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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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| UTAH POWER AND LIGHT COMPANY,<br>CONTESTANT | CONTEST PROCEEDINGS |
| v. | Docket No. WEST 87-210-R<br>Citation No. 2929193; 6/3/87 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>RESPONDENT | Docket No. WEST 87-211-R<br>Order No. 3043283; 6/17/87<br><br>Docket No. WEST 87-224-R<br>Citation No. 3044585; 7/20/87 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 87-242<br>A.C. No. 42-00080-03583 |
| v. | Wilberg Mine |
| UTAH POWER AND LIGHT COMPANY,<br>RESPONDENT | (Consolidated) |

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C.,
for Contestant/Respondent;
Edward H. Fitch, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent/Petitioner.

Before: Judge Morris

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act") to challenge the issuance by the Secretary of Labor of citations and an order charging Utah Power and Light, ("UP & L"), with a violation of the regulatory standard at 30 C.F.R. 75.1704.

A hearing on the merits took place on July 29, 1987 in Denver, Colorado. The parties filed post-trial briefs.

Issue

The principal issue is whether the 6 foot by 5 foot criteria in 75.1704Ä1 may be enforced without regard to functional passibility in an escapeway.

The regulation and criteria guide involved in these cases provide, in part, as follows:

75.1704 Escapeways

[Statutory Provisions]

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

75.1704Ä1 Escapeways and escape facilities

This section sets out criteria by which District Managers will be guided in approving escapeways and escape facilities. Escapeways and escape facilities that do not meet these criteria may be approved providing the operator can satisfy the District Manager that such escapeways and facilities will enable miners to escape quickly to the surface in the event of an emergency.

(a) Except in situations where the height of the coalbed is less than 5 feet, escapeways should be maintained at a height of at least 5 feet (excluding necessary roof support) and the travelway in such escapeway should be maintained at a width of at least 6 feet. In those situations where the height of the coalbed is less than 5 feet the escapeway should be maintained to the height of the coalbed (excluding any necessary roof support) and the travelway in such escapeways should be maintained at a width of at least 6 feet.

Findings of Fact and Discussion

The broad scope of the Secretary's uncontroverted evidence shows that UP & L's escapeways, in some instances, are less than 5 feet high and/or 6 feet wide. It is the Secretary's analysis of his regulations that when this does occur, as it will in the dynamics of mining, the operator must seek approval from MSHA's district manager to maintain a lesser distance.

On the other hand, the broad scope of UP & L's uncontroverted evidence shows that although portions of its escapeways were less than 5 feet by 6 feet it was nonetheless passable for any person, including disabled persons. UP & L's evidence arises from the stipulation of the parties that MSHA Inspector Dick Jones (in WEST 87Ä224ÄR) believed the overcast in question was adequate to insure safe passage of all persons, including disabled persons. However, he originally wrote MSHA's citation under 75.1704Ä1 because it did not meet the 5 foot by 6 foot requirement contained in 75.1704Ä1. Further, there had been no approval by MSHA's district manager for a smaller passageway (Tr. 5). The operator's evidence is further confirmed by the testimony of its witnesses who simulated moving a stretcher through the disputed area immediately after the inspection.

Section 75.1704Ä1 purports to set out criteria by which district managers will be guided in approving escapeways. The relevant portion contained in paragraph (a) provides that escapeways "should" be maintained at a height of at least 5 feet and "should" be at a width of at least 6 feet. If the escapeways does not meet the 5 foot by 6 foot criteria then they may be approved providing the operator can satisfy MSHA's district manager that the escapeways nonetheless will enable miners to escape quickly to the surface in the event of an emergency.

When Congress enacted the escapeway regulations it established a functional test. The statutory mandate, now embodied in the regulation, is that escapeways must be "maintained to insure passage at all times of any person, including disabled persons" .... 30 U.S.C. 877(f)(1), 30 U.S.C. 75.1704.

It is a fundamental rule of statutory construction that the Courts must start with the plain language of the statute, Rubin v. United States, 449 U.S., 424, 430, 101 S.Ct. 698 (1981). Where the language is clear, the courts must enforce the terms of the statutory provision as they are written unless it can be established that Congress clearly intended the words to have a different meaning. Chevron, USA v. NRDC, 467 U.S. 837, 842Ä43, 104 S.Ct. 2778 (1984); United States Lines v. Baldridge, 677 F.2d 940, 944 (D.C.Cir.1982); Phelps Dodge Corp. v. Federal Mine Safety & Health Review Commission, 681 F.2d 1189, 9th Cir. (1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

In the instant case the Congressional mandate, as now embodied in the regulation, directly addresses the precise issue in question. Notably, Congress did not establish specific size

requirements for escapeways as it has done in other contexts. See e.g., 30 C.F.R. 75.1700 (statutory) (requiring barriers around oil or gas wells to be no less than 300 feet in diameter); 30 C.F.R. 75.1701 (statutory) (requiring distances of 50 feet, 200 feet, 20 feet, 10 feet and 8 feet with respect to abandoned areas, adjacent mines and the drilling of bore holes); 30 C.F.R. 75.1706 (statutory) (requiring maximum distance between min opening and working face to be 500 feet during final mining of pillars).

In other words, Congress clearly knew how to mandate specific linear foot requirements when it wished to do so. Its failure to do so here is a confirmation of its intent to require a functional test as expressed in the statutory language.

Congress has set the standard as passibility. Because the language is clear on its face, MSHA cannot, at least without the benefit of rulemaking, ignore passability and, under the guise of interpreting 75.1704, substitute its own design - specific linear foot requirements for the height and width of escapeways.

The Secretary cites Udall v. Tallman, 380 U.S. 1, 13 L.Ed.2d 616, 85 S.Ct. 792 (1965) and Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C.Cir.1986) in support of his views.

The cited cases do not support the Secretary's position. In Udall v. Tallman the Supreme Court held that administrative construction of a 1941 Executive Order and a 1948 Public Land Order were consistent. In the case at bar the Secretary's construction is inconsistent with the statutory language which is his present regulation. In Cathedral Bluffs, the Court of Appeals held that the Commission improperly regarded the general statement of the Secretary's enforcement policy as a binding regulation which the Secretary was strictly required to observe, 796 F.2d at 539. In the instant case the writer likewise declines to consider the Secretary's policy as binding.

At the hearing the Secretary cited the legislative history dealing with the escapeway provision (Tr. 28, 29). However, a review of of the legislative history merely shows that Congress adopted what is now set forth and known as the escapeway regulation when it enacted in 1969 Act. See S.Rep. No. 91Ä411, 94th Congress, 1st Session (1975), Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 3.

In sum, the Secretary may not enforce his criteria requiring that escapeways be at least 5 foot high and 6 foot wide. The test, as presently provided, is that the passageways must be maintained to "insure passage at all times of any person, including disabled persons".

## Further Findings of Fact and Discussion

In addition to the essentially uncontroverted evidence as outlined above, the record presented additional facts relating to each of the captioned cases.

The cases, citations and order are summarized as follows:

WEST 87Ä210ÄR

In this case Citation No. 2929193, issued on June 3, 1987, charged UP & L with violating 30 C.F.R. 75.1704. The citation reads:

> The designated escapeway (belt-entry) for the 3rd Right Working Section was not being maintained to insure passage at all times of any persons, including disabled persons. Large lumps of loose coal and off set cuts in the coal bottom that range from 8Ä10" in depth, restricting the escapeway to 4 feet in width through the area and numerous tripping and stumbling hazards were present in the walkway. The area is located between the #5 and #7 cross-cuts, a distance of 200 feet.

WEST 87Ä242

In this case the Secretary seeks to impose a penalty for the violation of Citation No. 2929193, involved in the preceding case.

WEST 87Ä211ÄR

In this case Order No. 3043283, issued on June 17, 1987 charges UP & L with violating 30 C.F.R. 75.1704. The order reads:

> The designated escapeway (belt entry) for the 4th Right Inby Working Section was not being maintained to insure passage at all times of any person including disabled persons. Loose coal and the toe of the rib extended into the escapeway restricting the escapeway to 4 feet for a distance of 25 feet and from 43 inches up to 67 inches for a distance of 24 feet. This was located one brake outby, the section feeder breaker. Also a six inch water line angled across the escapeway leaving a travelway of 43 inches wide. The section belt was moved into this area on the graveyard shift. Coal was being produced.

In this case Citation No. 3044585, issued on July 20, 1987 charges UP & L with violating 30 C.F.R. 75.1704Ä1. The citation was subsequently modified to allege a violation of 75.1704. The citation reads:

> The designated escapeway off the 4 right inby and 4 right outby section did not meet the criteria by which District Managers will be guided in approving escapeways and escape facilities, which did not meet the five feet height requirement. The height when measured with a standard rule measured 4 feet through 4 feet 6 inches for a distance of 20 feet across the overcast located 1 break outby the 3 right belt drive in the belt entry. The width was 6 feet. The operator did not satisfy these criteria by contacting the District Manager for a lesser height approval.

## Stipulation

At the hearing the parties stipulated the areas in question are designated escapeways. Further, the use of the term "passability" means that passage is adequate at all times for any person, including disabled persons. In addition, MSHA inspector Jones (who did not appear as a witness) believed the overcast in WEST 87Ä224ÄR was adequate and fully passable to insure safe passage for all persons including disabled persons. However, Jones wrote Citation No. 3044585 because the passageway did not meet the 5 foot criteria set forth in 75.1704Ä1. It is the Secretary's position that 75.1704Ä1 restricts the ability of the inspector to entertain such a conclusion since that authority was not delegated to him by MSHA's district manager (Tr. 5Ä16, 50, 51). In addition, the operator does not challenge the procedural issuance of the 104(d) order (in WEST 87Ä211ÄR), but does challenge the designation of unwarrantability.

## Summary of the Evidence

Ted E. Farmer and William Ponceroff testified for the Secretary.

TED E. FARMER, since his most recent rehire by MSHA, has been a coal mine inspector for four years (Tr. 56, 57).

On June 3, 1987, the inspector, accompanied by his supervisor William Ponceroff, walked down a belt entry. Between crosscuts 5 and 6 he observed a lip cut across the entry. This 8 to 10 inch step suggested a tripping hazard going the out-by direction. This condition was created through the cutting process. In the next 200 feet the ribs had rolled and as a result the walkway itself was no wider than four feet except for the crosscuts which involved a larger area.

In the inspector's opinion the pieces of coal, ranging in size from small particles to football size, constituted tripping and stumbling hazards (Tr. 63Ä67, 73, 92). It would have been difficult for a man to walk down the escapeway carrying a stretcher.

There did not appear to have been any effort to minimize the existence of the step (Tr. 65). But the condition could have been corrected by mining the side of the entry the same depth as the center. The company abated the violation by leveling the area with gravel (Tr. 66).

Subsequently, the inspector distributed copies of John Barton's (Footnote 1) memorandum to the company (Tr. 69, Ex. G3).

The Barton memorandum of May 7, 1987, addressed to Sub-district Managers and Field Office Supervisors, reads as follows:

> SUBJECT: Evaluation of Escapeways
>
> All designated escapeways (both primary and secondary escapeways) must meet the requirements of 30 CFR 1704. The procedure employed for MSHA's evaluation of the adequacy of escapeways is in two parts.
>
> The Company provides to the District Manager the routing of the mine's designated escapeways on the mine map submitted under 75.316. The District office ventilation specialists review and evaluate the routing during the six month review of the mine's ventilation system and methane and dust control plan. The escapeways, however, are neither approved nor disapproved during the review. The review is limited to determining that the map indicates at least two separate and distinct escapeway routes, one of which is ventilated with intake air, which are continuous from each working section to the surface and that the escapeways are as direct or as short as practical.
>
> The remainder of evaluating escapeway adequacy is performed by regular CMI's during normal inspection activities. Part of a complete AAA is the determination that designated escapeways are present and:
>
> 1) At least two distinct and separate routes exist to the surface from each working section.
>
> 2) The escapeway separation is being maintained by properly constructed and maintained ventilation structures.

3) The escapeways are travelable at all times, especially by injured/disabled persons during an emergency.

4) The escapeways are clearly marked and have unobstructed walkways, with a minimum of detours and no obstacles or hazards to impede quick escape.

5) The escapeways meet the height and width requirements.

6) The escapeways are examined weekly by a certified person with any hazards recorded in the required examination book and the hazards immediately corrected.

Failure to meet any of the requirements should result in the issuance of appropriate enforcement action. Such violations should be considered as possible S & S due to the history of fatalities experienced during mine fires and explosions where adequate escapeways were either not present or not properly maintained. The narrative under "B Ä Conditions or Practice" of the citation and order form should clearly identify the inadequacy found and should substantiate the inspector's evaluation of gravity and negligence.

If an escapeway is cited for not meeting height and width requirements, only two avenues of abatement exist. Either the deficiency must be corrected or the Company may request in writing that the District Manager approve a lesser height or width. The District Manager will require a demonstration, observed and documented by his representative (usually a CMI assigned to observe the demonstration by his field office supervisor). The demonstration conducted by the Company is that two normal-size and healthy miners carrying a stretcher loaded to 150Ä200 pounds weight can quickly travel the restricted area of the escapeway. If the demonstration is successful, the District Manager, based on the observer's written report, may approve the escapeway. Neither the District Manager nor any of the CMI's under his direction are empowered to approve any other deviation from the statutory requirements. For instance, the detouring around a hazard such as a waterhole which would direct a man traveling an intake escapeway into a return airway and then back onto the intake is illegal even as a temporary measure and cannot be accepted. Such a routing is not continuous, separate, or restricted to an intake air course.

Whenever an escapeway is inspected, it should be kept in mind that it is for emergency use. In an emergency, men traveling the route will need the best possible avenue of escape, and their lives may depend on how

well the escapeway is marked and maintained.

(Govt Ex. 3)

The inspector believed that the failure of the operator to maintain the escapeway free from slips, trips, and falls constituted a violation (Tr. 69, 70).

The inspector considered that the operator's negligence was low since the company relied on passability rather than specific width and height (Tr. 72). However, the tripping and stumbling hazards should have been readily observable to management during a pre-shift examination (Tr. 72).

After the citation was issued the inspector modified it to an S & S violation (Tr. 77).

On June 17, 1987, Inspector Farmer issued a 104(d) order. It was issued when he observed a six-inch water line angled across the escapeway. The line restricted travel down the escapeway along the belt line (Tr. 79). At shoulder height there was a 43Äinch clearance between the rib and the pipe (Tr. 80).

In the inspector's opinion a miner, in a smoke filled atmosphere, could be injured or knocked out if he ran into the pipe (Tr. 81, 82).

The other violative conditions observed in the escapeway were caused by the rib that had rolled out and there was loose coal on the floor. There was also a two foot lip. In the 100 foot area cited by the inspector the floor narrowed down to an average of four feet. It measured 5 feet 7 inches to 3 feet 7 inches. The described offset in the floor was different from that noted in the previous citation. But the inspector didn't measure it because you couldn't walk on it (Tr. 84). The entry itself was 24 feet wide and the belt took up four feet. The citation was abated by cleaning up the other side of the belt and making it into a walkway (Tr. 85). The operator also moved the pipe to abate the violation and constructed a crossover (Tr. 86).

In the inspector's opinion the violation was S & S. He concluded that it was reasonably likely that the hazard could have resulted in a serious injury to a miner (Tr. 89). He also felt the operator's negligence was high because he had previously explained the condition (Tr. 90). Even without the pipe involved the situation would probably still involve unwarrantable failure by the operator (Tr. 91, 92).

The inspector admits that on the day of the inspection he knew about the Barton memorandum (Tr. 94). He understood he could not issue a citation on the premise that the escapeway was neither six feet wide or five feet high (Tr. 95). He understood the citation could only be written based on slips, trips and falls (Tr. 96). The citation was written because of such hazards (Tr. 98).

The inspector's supervisor, Mr. Ponceroff, was traveling with him so he could familiarize himself with the mine (Tr. 101, 102).

A coal mine floor is dynamic; it is often gouged and uneven with rough surfaces. A miner in a smoke filled environment could also slip on a step at an overcast (Tr. 103). The three areas of restricted space were all in the same place (Tr. 107).

There has been no change in the law since 1982 concerning the requirements for escapeways (Tr. 114).

When the citation was issued UP & L offered to show the inspector that they could move a disabled person through the area on a stretcher. Mr. Ponceroff said such a demonstration didn't matter (Tr. 115).

The Barton memorandum requires that an inspector look at the area. In turn he reports back and Barton approves or disapproves the area. The test in the Barton memorandum requires that two average sized miners carry a stretcher loaded with 150 to 200 pounds quickly through the restricted area (Tr. 117). The memorandum does not require freedom from other problems (Tr. 118).

An eight to ten inch lip is not normal for an entry (Tr. 119, 120).

The inspector does not believe he could write a citation based on the criteria of 1704Ä1. But he has been trained to write a citation based on slips, trips and falls (Tr. 128).

WILLIAM PONCEROFF, experienced in mining, is the supervisor of the MSHA office. He has been an MSHA inspector for ten years (Tr. 129Ä132). A good deal of the duties of the witness deal with the Wilberg fire and activities since the fire (Tr. 132Ä138).

Inspector Ponceroff believed a miner, traveling hurriedly in smoke, would be knocked off his feet if he struck a pipe at shoulder height (Tr. 147, 148). In addition, four men carrying a stretcher would not have sufficient room to pass (Tr. 149). The witness identified the memorandum of May 7, 1987 from John Barton concerning the evaluation of escapeways (Tr. 157, Ex. G3). The company did not object to complying with the 5 foot by 6 foot height (Tr. 159).

The witness also observed the condition cited by Inspector Farmer and he concurred that it constituted a violation of 30 C.F.R. 75.1704. The hazard involved loose lumps of coal and, in addition, an 8 to 10 inch cut in the mine floor. The width was a hazard and the tripping hazard was due to poor mining practices (Tr. 160, 161).

The witness felt that slips, trips, falls and stumbling hazards account for 75 percent of the accidents in the mining

industry. He also expressed the opinion that it was reasonably likely than an accident of a reasonably serious nature could occur due to oil accumulations; further, a shovel car was sitting on an energized cable (Tr. 162).

Witness Ponceroff did not agree with Inspector Farmer's evaluation as to S & S and negligence (Tr. 162). However, he agreed with the citation and order (Tr. 165).

The placement of the pipe was poor mining practice. It could have been constructed with a 90 degree turn (Tr. 166).

In 1984, due to roof conditions and short life, MSHA approved an area along an escapeway as narrow as 2 feet 2 inches wide (Tr. 168). If he receives a request to approve less than a six foot wide opening the inspector writes a memorandum to Mr. Barton (Tr. 168). Mr. Ponceroff would not have approved the existence of the water line nor the offset in the entry (Tr. 169).

Mr. Ponceroff agreed that there is no requirement that MSHA approve a company's escapeways (Tr. 173). He would also recommend approval for a passageway less than the criteria if the company showed a necessity for it and it was not the result of bad mining practices (Tr. 174).

The Barton memorandum says that if the escapeway is less than 6 feet by 5 feet a violation exists and enforcement action should be taken (Tr. 176, 177). Several operators were cited for the height and width issue (Tr. 178). Before the Barton memorandum the test of a violation wasn't passability but it was whether the escapeway was hazard free (Tr. 179). It was a functional test having to do with rapid egress. If the condition was newly created having to do with poor mining practices then the operator had to rectify the condition (Tr. 180).

Prior to the Barton memorandum, in already developed areas, the test was functional. But in new areas the MSHA would be firm about requiring compliance with the criteria (Tr. 183).

Tearing out an old overcast is hazardous in itself. Also removing an overcast could affect the ventilation (Tr. 185).

However, the Barton memorandum did not change the requirements as to height and width (Tr. 190).

Mr. Ponceroff declined to watch a demonstration by the operator as to whether a man could be carried through on a stretcher. If a man can be carried through on a stretcher then that finding goes to the district manager for approval (Tr. 204).

Under 1704 the operator, and not MSHA, must designate two escapeways. They must be the shortest, most direct and practical route out of the mine (Tr. 210, 211).

Randy Scott Tatton and Dave D. Lauriski testified for the operator.

RANDY SCOTT TATTON, experienced in a mine rescue, has been the chief safety engineer at the Wilberg mine for 30 months. He served as a rescue team captain during the recovery after the Wilberg mine fire (Tr. 218Ä224).

The witness is experienced with the use of escapeways and on numerous occasions he has been in smoke-filled entries. He related experiences during the Wilberg fire recovery (Tr. 225Ä226). In his experience a miner will not run but would feel his way out of a smoke filled atmosphere (Tr. 226).

Mr. Tatton accompanied Inspector Farmer; during the inspection Farmer and Ponceroff conversed. Farmer then indicated he would issue a citation due to lack of sufficient width, a requirement established by Mr. Barton. Mr. Ponceroff confirmed this view (Tr. 228).

Numerous MSHA inspectors have viewed the conditions cited here and they believed they did not constitute a violation of 1704 (Tr. 233).

Mr. Tatton took photographs immediately after the inspectors left the site (Tr. 233, Ex. C2). The witness found that for a distance of four feet the walkway was free of stumbling hazards. But rib sluffage did restrict the walkway to two to four feet at locations (Tr. 235, 304). Rib sluffage is common in this area. It can occur almost immediately or over a period of time (Tr. 236). The witness described how the lip was created during the mining cycle (Tr. 237Ä240). A person using the escapeway to evacuate the working area would step down (Tr. 241, 242). In Mr. Tatton's opinion the lip, similar to a step, does not constitute a tripping or stumbling hazard for a miner using the escapeway (Tr. 242, 243). But it could be a hazard for a person running through the escapeway (Tr. 243). It could also be hazardous in smoke for two men carrying a disabled miner on a stretcher (Footnote 2). But in any event it was not a serious hazard (Tr. 243, 244). In sum, the escapeway was fully passable, even for disabled persons (Tr. 250).

On June 17 the witness also accompanied Inspector Farmer. In the area for which the order was issued a pipe protruded into the walkway (Tr. 255). The pipe narrowed the escapeway to less than six feet (Tr. 257). Mr. Tatton further testified that he considered it safer to leave a four foot entry than to try to widen it (Tr. 260). Three or four hours after the inspection they simulated and photographed an excavation of a disabled person (Tr. 262, Ex. C6). Four men were able to transport a disabled person on a stretcher through the area (Tr. 263).

Abatement was accomplished by cleaning up along the belt and building a crossover (Tr. 264). While the abatement complied with the Barton memorandum the witness thought it was absurd (Tr. 266Ä268). A crossover presents more chances of tripping, falling and bumping (Tr. 267).

DAVE D. LAURISKI is presently the managing director of Health, Safety and Training for Utah Power and Light Company. Previously, he was director of Health and Safety for Emery Mining Corporation (Tr. 314). He is experienced in mine safety and health (Tr. 314Ä316).

In the spring of 1986 Emery adopted guidelines to be followed by its safety department. Basically the guidelines required, where practical, escapeways 6 foot wide and 5 foot high. The operator believes the criteria under 1704Ä1 are reasonable. But it is not always possible to meet that standard (Tr. 317, 318). The witness discussed the company's view of the regulation (Tr. 318, 319).

Before the John Barton memorandum, previous enforcement action against Emery Corporation, caused the company to conclude that it was not necessary to maintain the 6 foot widths and 5 foot heights (Tr. 319). The witness discussed instances of alleged violations being filed and later vacated by the Secretary (Tr. 319Ä333).

In the opinion of Mr. Lauriski each situation must be judged on its merits as to whether or not the area is passable as an escapeway (Tr. 334).

In cross examination, the witness agreed there have been a number of legal disputes and negotiations between the parties on the escapeway and other questions (Tr. 335).

Discussion and Evaluation of the Evidence

WEST 87Ä210ÄR

In this case the credible evidence establishes that there was an 8 to 10 inch lip or step across the escapeway. Further, for a distance of 200 feet rib sluffage reduced the walkway to four feet in width.

It is apparent these foregoing conditions fail "to insure passage at all time of any person, including disabled persons" within the meaning of 1704.

I do not credit witness Tatton's contrary evidence. At one point he stated the lip was not a hazard but later agreed it could be a hazard for a person running through the area. He further agreed it could be a hazard for two men carrying a disabled miner in smoke. Escapeways are often in use under such conditions.

It, accordingly, follows that the operator's contest of Citation No. 2929193 should be dismissed.

WEST 87Ä242

In this case the Secretary seeks to impose a civil penalty for the violation of Citation No. 2929193 involved in the contest in the preceding case. The parties did not request a hearing and the judge indicated his ruling in this case would conform to the decision in WEST 87Ä210ÄR.

On the facts established in connection with the preceding case Citation No. 2929193 should be affirmed and a civil penalty assessed.

The statutory criteria to access a civil penalty is contained in 30 U.S.C. 820(i). The only evidence in the record relates to the operator's negligence, the gravity of the violation and the operator's statutory good faith.

I conclude the operator was negligent since it appears the lip in the escapeway was caused when the area was mined. The sluffage was of a sufficient degree that it could have been removed. The gravity is moderate; these conditions would impede miners using the escapeway. The operator is entitled to statutory good faith since it abated the violative condition.

On balance, I deem that a civil penalty of $100 is appropriate for the violation of Citation No. 2929193.

WEST 87Ä211ÄR

In this case the operator contests the citation as well as the designation of unwarrantable failure in connection with the order.

The uncontroverted evidence establishes that a six water line angled across the escapeway. The line reduced the escapeway to a clearance of 43 inches. The inspector's evidence, basically confirmed by the operator's witness at the site, also establishes that loose coal and sluffage restricted the escapeway to a distance of less than four feet.

The foregoing facts establish that the contest of Order No. 3043283, in WEST 87Ä211ÄR, should be dismissed.

The operator also protests the designation of unwarrantable failure contained in the order.

On December 11, 1987, the Commission considered the issue of unwarrantability in two cases: Youghiogheny & Ohio Coal Company, LAKE 86Ä21ÄR and Emery Mining Corporation, WEST 86Ä35ÄR. In these cases the Commission indicated that unwarrantable failure means aggravated conduct by a mine operator. Such conduct constitutes more than ordinary negligence. Such aggravated conduct was found to exist in Youghiogheny where the operator violated its roof control plan and within three days repeated the violation. In Emery aggravated conduct was found not to exist where the operator failed to replace four defective roof bolts plates (in an extensive area of poor roof), although the defective condition had existed for at least a week.

In the case at bar MSHA's inspector concluded the operator's conduct involved unwarrantable failure to comply because he had explained this condition two weeks before he wrote the citation (Tr. 90, 91). Contrary to the inspector's views, I conclude that the operator's conduct constituted ordinary negligence but not aggravated conduct as defined by the Commission.

For these reasons the designation of unwarrantable failure should be stricken. Otherwise, the contest of Order No. 3043283 should be dismissed.

WEST 87Ä224ÄR

In this case the parties stipulated that Inspector Jones considered the overcast in question to be adequate and fully passable for all persons including disabled persons. But he wrote Citation No. 3044585 because the passageway did not meet the 5 foot by 6 foot criteria as set forth in 75.1704Ä1.

The issues presented here were discussed, supra.

For the reasons previously stated I conclude the contest of Citation 3044585 should be sustained.

The Commission has jurisdiction in these cases and based on the entire record and the findings entered in the narrative portion of this decision I enter the following:

ORDER

1. In WEST 87Ä210ÄR the contest of Citation No. 2929193 is dismissed.

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2. In WEST 87Ä242 Citation No. 2929193 is affirmed and a penalty of $100 is assessed.

3. In WEST 87Ä211ÄR the designation of unwarrantable failure is stricken and the contest of Order No. 3043283 is dismissed.

4. In WEST 87Ä224 the contest is sustained and Citation No. 3044585 is vacated.

John J. Morris
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 John W. Barton, at the time of the issuance of the memorandum, was the District Manager for Coal Mine Safety and Health for MSHA's District 9.

~Footnote_two

2 The witness also indicated he did not feel it was a hazard interfering with the passage of disabled persons (Tr. 244, 245).