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SOL (MSHA) V. CYPRUS EMERALD RESOURCES
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>Docket No. PENN 89-194<br>A.C. No. 36-05466-03687 |
| v. | Emerald No. 1 Mine |
| CYPRUS EMERALD RESOURCES<br>CORPORATION,<br>RESPONDENT | |
| CYPRUS EMERALD RESOURCES<br>CORPORATION,<br>CONTESTANT | CONTEST PROCEEDINGS<br><br>Docket No. PENN 89-45-R<br>Citation No. 3087308; 8/30/88 |
| v. | Docket No. PENN 88-318-R |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>RESPONDENT | Order No. 3087446; 8/31/88<br><br>Docket No. PENN 88-325-R<br>Order No. 3087309; 8/30/88 |
| | Emerald No. 1 Mine<br>Mine ID 36-05466 |

DECISIONS

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner/Respondent; R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the contestant (Cyprus) against MSHA pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the legality of the captioned citation and orders. Docket No. PENN 89-194, concerns proposed

civil penalty assessments filed by MSHA against Cyprus seeking civil penalty assessments for five alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Cyprus filed timely answers denying the alleged violations, and three of the alleged violations were subsequently settled by the parties (section 104(a) Citation Nos. 3087305 and 3087444, and section 104(d)(2) Order No. 3087600).

Docket No. PENN 88-318-R, concerns a Notice of Contest challenging the legality of a section 104(d)(2) Order No. 3087446, with special "S&S" findings, issued on August 31, 1988, and citing an alleged violation of mandatory safety standard 30 C.F.R. 77.205(b).

Docket No. PENN 89-45, concerns a Notice of Contest challenging the legality of a section 104(a) Citation No. 3087308, with special "S&S" findings, issued on August 30, 1988, and citing an alleged violation of 30 C.F.R. 77.209. Docket No. PENN 88-325-R concerns a challenge to a section 107(a) Imminent Danger Order No. 3087309, issued on August 30, 1988, in conjunction with the section 104(a) Citation No. 3087308.

Hearings were held in Washington, Pennsylvania, and the parties filed posthearing briefs. I have considered their respective arguments in the course of my adjudication of these matters.

## Issues

The issues presented in these proceedings include the following: (1) whether Cyprus violated the cited mandatory safety standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violation cited in the section 104(d)(2) order resulted from an unwarrantable failure by Cyprus to comply with the cited standard; and (4) whether the condition or practice cited in the contested imminent danger order was in fact an imminent danger. Assuming the violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of the adjudication of these cases.

## 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), 105(d), and 107(a) of the Act.

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

Stipulations

1. The subject mine is owned and operated by Cyprus, and it is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction to hear and decide these cases.

3. The contested citation and orders were properly served on Cyprus by a duly authorized representative of the Secretary of Labor (MSHA).

4. The parties agreed to the authenticity of all documents received in evidence in these proceedings, but not to the truth of the matters asserted therein.

5. The history of prior violations for the subject mine is reflected in an MSHA computer print-out received in evidence in a prior civil penalty proceeding (Docket No. PENN 88-287).

6. The annual coal production for Cyprus during the relevant time period in question in these proceedings is 1.8 million tons, and Cyprus may be considered a large operator.

7. The proposed civil penalty assessments for the contested violations will not adversely affect the ability of Cyprus to continue in business.

8. All of the contested alleged violations were timely abated by Cyprus in good faith.

9. There were no intervening clean inspections between the issuance of the contested section 104(d)(2) order and a previously issued section 104(d)(2) order.

Settlements - Docket No. PENN 85-194

Section 104(a) "S&S" Citation No. 3087305, was issued on August 30, 1988, in conjunction with a section 107(a) imminent danger order, and the inspector cited a violation of 30 C.F.R. 77.400, because a cyclone fence being used to prevent persons from entering an area under the counterweight for the No. 2 stacker belt conveyor was inadequate. MSHA proposed a civil penalty assessment of $800 for this alleged violation.

The parties filed a proposal to settle this alleged violation, and in support of the proposed settlement, MSHA stated that

the inspector was concerned that persons would walk over the coal stock pile and go underneath the counterweight and be struck by the counterweight. However, MSHA asserted that normal movement of the counterweight would not bring it in contact with persons below it, the belt and pulley structure were only 2 years old and in good condition, the counterweight was at least 30 feet above the level of the coal on the day the order was issued, and there was a sign posted that indicated that the area was restricted. Under the circumstances, MSHA vacated the imminent danger order, and the parties agreed to settle the alleged violation noted in the citation for a reduced civil penalty assessment of $400.

Section 104(d)(2) "S&S" Order No. 3087600, was issued on August 30, 1988, and the inspector cited a violation of 30 C.F.R. 77.1607(bb), after finding an inoperable start up alarm for th No. 1 belt between the No. 1 stacker and the coal transfer building. MSHA proposed a civil penalty assessment of $850 for this alleged violation.

The parties filed a proposed settlement for this alleged violation, and in support of the settlement, MSHA stated that additional evidence established that the condition cited was caused by an "isolated output card" that had gone bad, and there is no evidence as to how long the bad output card had existed before the inspector found it. MSHA concluded that there was insufficient evidence of an unwarrantable failure by the respondent to comply with the cited standard, and the order was modified to a section 104(a) "S&S" citation. The parties agreed to settle this alleged violation for a reduced civil penalty assessment of $450.

Section 104(a) "S&S" Citation No. 3087444, was issued on August 31, 1988, in conjunction with a section 107(a) imminent danger order, and the inspector cited a violation of 30 C.F.R. 77.404(a), after finding that an electrical junction box supplying power to a boiler heater located on the third floor of the preparation plant was not maintained in a safe operating condition in that openings in the box had allowed water and moisture to enter the box. MSHA proposed a civil penalty assessment of $650 for this violation.

The parties filed a proposed settlement for this alleged violation, and in support of the settlement MSHA stated that there was insufficient evidence that an accident would occur if normal mining operations had continued. MSHA stated further that although a person could be shocked if they came in contact with the box, it was mounted on a wall 10 to 12 feet off the ground, and the cables were protected by an adequate ground fault system. Under the circumstances, MSHA vacated the imminent danger order, and the parties agreed to settle the alleged violation noted in the citation for a reduced civil penalty assessment of $325.

In further support of the proposed settlement disposition of the aforementioned citations, MSHA submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. After careful and consideration of the arguments presented in support of the proposed settlement disposition of these violations, I conclude and find that the settlements are reasonable and in the public interest. Accordingly, pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the settlements ARE APPROVED.

Docket No. PENN 88-318-R

This case concerns a contested section 104(d)(2) "S&S" Order No. 3087446, issued by MSHA Inspector Charles Pogue on August 31, 1988. The inspector cited an alleged violation of mandatory safety standard 30 C.F.R. 77.205(b), and the condition or practice cited in the order states as follows: "Loose coal, two wash down hoses, 21 feet and 17 feet in length, 6 supply structure springs, and coal dust 24 inches in depth was permitted to accumulate in the walkways of the refuse belt and 300 ton bin building."

The cited standard, section 77.205(b), provides as follows: "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

The particular mine areas that are the subject of the order are the preparation plant building, a 300 ton refuse bin building, which is a separate building, and an inclined refuse belt conveyor which connected the two buildings (Exhibit G-6). Although there were actually two belts, one of them had been out of service for several years, and the cited belt area in question was used as a refuse belt. The belt was an enclosed structure, with an adjacent walkway of approximately 24 inches wide, and it was approximately 232 feet long, and was equipped with a handrail and lighting.

In support of the cited conditions, MSHA presented the testimony of Inspector Pogue, and the UMWA walkaround representative Keith Higginbotham, who accompanied the inspector during his inspection on August 31, 1988. Mr. Pogue and Mr. Higginbotham confirmed that they personally observed the conditions which prompted Mr. Pogue to issue the order.

In defense of the alleged violation, Cyprus presented the testimony of preparation plant foreman Ronald D. Kerr, and safety representative Jack B. Monas. Mr. Kerr confirmed that he did not accompany the inspector during his inspection, and that he did not observe the cited conditions (Tr. 126). Mr. Monas confirmed that he was involved in accompanying MSHA inspectors during the course of an MSHA inspection of the preparation plant which began

on August 26, 1988, and that he was at the plant when Inspector Pogue conducted his inspection on August 31, 1988. He further confirmed that he observed the accumulations of refuse materials at the lower part of the belt walkway "at the door as the walkway exited" the building, but he could not recall seeing any materials from the door back to the tail roller. He confirmed that he observed these materials after the order was issued, before any clean up operations were started, and observed a closure tag on the door. He believed that the conditions he observed were the same conditions observed by the inspector. Mr. Monas further confirmed that he could not see the cited hoses from the location of the accumulated materials, and that he did not walk up the belt or into the other areas cited by the inspector (Tr. 173-175).

Inspector Pogue testified that he observed loose coal refuse materials in the walkway in and around the walkway around the tail roller of the refuse belt. He stated that the materials were the size of golf balls and baseballs, and that he and Mr. Higginbotham had to walk through and over the accumulations as they walked up the inclined beltline. As he proceeded up the belt walkway, Mr. Pogue observed a wash down hose approximately one and one half inches in diameter, and 17 feet long, and it was connected to a water tap. Upon proceeding further up the walkway, Mr. Pogue observed another wash down hose approximately 21 feet long, and it too was connected to a water tap. He confirmed that both hoses were "scattered back and forth across the walkway" (Tr. 10-14). He also confirmed that they are usually hung on a hanger (Tr. 45).

Mr. Higginbotham confirmed that he also observed the accumulated coal refuse materials and hoses. He described the accumulations materials as "lump sized coal, probably the size of your fist down to a golf ball size," and stated that they were "scattered throughout the walkway going up the ramp," and that they extended for a distance of approximately 15 feet up the inclined walkway (Tr. 87). He stated that the hoses were "laid clear across the walkway in a very unorderly fashion," and "were snaked through," and that he had to walk on or over the hoses to pass (Tr. 88).

Mr. Pogue further testified that after observing the hoses, he proceeded inside the 300 ton refuse bin building to an "elevated walkway or platform" which was adjacent to the refuse belt roller. He gained access to this platform area by climbing up four to five steps similar to "step ladder rungs," and he described the platform as an area 10 feet by 10 feet, with an enclosed railing around it. He stated that there was a safety chain in place across the opening at the top of the platform, and that he had to unclip it to walk on the platform (Tr. 18, 21).

Mr. Pogue stated that he observed six spring mechanisms on the platform which were not stacked or set aside, and he described the springs as the approximate size of a basketball or volleyball (Tr. 19). Mr. Higginbotham confirmed that he also observed the springs, and he indicated that there was "grease and stuff all over the place" and that the springs were obstructing the walkway (Tr. 88).

Mr. Pogue stated that after leaving the platform area, he proceeded to the floor below, and entered through a door on the side of the building to a walkway next to the counterweight where he found an accumulation of fine refuse material approximately 24 inches deep and 24 inches in width in the walkway. He stated that "you had to kind of step over it in order to get on the back side of the top floor of this bin area" (Tr. 16). Mr. Higginbotham confirmed that he also observed the accumulations (Tr. 89).

Cyprus' counsel did not dispute the existence of the cited materials observed by the inspector and Mr. Higginbotham at the four locations in question (Tr. 118). Mr. Pogue confirmed that he cited a violation of section 77.205(b) because it requires that walkways be kept free of stumbling or slipping hazards where men are required to work or travel (Tr. 20). He believed that the accumulations of refuse materials adjacent to the belt tail assembly and the hoses in the walkway constituted a stumbling and slipping hazards because one had to walk through the accumulations and step over the hoses while walking along the walkway (Tr. 21). He further believed that the springs on the platform could cause a tripping hazard to someone on the elevated platform, and that if the safety chain were not put back in place someone could possibly fall through the platform opening (Tr. 21).

Although plant foreman Kerr's unrebutted credible testimony reflects that the top belt conveyor had been taken out of service in 1984, he confirmed that the bottom refuse belt is used continuously when the plant is in operation (Tr. 128). Mr. Kerr further confirmed that the hoses in question are used to wash down debris which collects under the belt, and that the belt is routinely washed down when the plant and belt are in operation (Tr. 139). Mr. Higginbotham, who testified that he had walked the belt on prior occasions, testified that the belt walkway is used by cleanup, maintenance, and inspection personnel, and Mr. Pogue agreed that this was the case (Tr. 16, 18, 93). Mr. Kerr conceded that cleaning and maintenance personnel used the belt walkway, and that he and other employees used it as an accessway to the bin building.

With regard to the cited walkway area in the bin building, Mr. Pogue and Mr. Higginbotham believed that the walkway was used by maintenance and inspection personnel, and Mr. Kerr confirmed

that the walkway provided an access way for maintenance personnel servicing the refuse belt, or for cleanup personnel washing down the area (Tr. 19, 94, 140-141).

## Findings and Conclusions

### Fact of Violation

I conclude and find that three of the cited areas, namely, the refuse belt walkway where the inspector found the accumulated coal refuse materials, the walkway areas where the inspector found the two hoses strewn across the walkway, and the walkway in the refuse bin building where the inspector found accumulated coal refuse, were all travelway areas which provided access to areas where persons were required to travel and work, and were therefore areas which fall within the scope of section 77.205(b). I further conclude and find that MSHA has established by a preponderance of the evidence that the cited materials which were found in these travelways constituted extraneous materials which presented stumbling or slipping hazards, and that the failure by Cyprus to keep the cited areas clear of these materials constitutes a violation of section 77.205(b). Accordingly, insofar as these cited locations are concerned, the inspector's finding that a violation occurred IS AFFIRMED.

With regard to the cited platform area in the refuse bin building, Cyprus argues that since the platform had not been in use since 1984, when the second belt was taken out of service, it does not fall within the purview of section 77.205(b), since no one is required to work on, or travel on, the platform (Tr. 124). With regard to the use of the platform, Mr. Higginbotham believed that it was probably used on a regular basis for maintenance and greasing of the belt, and for the servicing of a compressor located in the building (Tr. 94). Mr. Pogue believed that the platform would be used for routine examinations of equipment, and to provide a work platform for maintenance personnel (Tr. 19). However, Mr. Pogue could not recall the last time anyone may have been on the platform, and he confirmed that he made no inquiries of management as to where the springs came from, even though he knew that the plant foreman was in charge of the area and should have known where they came from, how long they were on the platform, and that a maintenance record may have given him such information (Tr. 65). When asked to explain why he made no further inquiries, Mr. Pogue stated that he relied on the presence of fine dust on the springs which he believed was "something that can give you that indication that it's been left to lay there" (Tr. 66). Mr. Pogue confirmed that the platform was equipped with a top railing, a middle railing, and a toe board, as well as a safety chain blocking off the platform access ladder (Tr. 55).

Mr. Kerr, whose testimony I find more credible than that of Mr. Pogue and Mr. Higginbotham, testified that the platform was once used for the head drive of the filter cake refuse belt which had been taken out of service in 1984, and that the springs had been used for a mechanical belt wiper. Mr. Kerr knew of no reason why anyone would have a need to be on the platform, and he confirmed that there is no compressor in the building, as claimed by Mr. Higginbotham (Tr. 53, 159). Although there was a hydraulic unit in the building, Mr. Kerr stated that it was located at the lower level of the bin building, and that it was located in a room at the bin bottom (Tr. 160). He speculated that someone may have stored the springs on the platform, and he had no personal knowledge where the springs came from. He reiterated that the platform was not used to service or maintain the belt which was in use (Tr. 164).

After careful review and consideration of all of the evidence, I conclude and find that MSHA has failed to establish that the cited platform area constituted a walkway or platform area where persons were required to work and travel. To the contrary, Cyprus' evidence, which I find credible and probative, establishes that the cited area, which had previously been used as a means of access to equipment associated with one of the belts, has not been used since the belt was taken out of service in 1984. Accordingly, I find that the platform in question does not fall within the purview of section 77.205(b), and that insofar as that particular location is concerned, a violation has not been established. That portion of the order which refers to this platform IS VACATED.

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." Energy 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. * * *

The issue here is whether or not Cyprus' failure to address the cited conditions constituted aggravated conduct exceeding ordinary negligence. Inspector Pogue testified that he based his "high negligence" finding on his belief that Cyprus should have taken some corrective action to prevent at least one of the cited conditions from existing because the condition was readily observable from the preparation plant (Tr. 25). When asked to explain the basis for his unwarrantable failure finding, Mr. Pogue stated as follows at (Tr. 25):

> A. Well, previously, to make an inspection of this area, I had inspected other areas of the surface facility and I had found that there was four other locations throughout the surface facility that had obstructions in walkways that could result in slipping or stumbling hazards. When I got to this location in

> the preparation plant and I could observe these accumulations adjacent to the belt and going up the belt conveyor system, it was just a condition that I felt that the operator should have been aware of, and that it's a highly traveled area and seemed to be that it was reasonable for a person that would be traveling through the area to observe the accumulations, at least in the preparation plant and then just be able to look up the conveyor and see the wash down hoses laying in the conveyor walkway.

In support of Inspector Pogue's unwarrantable failure finding, MSHA argues that the cited accumulations at the bottom of the belt were readily observable from inside the preparation plant, and that the cited hoses were visually obvious from the bottom of the belt in the preparation plant. MSHA further argues that the cited conditions had existed for some length of time, that some of the conditions had existed for a protracted period of time, and that given the amount of accumulated materials, and the number of locations involved where significant stumbling hazards existed for some length of time with no apparent attempts to clean them up, the violation was serious and extensive. MSHA also relies on the fact that the inspector had previously issued other violations of section 77.205(b) several days prior to the issuance of the contested order, and it concludes that these prior citations indicates indifference to general cleanup activities in travelways, or a serious lack of reasonable care, and consequently, aggravated conduct.

One critical factor in support of Inspector Pogue's unwarrantable failure finding, is his belief that some of the cited conditions were readily visible from the third floor of the preparation plant. The fact is that the only cited condition which may have conceivably been observable from Mr. Pogue's vantage point in the preparation plant itself was the accumulated refuse material at the lower end, or tail piece, of the conveyor belt (Tr. 38). Mr. Pogue conceded that the walkway location in the bin building where he observed the accumulated refuse were not observable from the preparation plant (Tr. 26). With regard to the two hoses which were scattered across the belt walkway, Mr. Pogue conceded that it was difficult to see the top of the conveyor belt walkway enclosure (Tr. 26). I find no credible evidence to support any conclusion that the second hose located at the upper inclined end of the belt walkway was observable from the preparation plant. With regard to the first hose located at the lower end of the walkway, Mr. Pogue believed that it would have been observable from the "general area of the tail roller" looking up the belt from the preparation plant floor (Tr. 53, 62).

Mr. Pogue's further conclusion that it was reasonable to expect anyone to readily observe the refuse accumulations at the

base of the conveyor belt, and the hoses located on the inclined portion of the belt walkway, was based on his opinion that these areas were "highly traveled." I find no credible evidence to support any such conclusion. Mr. Pogue made no apparent effort to speak to anyone concerning any work which may have taken place prior to the inspection, and he observed no one on the belt walkway, or in any of the other cited locations. Further, no testimony was forthcoming from the inspector with respect to any plant activities which may have been taking place during the inspection, and no testimony was forthcoming from the inspector to establish the presence of anyone on the third floor of the plant who may have observed the accumulations which Mr. Pogue said he saw from this location. Mr. Higginbotham, who was with Mr. Pogue, testified that while they were on the third floor of the plant, they stopped to rest, and while leaning on the handrail which was around the floor, they looked down and saw what Mr. Higginbotham characterized as "obvious spillage." Mr. Higginbotham conceded that had they not stopped to rest at that particular location, they would have had no reason to look over the rail, and that anyone simply walking by the area would not have seen the spillage "unless you actually looked down at it" (Tr. 90).

At page 12 of her posthearing brief, MSHA's counsel asserts that the plant area where the cited accumulations were found "was an active area." In support of this conclusion, counsel cites transcript pages 11, 25, 38, 87-90. I have carefully reviewed these transcript references, and I find no testimony to support counsel's conclusions that the preparation plant was "active." The fact that the inspector was in the plant conducting an inspection does not necessarily establish that any active plant processing work was taking place at the time of the inspection. I assume counsel made this argument to support an inference that since the plant was active, someone would reasonably be expected to notice the accumulations. I reject any such notion. One reasonable method for an inspector to determine whether anyone in the plant was in a position to observe the accumulations is to seek out witnesses and ask questions. Relying on a casual observation made during a rest period while leaning over a hand rail is hardly credible evidence that management indulged in aggravated conduct because it should have observe the condition and failed to do so.

The evidence in this case establishes that the plant and conveyor belt in question were shutdown at the time of the inspection, and that they had been shutdown for at least the week of August 26, 1988. Plant foreman Kerr and walkaround representative Higginbotham confirmed that this was the case, and Mr. Kerr testified that no one from his shift was assigned to the belt during the period of shutdown, and he confirmed that the only work that he was aware of was clean up work and work to abate several citations (Tr. 158-159, 165).

Walkaround representative Higginbotham confirmed that he saw no one on the belt walkway at the time of the inspection, and that on the three to five prior occasions he has used the walkway, he could recall seeing no one on the walkway other than an inspector or management personnel (Tr. 107). He was of the opinion that the hoses were left on the walkway since the last time it was washed down, but he had no knowledge as to when they may have been last used for this purpose (Tr. 107).

Mr. Pogue could not recall whether he had previously inspected the cited belt conveyor, and he confirmed that he saw no signs that anyone had been on the belt walkway recently, and that the belt was not running when he inspected it. Although he believed that he had checked to determine when the last monthly electrical inspections were performed, he did not do so "specifically for this area," and he could not recall when the last electrical inspection was conducted in the cited area (Tr. 47). Mr. Pogue confirmed that he observed no one using the belt walkway during his inspection and he saw no footprints in the accumulated refuse or dust.

Plant foreman Kerr's unrebutted and credible testimony reflects that when the plant is in operation, the conveyor belt is not totally unattended, and that someone is required to be there at some time over a 24-hour period (Tr. 152). Mr. Kerr conceded that cleanup and maintenance personnel are on the walkway, and that other employees, including himself, used the belt walkway occasionally as an access way to the plant or refuse bin building, and that he might use it once every 2 months. He denied that the walkway is heavily travelled, and indicated that it is only slightly used (Tr. 144, 147). Absent any evidence that Mr. Pogue had ever visited or inspected the belt in the past, and the fact that on the few occasions that Mr. Higginbotham was there and saw no one on the belt other than an inspector or management person, I give credence to Mr. Kerr's testimony and find little support for the inspector's belief that since the belt was heavily travelled, the conditions were readily observable and obvious, and therefore support a finding of aggravated conduct.

Mr. Pogue confirmed that no management representative was with him when he conducted his inspection and observed the conditions. He confirmed that when he issued the order, he found no "written record" or other evidence to establish that management had knowledge of the cited conditions prior to the issuance of the order (Tr. 61). Although I recognize the fact that such "hard evidence" may not be available, on the facts of this case, the inspector apparently made no effort to review any maintenance records, mine inspection reports, or to seek out any available plant personnel to determine when anyone may have been present

using the hoses, cleaning up around the belt tail piece, etc. etc.

After careful consideration of all of the testimony on this issue, I find no credible evidentiary support for MSHA's assertion that the cited accumulations at the belt tail piece, and the hoses on the walkway, were located in "heavily traveled" areas, and were "readily observable" by management. I further find and conclude that with respect to these factors, the evidence presented does not establish aggravated conduct by Cyprus. I take particular note of the following: When asked "what you're saying about the unwarrantable failure is that management should have known that it was there," Mr. Pogue responded "exactly" (Tr. 60). In my view, negligence based on "should have known" is something less than high negligence, and does not amount to inexcusable or aggravated conduct.

Mr. Pogue identified copies of four previous citations which he issued on August 26 and 29, 1988, during his inspection of the mine, and in each instance he cited violations of section 77.205(b) (exhibits G-2 through G-5; Tr. 29-35). He confirmed that he issued the citations for tripping hazards, but that the areas cited where at different locations and in different buildings from the areas which he cited in the contested order (Tr. 36).

Mr. Pogue confirmed that the prior citations on the slope belt occurred "a good distance away" from the preparation plant, and although he believed that Cyprus was responsible for them, he stated that Cyprus did not cause them, and that "there was contractors in there on some of them" performing work at the plant (Tr. 52).

Mr. Pogue was asked about his prior deposition in January, 1989, and his response to a question concerning the basis for his unwarrantable failure finding in this case. He confirmed that he stated that "I felt that because if the conditions on the walkway in relationship to the plant, that a foreman should have seen the condition being inside the plant" (Tr. 56). When asked whether he took into consideration the prior citations at the time he issued the order in this case, Mr. Pogue responded "to a degree, yes." However, he conceded that he did not mention these prior citations at the time he gave his deposition, and could not recall when he mentioned these citations to MSHA's counsel, but did not believe he mentioned them in preparation for the instant case (Tr. 57). Mr. Pogue confirmed that when he gave his deposition, he stated that the basis for the order was the fact that the cited condition could be observed by someone from management, "plus the amount of area that was covered" (Tr. 57).

When asked what role the prior citations played in his unwarrantable failure finding at the time he issued the order, Mr. Pogue responded as follows at (Tr. 67):

> THE WITNESS: Probably because of the fact that the management, there should be some effort on management to make a follow-up examination of the work area after a job is completed or in progress that gives workmen and even company officials a safe travel way in and around the surface area of the plant, and they know these areas that are under construction or maintenance is being performed in them.

Mr. Pogue stated that at the time he issued the order, he recognized that the operator had a problem with the general clean up of work sites during and after routine maintenance (Tr. 72). He conceded that some of these problems were caused by contractors, and although he confirmed that he has cited contractors in the past, he did not cite them for the prior violations in question because the contractor was not at the mine and had left the job, and the obligation for the violations was on the operator (Tr. 72).

Plant foreman Kerr confirmed that two of the prior citations were the result of a painting contractor's removal of certain materials from a building which was being sandblasted and painted, and that one of the citations concerned some material which was removed from an area where a counterweight was located so that access could be gained to the counterweight while maintenance was being performed (Tr. 142-143).

I take note of the fact that three of the tripping hazard violations previously issued by Inspector Pogue on August 26, 1988, were all section 104(a) citations. Three days later, on August 29, 1988, he issued another tripping hazard violation, and it too was a section 104(a) citation. In each instance, the inspector made a finding of "moderate" negligence. In the instant case, MSHA asserts that the fact that four other locations were cited in such a short period of time indicates a lack of indifference by Cyprus to general cleanup activities in travelways, and constitutes aggravated conduct.

In my view, if the basis for the inspector's unwarrantable finding with respect to the contested order was the fact that he had previously issued four citations for violations of the same standard shortly before the order was issued, then logic would dictate that he would follow the same procedure in connection with the issuance of the prior citations. The three section 104(a) citations were issued by Mr. Pogue on August 26, 1989, for violations of section 77.205(b). Three days later, on August 29, 1989, he found another violation of section 77.205(b), but instead of issuing an unwarrantable failure citation, he issued

another section 104(a) citation, with a finding of moderate negligence. I find this to be rather contradictory and inconsistent, and it raises doubts in my mind that the prior citations weighed heavily on the inspector when he made his unwarrantable failure finding in this case. In any event, I cannot conclude that the prior citations which were issued for different conditions, and at different locations far removed from the scene of the conditions which prevailed at the time of the inspection on August 31, 1988, may serve to support a finding of aggravated conduct. In my view, in order to support an unwarrantable failure order, which is a severe sanction, an inspector must make an informed judgment, on a case-by-case basis, with respect to the prevailing conditions which he believes justifies such an order. On the facts of the instant case, I reject MSHA's attempts to justify the order on the basis of prior violations issued for the same standard.

With regard to the time factor, Mr. Pogue was of the opinion that the cited conditions had existed for at least 5-work days prior to his inspection, and he based this on his observation of fine refuse dust deposited on the accumulated refuse materials along the belt walkway. The existence of this fine dust led him to conclude that the conveyor had been running and "this material had been left deposited in the walkway and on the platform for a period of time" (Tr. 28).

Mr. Higginbotham was of the opinion that the coal refuse accumulations at the belt tail had been there for "a lengthy period of time," "days," "roughly a week," because the area was dusty (Tr. 99). He conceded that refuse dust does accumulate on the belt, but indicated that the belt is required to be cleaned when it gets dirty and that accumulations are not permitted. Since the hoses were also covered with dust, he believed they were left in the walkway for "at least" or "probably a week to two weeks" (Tr. 101). With regard to the accumulations in the bin building, he stated that the belt is not used every day or regularly, but "probably weekly," but he did not know for certain (Tr. 103).

MSHA's assertion that the cited accumulations presented extensive and significant obstructions must be taken in context. The accumulations of refuse materials at the tail piece of the refuse belt extended a distance of approximately 10 to 15 feet along a belt line which was approximately 232 feet long, and the accumulations on the walkway in the bin building were described by Inspector Pogue as 24 inches deep and 24 inches wide. Mr. Higginbotham stated that they extended for a distance of 2-1/2 feet, 6 inches longer than Mr. Pogue's estimate. Since Mr. Pogue indicated that "you had to kind of step over it," I can only conclude that the pile was as described by the inspector, and that the accumulations did not extend along the entire length of the walkway.

With regard to the hoses, Mr. Higginbotham stated that he stepped on top of the hoses to pass through the area, and although he believed that a fall or slip were unavoidable, neither he or Mr. Pogue expressed any difficulty in passing through the area where the hoses were located. With regard to the accumulations at the belt tail, Mr. Pogue stated that he had to walk through the materials and over the larger coal and slate and Mr. Higginbotham indicated that the larger pieces were "scattered throughout the walkway."

After careful consideration of all of the evidence in this case, I find no credible evidence to establish that the cited accumulated materials in question had existed for any inordinate period of time. Inspector Pogue had never previously visited the belt area in question, and his reliance on the existence of dust on the accumulations in support of his conclusion that the materials had been present for at least a week is speculative at best. Had he made further inquiry, rather than relying on a rather cursory inspection of the belt areas, he may have found more probative evidence to support a conclusion of aggravated conduct. As for Mr. Higginbotham's testimony, I find it vague and lacking in probative weight. He believed the accumulations on the belt walkways were there "probably" or "roughly" for a "lengthy" period of "days" or "weeks" simply because they were dusty. As for the accumulations in the bin building, he had no idea as to how often the belt was used which would have caused these accumulations, and I find his testimony to be speculative and unsupported by any facts.

On the basis of the foregoing findings and conclusions, I conclude and find that the evidence advanced by MSHA in support of the inspector's unwarrantable failure finding does not establish that the failure by Cyprus to act was inexcusable or constituted aggravated conduct within the guidelines established by the Commission's line of cases with regard to this issue. Accordingly, the inspector's finding in this regard IS VACATED, and the contested order is modified to a section 104(a) citation.

Significant and Substantial Violation

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).

Inspector Pogue believed that the accumulated coal refuse on the walkways, and the hoses scattered across the two walkway locations in question, constituted a significant and substantial violation because anyone walking through those areas would be exposed to a tripping or slipping hazard. In the event of such an incident, he believed that the individual would suffer bumps, bruises, a broken arm, or twisted back (Tr. 22). He further believed that it was reasonably likely to expect that mine personnel, such as a belt examiner or maintenance person, who may be walking along the walkways would slip or fall over the accumulated materials, and that the potential for an injury would increase if the individual were carrying equipment or tools (Tr. 23). He confirmed that at least one person, the examiner or maintenance person, would be exposed to the hazard (Tr. 38).

Mr. Higginbotham believed that the cited accumulated materials presented a tripping or falling hazard, particularly with respect to the belt walkway because it was inclined. He confirmed that he stepped on top of a portion of the hoses, and while he did not fall, he nonetheless believed that a fall was "highly likely" and "almost unavoidable." In the event of a slip

or fall, he believed that someone could "definitely break an arm," and his principal concern for anyone walking through the hoses and accumulated coal refuse materials on the inclined belt was "your feet going out from under you" (Tr. 91-92).

Cyprus argues that the accumulated materials did not present a significant and substantial hazard because the walkways were not highly travelled, and that any hazard exposure would be limited by the fact that the belt was not in operation and there was little or no likelihood of injury. Cyprus argues further that there is no testimony that the materials presented stumbling or slipping hazards, and that the hoses were easily compressed when stepped on, and that Mr. Monas testified that they presented no stumbling hazard unless they were in a pile. Cyprus argues further that there was adequate lighting and visibility along the refuse belt walkway, and that lacking any credible evidence as to how long the materials had existed, a significant and substantial finding is inappropriate.

Cyprus' assertion that there is no testimony of any stumbling or slipping hazards is not well taken. Inspector Pogue and Mr. Higginbotham personally observed the accumulated materials and gave credible testimony as to the existence of these hazards. The fact that they did not fall or slip while walking through and over the materials is irrelevant. They obviously took care while walking through the area, but the same may not be the case for anyone else casually walking along the cited travelways in question.

While it is true that the refuse belt and plant were down at the time of the inspection, plant foreman Kerr admitted that during the course of normal operations, the belt is never left unattended, and that someone is always present during any 24-hour period. Further, the evidence establishes that cleanup or maintenance personnel have occasion to walk the cited areas, and the fact that there was another access route to the bin building is immaterial. Mr. Kerr confirmed that the cited refuse belt walkway was used as an accessway to and from the plant and bin building, and that he used this route on occasion. The opinion by Mr. Monas that the hoses would present a tripping hazard only if they were piled up, rather than scattered, is rejected. In my view, if the hoses were piled neatly at one location on the walkway, they may pose less of a hazard since someone could simply walk around the pile. However, since they were scattered and "criss-crossed" on the walkway, I believe the hazard of slipping or falling over them was increased.

The fact that there was no immediate hazard because the belt was not in operation at the time of the inspection, and the fact that Mr. Pogue and Mr. Higginbotham did not slip or fall while

walking through and stepping over the cited material is irrelevant to any determination of a significant and substantial violation. See: Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1369, 1376 (May 1984); R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986); Mathies Coal Company, 6 FMSHRC 1 (January 1984). In Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986), the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

After careful consideration of all of the testimony and evidence adduced in this case, I agree with the inspector's significant and substantial finding. I conclude and find that the cited accumulated materials at all three of the cited locations in question posed a discrete stumbling or slipping hazard, and that the hazards contributed to by these conditions would likely result in an injury of a reasonably serious nature. Accordingly, the inspector's significant and substantial finding IS AFFIRMED.

After consideration of the six statutory criteria found in section 110(i) of the Act, I further conclude and find that the violation was serious, that it resulted from ordinary negligence, and that the conditions were subsequently abated in good faith by Cyprus.

Docket Nos. PENN 89-45-R and PENN 88-325-R

These proceedings concern a contested section 104(a) citation and section 107(a) imminent danger order issued on August 30, 1988, by MSHA Inspector Joseph Koscho during an inspection of Cyprus' surface coal preparation plant. The facts establish that after the coal is cleaned and processed through the preparation plant, it is transported by overhead belts for storage at the No. 1 and No. 2 stackers, which are tall cylindrical buildings surrounded by coal stockpiles. The transported coal is dropped into the top of the stackers, and when it reaches

a certain level it is deposited onto a stockpile through openings located on all sides of the stacker levels. Coal is removed from the stockpiles by a series of feeders, designated A through F, located under the stockpiles. In order to remove the coal by these feeders, coal must be above the feeders or within an area close enough to the feeders to permit gravity to bring it to the feeders. The stockpiled coal which is fed through the feeders drops onto a belt system in an underground tunnel below the stackers and feeders, and it is transported away to be loaded onto trains.

Cyprus utilizes bulldozers to push the stockpiled coal toward the feeders and to compact and arrange the stockpile. During the course of his inspection, Mr. Koscho, in the company of UMWA safety representative Greg Shuba, and preparation plant foreman Ronald Kerr, were walking on an overhead belt catwalk between the No. 1 and No. 2 stackers. Although there were no bulldozers operating on the stockpile at the time, the inspector looked down and observed bulldozer tracks in the coal pile in close proximity to the points that he believed would be directly over the B and E feeders. The inspector observed what he believed to be a depression in the coal where coal had been feeding into the B feeder, and he estimated that the bulldozer tracks were within 3 to 4 feet of the hole. The inspector also observed bulldozer tracks and blade marks in close proximity to the E feeder, and he concluded that these track and blade marks showed that a bulldozer had reached across with its blade and run backwards to smooth over the coal pile in front of the dozer. He estimated the blade marks of the dozer to be 7 feet on the other side of a depression over the E feeder, and he concluded that the dozer had to have been over top of the feeder to be able to reach this point.

After viewing the aforementioned tracks from the catwalk, Mr. Koscho and Mr. Shuba came off the catwalk and walked onto the coal pile to verify their observations. Mr. Kerr did not accompany them onto the pile, and left the area on another matter. After viewing the tracks from where he believed was a safe distance, Mr. Koscho concluded that the tracks were no more than 3 days old, and he was concerned that bulldozers were operating in too close proximity to the feeders during the stockpiling and reclaiming operations, and that the bulldozer operators were at risk of becoming entrapped in the holes or voids in the coal pile. Based on his observations of the track and blade marks in the coal pile, Mr. Koscho issued an "S&S" citation for an alleged violation of mandatory safety standard 20 C.F.R. 77.209, and in conjunction with that citation, he also issued an imminent danger order citing Cyprus for operating bulldozers over feeders, or too close to feeders. The section 104(a) Citation No. 3087308, issued by Mr. Koscho states as follows:

> From evidence of the visual observation in the area of the feeder, in the area of the No. 2 stacker, showed equipment is coming in too close of a proximity of the feeder. The evidence at the B feeder at the No. 2 stacker showed dozer tracks went over the feeder or too close to the feeder to be a safe distance back from the angle of repose at the feeder. At the No. 2 stacker E feeder a dozer reached across the reclaim area above the feeder for a distance of 7 feet and then set the dozer blade down to drag back the blade, making a smooth surface. In doing this he had to reach over the angle of repose at the E feeder.

The section 107(a) imminent danger Order No. 3087309, issued by Mr. Koscho states as follows:

> This is an order to prevent persons from exposing themselves to the type of dangers evident by visual observation in the area of the No. 2 stacker feeders. Equipment is being operated too close or over the feeders. Tracks over the B feeder shows that either the equipment runs over the feeder or comes too close to the feeder in that the tracks go into the angle of repose. On the E feeder of the No. 2 stacker the evidence shows that the push blade of a dozer was 7 feet to the opposite side of the feeder, set down on coal and was dragged back for a smooth surface. The equipment had to be on top of the feeder to be able to reach this point. The operator of equipment shall be instructed by management and a representative of MSHA to watch the operation before work is to be resumed at the No. 2 stacker. Cit. No. 3087309 was also issued.

MSHA's Testimony and Evidence

MSHA Inspector Joseph Koscho confirmed that he conducted an inspection at the mine on August 30, 1988, and that he issued section 104(a) Citation No. 2087308, and section 107(a) imminent danger Order No. 3087309, in conjunction with the citation (exhibits G-1 and G-2). Union Safety Representative Greg Shuba, and mine management representative Doug Kerr accompanied him during the inspection. Mr. Koscho stated that he walked up one of the belts above the coal stockpile, and looking out from a window which overlooks the west side of the stockpile he observed bulldozer tracks in close proximity to the feeders, particularly feeders No. B and E. He came down from the belt and walked up on the stockpile to look at the tracks which he had observed from the belt. He observed tracks "too close in the vicinity of the B feeder." The tracks were located within 3 to 4 feet from a depression where the coal had been feeding into the feeder, and the tracks were "right along side of it. Too close for safety" (Tr. 17-22).

Mr. Koscho stated that he also observed tracks near the E feeder where there was a depression approximately 3-1/2 to 4 feet in diameter and 2 feet deep where the dozer had reached across with its 7 to 8 foot long blade, and then backed up smoothing out the depression in the pile. He believed that the dozer had reached across the depression, and the dozer tracks were up to the depression. Mr. Koscho confirmed that the feeders were not in operation at the time of his inspection, and that no coal reclaiming work was taking place at the stockpile area (Tr. 23).

Mr. Koscho stated that he issued the order "because there is a very strong likelihood" that someone could fall into the depression and be covered by the coal even though he would be sitting in a dozer, and "that there could be imminent danger" (Tr. 24). He was concerned that someone could suffocate if he fell into a void or hole in the stockpile, and that the fact that he would be in the equipment cab would make no difference because the cab glass around the operator could be pushed in and the operator would be unable to get out of the cab because the coal would block the doors.

Mr. Koscho stated that a void can be created by the feeders feeding coal onto the belt, and that the resulting hole under the surface of the coal pile would not be observable because the surface of the coal would be intact above the area of the hole (Tr. 25).

Mr. Koscho stated that he had previously issued a section 104(a) citation on August 23, 1988, citing a violation of section 77.209. He explained that he investigated an incident where a bulldozer had slid into a void created by a feeder while it was reclaiming coal. The dozer was evidently operating too close to the edge of the feeder and it had to be pulled out, and the dozer operator used a radio which was in the cab to summon help (Tr. 26).

Mr. Koscho stated that there is no way for anyone to determine whether a void is present over the feeders that are feeding coal into the reclaim belt, and that a void may occur at any time. Since the coal on the stockpile is compacted, a crest could form over the feeders, and one would be unaware of any voids created between the feeders and the surface of the coal pile (Tr. 27).

Mr. Koscho estimated the height of the coal stockpile as approximately 60 feet, and he stated that a chain which is normally in place to indicate the height of the coal pile was not in place, and that the coal was half-way up the side of the stacker. He stated that the height of the coal pile would affect the

likelihood of an accident, and the higher the pile of coal present, the wider the hole would be (Tr. 29).

Mr. Koscho confirmed that he had no knowledge as to the number of dozers which may have been previously operating on the pile, and no one was on the pile at the time of the inspection. He also confirmed that he had no knowledge whether any dozers were operating on the pile while the feeders were in operation, but that this made no difference "because a void could exist at any time" and "when these bulldozers go up on this pile, that void could be there without them even knowing about it." He also believed that voids could be present even if the feeders are not operating because "they could have been pulled out previously" (Tr. 29-30).

Mr. Koscho confirmed that he had no knowledge when the tracks he observed were made, or when the dozers last operated on the pile, but he was of the opinion that the tracks were made "within the last two or three days" because they were "more pronounced and acute" (Tr. 34).

Mr. Koscho stated that dozers would be on the pile to level out and spread the coal so that more coal can be stocked on the pile after it feeds out of the stackers. He had no way of knowing whether the dozers were recovering coal through the feeder or just spreading it out (Tr. 35). He believed that the pile around the No. 2 stacker was used every week, but did not know how often during the week it was in operation (Tr. 36).

Mr. Koscho stated that he cited a violation of section 77.209, because "its the only thing we have to cover this." He explained that even though section 77.209, addresses people walking or standing on a reclaim pile, anyone in a piece of equipment "is just as open to that danger as a man standing on it" (Tr. 37). He confirmed that the "reclaiming area" includes the feeders, stockpile, and the area where the coal is being stocked and reclaimed (Tr. 39).

Mr. Koscho stated that the previous violation he issued was a section 104(a) citation rather than an imminent danger order because it was terminated within 5 minutes and he determined that management had instructed the dozer operator. However, when he observed the dozer tracks on August 30, he believed that the dozer operators were not following instructions and that mine management was responsible for seeing to it that the job was being done "to save their lives" (Tr. 46).

Mr. Koscho stated that he considered Citation No. 3087308 to be "S&S" because "its a serious proposition" (Tr. 47). He believed there was a danger of suffocation if the equipment operator fell into a void, and "it would be a lost life." He

believed this "could happen at any time, whenever the equipment would be put back on the stockpile" (Tr. 48).

On cross-examination, Mr. Koscho explained the modifications which were made with respect to Citation No. 3087308 (Tr. 48-52). He confirmed that the imminent danger order was terminated after a meeting was held with all of the equipment operators who were present and they were instructed to stay a "safe distance" from the feeders (Tr. 51, 54).

Mr. Koscho stated that while he was on the pile observing the area around the B feeder, he stayed a "safe distance" away from the feeder, and that he stood back further than 20 feet, but could not recall the exact distance. He could not recall how far away from the E feeder he was standing, but that it was "a safe distance." He confirmed that he did not measure the 7 or 8 foot distance over the cited feeder, but was close enough to estimate that distance (Tr. 53).

Mr. Koscho confirmed that when he walked on the stockpile, he did not notify anyone that he was there because a management supervisor was with him. He also confirmed that he did not have a self-rescuer with him, was not attached to a life line, and he could not determine whether any voids were present on the pile. He stated that "I was in an area where I felt there wouldn't be a void," and conceded that he did nothing to check whether any voids were present over the feeders because "there's no way for us to know if there was voids" (Tr. 56).

Mr. Koscho confirmed that the locations of the feeders are marked, and that if anyone was operating in the area and observed no changes in the surface of the coal, he would know there was a problem with a void over the feeder (Tr. 56). He confirmed that he observed small depressions over the B and E feeders and therefore knew where the feeders were located. The tracks he observed were in the vicinity of both feeders, and the tracks at the B feeder were within 2 feet of the void (Tr. 57). He confirmed that the prior citation concerned the dozer which was too close to the C feeder while pushing coal into the A feeder, and it slipped into the C feeder (Tr. 58). He confirmed that the prior citation was based on a condition which he did not observe, and that he based the citation on what someone told him, and a statement by the dozer operator that he had made a mistake which caused the problem (Tr. 60).

Mr. Koscho confirmed that when he issued the contested citation and order in this case he did not know when the feeders were last operated, or whether mine management had observed dozers operating on the cited stockpile (Tr. 60). He stated that he made no effort to determine who had operated on the pile in question (Tr. 62). He also confirmed that no one was in danger when he issued the order, that he cited what he perceived to be a

practice of pushing coal too close to the feeder, and that it was a "practice that seems to exist" (Tr. 62).

Mr. Koscho confirmed that he did not recall the prior citation at the time he gave his deposition on January 26, 1989, in this case "but it may have been in my mind at the time that I issued the order" (Tr. 63). He confirmed that when he gave his deposition he stated that he did not know whether the cited conditions in this case was an "isolated occurrence" because he did not remember his prior citation (Tr. 65). He believed that two occurrences or violations of section 77.209, "does become a practice" (Tr. 66). He explained further as follows at (Tr. 67-68):

> Q. So apparently, as you were testifying earlier, that instruction apparently didn't work, that somebody wasn't paying attention?
>
> A. Well, somebody hadn't paid attention.
>
> Q. You don't know --
>
> A. According to what I saw.
>
> Q. You don't know whether it was somebody in management or somebody in the hourly workers?
>
> A. There's no way for me to know.
>
> Q. I take it you don't know whether it's one particular individual who did it, or two or six. You just don't know?
>
> A. There was nobody working at the time. I wouldn't know.
>
> Q. So you really don't know whether it's some hourly employee who took it upon himself to do this and figured he could get away with it on this one time, or whether it was actually a practice?
>
> A. To answer you, from experience, it seems to me that it's management's responsibility to see that it is done properly, and that's the basis that I was using.
>
> Q. So you were -- regardless of whether or not it was somebody who was violating management's instructions, you said management is responsible so I'll issue the citation and the Imminent Danger Order?
>
> A. Yes.

> Q. You didn't know whether it was somebody in management who was violating the instructions, someone in the hourly work force. You just didn't know that when you issued your order, isn't that correct?
>
> A. I wouldn't know.

Mr. Koscho stated that during a meeting held after the order was issued and terminated, Cyprus' vice-president and general manager Lamar Samples told the assembled employees that "if he caught anyone doing this again he would fire them" (Tr. 71).

Mr. Koscho stated that a void hazard would exist all the time, regardless of whether the feeders were operating. He conceded that when the feeders are shut off the depressions can be filled up with the ongoing movement of the coal out of the pile and into the feeders and that a firm working coal surface would be established. However, he stated "that don't mean it would fill completely up," and that even though one would know that the coal was going down into the feeder, "it could block itself off by pushing coal down in there" (Tr. 72).

When asked whether he issued the order to get management's attention because of the previously cited condition a week earlier, Mr. Koscho replied "I wouldn't say yes, but it sounds good" (Tr. 72). He confirmed that when he issued the order the prior citation "wasn't even in my mind probably. Probably not" (Tr. 74).

Mr. Koscho stated that when he issued the order he did not check any dozers to determine whether they were equipped with self-rescuers or operative radios. Although the dozers are usually equipped with cabs and safety glass, he did not check them at the time he issued the order (Tr. 75).

Mr. Koscho stated that an equipment operator who fell into a void while in a dozer would have time to be rescued while using a self-rescuer, assuming that the cab is not crushed, but that anyone falling into the void while walking or standing on the pile would not have this option (Tr. 75-76).

Mr. Koscho stated that if someone were to be walking in the stockpile area where he walked, or if a dozer were operating there, it would be safe. He agreed that there was a "safe area" on the pile, and if a feeder were operating and the coal above it were to run down in a conical shape, there would be a need to get more coal around the feeder, and that this is normally done by pushing coal to the feeder. He confirmed that this method is not unique to the Emerald Mine and that other mines have similar coal feeder systems (Tr. 78).

Mr. Koscho conceded that the only information he had to support his belief that dozers were operating too close to the feeders is the tracks in the coal (Tr. 79). He confirmed that he had inspected the dozers in the past, and he identified them as D-9 caterpillars equipped with safety-glass cabs with no wiremesh in the glass (Tr. 81). Although he was not aware of other surface mine facilities in his district that use a stacker feeder system, he was aware that this system is used at other mines (Tr. 82).

Greg T. Shuba, mobile equipment operator, and member of the mine safety committee, confirmed that he accompanied Inspector Koscho during his inspection of August 30, 1988. He confirmed that he observed the dozer tracks testified to by the inspector. With regard to the tracks at the B feeder, Mr. Shuba stated that part of the track impressions on the ground was broken away from the coal that had gone into the feeder, and that this indicated to him that someone was either directly over or too close to the feeder. He also agreed with the inspector's testimony concerning the dozer blade marks over the E feeder and he believed that the dozer had been over the feeder and "back-dragged" to smooth over the ground in front of the dozer (Tr. 89-92).

Mr. Shuba estimated the height of the coal stockpile as 70 feet. He confirmed that he has operated a dozer on the stockpile "on and off" since February, 1989. He also confirmed that he operated a dozer on the pile prior to the time of the inspection, but could not state when. He believed it would have been "months" before the inspection (Tr. 93).

Mr. Shuba stated that a dozer would be operating on the stockpile to reclaim coal or to stockpile it. Reclaiming consists of pushing the coal to the feeders to load the train, and this would be done when the feeders are operating. Stockpiling the coal, or pushing it on the pile or spreading out the pile, would be done while the feeders were not operating (Tr. 93-94).

Mr. Shuba stated that he has never crossed over a feeder while operating a dozer on the pile, but other operators have told him that "there were times" when they crossed the feeders, and that this would have been prior to August 30, 1988 (Tr. 94). Mr. Shuba stated that the stockpile reclaiming system is designed poorly, and that an operator can either get over a feeder or "literally destroy the machine" because of the restricted equipment turning area while attempting to push coal with the dozer blade. He stated that some operators may cross over feeders or operate over them because its easier to get behind the coal and push it in a straight line. He identified feeders C and D as the problem areas (Tr. 94-95). He stated that the problem with the cited B and E feeder areas was "the possibility of a void" (Tr. 96). He believed that the "probable" reason for operators to cross over the B and E feeders would be "to get from one side to

the other" (Tr. 96). He believed that the feeder system in question has been in effect for "a couple of years" (Tr. 97).

Mr. Shuba explained the operation of the feeder system, and he was of the opinion that "we are creating our own hazards by expanding the piles the way we are." He stated that there have been "a couple of close calls" where dozer operators have gone by areas where it has given in and that the front part of a dozer would start down in but they were able to get back out before anything materialized (Tr. 99).

Mr. Shuba confirmed that mine management has instructed equipment operators not to operate directly over feeders and that the instructions were also probably given prior to August 30, 1988. Mr. Shuba believed that management had reason to know that people were working over the feeders because the plant superintendent's office is directly below the piles, and the office has two windows where he can see out to the piles, and that "it doesn't take an expert to drive by in a pick-up truck and see which way a dozer is pushing" (Tr. 101).

Mr. Shuba confirmed that he has been instructed by management about the "safety zone" around the top of the feeders where one could safely operate, and he explained that a 65 degree angle of repose for the coal was the "safety zone." He also confirmed that a diagram explaining this safety zone was posted in each machine that operated on the pile, and he identified the diagram as exhibit G-4, (Tr. 103). He stated that for a 60 foot coal pile, the safety zone would be 32 feet away from the center of the feeder, or a radius of 64 four feet (Tr. 104). He confirmed that the stockpile at the number 2 stacker covered six feeders (Tr. 107).

On cross-examination, Mr. Shuba stated that the feeder operator has a radio to communicate with the equipment operators but conditions change momentarily and its difficult to maintain communications (Tr. 109-110). Mr. Shuba did not believe that he was in an unsafe position while on the pile with the inspector, and as long as he is not within the angle of repose he would not be in a hazardous area (Tr. 112).

Mr. Shuba stated that he had discussed the matter concerning the feeders with management as early as November 16, 1987, and that management's instructions that dozer operators were not to operate close to the feeders began at this time (Tr. 113). He confirmed that the angle of repose could change depending on the coal compaction, and that it was a guideline established by MSHA (Tr. 114).

Mr. Shuba confirmed that the biggest problem arises when coal is being stockpiled because the coal is stacked next to the stacker, and one has to get directly over the feeders to get

behind the coal to push it (Tr. 120, 122). He stated that while management has given instructions to equipment operators not to operate close to or over the feeders, it has been unable to tell the operators how to push the coal and stay within the law (Tr. 123).

Dr. Kelvin K. Wu, Chief, Mine Waste and Geo-Technical Division, MSHA, testified as to his background and experience, and he confirmed that he is a registered professional mining engineer, holds a PHD degree from the University of Wisconsin, and is an adjunct professor at the University of Pennsylvania (Tr. 127). Dr. Wu confirmed that he was familiar with the mine surface facility in question, and that in November, 1987, he was requested by MSHA's district office to make site visits and work with company personnel to try to come up with some safe operating procedures. He confirmed that he visited the site and observed the loading process. He identified exhibit G-5, as the field investigation report and recommendation he prepared. He stated that he made one site inspection on November 24, 1987, and believed he made a second visit, but was not sure (Tr. 129).

Dr. Wu explained his recommendations, including the establishment of a 65 degree angle of repose for the coal stockpile. The diagram used as a guide for the equipment operators was prepared by a company engineer, and it was based on his recommendations (Tr. 129-133).

Dr. Wu stated that he was concerned about voids that are not visually detectable from the surface (Tr. 134). He confirmed that his interpretation of the conditions cited in the citation and order describing the equipment tracks as being "too close" to the B feeder indicates to him that they were over and "right on top of the feeders." With regard to the E feeder, he agreed with the testimony that the dozer reached out over the feeder and then backing up to level out the coal (Tr. 137-138).

On cross-examination, Dr. Wu confirmed that the angle of repose was established in consultation with mine management who agreed that it was reasonable. He also confirmed that the coal was not tested because everyone observed the operation during his inspection, and he explained how the angle of repose was established (Tr. 140-142). He confirmed that the 65 degree angle of repose was based on a fatality which had occurred at the Loveridge Mine in 1985 where five individuals were fatally injured while walking on a coal stockpile. Although this accident involved people walking on a stockpile, there is no difference in the hazard simply because it concerns operators who are in a dozer (Tr. 143).

Dr. Wu confirmed that he was familiar with section 77.209, and notwithstanding the fact that it only refers to persons walking or standing on a stockpile, he believed that the intent

of the standard is to address the hazard exposure to a person on the pile, regardless of whether he is on foot or in a piece of equipment (Tr. 144-145). He also confirmed that the feeder system in use at the mine is not unique or unusual. If the feeders are not operating, one may need to fill any depressions over the feeders during the stockpiling process, but there is no guarantee that voids are not present. If there is any blockage while the feeders are closed, voids could develop (Tr. 145-149).

Dr. Wu agreed that it was necessary for a bulldozer to operate on top of a coal stockpile in order to push the coal into the feeders. When there is a 65 degree angle of repose and the coal is flowing freely into the feeder, any coal beyond the angle of repose would not feed into the feeder and the bulldozer must push the coal into the hole (Tr. 150). In this situation, there would be no need for anyone to be on the pile on foot. There is a need for bulldozers on the pile in order to spread or push the coal to the storage area and to maintain the volume of coal (Tr. 152). He confirmed that a standardized angle of repose cannot be applied "across the board" to all surface stacker feeder systems because of the variety of differences in the loading process, materials stockpiles, and the equipment used in the process (Tr. 153-154).

MSHA Supervisory Inspector Robert W. Newhouse, testified to his experience and training, and he confirmed that he is a certified mine foreman, and has an associate's degree in mining from Penn State University (Tr. 157). He confirmed that he is Mr. Koscho's supervisor and that he discussed the citation and order with him when they were issued. Mr. Newhouse also confirmed that in November, 1987, he visited the mine and observed the feeder operation after receiving information which raised questions about the feeder operating procedures and practices. He stated that he learned that dozers had been travelling over the feeders at some point through conversations with dozer operators, and plant superintendent Thurman Phillips. Mr. Newhouse confirmed that he never personally observed any dozers operating over the feeders (Tr. 158).

Mr. Newhouse was of the opinion that the condition described in the citation and order constitute violations of section 77.209, because the standard is designed to protect persons on stockpiles during reclaiming operations, and the standard states that it is "to protect people from being in an endangered area on those piles" (Tr. 159). He stated that MSHA made a determination that section 77.209 covers dozers operating over feeders in November, 1987, and the determination was made by MSHA's National office in Arlington, Virginia, and it was communicated verbally by him to plant superintendent Thurman Phillips. He also confirmed that this policy is current District 2 policy, which he confirmed through discussions with the district manager, Donald Huntley at various times prior to November, 1987 (Tr. 160).

Mr. Newhouse confirmed that he issued a citation regarding the operation of dozers over or near feeders at the same facility on June 10, 1988, and that he cited a violation of section 77.209 (Tr. 160, exhibit G-6). He stated that on this occasion, he observed dozer tracks directly over a feeder, and also observed a dozer working on an opposite pile, and made a determination that it was in "close proximity" to the feeder. He confirmed that he did not observe the dozer crossing over the feeders, but did observe it operating in "close proximity" to the feeder (Tr. 162). Mr. Newhouse stated that the dozer was working "on the side of the pile within the 65 degree," but he did not know how far it was from the center of the feeder, but that it was within the agreed upon safety zone (Tr. 162).

Mr. Newhouse confirmed that he did not issue an imminent danger in conjunction with his citation, but that in hindsight, he probably should have, and was probably mistaken for not doing so. However, the machine made a "momentary pass" in the feeder area, and as soon as he mentioned it to management, immediate corrective action was taken (Tr. 164). He explained that stockpiling takes place when the coal is spread out in all directions on the pile, and that reclaiming takes place when the feeder gates are opened and the coal is drawn into the belts under the feeders (Tr. 165).

Mr. Newhouse stated that he has received reports of accidents and fatalities which have occurred at other facilities by dozers operating on stockpiles, and he identified exhibit G-7 as an MSHA informational bulletin containing a synopsis of accidents which have occurred from 1979 to 1983 on certain storage piles (Tr. 167). He identified the fatal accidents which have occurred (Tr. 168-186, exhibits G-7, G-9).

Mr. Newhouse confirmed that he advised mine management of the application of section 77.209 to its feeder operation, and that the 65 degree angle of repose, "plus or minus five degrees," was an agreed upon prudent figure for the dozer operator to follow, and that this communication was made in November, 1987 (Tr. 186-188).

On cross-examination, Mr. Newhouse confirmed that the district policy in question was stated in a letter from Mr. Huntley to Safety Supervisor Dennis Dobish (exhibit O-4), and that prior to this time, the policy was verbally communicated to mine management (Tr. 189). He further confirmed that the current MSHA policy manual published in July, 1988, does not address section 77.209 (Tr. 190).

Mr. Newhouse confirmed that the citation which he issued in June, 1988, was abated after the equipment operators were

instructed not to operate over or too close to the feeders (Tr. 198). With regard to the alleged "common practice" engaged in by Cyprus, Mr. Newhouse stated as follows at (Tr. 199-200):

> Q. Now, you had the time you were cited and the equipment operators were instructed and then Mr. Koscho cited them at the end of August and they were instructed again. Do two times make it a common practice? Two times that they were cited?
>
> A. I'll tell you, I would say it's a common practice based on all the information collected over a year of fooling with that operation down there and the different questions and comments from operators.
>
> Q. I take it that during that year, as far back as November 1987, the company said they would instruct the employees who operate that equipment not to take dozers over the feeders or too close to the feeders?
>
> A. Yes. It started out to be a simple safety message to the operators not to run over feeders, and then it progressed into the threat of firing anybody that did take them over the feeders. Possibly if they had those control measures in the first place, we wouldn't have got the violations. I don't know.
>
> Q. Now, I take it that in November 1987 that there weren't any violations or Imminent Danger Orders issued?
>
> A. No.
>
> Q. And I take it that in January 1988 that when you were out there again you didn't issue any violations?
>
> A. Not that I recall.

Mr. Newhouse could not recall whether he issued any violations during his visit to the mine in January, 1988, when a section 103(g) inspection was conducted (Tr. 200). He identified exhibit O-5, as a finding made by Inspector Koscho that "no hazardous conditions existed and unsafe practices were not observed" (Tr. 201).

Cyprus' Testimony and Evidence

Donald D. Kerr, preparation plant foreman, testified as to his experience and duties, and he explained the coal loading process at the coal stockpile in question. He stated that the feeder loading operation is supervised by a foreman who is in radio contact with the bulldozer operators, and the foreman will

inform the operators as to which feeders are in operation (Tr. 227-231). He confirmed that he was with Inspector Koscho during his inspection, but did recall going onto the coal pile with him. He also confirmed that he observed the dozer tracks at the B and E feeders as testified to by Mr. Koscho, but could not recall observing any depressions in the pile (Tr. 232).

Mr. Kerr stated that he could observe the dozer operators operating on the pile from the catwalk and roadway which passes by the piles, but that he is rarely on the catwalk. The front of the pile can be observed from the roadway, but the back of the pile cannot be observed from the roadway, and one cannot determine whether the dozers are operating over the feeders from this vantage point (Tr. 234).

Mr. Kerr estimated that 600 tons of coal was loaded through the feeders during the period between August 21 and 30, 1988, and he believed that feeders C or D were in operation during this time, but that it was unlikely that the coal was loaded from the B or E feeders. With regard to the dozer tracks which the inspector observed on August 21, Mr. Kerr explained that after the completion of the loading and reclaiming operation, the dozer operators go back and push the coal into the voids created by the feeders in order to seal them to prevent any rain or inclement weather from washing the coal down into the reclaim tunnel, and that this procedure is a normal practice. Mr. Kerr was not certain if the tracks left at the B feeder were left there by the incident which occurred on August 21, but he believed they may have been left over tracks because "we hadn't operated the stacker system that much in that time" (Tr. 236).

On cross-examination, Mr. Kerr stated that the bulk of the 600 tons of coal in question came from the No. 2 stacker, and he confirmed that he did not check his loading records for the week prior to this time. He agreed that the B and E feeders are used on a regular basis, and he assumed that the August 21, incident occurred at the B feeder, and possibly the C feeder (Tr. 238). He believed that the tracks which were observed on August 30, were tracks which were left over by the dozer operating by the C feeder (Tr. 239). Since the feeders are close to each other, it was possible that the dozer operator strayed over near the B feeder while moving around to smooth out the pile. He confirmed that his records would not reflect when any particular dozer may have been operating on the coal pile (Tr. 240).

Mr. Kerr confirmed that he observed the dozer tracks and blade marks which were observed at the E feeder, and although he believed that the tracks at the B feeder were "left over" from the previous citation, he did not dispute the existence of the tracks at the E feeder (Tr. 243).

James Graznak, outside foreman, stated that part of his responsibilities include the supervision of dozer operators on the coal piles, and he confirmed that he was aware of the meetings held with respect to the issue of dozers operating in and around the feeders. He confirmed that the issue "came to a head" in November, 1987, and that MSHA was requested to bring some of its technical personnel to the site to address the problem. He identified a copy of an MSHA report, exhibit O-8, and confirmed that it reflects that he had "advised all operators not to cross over the feeders" (Tr. 255). He confirmed that these instructions would have been given 2 or 3-days prior to the November 19, date of the report, and that he also instructed that overhead markers and signs be placed over the piles to indicate the location of the feeders (Tr. 256).

Mr. Graznak confirmed that he was present at one of the meetings conducted by Dr. Wu, and that Cyprus agreed that "no man or equipment will be allowed directly over the feeders at any time, whether the feeders are operating or not" and that this instruction was communicated to the dozer operators (Tr. 258). Mr. Graznak had no knowledge of any discussions concerning the 65 degree angle of repose, but he confirmed that when he found out about this guideline, he found it difficult to follow because the angle of repose at which the coal was falling was steeper than 65 degrees, and that this was obvious by observation (Tr. 259). He confirmed that radios were installed in the dozers at the coal loadout for dependable communications between the dozers and the person in charge of the loading (Tr. 261).

In response to a question as to whether it is possible to reclaim coal without going too close to the feeders, Mr. Graznak stated that this would depend on "what is considered too close." He explained that although the contestant follows MSHA's recommended 65 degree angle of repose, it operates within that zone because it "has no choice" because it cannot get close enough to get the coal to the feeder otherwise. He confirmed that he was aware of the potential hazard by operating too close to the feeders, and he believes the dozer operators exercise judgment in determining how close they should push the coal (Tr. 263). He identified exhibit O-11, as copies of safety contacts made with employees as reminders of safe operating procedures while working on the coal piles (Tr. 263-265).

In response to a question as to whether or not the dozer operators made it a practice to operate over the feeders while reclaiming or stockpiling coal, Mr. Graznak responded as follows (Tr. 266-267):

> Q. Now, as far as you know, as of August 30, 1988, was there a practice of dozer operators running over the feeders when they were doing reclaiming or stockpiling?

A. There was not a practice of it, no.

Q. Now, was there a practice, as far as you know, of the dozer operators either doing reclaiming or stockpiling in August 1988 of going too close to the feeders?

A. I don't really know of any. You said during reclaiming?

Q. Reclaiming or stockpiling.

A. I really don't know of any problems with regard to reclaiming. For stockpiling, it's very difficult. Like we had some testimony earlier today, there are times when it is very difficult. Occasionally, but as far as, you know, was it a practice, no. That's the reason I kept reminding the people to try and stay on the dozer and be on the alert.

Q. You say it's very difficult. Is it possible to both reclaim and to stockpile without going over the feeders or too close to the feeders? Too close to the feeders being in a hazardous position.

A. It can be done, but it's tough.

Q. You have to work at it?

A. Well, we probably put up 500 tons per hour at that stacker, so it keeps the men busy. He has to stay on his toes.

Mr. Graznak stated that the contestant's stacker system is not unique and that it is common to other coal mines and power plants in the area, and that after the imminent danger order was issued he visited other mines in the area to check out their systems (Tr. 268). He stated that he was aware of four other operations where dozers were operating over the feeders during their stockpiling operations, and that in these instances, the reclaiming systems were locked out while the dozers travelled over the feeders while stockpiling coal (Tr. 269).

On cross-examination, Mr. Graznak confirmed that one of the operations he observed did not have coal stacking "tubes" similar to the contestant's No. 1 and No. 2 stackers, and that he did not discuss these other operations with MSHA, did not know whether these operators had approved MSHA plans, and had no information concerning the coal stacking capacities of these other operations (Tr. 271).

Mr. Graznak stated that during reclaiming operations, the dozers do not have to cross over the feeders, but during stockpiling, it is difficult to maneuver the equipment. He denied that dozers were crossing over feeders on a regular basis as of August 30, 1988, but that "occasionally someone would" (Tr. 276). Mr. Graznak could not recall the specifics concerning his safety contacts with the employees from November 30, 1987, to January 21, 1988, (exhibit O-11). He confirmed that these contacts may have been prompted by reports of someone observing dozer tracks, and that he sometimes makes them as "a blanket for the whole crew" after an indication that someone had crossed over or operated too close to a feeder. He also indicated that he issued these reports to insure that everyone was aware of the "gravity of the situation" (Tr. 278-280). Mr. Graznak could recall only one past incident where a bridged over cavity developed over one of the feeders (Tr. 284).

Mr. Graznak believed that with "certain limitations that we can live by," the dozers should be permitted to cross over the feeders during its stockpiling operation. He did not believe there was any reason for a dozer to cross over a feeder during the reclaiming operation because "we would move the material up to the edge of the draw hole and just let it go in by itself" (Tr. 285). With regard to dozers operating on top of the coal piles, Mr. Graznak stated that this was common to many coal mine operations for expanding the holding capacity of the stacking facilities (Tr. 286).

Dennis Dobish, safety supervisor, confirmed that he is a certified mine foreman, and that he is familiar with the feeder issue in this case. He confirmed that after the imminent danger order was issued, he sent a letter to Inspector Newhouse outlining the practice to be followed in the future, and to abate the order (Tr. 291). Since that time, he has worked to develop a plan which would permit the dozers to operate over the feeders, and he has met with various company, union, and MSHA officials in this regard, including a meeting with MSHA's sub-district manager Roger Uhazie on November 17, 1987 (exhibit O-6, Tr. 292). The plan was unacceptable to Mr. Uhazie, and a further meeting was held with former district manager Don Huntley, and a letter and the proposed plan was submitted to Mr. Huntley on December 1, 1988. The plan would permit the operation of dozers over the feeders during stockpiling operations after certain safety precautions were taken (Tr. 294).

Mr. Dobish stated that Mr. Huntley responded to the proposed plan by letter of January 4, 1989, exhibit O-4, and the letter does not state that dozers could not at anytime operate over the feeders. The letter stated in part "when reclaiming operations have been completed, however, a procedure may be developed to assure that there are no voids over the feeders. Compliance with such procedures would allow a dozer operation over the feeders at

that time." Mr. Dobish believed that this procedure would be in effect during the stockpiling operation (Tr. 295). He identified the proposed plan as exhibit 0-3, and confirmed that it was a "consensus" plan developed from the mine experience, and after discussions with the equipment operators in the presence of the safety committee. He further confirmed that the operators agreed unanimously that they could safely operate under these procedures and they knew that adjustments to the procedure may be needed. He stated that he gave the proposed plan to Mr. Koscho, who passed it on to Mr. Newhouse, but that no reply or opinion has been received from MSHA (Tr. 296).

Mr. Dobish stated that prior to the issuance of the imminent danger order, he participated in meetings held with the dozer operators, and they were instructed not to run over feeders at anytime and to comply with the 65 degree angle of repose. He confirmed that he has visited other mines, and has observed the same type of feeder operation which is in use at the Emerald Mine in one mine outside of district 2, where dozers travel over the feeders during stockpiling while the feeders are shutdown (Tr. 298-299).

On cross-examination, Mr. Dobish identified the mine which he visited as the Cyprus Shoshone mine in Hanna, Wyoming, and he confirmed that it had a stacker system like the one at the Emerald Mine. He did not know the height of the stockpile at this other mine, and stated that the stacker was shorter than the one used at Emerald Mine (Tr. 300).

## Findings and Conclusions

### Fact of Violation

Cyprus is charged with an alleged violation of regulatory mandatory safety standard 30 C.F.R. 77.209, which provides as follows: "No person shall be permitted to walk or stand immediately above a reclaiming area or in any other area at or near a surge or storage pile where the reclaiming operation may expose him to a hazard."

It is undisputed in this case that there is no evidence that anyone walked or stood on the coal pile in question, or in the vicinity of the areas affected by the operation of the feeders. The only persons who walked or stood on the pile, or in the area of the pile, were the inspector and the UMWA walkaround representative who accompanied him during the course of the inspection. They both testified that they walked on the pile to gain a closer look at the tracks which they had observed from a catwalk, and they both believed that they were in a "safe location" on the pile.

Cyprus takes the position that section 77.209, does not address or cover the operation of equipment on storage piles, and that the clear language found in section 77.209, with respect to the ordinary meaning of the terms "walk" or "stand" cannot properly be construed to mean "operating equipment" such as a bulldozer. Citing the dictionary definitions of the terms "stand" and "walk," the inspector's concession that these terms are not normally defined to include the operation of equipment, and the applicable case law dealing with statutory construction, Cyprus argues that the language of the standard simply does not prohibit the operation of equipment on a storage pile and that the citation must be vacated. Cyprus observes that while MSHA had the opportunity when the standard was promulgated to clearly include the operation of equipment as part of the standard, it did not do so.

In response to MSHA's argument that MSHA District 2 had previously interpreted section 77.209 to include the operation of equipment and that such an interpretation is reasonable and entitled to deference, Cyprus points out that the District 2 interpretation does not appear to have been accepted by other MSHA Districts. As an example, Cyprus makes reference to an MSHA Report of Investigation, issued by MSHA District 3, on April 25, 1983, where a fatality occurred when a bulldozer operating on a coal stockpile broke through material bridged over a feeder and fell into the bridge over cavity engulfing the bulldozer operator's compartment (exhibit G-8). Although MSHA's concluded that the accident occurred because the bulldozer was allowed to be operated on bridged material over top of the cavity in the coal stockpile, MSHA nonetheless made a finding that its "investigation did not reveal violations of the Coal Mine Safety and Health Act of 1977 of Title 30 Code of Federal Regulations" (pg. 7, report). Cyprus points out that no violation of section 77.209, was issued in this instance.

Cyprus also refers to an MSHA Regulatory Information Bulletin No. 83-4C, issued on August 3, 1983, by MSHA's Administrator for Coal Mine Safety and Health Joseph A. Lamonica, concerning "Fatalities Occurring at Surge or Storage Piles" (exhibit G-7). The bulletin discusses the hazards associated with equipment operators working on surge or storage piles where they are often required to maneuver in close proximity to "drawdown areas of feeders and hoppers," and it includes an attachment consisting of abstracts of eight fatal accidents mentioned in the bulletin, four of which involved persons walking over the feeder area or a void created by the reclaiming operation, and four of which involved bulldozers. Conceding that the bulletin does include a reference to section 77.209, in connection with bulldozers and front-end loaders operating in storage piles, Cyprus points out that it does not state that such operations are prohibited by section 77.209, and that Mr. Lamonica's reiteration of the language of the standard that "No person shall be permitted

to walk and stand immediately above a reclaiming areas or in any other area at or near a surge or storage pile where the reclaiming operation may expose him or her to a hazard," does not suggest that equipment was subject to the same prohibition found in the standard. To the contrary, Cyprus concludes that within the context of the bulletin, the absence of any indication that equipment was subject to the same prohibition suggests the absence of such a prohibition.

Citing the Commission's decision in Western Fuels-Utah, Inc., 11 FMSHRC 278, 284 (March 1989), Cyprus argues that deference to MSHA's interpretation of a standard is not required where it is clearly inconsistent with the language of the standard. In the Western Fuels-Utah, Inc., case, the Commission states in relevant part as follows at 11 FMSHRC 283-284, 287:

> It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." Old Colony R.R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932). When the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. Old Dominion R.R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932); see Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986).
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> * * * * * * *
>
> While the Secretary's interpretations of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulation. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)). Nor does it weigh in the Secretary's favor when the Secretary has not offered reasonable interpretations of the standards. See Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1145 (D.C. Cir. 1987). The Mine Act does not contemplate that the Commission merely "rubber-stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.
>
> * * * * * * *

> Finally, a regulation subjecting an operator to enforcement action under the Mine Act must give fair notice to the operator of what is required or prohibited and "cannot be construed to mean what an agency intended but did not adequately express." Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982). * * *

MSHA takes the position that the cited locations where the dozer tracks were observed are either "immediately above a reclaiming area" or "in any other area at or near a surge or storage pile" as stated in section 77.209. MSHA argues that the coal storage or surge pile in question is part of the reclaiming operations, and that clean coal is stockpiled to create a reserve until it is reclaimed or loaded out for shipment to customers. MSHA asserts that bulldozers are used in the actual reclaiming operations when the coal is pushed toward the angle of repose above the feeders when the feeders are running and coal is being loaded, and that they are also used in stockpiling operations when coal is being sent through the stackers to be stored in the area until needed later and the dozers push the coal away from the stackers and spread it around to cover a larger area so that more coal can be put on top of the pile as it comes out of the stackers. MSHA maintains that dozer operators are exposed to hazards from the reclaiming operations, as well as the stockpiling operations, because a dozer can fall into the holes that occur over the feeders when the feeders are operating or they can fall into voids that may exist under the surface of the coal pile.

MSHA asserts that it is well recognized that holes or depressions normally occur over the feeders as coal is drawn down the angle or repose into the feeder, and that voids may occur in the pile where cavities occur and are bridged over with coal. Since voids are not observable from the surface, MSHA concludes that dozers operating too close to the holes or depressions run the risk of falling into the holes during reclaiming operations, and that dozers operating over or too close to the areas over the feeders are at risk of breaking through any bridged over material and falling into voids during either reclaiming or stockpiling operations.

MSHA strongly disagrees with Cyprus' contention that section 77.209 is directed only to persons walking or standing on coal piles, and not to persons on pieces of equipment which may be operating on these piles. MSHA argues that the narrow interpretation advanced by Cyprus is at odds with the purpose of section 77.209, which is to protect miners from the hazards of reclaiming operations around coal storage piles. Recognizing the fact that the standard contains the terms "walk or stand," MSHA takes the position that it applies to "persons" in general, and that persons in bulldozers or other pieces of equipment are

exposed to the same hazards as persons walking on foot on a coal pile. MSHA asserts that the hazard presented is the possibility of falling into voids or holes in the coal pile. Recognizing the fact that if a miner on a bulldozer fell into a hole or void, he may have a better chance of survival than if on foot because the dozer cabs are enclosed and there are self-contained self-rescuers in the cab, MSHA nonetheless believes that the hazard of falling into a void or hole is the same, if not greater, for a dozer because of its weight, and the pressure on the coal pile by a dozer would make it more likely to fall into holes or voids under the surface of the coal, and the chances of survival are not as good.

In support of its argument that section 77.209, applies to persons in general, regardless of whether they are walking, standing, or operating a piece of equipment on a coal pile, MSHA relies on the testimony of MSHA Supervisory Inspector Robert Newhouse who testified that the standard is designed to protect persons on coal piles, and that this interpretation is MSHA policy and practice, as well as the testimony of MSHA's other witnesses who agreed with Mr. Newhouse (Mr. Shuba and Dr. Wu). MSHA asserts that in order to effectuate the broad purposes of the standard and the Act, it must be concluded that section 77.209, applies to persons in general on a storage pile, and that limiting the application of the standard to persons on foot and excluding persons on equipment is too narrow and technical and would defeat the purpose of the standard to protect persons from falling into holes and voids. MSHA takes note of the fact that Cyprus was issued at least two previous violations of section 77.209 involving bulldozers and did not contest either citation (exhibits G-3, G-6). MSHA concludes that its evidence, consisting of the dozer tracks and marks, clearly indicates that dozers were operated over or too close to the feeders, and that a violation of section 77.209, has been established.

After careful consideration of all of the arguments advanced by the parties in these proceedings, I agree with the position taken by Cyprus that section 77.209, only applies to persons walking or standing on or near a coal surge or storage pile where the reclaiming operation may expose him to a hazard. I conclude and find that the plain wording of the standard is limited to persons on foot and does not apply to equipment being operated on or near such a pile while reclaiming or stockpiling operations are actively in progress. Under the circumstances, the contested citation IS VACATED.

With regard to MSHA's purported policy interpretation, and its asserted practice of expanding the application of section 77.209 to equipment being operated on coal piles, I find no credible evidence supporting any conclusion that MSHA has promulgated any such policy, or that it has been communicated to all coal mine operators. MSHA's primary support for the existence of

any such policy lies in the testimony of its District No. 2 Supervisory Inspector Robert Newhouse.

Mr. Newhouse conceded that MSHA's most current policy manual, published in July, 1988, does not address the application of section 77.209, and I find nothing there to suggest that it applies to equipment operating on coal piles. Mr. Newhouse's assertion that MSHA's National Office in Arlington, Virginia, made a policy determination in November, 1987, that section 77.209, applies to equipment operating on coal piles is unsupported, and no documentation of any such policy has been forthcoming from MSHA.

Mr. Newhouse also contended that the purported policy is current District 2 policy, and that he confirmed this through discussions which he had with MSHA's former district manager Donald Huntley at various times prior to November, 1987. Mr. Newhouse also asserted that this policy was communicated orally to respondent's safety supervisor Dennis Dobish and plant superintendent Thurman Phillips, and that the written embodiment of the policy is stated in an exchange of correspondence between Mr. Dobish and Mr. Huntley in December, 1988, and January, 1989.

The exchange of correspondence referred to by Mr. Newhouse is a letter dated December 1, 1988, from Mr. Dobish to Mr. Huntley, in which Mr. Dobish requested an interpretation of section 77.209, with regard to the following points (exhibits O-6):

> 1. Does the statement "No person shall be permitted to walk or stand . . . " apply to bulldozer operation?
>
> 2. Please clarify the statement "immediately above a reclaiming area or in any other area at or near a surge or storage pile where the reclaiming operation may expose him to a hazard." MSHA has stated their intention of enforcing a 65 angle of repose adjacent to each feeder. Due to weather conditions, compaction, and moisture, this figure is unrealistic and arbitrary.
>
> 3. If the feeders are not operating and locked out and no reclaiming operation is in progress, does 30 C.F.R. 77.209 apply? If precautions have been taken to assure no void exists in the coal pile following reclaiming operations, and the feeders are locked out, the operation is no different from any other stockpile and 30 C.F.R. 77.209 should not apply.

In his reply of January 4, 1989, to Mr. Dobish's letter, Mr. Huntley stated in pertinent part as follows (exhibit O-4):

> This is in reply to your letter dated December 1, 1988, in reference to 30 C.F.R. 77.209. In reviewing this provision of law, it would appear to us that this regulation applies to persons immediately above a reclaiming area, whether on a bulldozer, walking, or standing. This provision was written to protect persons from falling into a void that occurred due to reclamation operations.
>
> Your plan is designed to allow a bulldozer to operate over feeders in an area susceptible to collapse. As stated above, this would not be in compliance with the regulations, therefore, bulldozers should not be operated in such areas when coal is being reclaimed from a stockpile. When reclaiming operations have been completed, however, a procedure may be developed to assure that there are no voids over the feeders. Compliance with such procedure should allow dozer operation over the feeders at that time.
>
> Since you raised the question about the use of 65 degrees, we will not specify any angle--the inspector will use his judgement to determine whether a person is "above" a reclaiming area or exposed to a hazard from the reclaiming operation. (Emphasis supplied).

I take note of the fact that Mr. Huntley's letter makes no reference to any National MSHA policy regarding the operation of equipment over feeders. In addition to his responses, Mr. Huntley furnished Mr. Dobish with an outdated MSHA Information Bulletin No. 83-4 C, August 8, 1983, concerning fatalities which have occurred at coal surge or storage piles (exhibit G-7). The bulletin includes a reference to section 77.209, as one of several standards found in Part 77, Code of Federal Regulations, which have been cited as contributing to one or more of the accidents discussed in the attachment to the bulletin. The bulletin also quotes the verbatim text of section 77.209, but I find nothing in the bulletin alluding to any MSHA policy prohibitions concerning equipment operating on coal piles. As a matter of fact, the safety procedures found on page two of the bulletin suggests that equipment may be permitted to operate on coal piles as long as the recommended safety procedures are followed, e.g., adequate communication, training, adequate means for identifying the location of feeders, the use of substantial screen guards over all windows of bulldozers and front-end loaders used around surge or storage piles, and the placement of self-contained self-rescuers in all dozers and front-end loaders.

I also take note of the fact that Mr. Huntley's letter suggests that dozers may be operated over the feeders when reclaiming is completed as long as certain safety precautions are

developed, and it contradicts MSHA's position that equipment operation on the coal pile is not permitted at any time, including reclaiming or stockpiling of the coal. This advice by Mr. Huntley also supports Cyprus' contention that it is permitted to operate its equipment on the coal pile during stockpiling operations as long as it follows certain safety precautions (exhibits O-3 and O-7). It also supports the unrebutted testimony of Mr. Dobish that other mine operators carrying on similar operations are permitted to operate equipment on their coal piles during stockpiling operations while the feeders are shutdown. Further, I find Mr. Huntley's apparent disregard for the 65-degree angle of repose as a yardstick safety precaution to be rather contradictory, particularly in light of MSHA's imposition of this requirement on Cyprus.

The Imminent Danger Order

The definition of an "imminent danger" is found in section 3(j) of the Act, and it is as follows: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition can be abated."

The validity of the contested imminent danger order in this case is not dependent on any finding of a violation of section 77.209. MSHA maintains that it has established that it was more than just an isolated occurrence that dozers crossed over the feeders during stockpiling operations and operated too close to the danger zone above the feeders during stockpiling and reclaiming. MSHA takes the position that there is substantial evidence supporting a conclusion that Cyprus engaged in a practice of crossing over and working in too close proximity to the feeders. The "substantial evidence" alluded by MSHA is (1) the physical evidence of equipment tracks observed by Inspector Koscho and Mr. Shuba during the inspection, (2) Mr. Shuba's testimony that other dozer operators told him that there "were times" when they crossed feeders, and his knowledge of "close calls" involving dozers over the feeders; (3) two prior citations because of dozers operating too close to the feeders; (4) "safety contacts" made by Cyprus with its dozer operators instructing them not to cross over feeders; and (5) the ongoing issue between MSHA, Cyprus, and the union since November 1987.

The thrust of MSHA's case is its contention that the alleged practice of dozer operators working above and/or in too close proximity to the feeders during reclaiming and stockpiling operations presented an imminent danger because of unknown voids or holes in the coal pile, and that an accident could have happened at any time if the practice of crossing over or in too close proximity of the feeders had continued. MSHA's position is that such a practice constitutes an imminent danger regardless of whether the feeders are operating.

The evidence establishes that no one was operating a bulldozer on or near the coal pile in question at the time it was observed by Inspector Koscho, the feeders were not in operation, no reclaiming or stockpiling operations were taking place, and no one was in any danger. I take particular note of the fact that the narrative description of the cited conditions does not include any assertion that Cyprus was engaging in any practice, and Inspector Koscho confirmed that in his pretrial deposition he admitted that at the time he issued the order he did not know if there was in fact a practice of operating equipment too close to the feeders. Further, although the order does not include any assertion that dozers were operating over or near nay voids or holes, Inspector Koscho testified that the tracks which he observed in the vicinity of the B feeder were within 3 to 4 feet of a "depression where the coal had been feeding into the feeder," and that the tracks near the E feeder led him to believe that the dozer blade, which was 7 to 8 feet long, had reached across a depression, and then backed up smoothing out the depression in the pile.

In order to prevail in this case, MSHA has the burden of establishing that in the context of its continued reclaiming and stockpiling operations, Cyprus was guilty of engaging in an imminently dangerous practice of operating its bulldozers over or in close proximity to feeders at all times, even when they were not operating. As recently noted by the Commission in Garden Creek Pocahontas Company, Docket Nos. VA 88-09, etc., November 21, 1989, slip op. at pg. 6, "%8BT]he litigation process requires the parties to obtain the evidence necessary to prove their allegations." With regard to the imminent danger order, the only evidence to support Inspector Koscho's belief that dozers were operating "to close" to the feeders were the equipment tracks which he observed. Although several inferences may be made with regard to these tracks in the coal pile, any such inferences must be reasonable and based on evidentiary facts, Mid-Continent Resources, 6 FMSHRC 1132 (May 1984).

In my view, in order to establish the existence of hazards such as operating over voids or holes in the coal pile, which could materialize at any time, although not necessarily immediately, MSHA must show the circumstances under which the tracks were made. In this case, although the inspector believed that the coal pile in question was in use every week, and believed that the tracks were no more than 2 or 3 days old because they were "more pronounced and acute," he conceded that he made no effort to determine who had operated on the pile, whether any dozers had actually operated on the pile while the feeders were in operation, when any dozers may have last worked on the pile, or when the feeders were last operated. Although the inspector agreed that dozers normally used by Cyprus are equipped with operator cabs and safety glass, and the evidence

establishes that self-rescuers and radios are provided for the dozer operators, the inspector conceded that he did not inspect any dozers which are used during the reclaiming and stockpiling operations. Further, the inspector made no effort to identify or speak with any of the dozer operators, nor did he review any mine production or work shift records which may have provided him with some factual information or answers to some of the aforementioned critical questions. I believe that it is incumbent on the inspector to at least attempt to develop and establish a factual basis to support his imminent danger order, particularly in a case of this kind where there is a contention that Cyprus has engaged in, and presumably still engages in, an imminently dangerous practice. On the facts of this case, it seems obvious to me that the "inspection" made in support of the order was cursory in nature, and I find nothing to suggest that the information and evidence which was not developed was not readily available to the inspector.

Mr. Shuba, the safety committeeman who accompanied the inspector during his inspection, testified that dozer operators have told him that there "were times" when they crossed the feeders, and he alluded to several "close calls" involving dozers operating over the feeders. However, none of these operators were identified or called to testify, and no further specific information was elicited from Mr. Shuba. Mr. Shuba, who confirmed that he operated a dozer on the pile intermittently since February, 1989, and for some unspecified "months" prior to the inspection, denied that he had ever crossed the feeders while operating a dozer on the pile. However, in its posthearing brief, MSHA asserts that several "safety contacts" made by mine management reflect that dozer operators were instructed not to cross over the feeders, and MSHA "assumes" that these contacts were made in response to instances of dozers crossing these feeders. If this assumption is correct, then Mr. Shuba has not been truthful since three of these "safety contacts" were issued to him (exhibit O-11). Under the circumstances, I have given no weight to Mr. Shuba's unreliable and uncorroborated hearsay testimony concerning what the other unidentified equipment operators may have told him.

With regard to the "safety contacts" (exhibit O-11), with the exception of Mr. Shuba, none of the individuals who were "contacted" testified in these proceedings, and the circumstances under which they were "contacted" are not known. Some of the contacts reflect that the foremen reviewed the safe operating procedures with the employees who presumably worked on the piles, and others caution employees to be careful while working on or near the piles. Foreman Graznak, who issued all of the contacts, prior to the issuance of the imminent danger order on August 30, 1988, could not recall the specifics of each of the contacts, but conceded that they may have been prompted by someone observing dozer tracks or other indications that someone had occasionally

crossed over the feeders or operated too close to them. However, he denied that dozers were crossing over feeders on a regular basis, and he could recall only one prior incident where a bridged over cavity developed over one of the feeders.

Mr. Graznak confirmed that the contacts were issued to alert the individuals of the hazards of working in and around the stockpiles, and Mr. Shuba, the safety committeeman, confirmed that mine management has instructed equipment operators not to work over the feeders, that he was instructed about the proper "safety zone" for safely working over the feeders, and that a diagram explaining the safety zone was posted in each machine that operated on the pile. Further, the evidence presented by Cyprus establishes that it has a communication system in effect with respect to the dozers operating in and round the coal pile, has marked the feeders, has equipped the dozers with cabs, safety glass, and self-rescuers, has consistently instructed the dozer operators as to the safety precautions to be taken while working in and around the pile, and has made it known that it will discharge any operator found running over feeders.

Mr. Shuba confirmed that due to the confined areas where the bulldozers must operate during stockpiling, it may be necessary for a dozer operator to position his dozer over the feeder in order to get behind the coal and push it towards the pile. Dr. Wu agreed that it was necessary for a dozer to operate on top of the pile in order to push the coal into the feeders, and he confirmed that if the feeders are not operating, there may be a need to fill any depressions over the feeders during the stockpiling process. Mr. Graznak confirmed that there is no need for a dozer to cross over a feeder during the reclaiming operation because the material which has been moved to the edge of the feeder draw hole will fall into the hole. Mr. Graznak also confirmed that it is difficult to maneuver the equipment and avoid crossing the feeder during stockpiling operations when the feeders are not operating. He also confirmed that he was aware of other mine operations where stockpiling activities permitted the travel of dozers over the feeders while they were locked out and not in operation. Safety supervisor Dobish corroborated that this was the case, and the letter of January 4, 1989, from MSHA District 2 Manager Huntley supports Mr. Dobish's belief that under certain conditions when the feeders are shutdown, dozers are permitted to operate over the feeders. Under all of these circumstances, MSHA's contention that a dozer operating over a feeder is at all times an imminent danger is not well-taken and contradictory.

With regard to the two prior citations issued to Cyprus for violations of section 77.209, one of them was issued by Inspector Koscho on August 23, 1988, a week before he issued the imminent danger order, and it is a section 104(a) citation with special "S&S" findings (exhibit G-3). Mr. Koscho stated that he issued

the citation after determining that a bulldozer had slid into a void created by a feeder while reclaiming coal, and although he did not personally observe the incident, someone told him about it, and the dozer operator admitted that he had made a "mistake." Mr. Koscho further explained that he issued a section 104(a) citation rather than an imminent danger order because the violation was abated within 5 minutes and mine management had previously instructed the dozer operator as to the proper operating procedure. Mr. Koscho also explained that at the time he issued the contested imminent danger order, he believed that the dozer operators were not following management's instructions. I fail to see the distinction since in both cases the dozer operators obviously were not following instruction. In addition, the condition cited in the prior citation was far more serious than that cited in the subsequently issued imminent danger order in that the dozer actually slid into a void and had to be assisted by another dozer to get out, and Mr. Koscho found that a fatality was highly likely. Even so, he did not believe this was an imminent danger, nor did he allege that the incident was the result of any practice.

The second citation for a violation of section 77.209, was issued by Inspector Newhouse on June 10, 1988, and it too is a section 104(a) citation with special "S&S" findings. The citation states that Mr. Newhouse observed a bulldozer operating on a coal pile at the No. 2 stacker over a reclaim chute that was in operation, and that he also observed dozer tracks indicating that bulldozers were working directly over reclaim chutes at the No. 1 stacker, and Mr. Newhouse made a finding that a fatality was highly likely. When asked why he did not issue an imminent danger order, particularly since he had personally observed the dozer over the reclaim chutes while they were in operation, Mr. Newhouse indicated that "in hindsight" he was "probably mistaken for not doing so," and he explained that the dozer he observed did not cross the feeders, and that it was only in "close proximity" to the feeders. This is contrary to the citation which specifically states that the dozers were operating directly over the reclaim chutes or feeders while they were in operation.

I find the explanations offered by Mr. Koscho and Mr. Newhouse as to why they did not consider the prior incidents to be imminently dangerous to be rather contradictory and self-serving. In those instances, the inspectors had reliable and probative evidence that dozers were in fact operating on the coal piles over the feeders during reclaiming operations while the feeders were in operation, and they both found that a fatality was highly likely. Yet, they concluded that no imminent dangers were presented. In the instant case, Mr. Koscho had no reliable and probative evidence that any dozers were operating over any feeders while they were in operation, and he based his imminent danger finding on speculative assumptions based on the equipment

tracks which he observed on the coal pile. I simply cannot reconcile these contradictory and inconsistent findings by the inspectors.

I find no credible or probative evidence in this case to support any conclusion that the tracks observed by Inspector Koscho and Mr. Shuba were made while dozers were operating on the coal pile during reclaiming operations while the feeders were in operation. Mr. Koscho conceded that he had no way of knowing whether or not the dozers were reclaiming coal or simply spreading it out on the pile when the tracks were made. The tracks at the E feeder were found at a location where the dozer had apparently reached across a depression with its 7 to 8 foot blade and then backed up to smooth out the depression in the pile. If this was done while the feeders were not in operation during the stockpiling operation, then I can only conclude that the dozer operator was following a normal practice of addressing depressions by smoothing them out, and this could not have been done if the feeder were operating. With regard to the tracks at the B feeder, there is no credible evidence that the dozer tracks extended over the feeder, and Inspector Koscho placed the tracks "in the vicinity" and to the side of the feeder approximately 3 to 4 feet from a depression which he believed resulted from the coal being fed into the feeder. I do not believe that these tracks could have been made and left intact if the feeder was operating.

Given the fact that the evidence and testimony in this case strongly suggests that the operations of dozers on a coal pile during stockpiling operations while the feeders are shutdown and not operating in order to fill the holes and voids left by the operation of the feeders is not specifically prohibited and seems to be an acknowledged method of operation, I believe it is just as reasonable as not for one to conclude that the tracks in question were made during the stockpiling operation while the feeders were not in operation, and that the dozer operators were not exposed to the danger of any voids or holes when the tracks were made.

In view of the foregoing findings, and conclusions, and after careful consideration of all of the evidence and testimony in this case, I cannot conclude that MSHA has established by a preponderance of the evidence that Cyprus has engaged in any imminently dangerous practice. Under the circumstances, the inspector's finding in this regard is rejected and the contested imminent danger order IS VACATED.

## ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. PENN 89-45. Section 104(a) "S&S" Citation No. 3087308, August 30, 1988, citing a violation of 30 C.F.R. 77.209, IS VACATED, and MSHA's proposed civil penalty assessment IS DENIED AND DISMISSED.

2. Docket No. PENN 88-325-R. Section 107(a) Imminent Danger Order No. 3087309, August 30, 1988, IS VACATED.

3. Docket No. PENN 88-318-R. Section 104(d)(2) Order No. 3087446, August 31, 1988, citing a violation of 30 C.F.R. 77.205(b), IS MODIFIED to a section 104(a) "S&S" citation, and the violation IS AFFIRMED. Cyprus is assessed a civil penalty in the amount of $400 for the violation.

4. Docket No. PENN 89-194. Cyprus IS ORDERED to pay civil penalty assessments for the following section 104(a) "S&S" citations which have been affirmed and/or settled in these proceedings:

| Citation No. | Date | 30 C.F.R. Section | Assessment |
|---|---|---|---|
| 3087305 | 08/30/88 | 77.400 | $400 |
| 3087444 | 08/31/88 | 77.404(a) | $325 |
| 3087600 | 08/30/88 | 77.1607(bb) | $450 |
| 3087446 | 08/31/88 | 77.205(b) | $400 |

Payment of the civil penalty assessments shall be made by Cyprus to MSHA within thirty (30) days of the date of these decisions and order, and upon receipt by MSHA, the civil penalty proceeding is dismissed.

George A. Koutras
Administrative Law Judge