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

ROCHESTER & PITTSBURGH COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS Docket No. PENN 89-115-R Order No. 2891302; 2/23/89
v.	Docket No. PENN 89-116-R
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 2891303; 2/23/89 Docket No. PENN 89-117-R Citation No. 2891304; 3/2/89
	Docket No. PENN 89-118-R Order No. 2889678; 3/1/89
	Docket No. PENN 89-119-R Order No. 2889679; 3/1/89
	Greenwich Collieries No. 2 Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. PENN 89-127 A.C. No. 36-05031-03553
v.	Main Complex Mine Docket No. PENN 89-236
ROCHESTER & PITTSBURGH COAL COMPANY, RESPONDENT	A.C. No. 36-02404-03761 Greenwich Collieries No. 2

DECISION

Appearances: Joseph A. Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania, for the Contestant/Respondent;
Mark V. Swirsky, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Maurer

Statement of the Case

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", to challenge five citations, two section 104(d)(2) orders and one imminent danger withdrawal order issued by the Secretary of Labor (Secretary) against the Rochester and Pittsburgh Coal Company (R&P) and for review of the civil penalties proposed by the Secretary for the related violations.

Pursuant to notice, these cases were heard in Indiana, Pennsylvania on July 18 and 19, 1989. Both parties have filed post-hearing briefs which I have considered along with the entire record in making this decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accepted on the record:

1. Greenwich Collieries No. 2 Mine and the Main Complex preparation plant are owned by Pennsylvania Mines Corporation and managed by Respondent Rochester and Pittsburgh Coal Company.

2. Rochester and Pittsburgh Coal Co. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citations and orders were properly served by duly authorized representatives of the Secretary of Labor upon an agent of Rochester and Pittsburgh Coal Company at the dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

5. The assessment of a civil penalty for those dockets that have civil penalty consequences will not affect Rochester and Pittsburgh Coal Company's ability to continue in business.

6. The parties stipulate to the authenticity of each other's exhibits, but not to the exhibits' relevance nor to the truth of the matters asserted within the exhibits.

7. The subject citations and orders were abated in good faith by Rochester and Pittsburgh Coal Company.

8. The annual production of Respondent is approximately 10, 554, 743 production tons.

Docket Nos. PENN 89-115-R, -116-R and -117-R

Inspector Samuel J. Brunatti issued an imminent danger order under 107(a) of the Act, and two citations under 104(a) of the Act. The order and both citations contained in the above referenced three dockets are all related to the same factual situation.

On February 23, 1989 he issued Order No. 2891302 at the Greenwich No. 2 Mine ("Greenwich").

The 107(a) order stated:

> The current of air ventilating the face of the No. 3 room M-16 active working section was not sufficient to dilute and render harmless and carry away flammable, explosive, noxious or harmful gases in that when checked with a MX 240 calibrated methane detector 1 foot from the roof, face and rib on the right side 1.7% to 2.2% of methane was detected a violation of 30 C.F.R. 75.301. The Joy continuous miner which was energized was in the immediate area. This condition occurred due to surveyors removing part of the back check between the intake and return, thus allowing the air to short circuit before ventilating the face effectively. Two air sample bottles were collected in the affected area 1 foot from the roof, face and rib.

The order was subsequently modified. The modification stated:

> Order No. 2891302 is being modified under Section 1 No. 8 to include the statement "This is a violation of 30 C.F.R. 75.302-1b2" after the sentence. This condition occurred due to surveyors removing part of a back check between the intake and return.
>
> This order has been previously terminated.

On the same date, the inspector issued Citation No. 2891303. The citation stated:

> The current of air ventilating the face of the No. 3 room M-16 active working section was not sufficient to dilute and render harmless and carry away flammable, explosive, noxious or harmful gases in that when checked with a MS-240 calibrated methane detector

1 foot from the roof, face, and rib on the right side 1.7% to 2.2% of methane. The Joy continuous miner which was energized was in the immediate area. This condition occurred due to surveyors removing part of a back check between the intake and return, thus allowing the air to short circuit before ventilating the face effectively. This citation was a factor that contributed to the issuance of imminent danger Order No. 2891302 dated 2-23-89; therefore no abatement time was set.

A subsequent modification to the citation stated:

Based on additional information provided by the operator at a close-out conference Citation No. 2891303 is being modified under Section II, 10 B to permanently disabling 10 D to 2 and No. 11 to B low.

This citation has been previously terminated.

On March 2, 1989, seven days after the initial order and citation were issued, the inspector issued Citation No. 2891304. The citation stated:

The check curtain installed between the No. 3 room intake and the No. 4 room return in the M-16 active working section was not installed to minimize air leakage and permit traffic to pass thru without adversely affecting face ventilation in that the surveyors had removed a portion of the check to pass thru and shoot sights which resulted in a accumulation of methane at the face of the No. 3 room. This citation was a factor that contributed to the issuance of an imminent danger Order No. 2891302 dated 2-23-89; therefore, no abatement time is set. This condition was observed on 2-23-89 by this writer.

A subsequent modification to the citation stated:

Citation No. 2891304 is being modified under section III No. 17 action to terminate to include the statement: This action to abate the condition was done on 2-23-89 at 10:15 a.m.

No. 18A is modified to show the date as 3-2-89 and 18B is modified to show the time as 0740.

Section 107(a) of the Act provides in part as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as:

> "Imminent danger" means 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 or practice can be abated.

The Greenwich No. 2 mine liberates in excess of 1,000,000 cubic feet of methane in a 24 hour period. Accordingly, by section 103(i) of the Act is therefore required to be inspected by MSHA every five days. Inspector Brunatti, an MSHA ventilation specialist, was making such a section 103(i) spot inspection on February 23, 1989, and again on March 2, 1989, when he wrote the order and citations at bar.

At approximately 9:00 a.m., on the morning of February 23, 1989, Inspector Brunatti arrived at Room 3 on the M-16 section and immediately noticed methane readings of .4% to .5% on the methane monitor of the continuous mining machine which was parked about 25 feet from the mining face in that room. The mining machine was not being used to mine coal at that time, but it was energized. He felt that these were unusually high readings for a machine sitting there parked. He proceeded to take methane readings with his hand-held methane detector from that point up to the face. The closer he got to the face, the higher the readings got. He obtained readings in excess of 4 percent at one point, with the readings stabilizing at about 2.2% to 2.3%. At this point he determined he had to issue an imminent danger order.

Bottle samples for methane were also taken, which were later analyzed by the MSHA laboratory at Mount Hope, West Virginia, and indicated methane levels of 1.56% and .53%.

Earlier that morning, at approximately 8:30 a.m., Mr. William LaBelle, the section foreman, had made a methane check at the face of the No. 3 room, in the same area where the inspector subsequently checked and from which the inspector collected the bottle samples. His examination revealed methane levels of .3% to .4% at that time.

Apparently, the underlying reason for these fluctuations in methane readings was that surveyors were working on the M-16 section that morning advancing sights. As an allegedly necessary part of performing this task, the surveyors had temporarily lowered the back check curtain between Rooms 2 and 3 in the fourth crosscut from the face, between locations X3260 and X3261 on Joint Exhibit No. 1 for approximately two minutes. It was also purportedly necessary to raise and lower the line curtain stretching from near location X3326 on Joint Exhibit No. 1 to the second crosscut in Room 3 three times for durations of 5 to 30 seconds each time.

The parties agree and the record certainly substantiates that the direct cause of the excessive methane accumulation at the Room 3 face was the disruption of ventilation caused by this activity of the surveyors.

R&P argues that the inspector's determination that an imminent danger order should be issued was based almost entirely on the fact that the methane had accumulated in an amount greater than 1.5%. Inspector Brunatti admitted that was MSHA policy.

The Secretary argues that a concentration of 1.5 volume per centum or more of methane per se warrants a finding of "imminent danger", and points to section 303(h)(2) and (i)(2) of the Act which provide that any time the air at any working place or the air returning from any working section contains 1.5 volume per centum or more of methane "all persons, except those referred to in section 104(d) of [the] Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place [or split] shall contain less than 1.0 volume per centum of methane."

The Secretary also cites the former Department of Interior Board of Mine Operations Appeals decision that the issuance of an imminent danger withdrawal order under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Coal Act), which was a virtually identical predecessor to section 107(a) of the Mine Act, was mandated by the presence of the factors set forth in section 303(h)(2), i.e., the detection of 1.5% methane. Pittsburgh Coal Company, 2 IBMA 277 (1973).

In that decision, the Board adopted the rationale of the administrative law judge that:

> If Congress has determined by statute that a 1.5 volume per centum reading is sufficient to require the drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger. Congress in 303(h)(2) has intentionally left no room for doubt or discretion in what it viewed as an imminent danger. Considering the nature of the gas, the perilous conditions created by it, and insignif-icant quantum of energy necessary to cause an ignition - there is a sufficient basis to characterize a 1.5 per centum concentration as one of imminent danger. . . . It can reasonably be inferred that the withdrawal requirement of 303(h)(2) presumes the existence of a condition of imminent danger. Pittsburgh Coal Company, 2 IBMA 281, 282 (1973).

While I am mindful that the Commission has previously stated in Pittsburg & Midway Coal Mining Co., 2 FMSHRC 787, 788 (1980), that it will examine anew the question of what constitutes an "imminent danger" under the Act; until it does, the legal analysis of the former Board concerning the issuance of imminent danger withdrawal orders under the conditions set forth in section 303(h)(2) is persuasive to me and I will accordingly follow the precedent of that case. Two other Commission judges have previously reached the same conclusion. See Consolidation Coal Co., 4 FMSHRC 1960 (1982) and Jim Walter Resources, Inc., 9 FMSHRC 538 (1987).

Furthermore, as the Commission recently stated in upholding the issuance of another imminent danger withdrawal order in Rochester & Pittsburgh Coal Co. v. Secretary of Labor, 11 FMSHRC 2159, 2164 (1989); "[s]ince he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists". The Commissioners quoted the United States Court of Appeals for the Seventh Circuit concerning the importance of the inspector's judgment:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added).

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

Inspector Brunatti was faced with a situation where methane readings obtained from his hand-held detector were fluctuating between a peak reading in excess of 4% right at the face to .4% 25 feet outby. According to his testimony, which I credit fully, the readings became stable near the face at 2.2% to 2.3%. Based on this evidence and the fact that methane's explosive range begins at a 5% concentration, I cannot find that the inspector abused his discretion or authority in this instance.

In any event, it is undisputed that there was in excess of 1.5 volume per centum of methane accumulated at the face area of Room 3, Section M-16, the mining machine in proximity to this face was energized and the miners had not been withdrawn from the area. Therefore, I find that an "imminent danger" existed at that time and the withdrawal order was properly issued.

Turning now to the two related section 104(a) citations and their associated civil penalties, I will consider them separately. At the hearing, I raised the possibility of whether they should be merged. Upon re-reading the record, I am now convinced that is inappropriate, as they do in fact charge separate violations.

Citation No. 2891303 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.301 which provides in pertinent part as follows:

> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases and dust, and smoke and explosive fumes.

R&P answers first that a methane level of 1.56% or even 2.2% is not harmful, but only potentially harmful. The inspector also testified that a 1.56% methane level would not be a problem if it was a constant 1.56% in a controlled area. However, here the methane levels were fluctuating widely and clearly were not under control. At one point, the inspector noted a peak methane reading of 4%, dangerously close to the lower end of the explosive range of methane, which is defined as 5% to 15%. I find these fluctuating levels of methane above 1.5% to be a harmful quantity of a harmful gas.

Secondly, R&P cites Secretary of Labor v. Freeman United Coal Mining Co., 11 FMSHRC 161 (1989) for the proposition that

"disruptions in mine ventilation inevitably occur and that the key to effective compliance lies in expeditiously taking those steps necessary to restore air quantity or velocity to the required level." Freeman at 165.

It is not disputed that the activity of the surveyors in lowering ventilation curtains was the cause of the fluctuating methane levels at the face. More particularly, with regard to the instant citation, the lowering of the line curtain in Room 3 going outby from the face and from location X3326 towards the second crosscut contributed along with the lowering of the back check between locations X3260 and X3261 to the methane accumulation found at the face by the inspector. But here, unlike the situation in Freeman, the section foreman knew the surveyors were on the section, a known gassy section, and presumably knew that there was a likelihood that their activities would disrupt his ventilation. Despite this, he took no action to monitor the methane levels at the face while the surveying was being done and took no action to abate the methane accumulation until after the inspector detected the condition.

I concur with the Secretary that first, this situation was not the type of disruption in mine ventilation contemplated by the Commission in Freeman; and second, that the regulations governing permissible methane levels do not tolerate occasional excursions of that methane level above 1.5 volume per centum for the operational convenience of the mine operator.

For the foregoing reasons, I find a violation of 30 C.F.R. 75.301 to be proven as charged. Since I have previously found an imminent danger existed as a result of this disruption of ventilation, a condition "which could reasonably be expected to cause death or serious physical harm", it follows that this is a "significant and substantial" violation as well under the test announced by the Commission in Mathies, 6 FMSHRC 1 (1984).

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $1000, as proposed by the Secretary.

Citation No. 2891304 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.302-1(b)(2) which provides in pertinent part as follows:

(b) When line brattice is used:

* * * * * * *

(2) Check curtains required in conjunction with the line brattice shall be so installed to minimize air leakage and permit traffic to pass through without adversely affecting face ventilation.

On the morning in question, the surveyors, Messrs. Luther and Cymbor, had proceeded into the section and were advised that mining had not yet commenced that morning. Mr. Luther then notified the shuttle car operator that they would advance the sights in the No. 3 entry since no production was taking place. They then proceeded to a crosscut between the No. 2 and 3 rooms and prepared to take a back sight with the transit. Mr. Cymbor lowered the back check about one foot for approximately two minutes while Mr. Luther got the sights. This was enough to interfere with the ventilation of the face in Room 3 and cause or contribute to cause an excessive level of methane (a peak value of 4%) to accummulate.

As previously noted herein, at the same time that these high levels of methane were detected by the inspector, an energized continuous mining machine was in close proximity (approximately 25 feet) to the high methane area. I therefore conclude that this was a "significant and substantial" violation of the cited standard. See Mathies, supra. Furthermore, I find, in accordance with section 110(i) of the Act, the civil penalty of $1000 proposed by the Secretary is appropriate to the violation.

R&P's allegations that there was no violation of 30 C.F.R. 75.302-1(b)(2) because: (1) The regulation applies only when coal is being cut, mined or loaded from the working face and; (2) the temporary disruption in ventilation precludes under the circumstances, a finding of violation, are rejected.

The phrase "cut, mined or loaded" does not appear in the cited standard. It speaks to "when line brattice is used". Line brattice use is required for all working faces, whether or not coal is being cut, mined or loaded. 30 C.F.R. 75.302 contemplates that the line brattice will provide adequate ventilation to the working face for the miners and remove or dilute noxious and explosive gases and the regulation contemplates this ventilation of the working face whether the miners are actually engaged in coal production or not at any particular minute.

The second allegation in defense is again based on the reliance by the operator on the Freeman case and again, as in the previous citation, I find the Commission's reasoning in Freeman to be inapplicable here. This is a totally different fact situation. Most importantly, what was done here to disrupt the ventilation was done intentionally with no provision to lessen or even monitor what effect their activity would have on the methane hazard on the section.

On March 1, 1989, MSHA Inspector Kenneth J. Fetsko issued Section 104(d)(2) Order Nos. 2889678 and 2889679 at R&P's Greenwich No. 2 Mine. Subsequently, the Secretary filed a petition seeking civil penalties in the amount of $850 each for the two violations.

Inspector Fetsko testified at length at the hearing of this case and at the conclusion of his testimony, the parties proposed a settlement of the case which I approved on the record.

Concerning Order No. 2889678, the Secretary moved to downgrade the classification of the paper from a section 104(d)(2) order to a section 104(a) "S&S" citation and lower the proposed civil penalty from $850 to $350. With regard to Order No. 2889679, the Secretary moved to amend it to a section 104(a) "non-S&S" citation and lower the proposed penalty to $150 from $850.

I approved the settlement and its terms will be incorporated into my final order herein. Docket No. PENN 89-127

On November 30, 1988, MSHA Inspector Charles S. Lauver issued Citation No. 2889402 at R&P's Main Complex, alleging a violation of 30 C.F.R. 77.405(b). The condition or practice alleged to be a violation of that standard is stated as:

> The 555 Ford tractor/backhoe/loader being repaired in the truck garage has not been blocked securely in position. The left front wheel and spindle has been removed and the left front of the machine is being held up by the hydraulic bucket.

30 C.F.R. 77.405(b) provides:

> (b) No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

Respondent argues in the first instance that no work was performed under the cited equipment, and therefore no violation of the mandatory standard was committed. The Secretary counters this by arguing that although no one saw him do it, the mechanic who removed the wheel, brake drum and spindle must have at some point placed a portion of his body underneath a portion of the axle. At least this is the opinion of the inspector. He

testified that at a minimum, the mechanic would have his arm, possibly his shoulder under a part of the machine when he was reaching in to take the ball joints out of the spindle.

Mr. Froum, the mechanic who actually performed the work, testified that he did not remove ball joints. The removal of the aforementioned parts simply required knocking out a kingpin with a hammer and punch as well as removal of a few bolts. The axle on which Mr. Froum was working was only eight inches to a foot above the floor and he simply leaned over the equipment and knocked out the kingpin. He testified that he did not go under the axle nor was any part of his body under the equipment at any time during the entire process. I find his testimony to be generally credible and the inspector to be generally unfamiliar with the equipment and the process of removing the wheel and spindle assembly.

I therefore find the Secretary has failed to prove a necessary element of the violation and the subject citation must be vacated. As an aside, I am also satisfied by Mr. Froum's testimony that the equipment in the configuration the inspector found it in could not have fallen in any event.

Citation No. 2889405 alleges an "S&S" violation of 30 C.F.R. 77.202 and states

> There is a fine layer of dry float coal dust on electrical boxes and all other surfaces in the energized motor control center in the old plant.

30 C.F.R. 77.202 states:

> Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

The float coal dust was being drawn into the motor control center from an outside coal stockpile through the intake for the pressurizing fan. The fan was used to pressurize the room to keep dust from coming in when the door was opened, but it was also apparently drawing in dust from outside.

The primary issue, which the Secretary of course has the burden of proof on, is whether the accumulation of coal dust was present in dangerous amounts.

It is not enough to prove merely that there was some coal dust on some electrical boxes inside a control room. Several Commission judges have previously held that whether an accumulation is "dangerous" depends on the amount of the accumulation and the existence and location of sources of ignition. The greater the concentration, the more likely it is to be put into suspension or propogate an explosion. See, for example, Pittsburg & Midway Coal Mining Co., 6 FMSHRC 1347, 1349 (1984) and Mettiki Coal Corporation, 11 FMSHRC 331, 343 (1989). I also agree with and adopt that rationale.

The inspector testified that there was a "very fine layer of dust" in the room, "too thin a layer to measure". The dust was located on the outside covers of electrical boxes and other surfaces in the room. There is no evidence in the record that any dust was inside any of the energized electrical boxes, as the inspector testified he didn't look in any of the boxes. The inspector also did not observe any dust in suspension even though he and another man walked around the room inspecting it. The dust has to be in suspension before an electrical spark will cause an explosion.

Mr. Wilkins, an electrician and electrical foreman at the facility testified that even if the electrical equipment malfunctioned and created an arc, sparks could not escape from the energized electrical boxes, as they were NEMA approved and protect the outside environment from the arcs resulting from the equipment starting and stopping.

Therefore, I find that the minimal amount of coal dust herein cited as present on the outside of the electrical box covers does not pose a hazard and I conclude that the Secretary has failed to establish that the coal dust present in the room existed in "dangerous amounts". According, the citation must be vacated.

Citation No. 2889408, issued on December 6, 1988, alleges a violation of 30 C.F.R. 77.1301(c)(2) in that:

> Dry brush and leaves have accumulated against the detonator magazine creating a source of fire.

30 C.F.R. 77.1301(c)(2) provides:

> (c) Magazines other than box type shall be:
>
> * * * * * * *
>
> (b) Detached structures located away from powerlines, fuel storage areas, and other possible sources of fire.

R&P does not dispute the fact that the dry brush and leaves were accumulated against the back of the detonator magazine, but does dispute that they were a source of fire within the meaning of section 77.1301(c)(2).

The inspector testified that he found a pile of dry leaves, approximately two feet high, piled half-way up the back of the magazine. He felt it was a fire hazard. More particularly, he felt this pile of dry leaves and brush was as much a source of fire as a fuel storage area. Neither one being in and of themselves a source of fire, however, they would both fuel a fire.

The magazine in question is a steel box, approximately four feet high, four feet wide and four feet deep. It is raised off the ground on either eight inch concrete blocks or steel skids. The floor of the box is steel and the interior of the box is lined with four inches of hardwood. Inside were several hundred blasting caps.

I am unconvinced that the leaves and brush posed any hazard to the blasting caps inside the magazine. I believe that even in the unlikely event the leaves were set on fire by some outside source of ignition such as lightning, the blasting caps inside the hardwood-lined steel magazine would not be affected. R&P's safety inspector at the Main Complex opined that the summer sun beating down on the magazine day after day has more of an adverse affect on the contents than would a leaf fire.

In any event, it is clear that the leaves and brush are not themselves a source of fire. It is also clear to me that leaves and brush do not pose comparable hazards to the contents of a magazine as do powerlines and fuel storage areas. The leaves and brush are not an ignition source in themselves nor a source of fire as contemplated by Section 77.1301(c)(2). Therefore, the accumulation near the magazine did not constitute a violation of the cited standard and the citation must therefore be vacated.

ORDER

1. Section 107(a) Order No. 2891302 and Citation Nos. 2891303 and 2891304 are hereby affirmed. The contests of that order and those citations are accordingly denied.

2. Section 104(d)(2) Order No. 2889678 is hereby modified to an "S&S" section 104(a) citation and affirmed.

3. Section 104(d)(2) Order No. 2889679 is hereby modified to a "non-S&S" section 104(a) citation and affirmed.

4. Section 104(a) Citation Nos. 2889402, 2889405 and 2889408 are vacated and Civil Penalty Proceeding Docket No. 89-127 is therefore dismissed.

5. Rochester & Pittsburgh Coal Company is ordered to pay the sum of $2500 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge