training record keeping and has followed them. He could not explain why Mr. Slaman's training records could not be located, and indicated that once he turns them in, "it's out of my hands" (Tr. 178). Mr. Hunt reiterated that he did not prepare a training certificate for Mr. Slaman after he trained him in 1985 because he believed that he had previously been trained, and he confirmed that after this training, he observed Mr. Slaman operating the 601 scoop. He assumed that Mr. Slaman had operated it at least 2 weeks before the accident occurred, because he knew he was assigned to the longwall and Mr. Slaman had indicated to him that "he had been up there for quite a while" (Tr. 178). Mr. Hunt did not observe him during this time because he was on vacation.

Mr. Hunt could not specify how often he observed Mr. Slaman operating the scoop between the time he trained him in 1985 and the time he went on vacation, but that anytime he would observe him on a scoop in his working area he would always check to see what work was done during the shift (Tr. 179). He specifically recalled one occasion when he sought out Mr. Slaman to advise him of a new state requirement that all scoop operators walk their roadways to check for debris, but he could not remember when this was (Tr. 180).

Mr. Hunt confirmed that he was not contacted or interviewed by any MSHA inspectors during the course of the accident investigation, and that Mr. Gibson did not talk to him before issuing the violation, and did not ask him about Mr. Slaman's training (Tr. 183).

Inspector Gibson was recalled by the Court, and he stated as follows:

BY JUDGE KOUTRAS:

Q. Mr. Gibson, you've been sitting here listening to all this testimony brought forward by Consolidation Coal Company with regard to the training that Mr. Slaman has received. Okay?

A. Yes.

Q. Now, assuming I can believe all that testimony, from what you've heard today, do you feel this man has received adequate task training to comply with the regulations, based on what you've heard?

A. From what I've heard, if it's true, I think he has had adequate training. But there was no record of it.

Q. I understand that. And still, that hasn't been explained yet. Mr. Peelish opted not to call the record keeper and let me grill him. But from what you've heard of the testimony, you feel the man was adequately trained.

A. Yes.

Q. Have you ever had any similar occurrences as this were a mine operator hasn't been able to produce training records?

A. Vaguely, I remember one, I think, at Osage Number 3 Mine.

Q. Another Consol?

MR. PEELISH: Another Consol Mine.

Findings and Conclusions

Consol is charged with an alleged violation of mandatory training standard 30 C.F.R. 48.7, which provides in relevant part as follows:

48.7 Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction.

(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section have been completed. The training program shall include the following:

(1) Health & safety aspects and safe operating procedures for work tasks, equipment and machinery. The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment, and

(2)(1) Supervised practice during non-production. The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; or

(ii) Supervised operation during production. The training shall include, while under brief and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) New or modified machines and equipment. Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different procedures.

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task.

(e) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.

Paragraph (a) of section 48.7, contains two exceptions to the stated new task training requirements, and they are as follows:

This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment.

The term "task" for purposes of the training requirements of the cited standard is defined as follows at section 48.2(a)(2)(f): " 'Task' means a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge."

MSHA cites two judges decisions in FMC Corporation v. Secretary of labor, 7 FMSHRC 1553 (October 1985), and Secretary of Labor v. WRW Corporation, 7 FMSHRC 245 (February 1985), in support of its conclusions that an untrained mobile equipment operator poses a hazard to his fellow miners, and that new task training promotes mine safety by giving miners greater awareness of work hazards. Although I agree with MSHA's conclusions, upon review of those decisions, I find that they are distinguishable from the facts in the instant case.

In the FMC Corporation case, Judge Lasher affirmed a violation of section 48.27 after finding that a foreman assigned a bulldozer operator to operate a front-end loader. The miner had never been required to operate a loader, had not been

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trained in its operation, and the foreman had not previously observed him operate the loader, and did not believe that he had been trained in its operation. Further, once the miner proceeded to operate the loader, the foreman was displeased with his performance, but failed to remove him from the machine. The miner ultimately requested another miner to finish up his work with the loader because he was uncomfortable with the machine, and when the work was finished, the untrained miner drove the machine back to its original location.

In affirming the citation in the FMC Corporation case, Judge Lasher relied on the fact that the loader was substantially different from a bulldozer because of substantial differences in weight, size, function, controls, brakes, speed, and the moving and steering mechanisms. Even so, Judge Lasher observed that new task training is not automatically or necessarily required every time a miner is assigned to a new piece of equipment, and that the assignment would not be deemed a new work task if the new piece of equipment was essentially the same as the one regularly operated by the miner in the past.

The WRW Corporation case involved a situation in which two miners with no training and less than a month of experience died of carbon monoxide poisoning while working in an underground mine. Judge Melick found that the deaths resulted from grossly inadequate ventilation resulting from unlawful blasting, and his affirmance of violations of section 48.5 and 48.7, was based on the fact that the miners had absolutely no training at all, and that one of the miners began working in the mine on the night of his death.

The record in this case reflects that the foreman who trained Mr. Slaman in the operation of the scoop did not review his training records to confirm that he had in fact received prior training. MSHA suggests that the reason Consol maintains training records is so that they may be reviewed. I would suggest that Consol keeps training records because it is required to do so pursuant to MSHA's regulations, and that its failure to do so will subject it to a citation. Although from a safety standpoint, one would expect a prudent mine operator and supervisor to maintain its training records in such a manner as to have them readily available to insure that its work force is properly trained, Consol in this case is not charged with sloppy or non-existent record keeping. It is charged with a failure to properly train a scoop operator. Further, I find nothing in MSHA's record-keeping regulation, section

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48.9, that requires an operator to review an employee's training record to assure itself that he has adequate training. If MSHA deems this critical, then I suggest that it consider amending its regulation to make this a requirement. Although the facts in this case suggests that Consol has a serious problem with the record-keeping procedures of the mine safety department, and its counsel candidly admitted as much during the course of the hearing, this is a matter that MSHA may wish to consider in any future compliance inspections at the mine.

While I agree that Consol's failure to produce copies of Mr. Slaman's scoop training records raises an inference that he was not trained, I find no basis for concluding that all of its witnesses who have testified in this case have lied or perjured themselves. To the contrary, having viewed the witnesses during their testimony, they impressed me as credible individuals, and I find their testimony as to the training received by Mr. Slaman in the operation of a scoop to be believable and credible. Inspector Gibson himself candidly conceded that assuming the witnesses are believable, he would agree that Mr. Slaman received proper scoop training prior to the accident in compliance with MSHA's requirements. Inspector Gibson also agreed that if he were a section foreman, and needed a job done, he would have to rely on a miner's assurance to him that he was trained on a piece of equipment needed to do the job (Tr. 49). He also agreed that if an employee worked for him a number of times and he initially trained him and then observed him operating a piece of equipment, he would not necessarily train him again prior to assigning him a task, provided these observations were recent and within a 12-month period (Tr. 50).

MSHA's assertion that Consol may not avail itself of the first exception found in paragraph (a) of section 48.7, because its records do not reflect any task training for Mr. Slaman within 12-months prior to his being assigned to operate the scoop in July, 1986, raises an inference that this was the first time Mr. Slaman was assigned to operate the scoop in a longwall work environment. This is not the case, and the record shows otherwise.

While it is true that Consol and Mr. Slaman have not produced any copies of Mr. Slaman's scoop training certificates, Mr. Slaman, who has worked at the No. 7 Mine continuously since 1978, testified that since that time and up to the time of the accident on July 19, 1986, he had operated a scoop at least "a couple of hundred times," and since 1981 or 1982, he operated it "pretty continuously." He estimated that he operated the 601 S & S scoop, the type he was operating at the time

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of the accident, at least 20 or 30 times in 1985 and 1986, and that on occasion he has operated an Elkhorn model and a model 610. Mr. Slaman also testified that during his employment in the mine he has received training and retraining in the operation of a scoop from at least 10 individuals, including one Charlie Johnson, and foremen Norman Cutright and David Hunt, both of whom testified in this case.

Mr. Slaman confirmed that his prior duties as a longwall shieldman required him to operate a scoop, and that during two longwall moves in 1983 and 1984, he was given scoop training by Mr. Cutright. Mr. Slaman also described other non-longwall work which he has performed, during which he operated a scoop. Longwall section foreman Cutright confirmed that he trained Mr. Slaman in the operation of the 601 S & S scoop during two longwall moves which occurred in February and September 1984. Mr. Cutright considered Mr. Slaman to be an experienced and competent scoop operator, and he confirmed that Mr. Slaman was specifically assigned to the longwall moves because the hazardous nature of such work requires an experienced and trained scoop operator.

Foreman David Hunt testified that he was Mr. Slaman's supervisor from 1985 until a few months prior to the hearing of August 27, 1987, when Mr. Slaman bid on another job. Mr. Hunt testified that he first trained Mr. Slaman in the operation of the 601 S & S scoop sometime during the fall of 1985 when the 6 Butt Longwall was being moved, and that subsequent to this training he observed Mr. Slaman operating the scoop on numerous occasions during the year while working under his supervision, including other longwall moves. Although Mr. Hunt stated that he was on vacation during the 2Äweek period immediately prior to the accident, he confirmed that he knew Mr. Slaman was assigned to the longwall move that was taking place at the time of the accident, that he had previously observed Mr. Slaman operating the scoop during his visits to the section to check on the progress of the work on the section, and he had previously observed Mr. Slaman operating a scoop while moving cribs.

Mr. Hunt testified that he considered Mr. Slaman to be an experienced trained scoop operator, and he confirmed that Mr. Slaman was assigned to do work on the longwall because of his experience and training. Mr. Hunt considered his training of Mr. Slaman on the scoop to be retraining or "follow-up" training, and that this is normally done when a longwall is to be moved in order to insure that miners involved in such moves are trained to do the work safely. Mr. Hunt confirmed that at the time he conducted his follow-up training of Mr. Slaman,

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since he had observed Mr. Slaman operating a scoop, and since Mr. Slaman advised him that he was an experienced scoop operator and had received prior training, Mr. Hunt saw no need to give him any initial training.

With regard to MSHA's assertion that Consol may not avail itself of the section exception found in paragraph (a) of section 48.7, I take note of the fact that this exception contains two conditions. The first condition requires a showing that the miner has performed the work task in question within 12 months preceding the work assignment, and the second condition requires a showing that the miner has demonstrated safe operating procedures for the task within this same time frame. With respect to the first condition, I conclude and find that the respondent's credible testimony establishes that Mr. Slaman operated a 601 S & S scoop on a fairly regular basis within the 12 month period prior to the accident, and that he was an experienced and trained scoop operator.

Mr. Slaman confirmed that Mr. Hunt retrained him to abate the violation, and that prior to the accident Mr. Hunt routinely retrained him, worked with him a lot, and observed him operating the scoop. Although Mr. Slaman could not recall whether Mr. Hunt read him the Safe Work Instructions, he nonetheless confirmed that during Mr. Hunt's training, he would go over safety topics, "read me the retraining," instructed him in the operation of the scoop, and prior to assigning him any tasks, would ask about his scoop training. Mr. Slaman also confirmed that Mr. Hunt would retrain him from time-to-time, and he recalled one particular occasion when Mr. Hunt discussed the need to walk the roads looking for obstructions (Tr. 67-69; 88). Mr. Slaman also confirmed that he was retrained by Charlie Johnson on the scoop 2 or 3 weeks before the accident, and that Mr. Johnson read him the SWI and reviewed its "safety aspects." Mr. Slaman conceded that Mr. Johnson did not review the scoop controls with him, and he explained that this was because he was already familiar with the controls (Tr. 96).

MSHA asserts that Consol has failed to show that Mr. Slaman demonstrated safe operating procedures for the scoop within the 12 month period preceding the accident. MSHA suggests that the statement made by Consol's counsel during the course of the hearing that no follow-up training is necessary if the miner in question operates the equipment at least once a year (Tr. 205), seems to be a loose reading of the "demonstration" required by the standard. Conceding that the term "demonstration" has not yet been interpreted by case law,

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MSHA submits that the plain meaning of the phrase "demonstrating safe operating procedures" entails more than the mere operation of the equipment. MSHA suggests that Mr. Slaman was somehow required to demonstrate to his supervisors that he could safely operate the scoop, but does not elaborate on how it expects this to be done. I find MSHA's argument to be as nebulous as the phrase it has attempted to explain.

Consol has established that the SWI used as part of Mr. Slaman's training has MSHA's approval, and that it was used in conjunction with his foreman's personal observations of his operation of a scoop on a number of occasions while in an underground work environment, particularly on the longwall. Further, there is no evidence in this case that Mr. Slaman has ever been involved in any prior accidents, or has ever been disciplined or cited for operating his scoop in an unsafe manner, and his supervisors considered him to be a competent and well-trained scoop operator.

MSHA's suggestion that the accident itself is ample evidence of Mr. Slaman's inability to safely operate a scoop is rejected. I cannot conclude that the occurrence of the accident per se establishes that Mr. Slaman was not trained in the technical and safe operation of the scoop he was operating at the time of that incident. Accidents involving miners whose training records may reflect that they are trained may occur at any time in an underground mine environment given the circumstances of each such incident. Since MSHA did not introduce its report of investigation concerning the accident, I have no way of knowing the extent and scope of Inspector Gibson's investigation of that incident. I take note of foreman Hunt's unrebutted testimony that Mr. Gibson did not discuss Mr. Slaman's training with him, and there is no indication that he discussed it with foreman Cutright.

Mr. Slaman testified that immediately prior to the accident he was concentrating on moving the pan line with the scoop, and that when he last observed the accident victim, he observed him in front of the scoop watching him move the pan line. He had no idea how the victim came to position himself next to the rib as it pivoted and pinned him against the rib. Inspector Gibson's notes reflect that "a breakdown in communication between the operator of the scoop and his helper resulted in this accident" (Exhibit GÄ4). Under the circumstances, it is altogether possible that the accident victim contributed to the accident though his inattention and lack of training.

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Inspector Gibson's abatement notice reflects that the citation and order were abated after Mr. Slaman was task trained "in the safe procedures of operating a scoop," and that all foremen and personnel "have been instructed that all persons will be in a safe position before equipment is moved or trammed." Mr. Slaman's un rebutted testimony is that this "training" simply consisted of someone reading the SWI to him, and his signing a safety form attesting to this fact, and that the form is on file with the company's safety department. Although the abatement action taken by Consol included cautionary instructions to individuals other than the equipment operator, Consol's counsel suggested that while there is no requirements that scoop helpers be included in the SWI training given equipment operators, all mine personnel are instructed to stay clear of tramping equipment as a general safety precaution (Tr. 197). In any event, the issue here is whether the scoop operator, not the helper, had received adequate training, and Consol has not been cited for any lack of training on the part of the helper who was injured. In the final analysis of this case, I am convinced that Inspector Gibson issued the violation because a serious accident had occurred and Consol could produce no records attesting to the fact that Mr. Slaman was a trained scoop operator. However, I am not convinced that MSHA has presented any credible evidence to support any such conclusion, or to support a violation of 30 C.F.R. 48.7. Accordingly, the contested citation and order ARE VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT section 104(a) Citation No. 2713397, and section 104(g)(1) Order No. 2713396, issued on July 21, 1986, BE VACATED. MSHA's proposal for assessment of civil penalty for the alleged violation in question IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge