CCASE:
SOL (MSHA) V. DOLET HILLS MINING VENTURE
DDATE:
19890620
TTEXT:

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 88-108 A.C. No. 16-01031-03507
v.	Dolet Hills Lignite Mine
DOLET HILLS MINING VENTURE, RESPONDENT	

DECISION

Appearances: Anthony G. Parham, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Bruce P. Hill, Esq., Sturgis, Kentucky, 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 $1,000, for two alleged violations of mandatory training standard 30 C.F.R. 48.28(a). A hearing was held in Shreveport, Louisiana, and the respondent filed a posthearing brief. Although the petitioner did not file a brief, I have considered its oral arguments made on the record during the course of 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 the respondent 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. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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. 11-13):

1. The respondent operates a surface coal lignite mine, with 83 employees.

2. The respondent's mine produces 2.5 to 2.75 million tons of coal annually, and it is a small-to-medium sized mining operation.

3. Payment of the proposed civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

4. The respondent's history of prior violations for the 24-month period prior to the issuance of the violations in this case consists of seven (7) violations, none of which are for violations of the training requirements found in Part 48, Title 30, Code of Federal Regulations.

Discussion

The contested section 104(d)(1) citation and section 104(d)(2) order were issued by MSHA Inspector Donald R. Summers in the course of an inspection which he conducted at the mine on January 19, 1988. In addition to the citation and order, the inspector issued two section 104(g)(1) orders withdrawing the two miners in question from the mine until they received

the required training. These orders were not contested and the petitioner does not seek civil penalty assessments for them. The citation and order in issue are as follows:

Section 104(d)(1) "S&S" Citation No. 2929494, January 19, 1988, cites a violation of mandatory training section 30 C.F.R. 48.28(a), and the cited condition or practice states as follows:

> Harold Mellott, Maintenance Supervisor, was working on the mine, performing supervisor duty at the mine office. Training records show Mr. Mellott received no training since 8-30-85. Discussions with Judy Tate, MSHA training spec. and Dennis Haeuber, Safety & Training instructor (Dolet Hills) had received no annual refresher training or first aid, as outline in the company training plan for supervisors and 77.1706(b). Dennis Haeuber, Company Training Instructor.
>
> A 104(g)(1) order (2929493) has been issued in conjunction with this citation.

Section 104(d)(2) "S&S" Order No. 2929496, January 19, 1988, cites a violation of mandatory training standard 30 C.F.R. 48.28(a), and the cited condition or practice states as follows:

> Randy Rhodes, operation foreman, was working on the mine performing foreman duty. Records show Mr. Rhodes has received no annual refresher training or first-aid since 8-23-85, hire date 7-8-85, first aid training as outline in 30 C.F.R. 77.1706(b). Mr. Dennis Haeuber, Company Training Instructor.
>
> A 104(g)(1) Order (2929495) has been issued in conjunction with this order.

Petitioner's Testimony and Evidence

Dennis A. Haeuber, respondent's safety training coordinator, testified that he is responsible for the planning and development of the respondent's training program, training compliance, and the conduct of all training.

Mr. Haeuber confirmed that he was present when Inspector Donald Summers conducted an inspection on January 19, 1988, and issued two citations for the failure to provide training for

Mr. Harold Mellott and Mr. Randy Rhodes. Mr. Haeuber confirmed that he advised Mr. Summers that he had not trained these individuals, and he explained that he could provide no training records to indicate that they received 8 hours of formal classroom training for the year 1987. However, Mr. Haeuber believed that these individuals were trained on an informal basis, but received no formal refresher course training for 1986 and 1987 (Tr. 15-19).

Mr. Haeuber stated that his "informal" training of Mr. Mellott and Mr. Rhodes consisted of "frequent conversations dealing with the entire safety and health area of 83 miners." Mr. Haeuber explained that the "informal" training is non-documented and he could produce no notes supporting these conversations (Tr. 19).

Mr. Haeuber stated that subsequent to the issuance of the citations, he has developed a computerized system for recording the training and retraining of all miner's (Tr. 21, exhibit R-8).

Mr. Haeuber stated that during his informal discussions with Mr. Mellott and Mr. Rhodes in 1986 and 1987, they discussed transportation controls and communications systems, escape and emergency evacuation plans, and fire fighting procedures. However, he could recall no dates when these conversations took place, and he confirmed that the conversations lasted from 10 to 15 minutes, to an hour (Tr. 26-31).

Mr. Haeuber confirmed that he could produce no training records to show that Mr. Mellott and Mr. Rhodes received any refresher course training for the years 1986 and 1987, and he confirmed that he advised Mr. Summers that these individuals had not received their annual refresher training (Tr. 32). He also confirmed that MSHA education and training specialist Judy Tate visited the mine on January 15, 1988, and informed him that these individuals had not received their annual refresher training for 1987 (Tr. 33).

Mr. Haeuber stated that he trained other employees with a formal refresher class, and that Mr. Mellott and Mr. Rhodes were scheduled for training on December 21, 1987, but he could not train them because he was sick (Tr. 34). Mr. Haeuber acknowledged that he was aware of the fact that the training was required, but could not explain why the training was not given during the period after he was informed by Ms. Tate that it was required, and prior to the issuance of the violations (Tr. 36).

On cross-examination, Mr. Haeuber confirmed that he was previously employed by MSHA from 1978 through May 1982 as a mine inspector and special investigator, and that he previously served as a safety director for another mining operation prior to his present job with the respondent (Tr. 37).

Mr. Haeuber confirmed that the mine operated 6 days a week in 1987, except for shut down periods in August and December, and that it operated in excess of 250 days that year. He also confirmed that Mr. Mellott and Mr. Rhodes were involved in no accidents or injuries in 1986 or 1987 (Tr. 40).

Mr. Haeuber reviewed a portion of the respondent's training plan which he submitted to MSHA in 1985, and he confirmed that he would speak with maintenance manager Mellott approximately an hour each day, and that 50 percent of the conversation dealt with safety. He also confirmed that Mr. Mellott spent 95 percent of his time in his office and that he spoke with him for more than an hour on the subject of mandatory health and safety standards in each of the years 1986 and 1987, and also spoke with him about transportation controls and communication during those same years (Tr. 43). He further confirmed that he covered each of the subjects shown in the training plan during his conversations with Mr. Mellott (Tr. 51-53).

Mr. Haeuber identified exhibit R-1 as an MSHA training guideline explaining the annual refresher training for certain categories of miners, and he believed that Mr. Mellott occupied an "administrative position" and that he received more than hazard training for the years 1986 and 1987, but had no record of this informal training (Tr. 59-60).

Mr. Haeuber identified exhibit R-8 as an example of his computerized training record keeping which was developed as a result of his "administrative oversight" of 1987 with respect to documenting training records (Tr. 62-64). He confirmed that MSHA's training specialist Judy Tate spent 3 days at the mine in January reviewing training records, and that when she left she told him that "you need to get these people trained" (Tr. 67). Mr. Haeuber further explained his position as follows at (Tr. 68-69):

> JUDGE KOUTRAS: So you say when you talked to Ms. Tate you took the position that yes, these people were trained. Did she ask you about Mellott and Rhodes specifically, do you remember?

~1127

THE WITNESS: She did not ask about Mellott and Rhodes specifically but as she would go through my training records, they were available to her. I had to show her everything that was in my file, then the point did come out, yes. But there was no paperwork to show training for '87.

JUDGE KOUTRAS: No paperwork to show training for '87 for who?

THE WITNESS: For Mr. Mellott and Mr. Rhodes.

JUDGE KOUTRAS: Mr. Rhodes.

THE WITNESS: And just before she left on Thursday, she indicated that I needed to get those people training, and that was --

JUDGE KOUTRAS: Needed to get them trained, that implies that they weren't trained.

THE WITNESS: Well, I guess that's probably true, Your Honor.

JUDGE KOUTRAS: Did you tell her that they were not trained? Or did she just come to the conclusion that she couldn't find records that they weren't trained.

THE WITNESS: I feel that's -- that's basically what she did, check my records. It shows up that there's no record for '87, and I'm the person --

JUDGE KOUTRAS: She's going to come to the conclusion that they weren't trained.

THE WITNESS: That's right.

JUDGE KOUTRAS: Did you explain to her that these people were trained?

THE WITNESS: No, I did not.

In response to further questions, Mr. Haeuber confirmed that the section 104(g)(1) orders issued by Inspector Summers on January 19, 1988, withdrawing Mr. Mellott and Mr. Rhodes from the mine were not contested by the respondent (Tr. 74). He also confirmed that exhibit R-2 is an MSHA approved training

plan which has been in effect from 1985 to the present (Tr. 75-76).

Mr. Haeuber stated that he had no notes concerning the precise number of hours or occasions that he spent with Mr. Mellott and Mr. Rhodes discussing the safety topics shown on the training plan, and he confirmed that during these discussions he did not inform them that they were part of any refresher training classes, and spent in excess of 30 minutes on each of the safety topics (Tr. 79).

Mr. Haeuber explained Mr. Mellott's duties, and confirmed that he has three maintenance supervisors working directly for him, and that these supervisors are in direct contact with the hourly miners. He also confirmed that Mr. Mellott spends less than an hour a week out of his office and in the mine, and relies on his supervisors (Tr. 82). He confirmed that Mr. Mellott has been a coal miner for over 24 years, and that Mr. Rhodes has been a miner for 4 years and previously served as a construction superintendent and has in excess of 8 years of experience (Tr. 86).

Mr. Haeuber confirmed that both Mr. Mellott and Mr. Rhodes received formal training in 1985 and 1988, but that in 1986 and 1987, he relied on his informal sessions with them in lieu of the 8-hour classroom sessions (Tr. 88). He believed that his informal safety discussions with Mr. Mellott and Mr. Rhodes were as good as the formal classroom training sessions utilizing a "canned training program" (Tr. 89). He confirmed that during an MSHA conference with Inspector Summers' supervisor with respect to the citations, the supervisor took the position that since he could not document the training in question, the citations would stand as written. Mr. Haeuber also confirmed that at the time the citations were issued he said nothing to Mr. Summers about his informal safety discussions with Mr. Mellott and Mr. Rhodes (Tr. 91).

Harold Mellott, respondent's maintenance manager, confirmed that he has been so employed since 1984, and he explained his duties. He also confirmed that he has 25 years of coal mining experience, and has worked in maintenance since 1970. He stated that he established the preventive maintenance program for the mine, and has three maintenance foremen who report to him. In addition to his maintenance duties, he is also responsible for parts purchases, and in 1986 and 1987, he worked 48 to 60 hours a week implementing the preventive maintenance program. Except for spending 2 hours a day in the shop during two 5-day shut down periods for each of these years, he estimated that he devoted 1 hour a day in the actual

work areas where maintenance was being performed. He confirmed that during these years his office was located in the main shop area (Tr. 93-107).

Mr. Mellott testified that he received formal refresher training in 1984 and 1985, and that it lasted 8 hours, or one full day. With regard to any training received in 1986 and 1987, Mr. Mellott stated as follows (Tr. 108-109):

> Q. And, during '86 and '87, you didn't receive any formal refresher training, did you?
>
> A. -- wasn't directing any work for us, but I did not, no.
>
> Q. You didn't --
>
> A. Other than Dennis and I have conversations of probably 30 minutes to an hour every day about different things at the mines. And we go on tours at the mines and he'll find something that needs to be done at the mine and he'll come in and discuss it. Maybe go on a trip and look at it.
>
> Q. I'm talking about formal safety refresher class like you had in '85, you didn't have that for '86 and '87, did you?
>
> A. No.

Mr. Mellott agreed that refresher training decreases the likelihood of employee injuries, and while he did not directly supervise the work of his maintenance crews, he does supervise his foremen and is involved in setting up and taking down the drag line. He confirmed that he has built 15 to 16 drag lines in the past, and has had direct supervision over 350 employees and 40 foremen during his years of experience in the mining business (Tr. 114-117).

On cross-examination, Mr. Mellott confirmed that during his past work in dismantling and erecting drag lines, he has never experienced any serious injuries. He also confirmed that he spends 95 percent of his time at his desk in his office, and that his foremen do all of the maintenance follow-up work (Tr. 119). He stated that he speaks with safety director Haeuber daily, and explained further as follows (Tr. 120-121):

~1130

Q. When you have your discussions with Dennis, what do you talk about?

A. He may see if fire extinguishers been knocked, see if glass broke out or something that somebody else hasn't seen and he comes to discuss it and we'll get in line to get fixed.

Q. What percent of your time do you spend talking to Dennis during that hour a day that you say you talk with him, what percent of time do you talk to him about safety?

A. Well, sometimes we measure a quick run around of the mine and he may see something down in the pit, down the mine that he wants to go look at so to pinpoint it, that'll be hard to do. But today it may be 30 minutes, tomorrow maybe 45, the next day maybe ten minutes.

Q. Would you say ten percent, 50 percent, 100 percent? What would you say percent of?

A. At least 50 percent of the time is safety when he's with me.

Mr. Mellott referred to the safety topics listed in the training plan (exhibit R-2), and explained how these topics are covered during his discussions with Mr. Haeuber. He confirmed that these discussions take place while they are walking around the mine site looking at various problems, or in their respective offices, and that they are not conducted in a structured classroom environment (Tr. 121-129). He believed that his daily contacts and discussions with Mr. Haeuber "is the best teacher there is," and that he received more out of these discussions than any formalized structured classroom training sessions (Tr. 130). Mr. Mellott confirmed that during his informal discussions with Mr. Haeuber, no reference was ever made to any of the "lesson outlines" referred to in the training plan (Tr. 132). With regard to the subject of first aid, Mr. Mellott confirmed that he received no "practical demonstrations" concerning CPR, and that he is not certified in CPR or first aid (Tr. 139). He also confirmed that during his 1986 and 1987 discussions with Mr. Haeuber, he received no course materials or other documents concerning any of the courses shown in the training plan, and that at no time did Mr. Haeuber inform him that their discussions were a part of any refresher training course (Tr. 141-142).

Randall L. Rhodes, testified that he has been employed by the respondent as a first line operations supervisor for 5 years, and that he supervises 15 to 20 people on alternating day and night shifts. Most of these individuals operate equipment such as coal haulers and bulldozers, and he conducts safety meetings with these individuals on a daily and weekly basis, and he explained his daily work routine. He confirmed that he spends most of his work time driving around the mine site in his pick-up communicating with his employees in various work areas of the mine, and that he spends approximately an hour each day out of his truck walking around on the ground (Tr. 144-149).

Mr. Rhodes confirmed that he received a formal refresher training course in 1985 and 1988, but did not receive any such formal refresher course in the years 1986 or 1987 (Tr. 149-150). He further confirmed that his 1985 and 1988 formal course training included all of the topics shown on the training plan (exhibit R-2). He believed that he received a CPR course in 1986, which included training with a CPR "dummy," but he received no course materials other than MSHA "Fatalgrams" (Tr. 151-156).

On cross-examination, Mr. Rhodes stated that neither he or any of his personnel were involved in any accidents during 1986 and 1987, and he believed that thee is nothing to indicate that formal training, as opposed to informal training, made him a more safe or unsafe miner (Tr. 157). He confirmed that he spoke with Mr. Haeuber on a daily basis for 45 minutes to an hour, and that 15 minutes of the conversation was related to safety (Tr. 158). He also confirmed that the conversations covered the topics listed on the training plan (Tr. 159-163). Mr. Rhodes confirmed that he kept no records of the actual time spent discussing safety topics with Mr. Haeuber, but that it was an "every day thing" (Tr. 164-166).

MSHA Inspector Donald R. Summers, testified as to his training and experience, and he confirmed that he visited the mine after his supervisor informed him that MSHA education and training specialist Judy Tate had visited the mine during the week of January 11, 1988, and found that Mr. Mellott and Mr. Rhodes had not received their annual refresher training (Tr. 180). Mr. Summers stated that he spoke to Mr. Haeuber and asked to see the MSHA Training Form 5023 for Mr. Mellott and Mr. Rhodes. Mr. Summers reviewed the forms and found that Mr. Mellott and Mr. Rhodes had not been trained, and he stated that Mr. Haeuber informed him that he had them scheduled for training but was sick and had not retrained them (Tr. 183). Mr. Summers stated further that Mr. Haeuber confirmed to him

that Mrs. Tate had found that Mr. Mellott and Mr. Rhodes had not received the annual refresher training, and that Mr. Haeuber said nothing to him about any informal training for these two individuals (Tr. 184).

Mr. Summers confirmed that after Mr. Haeuber informed him that Mr. Mellott and Mr. Rhodes had not received any annual refresher training and indicated that there were no records of any such training, he informed Mr. Haeuber that he was going to issue a section 104(g)(1) order for the two individuals and a section 104(d)(1) citation (Tr. 184). Mr. Summers explained his reasons for issuing the unwarrantable failure citation, with special "significant and substantial" findings (Tr. 185-187).

Mr. Summers confirmed that after issuing the section 104(d)(1) citation for the violation concerning Mr. Mellott, he issued a section 104(d)(2) order for the violation concerning Mr. Rhodes, and that he did so because it "fell into the criteria" and "the operator knew the condition and didn't correct it" (Tr. 196). Mr. Summers stated that he based his unwarrantable failure order on the fact that Mr. Rhodes had not been trained or retrained since 1985, and that he was scheduled for training on December 21, but that Mr. Haeuber was sick and was unable to give the training (Tr. 197). He explained his "significant and substantial" finding with respect to Mr. Rhodes (Tr. 197-199).

Mr. Summers believed that the respondent's failure to train Mr. Mellott and Mr. Rhodes constituted more than simple negligence for the following reason (Tr. 200):

> A. Those two individuals for the past two (sic) had received no formal training. Dennis was aware of this situation, and like I say, made a statement that he had them scheduled but that he was sick. Then Ms. Tate came and checked the records and Dennis told her that he hadn't gave any annual refresher training. On the day that I showed up there was still no record to indicate this. And when I asked Dennis he said, no, I haven't given them the annual refresher training for the reasons I just stated.

Mr. Summers confirmed that his review of the respondent's training records reflected that all other employees classified as miners had received their training except for Mr. Mellott and Mr. Rhodes (Tr. 200-201). He did not believe that the informal discussions between Mr. Haeuber and Mr. Mellott and

Mr. Rhodes during the years 1986 and 1987 constituted a formal training program because it did not comply with the MSHA approved training plan because "they've got to be in 30 minute segments and the individual that this training is given to has to be told that this is a part of your annual refresher training" (Tr. 201). Mr. Summers also believed that the informal discussions did not comply with the cited training standard, and that "if it was some type of formal instruction on a one-on-one basis, I don't see why it wouldn't work just as good" (Tr. 202).

On cross-examination, Mr. Summers confirmed that he had previously inspected the mine 10 to 12 times since it opened in 1984, and he considered the mine conditions to be "average." The number of citations that he has issued during his inspection are "below average," and compared to other mines of comparable size, the mine is "a well run mine" (Tr. 204). He also confirmed the mine has experienced no serious accidents or injuries since his last inspection, and while it has an "average" accident record, it has had some reportable accidents in 1985 and 1986, but he could not state how many (Tr. 204-206).

Mr. Summers stated that he issued a section 104(d)(1) citation on June 13, 1988, for the lack of guardrails on a working platform, and that Mr. Mellott admitted to the violation (Tr. 209). However, he never personally observed Mr. Mellott or Mr. Rhodes working in any unsafe manner, and to his knowledge they have never been injured on the job (Tr. 210). Mr. Summers believed that the lack of training could result in Mr. Mellott or Mr. Rhodes possibly getting themselves in a situation where they would not recognize a hazard (Tr. 212).

Mr. Summers stated that he was instructed by his supervisor to go to the mine and issue the section 104(d) and 104(g) citations and orders "if it met the criteria." He confirmed that the instructions were given before he went to the mine, but that he agreed with the citations and orders. He also confirmed that his supervisor was aware of the fact that Mrs. Tate had been to the mine previously and found that the two individuals had not been trained, and that this was the basis for his supervisor's instructions to go to the mine and issue the citations and orders (Tr. 212-214).

Mr. Summers confirmed that he wrote up the citations and orders at the mine after he had spoken with Mr. Haeuber who confirmed that Mr. Mellott and Mr. Rhodes had received no training and that there were no records of this training (Tr. 215, 217). Mr. Summers reiterated that Mr. Haeuber admitted that he

had not given the two individuals their annual refresher training, and said nothing about any informal training discussions (Tr. 224). Mr. Summers confirmed that he did not review the training plan with Mr. Haeuber (Tr. 225).

Mr. Summers stated that the training plan does not contain any prohibitions concerning the number of people to be trained, but does require that such training be given at the mine office (Tr. 227). He confirmed that the effect of the "G" orders was to require the immediate removal of the cited individuals from the mine until they have received the training prescribed by section 115 of the Act (Tr. 231).

Mr. Summers conceded that he could have issued section 104(a) citations rather than unwarrantable failure violations, but that he did not do so because he knew that Mrs. Tate had been at the mine the week before and he expected Mr. Haeuber to insure that the two individuals were trained (Tr. 247-249). He further explained as follows (Tr. 251):

> Q. So, what constitutes this significant and substantial and the aggravated conduct on the operator from the one week that Ms. Tate was there to the following week to when you issued these G's and the D's.
>
> A. The operator had full knowledge of what was going on at the particular time, and didn't take any corrective action to abate or correct this situation. He knew the training of those two individuals had not been -- had not received their annual refresher training, and he did not make any effort to train those individuals up to the first --

Mr. Summers confirmed that Mrs. Tate did not issue any citations because she is not an inspector (Tr. 257). He also reconfirmed his view that the failure by Mr. Mellott and Mr. Rhodes to receive training for 2 years constitutes significant and substantial violations, and the fact that they have had no accidents during this time period makes no difference since the failure to receive the training constitutes a hazard for those individuals (Tr. 259).

Mr. Summers confirmed that the training standards contain exceptions for mine supervisors who are State certified in those states approved by MSHA, but that this exception does not apply to Louisiana because it has no such certification authority (Tr. 266). He also confirmed that Mr. Haeuber conducted

the requisite training to abate the violations and filled out the required forms (Tr. 267).

Mr. Summers confirmed that Mr. Haeuber produced an MSHA training Form 5023 for Mr. Mellott and Mr. Rhodes at the time he inspected the records, but that the last entry only reflected training up to 1985. The forms for all other employees were current and reflected current training. When asked why the forms for Mr. Mellott and Mr. Rhodes were not up to date, Mr. Summers responded as follows (Tr. 269):

> THE WITNESS: I think it was an oversight up until the end of the year was rolling around and time caught them. They were going to get it -- like Dennis had testified in December the 21st, Dennis was sick. This is the problem of waiting until the last minute to get the job done.

Findings and Conclusions

Fact of Violation

The respondent is charged with two alleged violations of mandatory training standard 30 C.F.R. 48.28(a), which states that "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section."

Subsection (b) provides that the annual refresher training shall include the following ten subjects:

1. Mandatory health and safety standards.

2. Transportation controls and communication systems.

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

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

5. First aid.

6. Electrical hazards.

7. Prevention of accidents.

8. Health.

9. Explosives.

10. Self-rescue and respiratory devices.

11. Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

Subsection (d) states that "Where annual refresher training is conducted periodically, such sessions shall not be less than 30 minutes of actual instruction time and the miners shall be notified that the session is part of annual refresher training."

Section 48.23 requires that each mine operator have an MSHA approved training plan containing programs for annual refresher training, and the detailed requirements for such plans are found in this regulation. In the instant case, the respondent's approved training plan for annual refresher training is exhibit R-2, submitted by Mr. Haeuber in his capacity as the mine safety and training coordinator to Mrs. Tate by cover letter dated February 20, 1985. Except for the subject of "explosives," the plan provides for subject matter training for each of the remaining nine subjects listed in section 48.28(b)(1) through (10). Pursuant to the approved plan, Mr. Haeuber is listed as the approved training instructor, training is to be given in February in the mine office, and the duration of each training session is shown as "no longer than 8 hrs. 15 min." The course materials to be used for training are set forth in the plan, and the teaching methods are shown as "lecture and discussion." The subjects of first aid, electrical hazards, and self-rescue and respiratory devices include a "demonstration" requirements, in addition to lectures and discussions. Under the plan, maximum number of trainees at any training session is 20, and a "question and answer" evaluation is shown for each of the subjects covered during the training sessions.

I take note of the fact that in the answers filed by the respondent in this case by Mr. Haeuber and Mr. Richard F. Grady, Jr., respondent's general manager, they stated that "Management of the Dolet Hills Mining Venture does not deny that two training violations did exist at the time of the January 19, 1988, inspection." However, they took the position that the violations were "administrative in nature" and contended that each of the cited individuals had received the required training, but that the training had not been documented. They further stated that although the respondent

admits that violations occurred, they occurred only from "an administrative, bookkeeping perspective," and the thrust of their defense is the contention that the violations were not unwarrantable failure or significant and substantial violations.

During the course of the hearing, petitioner's counsel took the position that the respondent is bound by its pleadings and the admission in its answer that the violations occurred as charged. After careful review and consideration of the answer, while it is true that the respondent did not deny the violations, it seems clear to me that the respondent's admissions are qualified and less than unequivocal. The respondent contended that the two cited miners did in fact receive the requisite training, but that it failed to document the training through an "administrative or bookkeeping" oversight. In any event, my findings and conclusions with respect to the merits of the alleged violations are based on the credible and probative evidence presented at the hearing, rather than the respondent's answers (Tr. 49-51).

The respondent's assertion that the two cited individuals received the required training is based on the argument that MSHA's training regulations, and the approved training plan for the mine, do not require that the training be administered in a formal classroom setting or in accordance with any formalized or structured course curriculum (Tr. 44-49). The respondent maintains that under its plan, Mr. Haeuber, as the approved training instructor, has total flexibility as to the manner in which formal or informal training is conducted as long as no more than the maximum number of employees are in attendance, the class is held in the specified location and is taught by a certified instructor, and the training plan is followed. In support of its position, the respondent contends that the discussions which took place between Mr. Haeuber and Mr. Mellott and Mr. Rhodes during their daily contacts at the mine throughout 1986 and 1987, included discussions of each of the safety and health subjects listed in the mine training plan, and in fact constituted the annual refresher training required by section 48.28(a) and the approved training plan (Tr. 54). The respondent further relies on the belief by Mr. Mellott and Mr. Rhodes that these "on the job" discussions proved to be more effective than any formalized classroom instruction, and that the respondent's accident and injury record attests to this fact.

The petitioner takes the position that the respondent is required to adhere to the requirements of its approved training plan for annual refresher training and must insure that each

miner receives the formalized classroom instruction for all topics listed in the plan. Although the petitioner's counsel agreed that MSHA's training regulations do not specifically provide for "formal" or "informal" training instruction, he stated that the intent of the annual refresher training requirement is that the respondent follow its approved plan. Inspector Summers' view is that the respondent must follow its approved training plan, and he characterized the plan as a "formal" training plan that required structured course training in a class room environment, including the demonstrations, course materials, and "question and answer" sessions detailed in the plan. He did not believe that the informal discussions in question met the requirements of the plan or MSHA's regulations (Tr. 218-223).

Mr. Haeuber conceded that Mr. Mellott and Mr. Rhodes received no formal annual refresher training for the years 1986 and 1987 through the formal administration of any of the safety courses shown on the respondent's approved training plan, and he confirmed that he advised Inspector Summers that these individuals had not received any annual refresher training at the time of his inspection. Mr. Haeuber further confirmed that all other employees received formal annual refresher training classes, but that he could not train Mr. Mellott and Mr. Rhodes as scheduled because he was ill. Mr. Haeuber took the position that both Mr. Mellott and Mr. Rhodes were trained informally by means of daily discussions in which each of the safety topics listed in the mine training plan were discussed, and that this informal training was in lieu of formal classroom instruction and met the requirements of MSHA's regulations and the plan. Although Mr. Haeuber testified as to the time spent on each of the subjects discussed, he could not document the precise time, and he kept no records. Further, he conceded that during his discussions with Mr. Mellott or Mr. Rhodes, he never informed them that these discussions were a part of any annual refresher training courses, and he admitted that at the time the citations were issued, he did not inform Inspector Summers about his informal safety discussions.

Mr. Mellott confirmed that he received his annual formal refresher training for the years 1984 and 1985, and that this training consisted of 8 hours, or one full day of training, in each of the 2 years. He further confirmed that for the years 1986 and 1987, he received no formal refresher classroom training similar to that he received in the prior 2 years, and that he and Mr. Haeuber had daily discussions for approximately 30 minutes to an hour each day either in their offices or while walking around the mine site looking into various "problems."

In explaining his discussions with Mr. Haeuber, Mr. Mellott alluded to the fact that they discussed equipment which was causing problems, such as dust and dirt in welders, shop ventilation, brake problems with haulage equipment, radios, fire extinguishers in need of repair, trash clean-up, emergency exit signs over doors, occasional employee injuries, extension cords in need of repair, electrical problems, and accident prevention (Tr. 121-129). However, Mr. Mellott conceded that he never received any practical demonstrations concerning first aid, or any course materials or other documents concerning any of the subjects listed in the training plan, and that Mr. Haeuber never informed him that any of their discussions were a part of any annual refresher training.

Mr. Rhodes also confirmed that he received formal annual refresher training in 1985 and 1988, but not in 1986 or 1987. Although he believed he received a CPR course in 1986, including training with a CPR "dummy," he received no classroom training materials, and in 1987 received no first aid classroom demonstrations, but did receive information on first aid during his weekly safety meetings. He also confirmed that during the years 1986 and 1987 he received no course materials for any of the safety topics listed on the training plan other than MSHA fatal-grams.

Mr. Rhodes confirmed that he spoke with Mr. Haeuber on a daily basis for an hour or 45 minutes, and that 15 minutes of the conversation was related to safety. He kept no records of these conversations, or the actual time spent in discussing safety, and confirmed that at no time during these conversations during the years 1986 or 1987, did Mr. Haeuber ever indicate to him that their discussions fulfilled the requirements of the annual refresher training courses.

Mr. Rhodes confirmed that he and Mr. Haeuber covered all of the topics listed on the training plan during their safety discussions, and as examples he cited the fact that transportation controls and communications systems were "brought up every day," that employees were continually reminded about escapeways, emergency evacuations, fire warnings and fire fighting, and that ground control, working near high walls, and water hazards was discussed on a daily basis. He also alluded to the fact that when electrical problems occur, "you go over safety precautions," and that accident prevention is discussed daily through a safety awareness program, and signs and slogans are posted to remind employees about accident prevention (Tr. 159-161). Mr. Rhodes also confirmed that he regularly consulted with Mr. Haeuber on all of these matters, including

preparation for weekly safety meetings covering the topics listed on the training plan (Tr. 162).

After careful consideration of the respondent's arguments, they are rejected. I conclude and find that the respondent is bound by its own MSHA approved training plan, and must follow it to the letter. I find nothing in the plan that allows the respondent to use daily informal conversations between an approved training instructor and miners required to receive annual refresher training in lieu of the formalized and structured training program found in the plan. Although I do not dispute the fact that Mr. Haeuber, Mr. Mellott, and Mr. Rhodes may have discussed various and sundry "safety matters" during the course of their daily routines, such conversations obviously taken place every day in a mine and I reject any notion that they may be used in lieu of the approved plan.

The record here reflects that Mr. Mellott and Mr. Rhodes received annual refresher training in 1984 and 1985, and that this training was administered in a class room environment which was completed in the course of 8 hour days. Exhibit R-8, a computerized print-out reflecting training administered to other miners at the mine during intermittent periods from 1985 to 1988, reflects training received by miners in concentrated hourly sessions held on the specific dates shown on the training records. Further, the record also establishes that except for Mr. Mellott and Mr. Rhodes, the respondent had trained all other miners in accordance with MSHA's requirements and had records which it produced for MSHA's scrutiny. Thus, it would appear to me that with the exception of Mr. Mellott and Mr. Rhodes, the respondent's normal training procedures and practices included formalized and structured training sessions administered on specific days set aside for these purposes. I find nothing in the record to even suggest that the respondent has ever advanced any argument that daily conversations among miners and a training instructor or safety director were deemed by the respondent to be adequate to satisfy MSHA's training requirements.

Mr. Haeuber conceded that he did not administer any formalized or structured training to Mr. Mellott or Mr. Rhodes during 1986 and 1987, and they candidly admitted that they received no such formalized training. The evidence clearly establishes that the purported training received by these individuals did not include the use of any of the course materials detailed in the plan, did not include any evaluation sessions or practical demonstrations, and I find nothing to suggest that Mr. Haeuber utilized the lecture training method required by the plan in the course of his discussions with Mr. Mellott and Mr. Rhodes.

The evidence also establishes that Mr. Haeuber never informed Mr. Rhodes and Mr. Mellott that their conversations were part of any refresher training sessions, and both of these individuals confirmed that they were never informed that they were receiving their annual refresher training during any of these conversations. Subsection (d) of section 48.28 requires that miners receiving training during any periodic sessions be notified that such sessions are part of their annual refresher training. Section 48.29 requires that all training be recorded and documented on MSHA form 500-23, and that the miner be given a copy of a training certificate. None of this was done in this case.

During the course of the hearing, respondent's counsel suggested that Mr. Mellott, in his capacity as the respondent's maintenance manager, was an "administrative type" who spent 95 percent of his time in his office, and was therefore not regularly exposed to mine hazards. Under these circumstances, counsel argued that Mr. Mellott is excluded from the requirements for annual refresher training (Tr. 55-59). Counsel also argued that even assuming that Mr. Mellott were required to receive training, he would only be required to have hazard recognition training (Tr. 60-61). In support of his arguments, counsel produced a copy of a portion of an undated MSHA Training Guideline, containing the following "Question and Answer" (exhibit R-1):

> Question
>
> For training purposes, are mine superintendents (not certified by the state), president, general manager, etc., considered miners?
>
> Answer
>
> Anyone working on mine property is considered a miner for training purposes. The amount of training a miner receives depends on his exposure to the mining hazards. If the President of the company came only to the office, there is probably no exposure, and he would not be required to take any training. If he goes into a mine occasionally he is probably exposed to the mining hazard in a limited way and is required to receive hazard training. If he works along side with other miners, he is subject to full training.

The definition of a "miner" required to receive annual refresher training is stated in relevant part as follows in section 48.22:

> [A]ny person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards . . . .

Supervisory personnel subject to MSHA approved state certification requirements are excluded from the definition of a miner required to receive annual refresher training (48.22(a)(1)(ii)). Subsection 48.22(a)(2), also excludes such supervisory personnel from the hazard training requirements of section 48.31, as well as miners covered under section 48.22(a)(1).

The record establishes that Mr. Mellott is responsible for the maintenance activities at the mine. Although his testimony reflects that he spends most of his time in the office, he confirmed that he regularly and routinely spends at least an hour each day in the actual work areas where maintenance is being performed. He also confirmed that he tours the mine when problems arise, is responsible for the direct supervision of at least three maintenance foremen, including involvement with the erection and dismantling of the drag line. Under these circumstances, I conclude and find that Mr. Mellott's duties are directly connected with the mine extraction and production process, and that his daily visits to the mine maintenance work areas constitutes a regular exposure to mine hazards. Further, the fact that he received annual refresher training in years prior to the time the violations here were issued while serving in his capacity as the maintenance manager raises a strong inference that the respondent has never taken the position that he was excluded from the annual refresher training requirements. Under all of these circumstances, I conclude and find that Mr. Mellott is not excluded from these requirements, and the respondent's argument to the contrary is rejected.

Insofar as Mr. Rhodes is concerned, the evidence reflects that as a first line operations supervisor he is directly involved in the supervision of the work of 15 to 20 miners engaged in the operation of coal haulers and bulldozers, and is in daily contact with these miners and their work while driving around the mine in his pick-up truck. The fact that he may spend only 1 hour a day out of his truck walking around on the ground is irrelevant. He is directly engaged in the mine extraction and production process, and he is regularly exposed

to mine hazards. Accordingly, I conclude and find that he is not excluded from the annual refresher training requirements.

With respect to the training exclusion for supervisory personnel subject to MSHA State certification requirements, Mr. Mellott and Mr. Rhodes do not qualify for this exception because the State of Louisiana where they are employed does not have MSHA approval for any such state certifications.

In view of the foregoing findings and conclusions, I conclude and find that the preponderance of the evidence adduced in this case establishes that Mr. Mellott and Mr. Rhodes were subject to the annual refresher training requirements of the cited section 48.28(a), and that they failed to receive such training for the years 1986 and 1987. Accordingly, the violations issued by Inspector Summers ARE AFFIRMED.

The Section 104(g)(1) Order Issue

The record in this case reflects that after determining that Mr. Mellott and Mr. Rhodes had not received the requisite annual refresher training, Inspector Summers issued two section 104(g)(1) orders requiring their withdrawal from the mine until they were trained. These orders were not contested by the respondent, and they are not the subject of the instant civil penalty proceeding.

The respondent argues that since Mr. Mellott and Mr. Rhodes were withdrawn from the mine pursuant to section 104(g)(1), and since the withdrawal sanction provided for by this section specifically addresses a training violation, any sanctions imposed by MSHA for this violation is limited to the issuance of the order. Respondent suggests that once the withdrawal orders were issued, compliance was achieved by the withdrawal of Mr. Mellott and Mr. Rhodes until they were trained, and that the concurrent issuance of the section 104(d)(1) citation and order charging it with the violations of the identical training standard which formed the basis for the section 104(g)(1) withdrawal orders was unauthorized and illegal.

Respondent argues that section 104(g)(1) does not authorize the issuance of any additional citations or orders for training violations, and that by issuing the section 104(d)(1) citation and order, it has been "double barrelled" and subjected to "double jeopardy." The respondent points out that with the exception of an imminent danger order issued pursuant to section 107(a) of the Act, MSHA does not "piggyback" citations or orders, and that in this case, the section 104(d)(1) citation and order were not issued in conjunction with the

section 104(g)(1) order, but were issued for the identical condition.

During the course of the hearing, respondent's counsel asserted that since a miner who is withdrawn for lack of training is deemed to be an immediate hazard to himself and to his fellow miners, this is somewhat akin to an imminent danger situation, and there is a suggestion that since untrained miners pose an imminent danger, a section 104(d)(1) citation or order cannot be issued because the finding of no imminent danger is a prerequisite to the issuance of such citations and orders (Tr. 231-235). I find no merit to this argument, and it is rejected. Respondent's counsel also alluded to the fact that MSHA's policy of issuing citations and orders in conjunction with section 104(g)(1) orders "has been done away with" and that its "new policy" does not address this issue (Tr. 235). However, counsel has presented no further arguments or evidence with respect to this asserted policy, and none has been forthcoming in his posthearing brief.

The respondent's arguments are rejected. I find nothing illegal or procedurally defective in the action taken by the inspector in this case. The record reflects that the issuance of the section 104(d)(1) citation and order complied with the procedural requirements of the Act with respect to the issuance of such citations and orders. MSHA's training standards are duly promulgated mandatory standards under the Act, and violations of these standards are subject to the citation sanctions provided for in sections 104(a) and (d)(1) and (d)(2) of the Act, as well as the civil penalty assessment sanctions provided for in section 110(a). As noted above, the petitioner is seeking civil penalty assessments for the violations noted in the section 104(d)(1) order and citation, and not the section 104(g)(1) order.

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 295-96:

> 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 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Respondent's argument that its negligence is found in the lack of adequate record keeping, which it claims was inadvertent, is not well taken. The respondent is not charged with a violation of the record keeping requirements of MSHA's training regulations. It is charged with the failure to give refresher training to two individuals for two successive years, and I have rejected its assertion that the "discussion and conversation" training satisfied the requirements of the cited training standard. Therefore, the issue presented is whether or not the respondent's failure to train Mr. Mellott and Mr. Rhodes constituted aggravated conduct exceeding ordinary negligence.

Inspector Summers testified that he based his unwarrantable failure findings on the fact that Mr. Mellott and Mr. Rhodes had received no annual refresher training for a period of 2 years and 5 months. Mr. Summers considered Mr. Haeuber's admissions that he knew that these two individuals had not received any formal training during this time period, and the fact that after Mrs. Tate visited the mine and informed Mr. Haeuber that these individuals had not been trained, Mr. Haeuber took no immediate action to insure that they received the training (Tr. 194-197). Mr. Summers also considered the fact that other employees, including Mr. Mellott and Mr. Rhodes, had previously received formal training, and this obviously led him to further conclude that Mr. Haeuber was well aware of the requirements for such formal training.

Mr. Haeuber confirmed that Mrs. Tate had visited the mine on January 15, 1988, and informed him that Mr. Mellott and Mr. Rhodes had not received their annual refresher training. The only explanation he could offer for not training them previous to this time was his assertion that they were scheduled for such training on December 21, 1987, but that he could not train them because he was ill. Mr. Haeuber acknowledged that he had trained other employees through refresher training classes, and that he was aware of the fact that such training was required. When asked why he had not trained Mr. Mellott and Mr. Rhodes after he was advised by Mrs. Tate that they had not received such training, Mr. Haeuber responded "I can't answer that. I don't know" (Tr. 36). He also acknowledged that he said nothing to Mrs. Tate about taking care of the training for Mr. Mellott and Mr. Rhodes (Tr. 37).

The record reflects that Mr. Haeuber was formerly employed by MSHA as a mine inspector and special investigator from 1978 to 1982, and that he was previously employed as a safety director for another mining company prior to his employment with the respondent. His current duties include the planning and development of all training at the mine, including the

conduct of such training, and the responsibility of insuring compliance with MSHA's training requirements. In view of Mr. Haeuber's background, I doubt that he really believed that his informal discussions and conversations with Mr. Mellott and Mr. Rhodes satisfied MSHA's training requirements. If this were truly the case, anyone in his position would have offered some explanation to Mrs. Tate and to the inspector.

I conclude and find that Mr. Haeuber was well aware of the requirements for formalized training of all employees, and that he was aware of the fact that Mr. Mellott and Mr. Rhodes had not received such training for over 2 years. Although one may excuse and mitigate Mr. Haeuber's failure to train Mr. Mellott and Mr. Rhodes when he was ill, I find nothing to mitigate or excuse his failure to take immediate measures to properly train them after he was notified by Mrs. Tate that such training was lacking. Under the circumstances, I conclude and find that his failure to do so constitutes aggravated conduct supporting the unwarrantable failure findings made by the inspector. Accordingly, those findings ARE AFFIRMED.

Significant and Substantial Violations

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, 3-4 (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, 1574-75 (July 1984).

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., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

During the course of the hearing, respondent's counsel took the position that a significant and substantial violation finding is a prerequisite to the issuance of a section 104(d)(1) citation and order (Tr. 253). In Youghiogheny & Ohio Coal Company, 10 FMSHRC 603 (May 1988), the Commission, citing UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert denied sub nom. Bituminous Coal Operator's Assn., Inc. v. Kleppe, 429 U.S. 1405, held that while a significant and substantial finding is a prerequisite for the issuance of a section 104(d)(1) citation, there is no such requirement for the issuance of a section 104(d)(1) order.

The respondent takes the position that the violations were not significant and substantial because the informal training received by Mr. Mellott and Mr. Rhodes was better and more effective than that found in the formal training plan, that the individuals in question had never suffered any injuries, and that the mine accident record attests to the effectiveness of the informal training received by them. The respondent further argues that Mrs. Tate obviously did not believe that it was reasonably likely that an accident would occur since she failed

to contact her supervisor who would have issued a verbal order over the telephone, and MSHA let a week go by before dispatching Inspector Summers to the mine. The respondent also points to the admission by Mr. Summers that the "possibility" of serious injuries flowing from a lack of training does not equate to "reasonably likely" (Tr. 211-212).

With regard to Mrs. Tate, the fact that she took no enforcement action is irrelevant. Mrs. Tate was not authorized to take any direct enforcement action through the issuance of violations, and she obviously reported the lack of training to MSHA's district office. Inspector Summers confirmed that this was the case (Tr. 214). He also confirmed that the fact that Mr. Mellott and Mr. Rhodes have never personally been involved in any accidents would make no difference as to whether or not the violations were significant and substantial (Tr. 259).

Inspector Summer's confirmed that the mine has had MSHA reportable accidents in 1985 and 1986 (Tr. 206). He believed that the failure to train Mr. Mellott and Mr. Rhodes presented the possibility that they would overlook or not recognize hazardous situations (Tr. 211-212). Mr. Summers confirmed that during his prior mine inspections, he seldom observed Mr. Mellott in his office, and he usually observed him in the maintenance shop area (Tr. 207). He also testified that he has observed Mr. Mellott in situations where individuals around him were working in an unsafe manner, and that he discussed this with Mr. Mellott and has issued citations and orders in these instances (Tr. 207). Mr. Summers confirmed that he issued a section 104(d)(1) citation involving the maintenance of a piece of equipment that Mr. Mellott was responsible for, and that this occurred on June 13, 1988, when he cited a violation for a work platform which did not have handrails. Mr. Summers further confirmed that after discussing this with Mr. Mellott, he admitted that miners were working on the platform without hand rails (Tr. 208-209).

Inspector Summers also testified with respect to an accident which occurred at the mine when a miner lost part of his finger while using a paint gun sometime in 1986. Mr. Summers explained that the miner sustained nerve damage to his finger by the paint which was injected into his finger, and he believed that annual refresher training would have presented an opportunity to discuss this incident and to alert miners about the hazards of using such equipment (Tr. 259-262).

Inspector Summers believed that Mr. Mellott would be exposed to various hazards in the pit, and along the drag line and belt line. He confirmed that during prior inspections, he

has observed Mr. Mellott near the equipment and work areas, and he believed that he would be exposed to the same hazards as other miners in those mining areas. Mr. Summers emphasized the fact that the failure by Mr. Mellott to receive refresher training since 1985 constituted a hazard to himself, and that his failure to receive such training would result in the likelihood that he would overlook or not be aware of hazardous conditions or situations without taking corrective action (Tr. 186-187).

With regard to Mr. Rhodes, Inspector Summers believed that his lack of training since 1985 was in itself a hazard, and that training was essential to "refresh his memory on the hazards that he's possibly overlooking out in the mine itself" (Tr. 197). Mr. Summers also alluded to the fact that in his experience as a mine inspector, case histories have established that annual refresher training, or the lack thereof, is directly related to the cause and prevention of accidents (Tr. 198-199). Mr. Summers pointed out that Mr. Rhodes works in the pits and highwall areas around heavy equipment, and is in contact with coal haulers and other heavy equipment during his work throughout the mine. Should an accident occur, Mr. Rhodes would be exposed to an injury which "could very well be fatal" (Tr. 199).

Unlike other mandatory safety and health standards covering specific mine conditions and potential hazards which are for the most part readily recognizable, and which are intended to promote mine safety by requiring compliance with a specific standard, MSHA's overall training requirements are intended to promote safety by providing a means for training miners through training classes covering many safety and health subjects. The requirements for training new miners are intended to train miners who have no prior mining experience. Newly employed experienced miners are trained so that they may be familiar with a new work environment which may be different from their last place of employment. Task training is provided to train miners who are required to operate equipment or perform job tasks for which they have had no prior experience. Annual refresher training is intended to provide a means for experienced miners to keep informed and to be always aware of the work hazards incident to their work.

I take note of the fact that in enacting the section 104(g)(1) withdrawal provision for miners who have not received the requisite training, Congress declared that such miners are hazards to themselves as well as others. In this case, the inspector's credible testimony establishes that Mr. Mellott and Mr. Rhodes are exposed to potential mine hazards on a daily basis, and I conclude and find that their failure to receive

the requisite annual refresher training is in itself a hazard. As the overall manager for mine maintenance, and aside from his own safety, Mr. Mellott is under a duty and obligation to be alert for mine hazards affecting those who work in his department. Likewise, Mr. Rhodes, as a first line operations supervisor, has a duty and obligation for the safety of his work crews. Their failure to receive the requisite training is a poor example for the rank and file miners, and does little to promote mine safety. Given the fact that mine conditions change from day to day, I find merit in the inspector's belief that the lack of such training may lead to complancency, or the overlooking of otherwise routine situations that may be potentially hazardous, not only to the two individuals in question, but to others. On the facts of this case, the hazard is exacerbated by the fact that Mr. Mellott and Mr. Rhodes failed to receive the requisite refresher training for a period in excess of 2 years. Under all of these circumstances, I agree with the inspector's findings that the failure by Mr. Mellott and Mr. Rhodes to receive their annual refresher training over an extended period of time presented a reasonable and potential likelihood of an accident or injury of a reasonable serious nature. Accordingly, the inspector's significant and substantial findings ARE AFFIRMED.

On the basis of the foregoing findings and conclusions, section 104(d)(1) Citation No. 2929494, and section 104(d)(1) Order No. 2929496, both issued on January 19, 1988, for violations of the annual refresher training requirements of 30 C.F.R. 48.28(a), ARE AFFIRMED.

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

The parties have stipulated that the respondent is a small-to-medium size surface mine operator, and that the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

History of Prior Violations

The parties have stipulated that the respondent's history of prior violations for the 24-month period prior to the issuance of the contested violations in this case consists of seven citations, none of which are for violations of the training requirements found in Part 48, Title 30, Code of Federal Regulations. Under the circumstances, I conclude and find that the respondent has an otherwise good compliance

record and that additional increases in the proposed civil penalty assessments are not warranted.

Good Faith Compliance

The record supports a finding and conclusion that Mr. Mellott and Mr. Rhodes were immediately trained after they were withdrawn from the mine, and that the violations were timely abated by the respondent in good faith.

Gravity

In light of my significant and substantial findings, I conclude and find that the failure by Mr. Mellott and Mr. Rhodes to receive their annual refresher training constitutes serious violations of the cited training standard.

Negligence

The inspector concluded that the violations resulted from a high degree of negligence on the part of the respondent and were the result of an unwarrantable failure by the respondent to comply with the training requirements of the cited standard. I agree with these findings and they are affirmed.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following proposed civil penalty assessments filed by the petitioner for the violations in question are reasonable and appropriate:

Citation/Order No.	Date	30 C.F.R. Section	Assessment
2929494	01/19/88	48.28(a)	$ 500
2929496	01/19/88	48.28(a)	$ 500

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