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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 88-2 A.C. No. 34-01353-03509
v.	
PATCH COAL COMPANY, RESPONDENT	Welch Mine

DECISION

Appearances: Michael Olvera, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Marcus A. Wiley, Mining Engineer, Wiley Engineering, Inc., Broken Arrow, Oklahoma, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of $1,050, for five alleged violations of mandatory training standard 30 C.F.R. 48.26(a). The respondent filed an answer denying the violations, and a hearing was held in Tulsa, Oklahoma. Although the parties waived the filing of posthearing briefs, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this case include the following: (1) whether the respondent violated the cited mandatory training standard; (2) whether the violations resulted from an unwarrantable failure by Patch Coal Company to comply with the requirements of the cited standard; and (3) whether or not the

violations were significant and substantial. Assuming the violations are affirmed, the question next presented is the appropriate civil penalties to be assessed pursuant to the penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq

2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 3Ä4):

1. The respondent's history of prior violations consists of two (2) citations issued during the twenty-four (24) months prior to the violations in this case, over a period of twenty-two (22) inspection days.

2. The respondent's annual 1986 coal production was 28,000 tons, with first-quarter 1987 production of 12,000 tons.

3. The respondent admits to "technical violations" of the training requirements of 30 C.F.R. 48.26(a), but contests the inspector's gravity and negligence findings.

Discussion

The contested section 104(d)(1) citation and orders were issued by MSHA Inspector Johnny M. Newport in the course of an inspection which he conducted at the mine on April 13, 1987, and they are as follows:

Section 104(d)(1) Citation No. 2839121, issued on April 13, 1987, at 8:30 a.m., cites an alleged violation of 30 C.F.R. 48.26(a), and the condition or practice is described as follows:

Mr. Gary Layton determined to be a newly employed experienced miner operating a 988ÄB front-end loader at pit 004Ä0 load rear dump trucks. A discussion with Mr. Layton revealed

> he had received no newly employed experienced miner training. Mr. Layton had been working at this mine for approximately three weeks.

The inspector made gravity findings of "reasonably likely" resulting in "fatal" injuries, and he concluded that the violation was "significant and substantial." He also made a negligence finding of "reckless disregard," and included all of these findings on the face of the violation form by marking the appropriate places under Section II, "Inspector's Evaluation."

At 8:45 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839123, which states as follows:

> Mr. Scott Bullard determined to be a newly experienced (employed) miner operating a caterpillar 769B rear dump truck at pit 004Ä0 had not received newly employed experienced miner training. Mr. Bullard had been working at this mine for approximately two weeks.

At 9:15 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839125, which states as follows:

> Mr. Gaylin Rogers determined to be a newly employed experienced miner operating a caterpillar 769ÄB rear dump truck at pit 004Ä0 had not received newly employed experienced miner training. Mr. Rogers has been working at this mine for approximately three weeks.

At 9:15 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839127, which states as follows:

> Mr. Rick Nash determined to be a newly employed experienced miner operating a Caterpillar 9ÄL bulldozer at pit 004Ä0 had not received newly employed experienced miner training. Mr. Nash has been working at this mine for approximately three weeks.

At 9:45 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839129, which states as follows:

> Mr. Larry Pitts, determined to be a newly employed experienced miner operating a Caterpillar 9ÄL bulldozer at pit 004Ä0 had not received newly employed experienced miner

> training. Mr. Pitts has been working at this mine for approximately three weeks.

The inspector made gravity and negligence findings with respect to the aforementioned four orders identical to those made in connection with the initial section 104(d)(1) Citation No. 2839121.

Petitioner's Testimony and Evidence

MSHA Inspector Johnny M. Newport testified as to his experience and background, and he confirmed that he issued the citation and orders in question during his inspection of the respondent's mining operation on April 13, 1987. Mr. Newport described the respondent's mining operation as a surface pit coal mine utilizing a drag line, front-end loaders, and rear dump trucks. At the time of his inspection, the cited employees were removing overburden with bulldozers, and were operating endloaders and rear dump trucks. During the inspection of the equipment he asked each of the five cited miners whether they had received newly employed experienced miner training, and they replied that they had received no such training from the respondent (Tr. 8Ä11).

In response to a question as to why he concluded that the lack of the required training would "reasonably likely" result in injuries, Mr. Newport responded as follows (Tr. 11Ä12):

> A. It would be reasonably likely that an accident would occur, based on their experience, the hazards involved with moving overburden, leaving the high wall, plus the general aspects of just the coal mine industry; it's a hazardous business.
>
> Q. You've found, I guess in your experience, that as the amount of training of an employee goes down, the chance of accidents go up?
>
> A. That's true; yes, sir.

In response to a question as to why he concluded that any injuries resulting from the lack of training could reasonably result in fatalities, Mr. Newport responded as follows (Tr. 12):

> A. Basically, because of the hazards involved in the coal mining industry. If a person is not trained to notice certain aspects of high

walls, the patterns of equipment movement, where they dump, what method is being mined, there's a reasonable likelihood that it would result in a fatality.

Q. Was there anything in particular with the types of machines that they were using at this present time that would lead you to believe that a fatality could occur?

A. It's large equipment that's being used in the mining industry.

Q. Could you say that if the injury did occur, it would probably be of a reasonably serious nature?

A. Yes, sir, in my opinion, it would.

Mr. Newport stated that his negligence finding of "reckless disregard" was based on the fact that during the respondent's operation of a prior pit with a drag line, he discussed training with mine superintendent Doug Cook, and it was his understanding that depending on their experience, Mr. Cook knew the types of training required of miners. Mr. Newport stated that Mr. Cook has a copy of the "C.F.R." and the mine training plan. Mr. Newport confirmed that the respondent was cooperative during his inspection (Tr. 13).

On cross-examination, Mr. Newport stated that at the time he asked the employees whether they had received training, he had reviewed the respondent's training plan and asked about the location of the first aid station and first aid supplies, and no one could answer his questions in this regard. He also asked about communications, general mine policies, and accident reporting, and the only safety items that the employees were aware of were the need to wear hard hats and safety shoes. Mr. Newport identified copies of two training certificates for cited employees Gary Layton and Gaylin Rogers, and he confirmed that at the time of his inspection the employees could not produce copies of the certificates, and Mr. Newport confirmed that he could not find them among the mine records he reviewed (Tr. 13Ä16; exhibits RÄ1, RÄ2).

Mr. Newport confirmed that all of the cited employees were experienced miners, but were newly employed by the respondent for 1 to 3 weeks prior to his inspection. When asked to explain the basis for his conclusions that the lack of the required training pursuant to the respondent's approved plan

would expose each of the cited miners to "serious injuries" or that it was reasonably likely that each miner would likely be involved in an accident of a reasonably serious nature, Mr. Newport responded as follows (Tr. 19Ä21):

> THE WITNESS: At the time that I made the inspection, it did have a high wall. The gentlemen working next to the high wall, or the spoil banks, comes, not in contact, but in that general area. Per se, just on a flat, as this floor, it's reasonably likely it could be less than that.
>
> Going and coming from this pit, though, there's hills. You could have a flat tire, steering, blowing the hydraulic hose is a common occurrence in the coal mines with heavy equipment.
>
> JUDGE KOUTRAS: I understand all that, but how would training this fellow keep those events from happening? You could have the best-trained miner in the world operating a front-end loader and all of a sudden, his hydraulic goes out because maybe the front-end loader is defective or it wasn't inspected for brakes or it had a broken hose or something like that. I suppose that's what Mr. Wiley is asking you.
>
> THE WITNESS: In the portion of the training with trucks, front-end loaders, there's a mining method. It's either a left-hand method or a right-hand method. If a certain person has been trained in a right-hand method and this company is doing the opposite, if he's not properly trained to his aspect, they could run into each other.
>
> The size of the equipment could play a big importance on that gentleman getting hurt or hurt seriously, so it does play a big importance.
>
> Some of the other coal companies, for example, that one truck -- you're sitting here, and it's anywhere from zero to maybe 15 feet.

> We have some people that pass like on the highway, which is called the "left-hand method," whereas other people, for safety purposes -- they do that for --
>
> JUDGE KOUTRAS: In this case, did you make those determinations individually for all these people or did you just assume that since they weren't trained, they would be exposed to all of these things that generally could happen at any operation?
>
> THE WITNESS: Yes, it could generally happen.
>
> JUDGE KOUTRAS: You didn't, for example, take each of these people and determine what their jobs were and all that business, whether it was left-hand or right-hand and all that business; did you?
>
> THE WITNESS: Each is supposed to be incorporated in the Training Plan to go about it, sir.

Referring to his inspection report of April 13, 1987, Mr. Newport confirmed that he issued a citation for the lack of a front horn on a motor grader and inadequate brakes on mobile equipment. The citations were issued at a different pit than those where the untrained miners were working, and Mr. Newport conceded that no citations were issued for the work environment in which these miners were working. However, Mr. Newport took the position that the cited equipment travelled to the pit where the employees were working (Tr. 23Ä26).

In response to further questions concerning his gravity and negligence findings, Mr. Newport stated as follows at (Tr. 31Ä32):

> JUDGE KOUTRAS: Did you, Mr. Newport, find any conditions at that mine when these fellows were working that would lead to any unusual circumstances in the form of hazards?
>
> THE WITNESS: Not at that time, sir, but as far as the conditions during this inspection, it was during the winter and with the high walls, when the sun dries them out and then we have the rains, there's a possibility rocks could

> fall from the high wall. There's people on foot cleaning coal.
>
> JUDGE KOUTRAS: This would be true in any surface mining environment; wouldn't it?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: So you would come to the same conclusion if you'd gone to the next one down the road? You would come to all these conclusions?
>
> THE WITNESS: Even at the ones to the next mine, we asked them on their training. Once the initial time period that a person starts at a mine -- Some mines give training on a monthly basis for these same aspects. By law, they're required eight hours of annual refresher training to go over these things.

And, at (Tr. 39Ä40):

> As far as I was concerned, Mr. Cook did know; he's an experienced mining engineer. He's been in the business for at least -- better than 20 years; he's familiar with this.
>
> Unless him and this gentleman have some agreement, as far as I am concerned, yes, sir, it's just total disregard.

Mr. Newport confirmed that he did not have the mine training plan with him at the time he interviewed the employees by their equipment, and that he did not review the plan with them item-for-item to insure that they had received training in each of the subjects listed on the plan. He assumed that they were aware of these items, and aside from their knowledge of the requirements for safety shoes and hard hats, the employees told him that they had not received all of the training required by the plan (Tr. 42).

Mr. Newport confirmed that MSHA's training requirements require different degrees of training, depending on the experience of the miner. Pursuant to the respondent's training plan, newly employed experienced miners are required to receive 3 hours of training, and new miners with no experience are required to receive 40 hours of training. He confirmed that the type of training required of the cited miners in this

case appears at page 5 of the training plan (exhibit PÄ1, Tr. 42). He also believed that the "hazard training" indicated on the training certificates for Mr. Layton and Mr. Rogers is the type of hazard training given to mine visitors, rather than to newly hired experienced miners (Tr. 43).

Mr. Newport confirmed that all of the cited miners were withdrawn from the mine, and that the citations were timely abated after the miners received the requisite training from an individual who is on retainer with the respondent (Tr. 45). He also confirmed that the cited miners had worked at least 2 years at other mines (Tr. 51).

Mr. Newport stated that his prior conversation with Mr. Cook concerning training took place while he was on a spot inspection of another mine. Mr. Newport explained that this mine was along the same haulage road used by the respondent, and Mr. Cook advised him at that time that the respondent was considering opening up a new pit. During a conversation in the mine office, Mr. Newport stated that he advised Mr. Cook that "you need to remember the training," and Mr. Cook responded that "it would be taken care of." Since Mr. Cook was responsible for the entire mine, Mr. Newport believed that he was adequately informed about the training requirements (Tr. 53Ä54). Mr. Newport confirmed that he had no knowledge that Mr. Callahan had done any training. Assuming that he did, since he was not an MSHA certified trainer with a "blue card," Mr. Newport would still have issued the citations for improper training (Tr. 56Ä57).

Respondent's Testimony and Evidence

Marcus A. Wiley, Professional Engineer and President, Wiley Engineering Company, stated that he was designated by the respondent's mine superintendent, Doug Cook, to represent the respondent in this matter because his firm in on retainer by the respondent as a consulting firm. Mr. Wiley asserted that the respondent has an excellent compliance record and is concerned for the safety of its employees. He confirmed that the respondent's principal reason for contesting the violations was based on its desire to challenge the inspector's finding that the respondent exhibited a "reckless disregard" for MSHA's training requirements. He conceded that the complete training required by section 48.26(a), was not given to the five newly hired experienced miners cited by Inspector Newport. Mr. Wiley maintained that the employees did receive some "hazard recognition" training from one of his contractor employees, John Callahan, and he submitted copies of training certificates issued to two of the cited miners (Gary Layton

and Gaylin Rogers) which indicate that they received this training on March 30, 1987 (Exhibits RÄ1 and RÄ2; Tr. 6Ä8).

Mr. Wiley explained that Mr. Callahan was one of three employees of his firm who are certified by the State of Oklahoma as mine training supervisors, and that Mr. Callahan was a certified mine foreman assigned as the pit supervisor at the respondent's mine. Conceding that Mr. Callahan was not an MSHA "approved" training instructor, Mr. Wiley nonetheless maintained that the training given to the cited miners by Mr. Callahan concerned hazard recognition and avoidance, emergency and evacuation procedures, and health and safety standards, and that some of this training overlapped MSHA's training requirements for newly employed experienced miners.

Mr. Newport stated that he has never met Mr. Callahan and was not aware of his supervisory responsibilities. Mr. Wiley explained that this was not unusual since Mr. Cook was the individual identified under MSHA's mine ID number as the responsible person at the mine. Mr. Wiley assumed that Mr. Newport would have contacted Mr. Cook in regard to the citations which he issued and would not necessarily speak with Mr. Callahan. Mr. Newport confirmed that during his inspection he did not speak with Mr. Cook or Mr. Callahan, and he explained that Mr. Cook's name appears on the citation forms as the person to whom he served the citations because Mr. Cook had previously instructed him to put his name on all citations issued at the mine (Tr. 26Ä30).

Mr. Wiley pointed out that the respondent did have an MSHA approved training plan in effect at the time of the inspection conducted by Inspector Newport, and that after the withdrawal of the affected miners, they received immediate training in order to abate the violations, and that the respondent's training plan was amended to include mine superintendent Cook as one of three individuals certified by MSHA as approved training instructors. Prior to the inspection, Mr. Cook was not an approved trainer. Inspector Newport agreed that this was the case, and he stated that the citations could have been avoided if the respondent had upgraded its training plan to include Mr. Cook and Mr. Callahan as MSHA certified and approved training instructors (Tr. 26Ä27; 48Ä50).

Mr. Wiley candidly conceded that while the complete and proper MSHA training may not have been provided by the respondent in this case, he feels personally responsible for this, but believes that the severity of the inspector's conclusion that the violations were the result of the respondent's

"unwarrantable failure" to comply with MSHA's training requirements is not justified (Tr. 34Ä35).

Findings and Conclusions

Fact of Violations - 30 C.F.R. 48.26(a)

The respondent is charged with five alleged violations of mandatory training standard 30 C.F.R. 48.26(a), which mandates certain training for newly employed experienced miners. The standard requires that such miners complete a program of instruction in seven topical categories which are as follows:

1. Introduction to work environment.

2. Mandatory health and training standards.

3. Authority and responsibility of supervisor's and miners' representatives.

4. Transportation controls and communication systems.

5. Escape and emergency evacuation plans; firewarning and firefighting.

6. Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.

7. Hazard recognition.

Inspector Newport confirmed that he issued the violations during the course of an inspection and after interviewing the five miner equipment operators while they were engaged in work involving the removal of overburden at the surface pit mine in question. The miners confirmed to the inspector that while they were aware of the requirements for wearing hard hats and safety shoes, they had not received any newly employed experienced miner training as required by the respondent's approved training plan. The inspector also confirmed that the cited employees could not produce copies of any training certificates indicating that they had received the required training, and he could not find any copies of any such certificates during his review of the appropriate mine records.

The record establishes that while the cited equipment operators were experienced miners trained in the operation of

the equipment they were operating at the time of the inspection, they were newly employed miners at the respondent's mine and had worked there for several weeks prior to the inspection. Further, the respondent has stipulated and admitted that the employees in question had not received the required training specified in section 48.26(a), as well as its own MSHA approved mine training plan. Under all of these circumstances, I conclude and find that the failure by the respondent to provide the required newly employed miner training for the five cited employees in question constituted violations of the requirements of mandatory training standard 30 C.F.R. 48.26(a), and the violations ARE AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295Ä96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or

> "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930Ä31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

I take note of the fact that in this case the petitioner's proposed civil penalty assessments for the violations in question were processed by MSHA's regular assessment procedures, taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act. Although MSHA had discretion to waive the regular assessment formula in determining the amount of the proposed civil penalty assessments for the violations in question and to apply a more stringent "special assessment" procedure pursuant to 30 C.F.R. 100.5, it did not do so in this case. Two of the categories listed among the guidelines for determining whether or not a "special assessment" is appropriate are found in section 100.5(b) and (h), and they are as follows:

> (b) Unwarrantable failure to comply with mandatory health and safety standards;
>
> * * * * * * * * * *
>
> (h) Violations involving an extraordinary high degree of negligence or gravity or other unique aggravating circumstances.

Notwithstanding the inspector's "unwarrantable failure" and "reckless disregard" negligence findings, MSHA opted not to levy "special assessments" for the violations in question, and its trial counsel could offer no explanation as to why MSHA did not choose to waive the regular assessment formula in connection with the violations in question.

The evidence in this case establishes that the respondent was aware of MSHA's training requirements for newly employed experienced miners, and had adopted an approved training plan pursuant to the appropriate MSHA regulations. The evidence also establishes that at least two of the affected miners received some hazard recognition training, and I have no reason not to believe Mr. Wiley's assertions that all of the miners received at least a minimum of training regarding hazard recognition. Mr. Wiley impressed me as a credible individual who readily accepted responsibility for the failure by the miners to receive the full 3Ähour training required by MSHA's regulation. The evidence also establishes that the miners in question, who no longer are employed at the mine, were experienced equipment operators who knew how to operate their equipment, and were instructed to wear safety shoes and hard hats.

Inspector Newport confirmed that the respondent had always previously been in compliance with the required training regulations and had received no prior citations for violating MSHA's training standards. As a matter of fact, Mr. Newport stated that when he went to the mine for his inspection he was under the assumption that all of the miners had been trained because he had never experienced any prior training problems with the respondent, and as an example, he cited the fact that John Hare, an individual in the employ of the contractor, and who was listed in the approved training plan as an MSHA qualified training instructor, had always conducted the proper training pursuant to the respondent's plan (Tr. 51, 59).

Although the respondent's mine superintendent Doug Cook did not appear or testify at the hearing, I take note of, and find credible, the answer that he filed in this case. In his answer to the penalty assessment proposal filed by the petitioner, Mr. Cook conceded that he was aware of MSHA's training requirements, and has always made a sincere effort to comply with those requirements. This statement is supported by the inspector's testimony that the respondent has always been in compliance with the subject training requirements. Conceding the fact that Mr. Callahan, a contract employee of Wiley Engineering, was not listed as an MSHA approved training instructor in its approved training plan, Mr. Cook maintained

that this was an "oversight." This contention is supported in part by the fact that during the abatement process, the respondent's training plan was subsequently modified to include Mr. Cook as an MSHA certified training instructor, and Inspector Newport confirmed that had Mr. Cook or Mr. Callahan been included in the plan as qualified training instructors, the violations could have been avoided.

I also take note of the fact that in his answer, Mr. Cook asserted that all of the affected miners were familiar with the equipment they were operating at the time of the inspection, and that they had received "orientation (walk-around) training" from Mr. Callahan prior to starting work at the mine. Mr. Cook apparently believed that since Mr. Callahan was an experienced surface miner certified by the State of Oklahoma as a mine foreman, qualified to train miners, he also met MSHA's requirements as an individual qualified to train the respondent's miners pursuant to the contract with Wiley Engineering. This position by Mr. Cook was corroborated by Mr. Wiley who believed that Mr. Cook thought he was acting properly, and Mr. Wiley, in hindsight, candidly conceded that he should have insured that all of the training topics listed in MSHA's regulation were covered during the training of the miners in question (Tr. 61Ä62).

Inspector Newport testified that he based his negligence finding of "reckless disregard" on the fact that on a prior brief visit to another pit operated by the respondent, he reminded Mr. Cook about the need for training in the event the respondent were to open a new pit, and that Mr. Cook had the training plan and a copy of the "C.F.R." available for reference. Mr. Newport conceded that at the time of his inspection, he did not have the training plan with him, nor did he review it with the miner's who informed him that they had not received all of the required training, but had been instructed to wear safety shoes and hard hats.

In further explanation of his "reckless disregard" negligence finding, and in particular Mr. Cook's knowledge of the training requirements, Mr. Newport stated that "it was my understanding that he knew that depending on a person's experience on what type of training had to be given." Mr. Newport also commented that "I thought I covered it pretty good. Maybe I didn't; I'll say maybe there's something I left out" (Tr. 13). At another point during the hearing, Mr. Newport stated "As far as I was concerned, Mr. Cook did know; he's an experienced mining engineer. He's been in the business for at least -- better than 20 years; he's familiar with this" (Tr. 39Ä40).

On the facts of this case, and after careful review and consideration of the record, I find no credible support for the inspector's "reckless disregard" negligence finding. Nor can I find any credible evidence to support an "unwarrantable failure" finding. To the contrary, I conclude and find that at most, the inspector's rationale for making the disputed finding supports a negligence finding ranging from "ordinary" to "moderate," rather than one supporting any conclusion that the respondent's conduct was inexcusable, or egregious, or that it exhibited the absence of the slightest degree of care. In short, I find no evidentiary support for any conclusion that the respondent's failure to insure that the cited newly employed experienced miners received all of the required training was the result of any aggravated conduct of the kind described by the Commission in its recent holdings on this question. Accordingly, the inspector's unwarrantable failure findings for each of the violations ARE VACATED.

Modification of Citations and Orders

In view of my unwarrantable failure findings, the contested section 104(d)(1) citation and orders are modified to section 104(a) citations. See: Old Ben Coal Company, 2 FMSHRC 1187 (June 1980); Consolidation Coal Company, 3 FMSHRC 2207 (September 1981); Youngstown Mines Corporation, 3 FMSHRC 1793 (July 1981).

The Significant and Substantial Violations Issue

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary

> of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

Although I agree that any mining operation, whether it be a surface pit mine such as the one operated by the respondent in this case, or an underground mine, generally involves a working environment exposing miners to potential hazards and dangers, the question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., Docket Nos. WEST 85Ä148ÄM and WEST 86Ä83ÄM, decided by the Commission on April 20, 1988; Cement Division, National Gypsum Co., supra; Youghigheny & Ohio Coal Company, supra.

With regard to the training requirements found in section 48.26(a), I agree that such training promotes mine safety by making miners aware of the hazards associated with their particular jobs tasks, and I have affirmed an inspector's "S & S" findings where the facts and circumstances clearly established that the lack of training presented a reasonable likelihood of serious injuries associated with such a violation, Secretary of Labor v. Highwire, Incorporated, 10 FMSHRC 22, 67Ä68 (January 1988).

On the facts of the case now before me for adjudication, the record establishes that the cited miners who lacked the training required for newly employed experienced miners were experienced equipment operators who were trained in the operation of the particular equipment they were operating at the time of the inspection. The facts also establish that at least two of the miners, as well as the others, received some minimum type of "orientation" and hazard recognition training, and were aware of the fact that they should wear hard hats and safety shoes. The respondent has conceded that all of the affected miners had not received the complete 3Ähour training mandated by the respondent's training plan and the cited training standard, and the violations have been affirmed. The issue is whether or not these violations were significant and substantial, and whether the facts and evidence adduced by MSHA in support of the inspector's "S & S" findings support those findings.

In the instant case, Inspector Newport confirmed that he issued no citations for any other safety infractions for the work environment where the miners in question were working at the time of his inspection. He also conceded that the equipment operators were experienced and trained in the operation of their equipment, and he found no unusual mine conditions or hazardous circumstances present in the areas where the miners were working. Although he alluded to citations which he issued at the time of his inspection for the lack of a front horn on a motor grader and inadequate brakes on some mobile equipment, he conceded that these violations were found at a different pit location from that in which the untrained miners in question were working, and there is no evidence that any of the equipment being operated by the miners in question was unsafe or otherwise defective. The inspector also confirmed that he found no violations associated with the high wall or spoil bank located in the general area where the miners were working, and he confirmed that the miners would not be "in contact" with those areas (Tr. 19Ä21; 25).

Although Mr. Newport indicated that his inspection was "during the winter" and that there was a possibility that rocks could fall from the highwall when it dries out after a rain and that people would be on foot cleaning coal, (Tr. 31), the fact is that the citations were issued in April, and there is no evidence to establish that it had rained or that any of the miners in question were exposed to any rock fall hazards.

Inspector Newport alluded to the fact that the equipment which lacked a front horn or adequate brakes travelled to the

pit where the miners in question were working, and he took the position that "it's all one mine." However, there is no probative evidence that this equipment was in fact operated at the pit where the miners in question were working. Under the circumstances, I give little weight to this testimony and find it too remote and general to establish that the miners were in fact exposed to these equipment hazards, or that their lack of training would have contributed to any hazards associated with those violations.

In support of his conclusion that the lack of training would reasonably likely result in injuries to the experienced miners in question, Inspector Newport relied on the general hazards associated with moving overburden and the hazardous nature of the coal mining industry as a whole. In support of his conclusion that it was reasonably likely that any injury associated with the lack of training would result in a fatality, Mr. Newport relied on the fact that the miners were operating "large equipment," and "because of the hazards involved in the coal mining industry" (Tr. 12). He also believed that an individual who was not trained to recognize certain aspects of high walls, equipment movement and dumping patterns, and the method of mining being followed would reasonably likely to be exposed to fatal injuries. He further alluded to the fact that the operation of front-end loaders and trucks entails right-handed and left-handed mining methods and vehicle passing patterns, and that if equipment operators are not trained in these methods they could run into each other.

There is no evidence in this case that the experienced equipment operators who had worked at the mine for 2 or 3 weeks prior to Inspector's Newport's inspection were oblivious to the mining methods and equipment passing procedures alluded to by the inspector as part of the basis for his "S & S" findings. Although it is true that the miners may not have been formally trained in these matters pursuant to general topical subject of "Transportation controls and communication systems" which is part of the respondent's training program, Mr. Newport conceded that he did not review the training plan with the miners with whom he spoke to determine their knowledge of these matters, nor did he make any determinations as to the mining method being utilized at the time of his inspection, or the specific equipment passing procedures being utilized by these operators.

Inspector Newport admitted that the miners told him that they were aware of the itemized training subjects listed in the training plan, but had not received all of the training listed herein (Tr. 42). Given the fact that at least two of them received some kind of hazard recognition training, and

that all of them knew about the wearing of hard hats and safety shoes and were experienced equipment operators who had worked at the mine for weeks before the inspection without any apparent difficulty or accident or injury incidents, I find it difficult to believe that they were totally ignorant of the appropriate work procedures associated with the operation of their equipment. Further, Mr. Newport conceded that he simply assumed that the lack of training exposed the miners to injuries and fatalities generally associated with any mining operation (Tr. 19Ä21).

On the facts of this case, and after careful review and consideration of Inspector Newport's testimony in support of his "S & S" findings as to each of the violations, I conclude and find that these findings were based on general and speculative assumptions that a lack of training would expose miners to injuries and fatalities generally associated with any mining operation, rather than on any specific prevailing mining conditions from which one could conclude that the miners in question were in fact exposed to mine hazards likely to result in injuries of a reasonably serious nature. In short, I conclude and find that the petitioner has failed to establish by a preponderance of the credible and probative evidence adduced in this case that the violations were significant and substantial. Accordingly, the inspector's findings in this regard are rejected and they ARE VACATED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

Respondent's representative stated that the Welch Mine employs a minimum of 15 miners, and a maximum of 30. He confirmed that at the time the violations were issued, the mine employed 15 miners, and currently employs less than five. Petitioner's counsel agreed that the respondent is a small surface coal mine operator. Under these circumstances, and taking into account the respondent's coal production as stipulated to by the parties, I conclude and find that the respondent is a small mine operator. Further, absent and information to the contrary, I also conclude and find that the civil penalties assessed for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated to the respondent's history of prior violations. Based on that stipulation, I conclude and find that the respondent has a good compliance record, and

there is no evidence that it has been previously cited for any violations of MSHA's training standards.

Negligence

I conclude and find that the respondent knew or should have known about the training requirements found in section 48.26(a), and that its failure to exercise reasonable care to insure that this training was given to the newly employed experienced miners in question constitutes a moderate degree of negligence on its part.

Gravity

Although I have found that on the facts of this case the violations in question were not significant and substantial, I nonetheless conclude and find that the failure to adequately train the newly employed experienced miners in question constituted a serious violation of the training requirements of section 48.28(a). The failure to adequately train a miner could under certain conditions and circumstances, result in exposing a miner to potential and possible mine hazards.

Good Faith Compliance

Inspector Newport confirmed that the respondent exhibited good faith in timely abating the violations. He confirmed that after the miners were withdrawn from the mine, they received immediate training administered by a contractor who was an MSHA approved training instructor, and the orders were terminated. Under the circumstances, I conclude and find that the respondent exercised good faith compliance in abating the violations.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessments criteria found in section 110(i) of the Act, I conclude that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate:

Citation No.	Date	30 C.F.R. Section	Assessment
2839121	04/13/87	48.26(a)	$75
2839123	04/13/87	48.26(a)	$75
2839125	04/13/87	48.26(a)	$75
2839127	04/13/87	48.26(a)	$75
2839129	04/13/87	48.26(a)	$75

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge