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FMSHRC-DC  
May 20, 1988

EMERY MINING CORPORATION  
AND/OR UTAH POWER & LIGHT  
COMPANY,

Contestant

v.

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

Respondent

and

UNITED MINE WORKERS OF  
AMERICA (UMWA),

Intervenor

CONTEST PROCEEDINGS

Docket No. WEST 87-130 R  
Citation 2844485; 3/24/87

Docket No. WEST 87-131-R  
Order 2844486; 3/24/87

Docket No. WEST 87-132-R  
Order 2844488; 3/24/87

Docket No. WEST 87-133-R  
Order 2844489; 3/24/87

Docket No. WEST 87-134-R  
Citation 2844490; 3/24/87

Docket No. WEST 87-155-R  
Citation 2844811; 03/24/87

Docket No. WEST 87-135-R  
Citation 2848891; 03/24/87

Docket No. WEST 87-156-R  
Order 2844813; 3/24/87

Docket No. WEST 87-136-R  
Citation 2844492; 3/24/87

Docket No. WEST 87-157-R  
Order 2844815; 3/24/87

Docket No. WEST 87-137-R  
Citation 2844493; 3/24/87

Docket No. WEST 87-158-R  
Citation 2844816; 3/24/87

Docket No. WEST 87-144-R  
Order 2844795; 3/24/87

Docket No. WEST 87-159-R  
Citation 2844817; 3/24/87

Docket No. WEST 87-145-R  
Order 2844798; 3/24/87

Docket No. WEST 87-160-R  
Order 2844822; 3/24/87

Docket No. WEST 87-146-R  
Order 2844798; 3/24/87

Docket No. WEST 87-161-R  
Order 2844823; 3/24/87

Docket No. WEST 87-147-R  
Order 2844800; 3/24/87

Docket No. WEST 87-163-R  
Citation 2844826; 3/24/87

Docket No. WEST 87-150-R  
Order 2844805; 3/24/87

Docket No. WEST 87-243-R  
Citation 2844828; 8/13/87

Docket No. WEST 87-152-R  
Order 28444807; 3/24/87

Docket No. WEST 87-244-R  
Citation 2844830; 8/13/87

Docket No. WEST 87-153-R  
Order 2844808; 3/24/87

Docket No. WEST 87-245-R  
Citation 2844831; 8/13/87

Docket No. WEST 87-246-R  
Citation 2844832; 8/13/87

Docket No. WEST 87-247-R  
Citation 2844833; 8/13/87

Docket No. WEST 87-248-R  
Citation 2844835; 8/13/87  
Docket No. WEST 87-249-R  
Citation 2844837; 8/13/87

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

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 87-208  
A.C. No. 42-00080-03578

v.

Docket No. WEST 87-209  
A.C. No. 42-00080-03579

EMERY MINING CORPORATION,  
UTAH POWER & LIGHT COMPANY,  
Respondent  
and

Docket No. WEST 88-25  
A.C. No. 42-00080-03584  
Wilberg Mine

UNITED MINE WORKERS OF  
AMERICA (UMWA),  
Intervenor

ORDER

The matter at issue involves a motion in limine filed by Emery Mining Company, (EMC), to exclude as evidence a document entitled "Report of Investigation, Underground Coal Mine Fire, Wilberg Mine, I.D. No. 42-00080, Emery Mining Corporation, Orangeville, Emery County, Utah, December 19, 1984", hereafter referred to as "Wilberg Mine Fire Report" or "Report".

The Secretary and Emery have filed briefs in support of their positions.

The admissibility of the Report was set for oral argument but in the interest of informed litigation planning the parties waived oral arguments and submitted the issues.

As a foundational matter the parties also stipulated that Donald W. Huntley, a witness offered by the Secretary, would testify and identify the Wilberg Mine Fire Report as the document prepared by the Secretary. Further, the document is the final and official MSHA report on the fire and that it was released on August 7, 1987.

The abstract of the report indicates that it deals with the Wilberg mine fire that occurred on December 19, 1984. The authors are identified as Cavanaugh, Denning, Huntley, Oakes and Painter. The originating office is that of the Administrator, Coal Mine Safety and Health, 4015 Wilson Boulevard, Arlington, Virginia 22203.

The table of contents of the report (omitting page references) reads as follows:

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ABSTRACT

GENERAL INFORMATION

Mining Methods  
Mine Inspections  
Roof Support  
Ventilation  
Combustible Material and Rock Dusting  
Electricity  
Fire Protection and Emergency Procedures  
Designated Escapeways  
Explosives  
Transportation and Haulage  
Communications  
Oil Wells and Gas Wells  
Smoking  
Mine Rescue and Self-Rescuers  
Identification Check System  
Training Program  
Emergency Medical Assistance  
Illumination  
Mine Drainage System

FIRE, FIRE FIGHTING, SEARCH AND RESCUE ATTEMPTS,  
AND SEALING OF THE MINE

Fire

Activities Prior to the Fire  
Discovery of the Fire  
Activities on the 5th Right Section and Escape  
of only survivor  
Mine Evacuation and Notification of Mine Emergency

Personnel

Activities of MSHA Personnel  
Fire Fighting  
Initial Fire Fighting Activities  
Restoration of Water and Additional Water Problems  
Fire Fighting Activities and Advance of the Fire  
Search and Rescue Attempts  
Initial Explorations  
Mine Rescue Team Response  
Sealing of the Mine

RECOVERY AND INVESTIGATION

Recovery

Recovery of the Mine  
Recovery Entries  
Recovery of the Fire Area  
Investigation of the Accident  
Participants  
Sworn Statements  
Underground Investigation

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Extensive Testing and Involvement of Experts  
and Specialists  
Independent Expert Analysis

#### DISCUSSION AND EVALUATION

Longwall Panel Development  
Ventilation of 5th Right  
Ventilation Control devices for 5th Right  
Escapeways and Travelways  
    Escapeways  
    5th Right Return  
    Bleeder Entries  
Fire Fighting and Evacuation Training  
Products of the Fire  
    Contaminates From the Fire  
    Mine Equipment and Substances  
    Carbon Monoxide, Oxygen, and Carbon Dioxide  
    Carbon and Soot  
Self-Rescuers - Location and Use  
    Self-Contained Self-Rescuers  
    Filter Self-Rescuers  
    Use of Rescue Devices by the Victims  
Electricity  
Examination and Maintenance of Electric Equipment  
Location of the Source of Fire  
    Location of Fire when First Observed  
    Fire Spread in the Direction of Airflow  
    Burn Pattern of the Fire  
    Cable Damage  
    Energized Equipment  
Source of Fire - Air Compressor  
    Underground Use of Air Compressors  
    Installation and Ventilation - Air Compressor Station  
    Examination and Maintenance of 5th Right Air Compressor  
    History of 5th Right Air Compressor  
    Recovery of the Air Compressor  
    Air Compressor Operating While Flames Present  
    Indications of Sudden Over-Pressure  
    Evidence of Localized High Temperatures  
    Oil Used in 5th Right Air Compressor - An Accelerant  
    Electrical Deficiencies - Over-Temperature Safety  
    Switch and On/Off Switch  
Other Potential Fire Sources Considered by MSHA  
    Spontaneous Combustion  
    Smoking Articles  
    Diesel Equipment  
    Arson or Sabotage  
    Electrical Circuits and Equipment  
        No. 4 Entry - High-Voltage Circuits and Equipment  
        High-Voltage Cable  
        Belt Drive Power Center

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Protective Switchgear  
No. 4 Entry - Low-Voltage Circuits and Equipment  
Roof Drill Cable and Satellite Pump Cable  
Air Compressor Cable  
Motor Starter Cable  
EMC Source of Fire Scenario  
Belt Entry - Low-Voltage Circuits and Equipment  
Belt Drive Motor Starter  
Belt Drive Motor Cables and Electric Enclosure Cable  
Belt Control Cables  
Belt Take-Up and Power Cable  
Super 500 and Protective Line Starter  
5th Right Belt Conveyor  
Belt Fire Detection and Fire Suppression  
Fire Detection System  
Fire Suppression System

#### CONTRIBUTORY VIOLATIONS AND MSHA ACTIONS

Contributory Violations  
Actions Taken by MSHA to Reduce the Likelihood of Similar Occurrences

#### CONCLUSION

Conclusion

#### APPENDICES

Appendix A Victim Data Sheets  
Appendix B Rescue Team Members Who Participated in the Rescue and Recovery Operation  
Appendix C Persons Who Participated in the Investigation  
Appendix D Persons Who Provided Sworn Statements During the Investigation  
Appendix E Mine Fan Pressure Recording Chart Dated 12/19/84  
Appendix F Copy of Kenneth Blake's Handwritten Statement Dated 12/19/84  
Appendix G Wilberg Mine Fire: Contamination of the 5th Right Section Report  
Appendix H Wilberg Mine Fire: Cause, Location, and Initial Development by John Nagy  
Appendix I Wilberg Mine Disaster Self-Rescuer Evaluation  
Appendix J Ingersoll-Rand Models 5M, 7M, and 9M Air compressor Operating and Maintenance Manual  
Appendix K PTL-Inspectorate, Inc., Report of Testing and Analysis of Air Compressor Parts from Wilberg Mine Fire  
Appendix L Tests of similar Air Compressor  
Appendix M Calculated Temperatures Inside Air Compressor Station  
Appendix N Wilberg Mine Fire Investigation: Lubricating Oil Samples Tests

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Appendix O	Detailed Account of Recovery Activities
Appendix P	Test Results, Evaluation, and Discussion of Potential Electrical Sources of Fire
Appendix Q	Electrical Wiring Diagrams and UP&L/CRSP Power Report
Appendix R	Test and Evaluation of Fire Detection and Fire Suppression Systems
Appendix S	Test and Evaluation of Mine Communication System
Appendix T	Reports Evaluating the EMC Source of Fire Scenario
Appendix U	Selected Photographs Taken During the Investigation
Appendix V	Copies of the Contributory Citations and Orders Issued as a Result of the Investigation
Appendix W	Mine Map - Entire Mine
Appendix X	Mine Map - 5th Right to 8th Right Panels and Ventilating Air Current Directions
Appendix Y	Mine Map Showing Location of Detailed Information Maps
Appendix Z	Detailed Information Mine Maps
Appendix Z1	Mine Map (Detail A) - Detailed Information of fire fighting activities and spread of fire in 1st North between crosscuts 37 and 43, as gathered by the investigation team
Appendix Z2	Mine Map (Detail B) - Information of the initial fire area in 1st North, as gathered by the investigation team
Appendix Z3	Mine Map (Detail C) - Detailed information of 5th Right section between crosscuts 2 and 7, as gathered by the investigation team
Appendix Z4	Mine Map (Detail D) - Detailed information of 5th Right section between crosscuts 8 and 21, as gathered by the investigation team
Appendix Z5	Mine Map (Detail E) - Detailed information of 5th Right section between crosscuts 20 and 23, as gathered by the investigation team
Appendix Z6	Mine Map (Detail F) - Detailed information of 5th Right section between shields 20 and 115, as gathered by the investigation team
Appendix Z7	Mine Map (Detail G) - Detailed information of 5th Right return between crosscuts 18 and 23, as gathered by the investigation team
Appendix Z8	Mine Map (Detail H) - Detailed information of bleeder entry for 5th Right section between 6th and 7th Rights, as gathered by the investigation team.



Discussion and Evaluation of Report

The Commission has previously ruled that properly admitted hearsay testimony, and the reasonable inferences drawn from it, may constitute substantial evidence if the hearsay testimony is surrounded by adequate indicia of probativeness and trustworthiness. It is accordingly necessary to explore the crucial issue of trustworthiness to avoid unfairness to Emery and UP&L at an evidentiary hearing. *Mid Continent Resources, Inc.*, 6 FMSHRC 8, 12n. 7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert denied, U.S. , 77 L.Ed. 2d 299 (1983); *Richardson v. Perales*, 402 U.S. 389, (1971); Commission Rule 60(a), 29 C.F.R. § 2700.60(a). To determine such issues it is necessary to review in detail the proffered exhibit.

Basically, the Report is a characterization of the events of the Wilberg Fire. It focuses on MSHA's enforcement actions regarding the alleged regulatory violations now in dispute and pending for a hearing. For example, see pages 88-92 of the Report which summarize the severity of the fire and specify alleged contributory violations of the Mine Act and implementing MSHA regulations. The MSHA officials who signed the citations and orders (James E. Kirk and Lawrence J. Ganser) are listed in Appendix C of the Report as persons who participated in the investigation. MSHA's dual roles both as author of the report and as regulator are thus inextricably connected. Thus, I believe the Secretary's Report is at the opposite end of the reliability spectrum from the routine medical reports prepared by independent physicians deemed admissible by the Supreme Court in *Richardson v. Perales*, supra.

Further in support of the view that the exhibit should be excluded I find the Report is a wealth of factual and legal conclusions simply stated but without any apparent foundation. For example, the GENERAL INFORMATION 1/ section contains certain detail relating to Emery, its principal officers and mine management and it deals with the history of the mine. The section has 19 subparts. A reading of these subparts shows they should not be received in evidence without further foundation. For example,

DESIGNATED ESCAPEWAYS 2/ reads as follows:

Generally, the two designated escapeways from working sections to the surface were the diesel roadway (intake)

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1/ Pages 1-7.

2/ Page 5.

and the belt conveyor entries. The escapeways were parallel and adjacent in the 1st North areas of the mine. Concrete block stoppings, aluminum overcasts and material doors were used to separate the two escapeways in the 1st North area. Ladders or ramps were provided at overcasts to facilitate travel over these structures. There were deficiencies in both the route and condition of these escapeways, details of which are discussed in other parts of the report.

Needless to say the deficiencies, if any, in the escapeways are contested issues in WEST 87-133-R, WEST 87-157-R, WEST 87-163-R and in penalty case WEST 87-208.

Further, the subpart dealing with SMOKING 3/ provides as follows:

EMC had not submitted to MSHA a search program to ensure that smoking articles were not taken into the mine. A search program had been submitted by Peabody Coal Company and approved by MSHA on May 8, 1974, but EMC had not formally adopted the program. Records indicating that searches for smoking articles were being made were contained in a book on the surface; however, sworn statements from several miners indicated that they had not been searched for several months.

Again, these are contested issues in WEST 87-156-R and in the penalty case WEST 87-209.

Further, the subpart dealing with a TRAINING PROGRAM 4/ reads as follows:

EMC's training and retraining plan, which was submitted in accordance with 30 CFR Part 48, was approved by MSHA on April 28, 1983. According to sworn statements, instruction was being given in accordance with this plan. However, the SCSR training was not adequate and is discussed in other parts of this report.

Again, these issues are contested in WEST 87-134-R and the penalty case, WEST 87-208.

Further, and by way of illustration, it is apparent that a closely contested issue, both legally and factually, focuses on the source of the fire. The Report deals extensively with

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3/ Page 6.

4/ Page 7.

MSHA's analysis of how the fire started 5/, considers and eliminates other potential sources 6/ and reviews the EMC version. 7/

These assertions may or may not be true but credibility issues abound in the case.

It is the judge's view that the hearing such as involved here, conducted under the Administrative Procedure Act, entitles mine operators to conduct such cross-examination "as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556. Hearing procedures under the Act must comport with procedural due process and be fundamentally fair. *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985). See also *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980).

The Secretary contends the Report is admissible because it is a public report investigated and issued under Section 103 of the Act. 8/

I agree the Secretary certainly has the statutory authority to disseminate information relating to the causes of accidents and disasters, but the trustworthiness limitation on its admissibility in an administrative hearing has been expressly articulated by the Supreme Court in *Richardson v. Perales*, 402 U.S. at 403-405. In addition, while the Secretary may disseminate information to the public his posture here is substantially different in that in these proceedings he is seeking substantial monetary penalties against Emery and UP&L.

I agree with the case law cited by the Secretary that an investigative report prepared by a government agency pursuant to

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5/ Page 56-68.

6/ Page 68.

7/ Page 79-80.

Section 103 provides in relevant part:

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 103. (a) Authorized representatives of the Secretary of the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. . . . (emphasis added).

law creates a presumption of a admissibility. However, often this presumption of trustworthiness is rebutted on the basis of factors which are present in this case. For example, in *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141, (6th Cir. 1983) the Court observed that the investigative report which was refused admission was prepared by [the] ... United States Bureau of Mines, to authority vested by statute, 30 U.S.C. §§ 3- and 5 ... that the investigative report in *Miller* was prepared pursuant to a duty imposed by law was the beginning, not the end, of the trustworthiness analysis. In *Miller*, the Court excluded the Bureau of Mines report relying on a determination of untrustworthiness.

*Miller* is now reviewed in detail since it illustrates some of the issues that arose in that case. We will consider each of the six factual determinations made by the trial court in *Miller* to determine a lack of trustworthiness.

First, the investigation commenced approximately three days after the accident occurred. The writer does not consider that the time lapse is a factor in the *Wilberg* Fire Report. The fire commenced December 19, 1984 and MSHA's personnel were present at the scene that day.

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9/ 30 U.S.C. § 3 provides, in part:

It shall be the province and duty of the Bureau of Mines, subject to the approval of the Secretary of the Interior, to conduct inquiries and scientific and technologic investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions, and increasing safety. . .  
(emphasis added)

30 U.S.C. § 5 provides:

The Director of the Bureau of Mines shall prepare and publish, subject to the direction of the Secretary of the Interior, under the appropriations made from time to time by Congress, reports of inquiries and investigations, with appropriate recommendations of the bureau, concerning the nature, causes, and prevention of accidents, and the improvement of conditions, methods, and equipment, with special reference to health, safety, and prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; the use of explosives and electricity, safety methods and appliances, and rescue and first-aid work in said industries; the causes and prevention of mine fires; and other subjects included under the provisions of sections 1, 3, and 5 to 7 of this title. (emphasis added)

The second factor in Miller was that "the author of the report possessed no first hand knowledge of the incident". In the instant case it is not facially shown what knowledge the authors had concerning the fire.

The third factor is that "the author of the report relied upon information received from various other persons". This element is apparent from the context of the Report.

Fourth, "the sources of information were suspect as to hearsay". While hearsay is admissible the hearsay here no doubt forms bases that are supportive of MSHA's position.

Fifth, Miller's author was a mining engineer and was not facially qualified to render opinions and conclusions relating to mechanical operations and/or failures. The writer finds this facet is most troublesome in this case. The only reference to the qualifications of the experts and specialists appears in the Report. 10/ Initially, the Report furnished a broad umbrella for the experts and specialists. It reads:

Extensive Testing and Involvement of Experts  
and Specialists

The underground investigation consisted of detailed examination of the affected areas of the mine, particularly the accident area to determine the origin of the fire and the circumstances surrounding it. Extensive evidence was gathered and equipment was tested. All of the information and data was thoroughly analyzed. The investigation was a painstaking process which involved many experts and specialists from the various segments of MSHA. Other government entities and the private sector were also involved. A structured analysis (fault tree) was conducted and consisted of potential sources based on examinations and laboratory test results, analysis of sworn statements, and other physical factors and phenomena of the mine fire. Special laboratory services from the FBI, the Bureau of Mines, and MSHA Technical Support were obtained for the expert examination of many important items.

Further, concerning an independent expert the Report reads:

Independent Expert Analysis

MSHA engaged John Nagy as a consultant to perform an independent study and analysis of the Wilberg fire. Mr. Nagy is a renowned mine expert, having spent his entire

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42-year career, most of it with the Bureau of Mines, researching and investigating mine fires and explosions. Mr. Nagy's report of his findings can be found in Appendix H.

The services of PTL-Inspectorate, Inc. (PTL) were also engaged to perform tests and analysis on critical compressor parts. Their independent opinions and conclusions are discussed in the Discussion and Evaluation section of this report. PTL's test results can be found in Appendix K.

John Nagy may well be a "renowned mine expert" but his expertise is not shown on page 29 of the Report, nor in his findings in Appendix H.

Sixth, in Miller the report "included a conclusion as to the cause of an accident which was not independently verifiable". In this case the Report contains a wealth of conclusions not independently verifiable. See also McKennon v. Skil Corporation, 638 F.2d 270, 278 (1st Cir. 1981), a products liability case, where the Court excluded as untrustworthy [under Rule 803(8), FRE] an accident report prepared by the Consumer Product Safety Commission.

The Secretary, in support of his position on admissibility and trustworthiness cites Richardson v. Perales, supra, as well as In Re Japanese Electronics Products, 723 F.2d 238, 265 (3rd Cir. 1983); Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3rd Cir. 1978); and Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 473 (3rd Cir. 1950); Robbins v. Whelan, 653 F.2d 47 (1st Cir. 1981); cert denied 454 U.S. 1123, (1981). He further seeks to distinguish Miller from the facts in the Wilberg Report.

The Supreme Court case, Richardson v. Perales, 11/ has been discussed, supra. It supports Emery rather than the Secretary, 402 U.S. at 403-405.

In Re Japanese Electronics Products 12/ merely states the general law that an investigative report prepared by a government agency creates a presumption of admissibility. For the reasons previously outlined I believe this presumption has been overcome.

In Melville v. American Home 13/ the Court ruled that documents prepared by the FAA pursuant to FAA regulations were admissible unless the party challenging the directives comes

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11/ Medical reports admitted.

12/ Findings by Japanese Fair Trade Commission pursuant to Japanese Anti-Trust Law held admissible.

13/ Air worthiness Directives prepared by FAA held admissible.

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forward with evidence impugning their trustworthiness, 584 F.2d at 1316. Air worthiness directives are vastly different from the Fire Report here. Further, the Report itself, as previously noted contains the material supporting its own exclusion.

In Moran v. Pittsburgh-Des Moines 14/ the Court allowed in evidence a report on the cause of a gasoline tank explosion. However, the Secretary's reliance on Moran is misplaced. The Moran case arose before Rule 803(8)(c) and its trustworthiness standard was adopted. Specifically, it arose under the old business record statute. As the Sixth Circuit recently stated the "precedential value of Moran is suspect. ..." Miller v. Caterpillar Tractor Co., 697 F.2d at 144 n. 1.

In Robbins v. Whelan 15/ the Court ruled that the jury should have been permitted to hear evidence of the braking performance of new cars.

The Secretary also seeks to distinguish Miller. She claims Miller is not persuasive because the engineer who drafted the report did not arrive on the scene until three days after the accident. At that time the accident had been cleared up. Further, the engineer based her findings solely on interviews. In contrast, the Secretary asserts her report is based on an investigation by a "team of experienced investigators and experts". As previously noted the experience and skill of the investigators is not facially apparent.

For the reasons previously stated I conclude that the Wilberg Mine Fire Report should be and is excluded as evidence.

Additional issues urged by Emery should be considered. Emery argues the Report is untrustworthy because of political motivation. This arose because the report was prepared during Congressional hearings relating to the fire. It is claimed that the Congressional committee questioned MSHA's ability to protect miners, its ability to conscientiously enforce the Act, its own alleged culpability and the adequacy of its accident investigation.

Political motivation can be a basis to exclude government reports. 16/ However, only minimal portions of the transcript of the hearings were filed in this case. It is accordingly not possible to form a conclusion that the report was politically motivated. Emery's contentions in this respect are accordingly rejected.

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14/ Bureau of Mines report on cause of gasoline tank explosion admitted.

15/ The Appellate Court ruled it was error to exclude Department of Transportation braking performance report.

16/ Baker v. Firestone Tire and Rubber Co., 793 F. 2d 1196, 1199 (11th Cir. 1986); United States v. Durrani, 659 F. Supp. 1183 (D. Conn. 1987).

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Emery also contends that the company and a number of its former employees are currently the subject of a criminal investigation being conducted by MSHA for submission to the U.S. Attorney for the District of Utah. Contrary to Emery's views, the admissibility of the Report is not related to the criminal investigation. Rather, its admissibility is determined by the Mine Act, the Commission's rules, and the case law precedent cited above.

Accordingly, for the reasons stated herein I enter the following:

ORDER

The proffer of the exhibit 17/ identified as "Report of Investigation, Underground Coal Mine Fire, Wilberg Mine, I.D. No. 42-00080, Emery Mining Corporation, Orangeville, Emery County, Utah, December 19, 1984" is refused.

John J. Morris  
Administrative Law Judge

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17/ The exhibit is filed in Official Commission File No. 7 of  
WEST 87-130-R.