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

CONESVILLE COAL PREPARATION COMPANY, CONTESTANT	CONTEST PROCEEDINGS Docket No. LAKE 89-29-R Order No. 2950067; 12/5/88
v.	Docket No. LAKE 89-30-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 2950068; 12/5/88 Docket No. LAKE 89-31-R Citation No. 2950069; 12/5/89 Docket No. LAKE 89-32-R Order No. 2950070; 12/5/88 Conesville Coal Preparation Company Mine ID 33-03907
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 89-75 A.C. No. 33-03907-03516
v. CONESVILLE COAL PREPARATION COMPANY, RESPONDENT	Conesville Coal Preparation Company

DECISIONS

Appearances: David A. Laing, Esq., Porter, Wright, Morris & Arthur, Columbus, Ohio, for the Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the contestant (Conesville) 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 orders and citations issued by MSHA mine inspectors. The civil penalty proceeding concerns proposals for assessment of civil penalties filed by MSHA seeking civil penalty assessments against Conesville for three alleged violations noted in two of the contested citations and one of the orders. Hearings were held in Zanesville, Ohio, and the parties filed posthearing briefs which I have reviewed and considered.

Issues

The issues presented in these proceedings include the following: (1) whether Conesville 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 contested section 104(d)(1) citation and section 104(d)(2) order resulted from an unwarrantable failure by Conesville 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 my 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

The parties stipulated to the following (Tr. 9-13):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

2. The Conesville Coal Preparation Company Mine I.D. 33-03907 is owned and operated by the Conesville Coal Preparation Company.

3. The Conesville Preparation Company is an operator as defined by 3(d) of the Act.

4. The Conesville Coal Preparation Company, Mine I.D. 33-03907 is a mine as defined by 3(h) of the Act.

5. The Conesville Coal Preparation Company and Mine I.D. 33-03907 are subject to the jurisdiction of this Court and the 1977 Mine Act.

6. The size of the proposed penalties, if any are assessed, will not affect the operator's abillity to continue in business.

7. The Accident Report, (Exhibit M.X. - 30), fairly and accurately reflects the findings and conclusions of MSHA Inspectors Franklin Homko and Joseph Yudasz.

8. The reference made to an alleged violation of 30 C.F.R. 48.13(a), in the last sentence of page 5 of the aforementioned accident report is modified to allege a violation of 30 C.F.R. 48.31(a).

9. The first name of Mr. Lent referred to in the condition or practice stated in the section 104(d)(1) Order No. 2950070, is Richard, rather than Robert. Further, as a result of discovery, the parties agree that Norman Hicks and David Summers did in fact receive hazard training, and their names are deleted from the cited condition or practice.

10. The respective exhibits offered by the parties (C-1 through C-3, and MX-1 through MX-39) may be admitted as part of the record in these proceedings. Exhibits MX-35 and MX-38 are withdrawn by MSHA.

11. In view of the unavailability of Truck Driver Orville Parks, the testimony of Mr. Parks, transcribed from a tape made during the course of MSHA's accident investigation, is admitted as evidence in these proceedings (Joint Exhibit -1).

Discussion

The facts in these proceedings establish that at approximately 8:07 a.m., on Friday, December 2, 1988, a fatal haulage accident occurred at Conesville's preparation plant, resulting in the death of truck driver Dale A. Hina, a driver with 5 years 8 months experience, including 4 months experience transporting coal to the preparation plant from other mines. Mr. Hina, and another truck driver, Norman M. Fortney, had transported their loads of coal from a loading facility operated by the Crooksville

Coal Company, to the Conesville plant, an over-the-road distance of 60 miles. Mr. Hina and Mr. Fortney were operating trucks which were in tandem with 25-ton end-dump trailers. The trucks and coal contents were weighed at the Conesville preparation plant scalehouse and then driven to the raw coal pile unloading site. Mr. Fortney backed his truck near the toe of the raw coal pile and began dumping his load of coal onto the ground. Mr. Hina backed his truck next to Mr. Fortney's and began to dump his coal load from his trailer. As Mr. Fortney was dumping coal from the raised trailer of his truck, he moved the truck forward to allow the coal to flow freely from the trailer bed. A "sizable amount" of frozen coal which had remained adhered to the inside of the trailer bed at the right front part of the trailer apparently affected the stability of the raised trailer causing the truck and trailer to roll over onto its right side. The trailer landed directly on the cab of the truck that Mr. Hina was operating causing fatal crushing injuries to Mr. Hina. Mr. Fortney was not injured. According to MSHA's accident investigation report, prior to the accident, Mr. Fortney's truck was positioned approximately 10 feet to the left and 10 feet forward of Mr. Hina's truck.

The facts further show that the truck operated by Mr. Hina at the time of the accident was owned by Cox Farms Company, and that Mr. Hina was one of its employees. Mr. Fortney owned and operated the truck that he was driving at the time of the accident. Both trucks were leased or contracted to Ross Brothers, Inc., an independent contractor with MSHA I.D. No. V71. Ross Brothers Inc., had a contract with the Crooksville Coal Company to transport the coal loaded at the Crooksville facility to Conesville's preparation plant. Ross Brothers Inc., owned five trucks, and leased two trucks and drivers from Cox Farms, including the one operated by Mr. Hina, and leased or contracted the truck owned and operated by Mr. Fortney.

As a result of its accident investigation of December 2, 1988, MSHA concluded that the accident occurred because the frozen coal which remained in the raised trailer bed of Mr. Fortney's truck affected the stability of the trailer causing the truck and trailer to roll over on its right side. MSHA further concluded that the "practice" of dumping coal from a tandem truck and trailer without providing adequate side clearance between trucks contributed to the severity of the accident. MSHA also concluded that because of the failure by Conesville to insure that adequate clearance was provided for the trucks dumping coal at its preparation plant raw coal dumping location, Conesville violated mandatory safety standard 30 C.F.R. 77.1600(c), and on December 5, 1988, MSHA Inspector Robert L. Grissett issued to Conesville contested Imminent Danger Order No. 2950067, citing a violation of section 77.1600(c), and in conjunction with that order he also issued contested section 104(a) Citation No. 2950068, with "S&S" findings citing the same

standard. He also issued contested section 104(d)(1) Citation No. 2950069, with "S&S" findings citing Conesville with an alleged violation of mandatory training standard 30 C.F.R. 48.31(a), for failing to provide hazard training to Mr. Hina and Mr. Fortney, and section 104(d)(1) "S&S" Order No. 2950070 for failing to hazard train four other drivers. The orders and citations issued by Mr. Grissett state as follows:

Docket No. LAKE 89-29-R. Imminent Danger Order No. 2950067 (exhibit MX-2):

> The mine operator did not insure that adequate side clearance was provided at the raw coal pile, dumping location. A coal truck leased under Ross Bros. Inc., contractor No. V71, overturned while dumping coal and the bed of the truck fell on the cab of another truck, leased under Ross Bros. Inc. contractor number V71, which caused fatal injuries to the driver of the parked truck. A bulldozer operator works in conjunction with the truck during the dumping process.
>
> This is a violation of 30 C.F.R. 77.1600(c) and a separate citation will be issued. The investigation revealed that another trailer had overturned at this dumping location on 2-26-88.

Docket No. LAKE 89-30-R. Section 104(a) "S&S" Citation No. 2950068 (exhibit MX-3):

> The mine operator did not insure that adequate side clearance was provided at the raw coal pile dumping location. A coal truck leased under Ross Bros. Inc. contractor No. V71, overturned while dumping coal and the bed of the truck fell on the cab of another truck, leased under Ross Bros. Inc., which caused fatal injuries to the driver of the parked truck. A bulldozer operator works in conjunction with the trucks during the dumping process.
>
> This is the main factor in the imminent danger Order No. 2950067, dated 12-5-88, therefore no abatement time is given.

Docket No. LAKE 89-31-R. Section 104(d)(1) "S&S" Citation No. 2950069 (exhibit MX-4):

> Dale A. Hina and Norman H. Fortney, truck drivers contracted by Ross Bros. Inc., contractor I.D. No. V71, had not received hazard training prior to hauling coal onto this mine property. Fortney's truck, when dumping, overturned on Hinas' truck, causing fatal injuries to Hina. The operator's hazard training under item 6

> states to stay clear of all raised equipment. There were no entries in the hazard training log book to indicate that these truck drivers did receive hazard training.

Docket No. LAKE 89-32-R. Section 104(d)(1) "S&S" Order No. 2950070 (exhibit MX-5):

> Hazard training was not provided to the following truck drivers who haul coal onto this coal mining property: Orville Parks, Richard Lent, Robert St. Clair, Jr., . . . and Harold Jacobs. These truck drivers either work for or are contracted by Ross Bros. Inc., contractor I.D. No. V71. There were no entries in the hazard training log book to indicate that these truck drivers did receive hazard training.

MSHA's Testimony and Evidence

Norman Fortney testified that he is currently employed by Landis Trucking, and that most of his adult occupation has been the driving of trucks (Tr. 19). He stated that he began delivering coal at the Conesville preparation plant in August, 1988, and that during the period from August to December 2, 1988, he made approximately 200 deliveries at that site, and he explained the procedures that he followed in delivering and dumping his coal loads (Tr. 21-23). He confirmed that prior to December 2, 1988, the scalemaster never told him how he wanted the coal dumped, and that there were no controls over how the trucks should be backed into the pile for dumping. He stated that the drivers themselves would keep their trucks apart and would dump where they thought it was safe to dump. There were no Conesville employees at the dumping location to tell the drivers where to dump (Tr. 24).

Mr. Fortney confirmed that he regularly observed other trucks dumping at the pile during his deliveries, and he explained what he observed as follows at (Tr. 25-26):

> Q. All right. Generally, what sort of distances were kept between the trucks when they were dumping?
>
> A. Really there wasn't any set pattern. If you could get backed in, and you thought it was safe to dump, you backed in. There was no -- as I say today, maybe backing in there, if they're busy, 10 or 12 feet apart. If they're -- if it would happen that you took a little extra time at the sampler, or something, and maybe one of the trucks got unloaded quicker, he'd be gone. So, there'd be more room then.

> There really wasn't any set pattern of how far apart the trucks stayed other than the drivers tried to operate in a safe manner and dump their trucks.
>
> Q. All right. During the 200 -- approximately 200 deliveries that you were involved in, was it -- was it usual to see trucks within 10 or 12 feet of each other when they were dumping?
>
> A. Yes.

Mr. Fortney confirmed that he was familiar with hazard training, and he explained that "It's a program instituted by the operation---the wash plant operation that explains to us, the drivers that come in there, certain rules and regulations," including driving on the right side of the road and giving the right of way to heavy equipment (Tr. 26). He stated that during the time he was delivering coal to the Conesville property from August to December 2, 1988, no employee of Conesville ever gave him any hazard training. After examining Conesville's hazard training check lists, Mr. Fortney stated that he recognized them as the "verbal" hazard training which was explained to him "by the gentlemen that explained" it to him. He further stated that he had never seen these check lists during the prior occasions when he was delivering coal to the Conesville property (Tr. 28-30).

Mr. Fortney stated that during the period August through December 2, 1988, he had "heard" of more than one coal truck upsetting at the Conesville raw coal pile (Tr. 31). He explained the circumstances of the accident that he was involved in on December 2, 1988 (Tr. 31-35).

On cross-examination, Mr. Fortney stated that at the time of the accident he was leasing the truck and trailer which he owned to Ross Brothers Inc., and was paid by the ton for the coal which he delivered from the Crooksville Coal Company to the Conesville preparation plant. He confirmed that prior to the accident he received no training of any kind from Ross Brothers Inc. or the Crooksville Coal Company (Tr. 37). He confirmed that he has papers as a certified surface mine foreman from the State of Ohio, and was so certified at the time of the accident (Tr. 38).

Mr. Fortney confirmed that he delivered coal to the Conesville facility on an average of three loads a day, 3 days a week, and that Mr. Hina's delivery schedule was approximately the same as his (Tr. 39-40). Although he believed that there was "room for improvement" at the Conesville facility, he agreed with a prior statement that he made during the taking of his deposition that the Conesville coal facility "runs as smooth as any I've ever worked at" (Tr. 44).

Mr. Fortney stated that as of December 2, 1988, he was allowed to dump anywhere at Conesville's coal pile, and was never directed where to unload. He stated that dumping was left to the driver's discretion and that he dumped at a spot where he felt comfortable, and was not required to be within so many feet of another truck while dumping (Tr. 45). He confirmed that the drivers could communicate among themselves and with the scalehouse by means of CB radios, and that if he did not feel comfortable at any dumping location he was free to move to another location, and that Conesville never told him that he could not do this (Tr. 45).

Mr. Fortney confirmed that he was aware of the hazard of a truck trailer tipping over, and was aware of the fact that frozen coal could cause a tipping hazard and that this was the reason why a truck driver may choose to line his trailer bed with anti-freeze or diesel fuel on cold days (Tr. 47). He stated that the actual backing up and raising of the coal load is the most crucial part of his delivery process, and that he is selective in where to dump his load. He confirmed that the dumping area at the time of the accident appeared to be normal, and he believed that he was safe and on firm and level ground at the location where he was dumping. He confirmed that he had not lined his trailer with any anti-freeze or diesel fuel at the time of the accident. He stated that since the accident, he no longer hauls coal (Tr. 48).

Mr. Fortney stated that at the time of the accident, he backed into the dumping location first, and Mr. Hina backed up after him. He stated that there was another truck to his left, approximately 40 to 50 feet away, and that the drivers try to leave that kind of distance between trucks "when the room was there." There were times when drivers were 40 to 50 feet from each other, and other times when they were not, and he tried to "find a level spot, and a safe spot to dump" (Tr. 49). He stated further that if there are four trucks dumping at the same time, there is no room to maintain a 40 to 50 foot distance between trucks at the pile in question (Tr. 50). He stated that he was not surprised when Mr. Hina backed in as close as he did to him because he could not see him across his truck, but that after the accident occurred he was surprised that Mr. Hina was so close, or 10 feet from his truck (Tr. 51).

Mr. Fortney confirmed that he received hazard training after the accident, but that it taught him nothing that he did not already know about hazards associated with dumping coal loads at the Conesville facility (Tr. 54). He confirmed that prior to December 2, 1988, he never asked anyone at the Conesville site to train him, and that he never told anyone there that he had not received hazard training (Tr. 54). No Conesville employee ever asked about or tested his knowledge of safe dumping procedures (Tr. 61).

Mr. Fortney stated that during all of his trips to the Conesville plant, he never knowingly dumped a load of coal when he felt it was not safe, and he believed that he was following safe dumping practices regardless of whether he was 15 or 50 feet from another truck. He confirmed that he never complained to MSHA about any unsafe dumping practices, but that he and other drivers would complain to the scalemaster if it rained, and the dumping area became muddy and not level. When this occurred, the scalemaster would instruct the dozer operators to correct the conditions (Tr. 64).

Mr. Fortney confirmed that he and other drivers have been as close as 10 feet to other trucks while dumping their coal loads, and had Mr. Hina arrived first to dump, he would have pulled in as close as Mr. Hina did to him. However, at the present time, drivers must stay 50 feet from other trucks because there are lanes marked off by traffic cones (Tr. 68). He believed that the Conesville hazard training check list concerns staying away from loaders with buckets in the air, or staying away from a moving dozer, rather than the trucks backing up and dumping (Tr. 77).

Robert St. Clair, Jr., truck driver, Ross Brothers Trucking Company, testified that he has worked for this company for 5 years and has delivered coal to the Conesville preparation plant on and off since it began operating 4 years ago. He stated that he hauled coal to the plant on December 2, 1988, but in view of the accident, he was directed to take his load to the power plant and did not dump it at the preparation plant raw coal pile.

Mr. St. Clair stated that he has made approximately 2,000 coal deliveries to the Conesville plant since he began driving for Ross Brothers and he described the procedure he followed in dumping his coal load. He confirmed that depending on the type of trailer he was driving, he would be required to leave his truck cab in order to activate the necessary controls to dump his load. He stated that prior to December 2, 1988, he had occasion to be out of his cab and on the ground while dumping his load.

Mr. St. Clair stated that when he started dumping coal at the Conesville raw coal pile no one from Conesville ever showed him how the coal was to be dumped at the pile. He confirmed that he knew the scalemaster at the preparation plant by his first name "Rick." He confirmed that he was aware of "hazard training" and explained that "It's where somebody tells me how to do my job on their property and then I sign a paper stating that I understand their training" (Tr. 87). He stated that no employee of Conesville ever gave him any hazard training prior to December 2, 1988, and in the 4 years that he has delivered coal to the property he never received any training. After examining copies of Conesville's hazard training check lists, (exhibits MX-33 and

MX-37), Mr. St. Clair stated that he had never seen them prior to December 2, 1988 (Tr. 88).

On cross-examination, Mr. St. Clair stated that his father formerly worked for Ross Brothers and trained him while he was growing up, and that "it comes natural" to him as part of his making a living as a truck driver. He stated that he never received any truck driver training from Ross Brothers, and received no hazard training with respect to delivering coal at any facility (Tr. 89). He stated that he hauled coal to the Conesville plant 3 times a day, 3 days a week since December 2, 1988, and that Ross Brothers has a 2-1/2 year contract to haul coal from the Crooksville Coal Company to the plant. He confirmed that he did not receive any training at the Crooksville Mine.

Mr. St. Clair stated that he can control the trailer tailgate from the cab of the truck which he is presently driving. He confirmed that in December, 1988, while in the employ of Ross Brothers he was aware of coal trailers tipping over and that he has been warned about this hazard. He stated that "its something you have to always be aware of." He believed that he always takes precautions while operating his truck and that he is "safety conscious." He stated that one needs to watch every load which is dumped, and that if he does not believe it is safe to dump a load he will not dump it.

Mr. St. Clair stated that he has never requested Conesville to train him, and he believed that many of the items on the company's hazard training checklist do not pertain to his work as a truck driver. He confirmed that MSHA has never inspected his truck, but that both he and Ross Brothers inspect the truck on a daily basis.

Mr. St. Clair stated that he never heard of any other trucks overturning at the Conesville coal pile during the years that he has delivered coal to the property. He confirmed that he never told anyone at Conesville that he had not been trained, and that no one at Conesville ever asked or tested him as to his knowledge concerning the safe operation of his truck or the dumping of his coal loads. He stated that "they leave me alone, just told me to go dump my load" (Tr. 99).

Richard Lent, truck driver, Ross Brothers Trucking Company, testified that he has 22 years of experience as a truck driver, and that he has delivered coal to the Conesville plant for approximately a year. He was scheduled to deliver coal to the plant on December 2, 1988, but was diverted to the power plant after the accident occurred.

Mr. Lent explained the procedure he followed in dumping his coal loads. He confirmed that depending on the type of trailer

he was operating on any given day, he would have to get out of his truck cab to activate the tailgate lever in order to facilitate the dumping of his load.

Mr. Lent stated that prior to December 2, 1988, no one from Conesville ever instructed him how to dump his coal load. He stated that "I just watched the other drivers, where they dumped theirs and that was it" (Tr. 106). He identified Conesville's scalemaster as "Rick" and confirmed that he has heard the term "hazard training." He explained that "it means what the company wants us to do inside their plant . . . dumping and stuff" (Tr. 106). He confirmed that prior to December 2, 1988, no employee of Conesville ever gave him any hazard training or ever asked or tested his knowledge as to how to safely operate his truck (Tr. 107). After identifying Conesville's hazard training check lists, Mr. Lent stated that he never saw them prior to December 2, 1988 (Tr. 106-107).

On cross-examination, Mr. Lent confirmed that he received no hazard training from Ross Brothers or the Crooksville Coal Company. He stated that he does inspect his truck and had to pass a test to work for Ross Brothers. He confirmed that he delivers coal to the Conesville plant 3 days a week, making 3 trips a day, and that he knows what to do while dumping his load by observing the other truck drivers.

Mr. Lent stated that he has always been alert and aware of the hazard concerning the overturning of a truck while dumping, and that if possible, he tries to dump his load after the other trucks have completed their dumping. He confirmed that he always puts fuel oil in his truck bed to prevent coal freezing and takes precautions while dumping.

Mr. Lent stated that prior to December 2, 1988, he had to get out of his truck cab to operate the tailgate levers and to observe the dumping of his load. He stated that he would also stand on the fuel tank between the truck cab and trailer bed, and that some of the new trucks used by Ross Brothers have all of the trailer controls inside of the truck cab. He stated further that during the period October, 1988, to December, 1988, he sometimes had to get out of his cab and walk to the rear of the truck to see if the tailgate was down (Tr. 108-119).

James R. Stull, truck driver, Bellaire Trucking Company, testified that he has 32 years of driving experience and has worked for Bellaire for 2 years. He stated that he has hauled coal for 18 years, and started hauling coal to the Conesville plant in October, 1987. He confirmed that he overturned a truck at the Conesville plant coal pile in February, 1988. The ground was not level, and as he backed up his truck to dump the load of coal, the right rear wheel sunk into the mud, and the truck overturned but no one was hurt. Mr. Stull stated that Conesville

never instructed him how to dump his coal on the pile, and there were no traffic lanes at the dump site for the trucks to follow while dumping their loads (Tr. 120-124).

On cross-examination, Mr. Stull confirmed that he received no training at the Bellaire Company, but did receive hazard training at the Conesville plant. He stated that when his truck overturned, it fell for a distance of 30 feet but did not strike anything. He stated that the truck trailer telescope broke off after the truck tipped over (Tr. 125-127). In response to further questions, Mr. Stull stated that the training he received at the Conesville plant came after the fatal accident, and he explained the training that he received (Tr. 128-129).

Clyde O. Parks, electrician, Conesville Coal Preparation Company, stated that he has worked at the plant for 5 years and has 37 years of mining experience. He confirmed that he is a member of the UMWA, and except for a 13-month period, he has served as a member of the mine safety committee. He stated that the coal haulage truck drivers are not members of his union.

Mr. Parks stated that when another truck overturned at the plant coal pile on February 26, 1988, he participated in the union walkaround inspection at the site as a member of the safety committee. He stated the truck overturned after the right rear wheel dual tires hit a soft spot while dumping a load and caused the yoke to break at the point where the truck telescope fastens to the trailer.

Mr. Parks stated that Mr. Bill Lyons, Safety Director of Conesville Coal Company, accompanied him during the walkaround. As a result of the incident of February 26, 1988, measurements were taken of the distance covered by the truck which overturned and the safety committee expressed their concern about maintaining a safe distance between the trucks. The union held a communications meeting with Conesville's management and recommended that only three trucks be permitted to dump coal at any one time, no less than 30 feet apart. Mr. Parks stated that the company accepted the recommendations and limited the dumping to three trucks at a time, but it only did this for a period of 2 weeks (Tr. 129-140).

On cross-examination, Mr. Parks confirmed that he also served on the safety committee while previously employed by Peabody Coal Company. He stated that after a truck tipped over at the coal hopper at Peabody, MSHA took no further action.

Mr. Parks confirmed that the union has the authority to declare an imminent danger at the plant coal dumping piles, but that it has never exercised this right and has never advised MSHA of any imminent danger. He confirmed that he first spoke to Inspector Grissett about the instant case 2-weeks prior to the

hearing. He also confirmed that the Conesville Company has received safety awards, was cited by MSHA for having 600 days without a lost time accident, and that MSHA inspectors have advised him that the company runs a safe operation (Tr. 140-158).

MSHA Inspector Robert L. Grissett, confirmed that he and several other inspectors conducted an investigation of the accident in question on December 2, 1988, and that he issued a section 103(k) order that day (Tr. 164). He identified several photographs of the trucks which were involved in the accident, and explained what the investigating team found (Tr. 165-175). Mr. Grissett and the other inspectors returned to the mine on December 5, 1988, to continue their inquiry, including interviews with witnesses (Tr. 176). He reviewed the company training plan and records, and explained the coal dumping procedures. He confirmed that there were no designated lanes marked off for the trucks to use at the coal pile, and that once the load was weighed and sampled, the trucks were free to go to the dumping area.

Mr. Grissett stated that he learned about Conesville's training plan for contract truck drivers during an interview with scalemaster Rick Shuck. Mr. Shuck informed him that each truck had an identification number on a card on the windshield of the passenger side, and as each truck passed over the scales Mr. Shuck would log the number and then hazard train the driver. During subsequent truck trips, Mr. Shuck would refer to his log to insure that the number on the truck corresponded with the number in his log. However, if there were a change in drivers, he would have no way of knowing whether that particular individual was trained because the log would only reflect a truck number. Mr. Grissett stated that Mr. Shuck and superintendent Leppla acknowledged that this system presented a problem because "too many trucks were coming in" (Tr. 182). Mr. Grissett stated that he was particularly interested in items 5 and 6 of Conesville's training plan which advises persons to stay clear of all raised equipment and to watch for moving equipment (Tr. 183, exhibit MX-37).

Mr. Grissett confirmed that after the completion of the accident investigation he issued a section 107(a) imminent danger order and a section 104(d)(1) citation and order (Tr. 182). The imminent danger order was issued in conjunction with a section 104(a) citation which was issued for a violation of section 77.1600(c), for failure to maintain adequate and safe side clearance on raised equipment. He explained that Mr. Hina's truck was within 10 feet of Mr. Fortney's truck and there were no established guidelines as to the procedures for dumping, and there were no designated areas provided at the dump location for safe side clearances for the trucks. Based on his investigation, record review, and interviews, he concluded that these failures had been a "practice at the mine" (Tr. 185). He explained his

reason for issuing the imminent danger order as follows at (Tr. 184):

> * * * * * * *
>
> A. Well, you have to have a condition or practice that is so serious that you feel that an abatement time couldn't be given before a serious injury or accident could happen.
>
> * * * * * * *
>
> A. The practice--we had established that they had not provided adequate side clearance. And I know I had the area closed on a 103(K) order, but that was soon to be lifted as soon as the investigation was over, and there would be nothing to prevent them from continuing to operate the way they had prior to that.
>
> Q. So why did you issue the imminent danger order?
>
> A. To keep the area closed until management could devise a method to ensure adequate side clearance.

Mr. Grissett stated that he based his "high negligence" finding on the fact that there had been a prior truck tipping incident at the mine on February 26, 1988, as confirmed by the photographs produced by Conesville's Safety Director Bill Lyons (Tr. 186). He based his "S&S" finding on the fact that an accident resulting in a fatality had occurred (Tr. 187). He confirmed that he issued a citation for a violation of the training requirements of section 48.31(a), and that he reviewed the mine hazard training log and plan before doing so (Tr. 187). He also consulted MSHA's Part 48 training policy manual (exhibit MX-31), and discussed the citations and orders with his supervisor and the other MSHA inspectors who were with him on December 5, and that they all agreed with his enforcement actions (Tr. 189).

Mr. Grissett stated that he based his "high negligence" finding with respect to the training violation on Mr. Leppla's statement that he recognized that there was a problem with training the truck drivers, and the fact that Conesville had knowledge of the prior truck tipping incident and failed to do anything about its training. He stated that "I put all that together, and felt that it met the criteria for a (d)(1) citation" (Tr. 190). He also confirmed that he found the violation to be "S&S" because "we had an accident that resulted in a fatality" and "that's part of the criteria on S and S" (Tr. 190). With regard to his unwarrantable failure findings, Mr. Grissett stated as follows at (Tr. 190-192; 195-196):

A. Well, it has to be a violation of mandatory standard. It has to be S and S, or significant and substantial. It can't be imminent danger. And the operator has had to show aggravated conduct, which would constitute more than ordinary negligence.

Q. Okay. What do you understand aggravated conduct constituting more than ordinary negligence to mean?

A. That would mean that they had prior knowledge of a serious condition or act or area of the mine that could cause injury to someone, and failed to take appropriate steps to eliminate it or prevent a reoccurrence.

Q. Okay. And in your investigation, interviews, observations and record reviews, what findings did you make that led you to conclude that Conesville had, in fact, exhibited aggravated conduct constituting more than ordinary negligence with respect to their training?

A. That they recognized they had a breakdown in their system, or their system was just not -- not adequate to assure that everybody was getting hazard trained.

* * * * * * *

Q. All right. What findings did you make that led you to conclude that Conesville Coal had exhibited aggravated conduct constituting more than ordinary negligence with respect to their hazard training and their prior knowledge of the hazard training?

A. In the fact that they had -- that we had the accident in February 26th of '88 that was brought to their attention, that they had the breakdown in their hazard training system and was aware of that.

* * * * * * *

Q. With respect to Line 11 on your (D)(1) order, you marked high for negligence on this training violation. Why did you find that Conesville was highly negligent with respect to their training program?

A. Because they admitted that they had problems and were not sure how many truck drivers had received hazard training, and seemed to feel that it was just practically an impossible situation to -- to get everybody hazard trained because of the amount of trucks that come in.

Q. All right.

A. And it was actually the -- it was more the method they were using than anything else.

With regard to his "S&S" finding concerning the section 104(d)(2) order, Mr. Grissett stated as follows (Tr. 196-197):

Q. And how did it -- what findings did you make that it met the S and S criteria?

A. That hazard training in this case where you have truck drivers that's coming into an area, and can dump at will wherever they want to, I think the hazard training that addresses -- that they address in their hazard training program that they have addresses that area.

So, I feel the hazard training and the dumping of coal at the raw coal pile go together because that's all these gentlemen that come in there with those trucks do. They just come in, and dump coal and leave. So, they're only exposed to very few hazards. And one of the main ones is in the dumping of it.

Q. All right. And what hazards in the dumping area?

A. That they will upset, and that you have to keep it level, and you have to keep them apart to allow for these trucks to upset.

On cross-examination, Mr. Grissett confirmed that he had inspected the preparation plant in question at least 2 times a year for the past 3 years, including the raw coal dumping area, and that other inspectors have also inspected the facility. He confirmed that he has observed the dumping in progress during prior inspections before December 2, 1988, and that it was very likely that he inspected the facility during a regular inspection from September 20 to 28, 1988. He confirmed that prior to December 2, 1988, he never issued any imminent danger orders at the dumping location, and had never previously cited Conesville with a violation of section 77.1600(c) (Tr. 202-206).

Mr. Grissett confirmed that the accident investigation revealed that frozen coal which remained in the upper right-hand corner of Mr. Fortney's truck trailer bed caused his truck to tip over (Tr. 207). He confirmed that he based his imminent danger order on his belief that Conesville had a continuing violation of section 77.1600(c), that was creating an imminent danger because it did not insure that there was an adequate side clearance between trucks to ensure that a truck which tipped over would not come in contact with another truck (Tr. 209-211). He confirmed

that when he issued the order, he did not have in mind any specific adequate minimum distance between trucks, but that he did not believe that 10 feet was adequate. He now believes that an adequate distance would be "in the neighborhood of 40 or 50 feet" (Tr. 212). He defined the term "adequate" to mean "if it was raised it would not cause an injury to somebody if it fell over" (Tr. 213). He believed that the cited standard required Conesville to keep enough distance between the coal trucks dumping at the coal pile so that if one toppled over it could not hit another truck (Tr. 214).

Mr. Grissett confirmed that in order to abate Citation No. 2950068, Conesville was required to establish a system to ensure that trucks would not come in contact with each other in the event of another accident similar to the one which occurred in these proceedings, and that simply posting a sign would not be sufficient (Tr. 214). He confirmed that the use of the cones for truck spacing was suggested by Conesville, and that this was acceptable to MSHA. Another alternative would be to enlarge the dumping area to provide ample room between trucks while they are dumping (Tr. 218). He confirmed that a hazard always exists at the dumping areas where hoppers are located, but that Conesville always flagged those areas to alert the truckers of the hopper hazards (Tr. 221).

Mr. Grissett confirmed that prior to December 2, 1988, he issued a citation for a violation of section 77.1600(c), at another tipple raw coal pile because of an overhead high voltage line which could have been contacted by a truck raising its bed, but that he never issued any violation for trucks dumping too close together, and the Conesville case was his first experience of this kind (Tr. 223-224).

Mr. Grissett confirmed that although he did not investigate the prior tipping incident of February, 1988, it was his understanding that it was caused by a broken hydraulic hoist scope which caused the truck to tip, and it did not hit anything when it fell over (Tr. 225). He confirmed that during his investigation of the December 2, 1988, accident, he determined that the truck drivers with whom he had spoken were aware of the tipping hazards created by frozen coal, and that Mr. Fortney had not used any kind of anti-freeze on his truck that day (Tr. 227). He also confirmed that the drivers listed in Order No. 2950070, who either worked for or leased their trucks to Ross Brothers, had not been hazard trained (Tr. 228). He explained his understanding of the contractual arrangements between Conesville, Crooksville Coal Company, and Ross Brothers, and independent trucker Fortney, and Mr. Hina, an employee of Cox Farms (Tr. 225-229).

Mr. Grissett confirmed that although Ross Brothers has an MSHA I.D. Number V7-1, and is considered to be an independent

contractor subject to MSHA's jurisdiction, no citations or orders were issued to Ross Brothers or to Mr. Fortney (Tr. 230-231). He also confirmed that there are no MSHA requirements for a trucker to apply anti-freeze or diesel oil to their trucks to prevent coal freezing (Tr. 231).

Mr. Grissett stated that his investigation did not reveal whether or not Ross Brothers was providing hazard training to its drivers. He stated further that Ross Brothers was not required to give this training because "it would have to be to the people entering upon the mine property." Conceding that the drivers in question did enter mine property, Mr. Grissett stated that the training would have to be provided "by the operator that's invited the man in there" and that Ross Brothers "wouldn't know of the existing or potential hazards of that raw coal dump" (Tr. 233). He agreed that a trucking company such as Ross Brothers should be concerned about hazards to its drivers and possible damage to its equipment, but that "the way the law is," it is the mine operator's responsibility to train the drivers "once that truck enters the gate" (Tr. 233). He confirmed that the Crooksville Coal Company had not trained some of its drivers, and while he did not know whether any citations were issued to Crooksville, he believed that another MSHA inspector visited that site and that "the situation has been taken care of" (Tr. 234).

Mr. Grissett stated that the cited training standard section 48.31(a), requires hazard training for all individuals who come within the definition of "miner" pursuant to section 48.22(a)(2). He believed that Mr. Fortney, Mr. Hina, and the other cited truckers came within the definition of "delivery personnel" included in the definition of "miner" (Tr. 236). He determined from Mr. Fortney that he had been delivering coal to the preparation facility 3 times a day, 3 days a week, but did not determine how long Mr. Hina had been coming to the facility (Tr. 237). However, he did not disagree with the information in the accident investigation report that Mr. Hina had delivered coal to the facility for 4 months during the same daily intervals as Mr. Fortney (Tr. 238).

Mr. Grissett stated that Mr. Fortney and Mr. Hina would be exposed to the potential of a truck upsetting while dumping coal. They were also exposed to hazards from the hoppers, and while on foot they may be exposed to other truck and dozer traffic hazards. He confirmed that they were exposed to these hazards on a daily basis during each trip that they made to the raw coal pile. He explained that these individuals would not be classified as miners pursuant to the definition found in section 48.22(a)(1), because they were not employed at the mine, or contracted to work there for a period of 5 days, and "were just contracted to deliver a product to the mine" (Tr. 250). He confirmed that he followed MSHA's training policy guidelines when

he issued the citations, and consulted with MSHA's training and education specialist Jim Myers in this regard (Tr. 251).

Mr. Grissett confirmed that MSHA's policy manual provides an exception for truck drivers who remain in their vehicles while on mine property, and that they are not required to be hazard trained pursuant to section 48.31(a) (Tr. 253). After responding to further questions concerning the exception for persons who come to the mine property to pick up or deliver materials and supplies, Mr. Grissett disagreed that coal truck drivers that stayed in their vehicles need not be hazard trained (Tr. 255). He conceded that when he gave his prior deposition he stated that individuals who came to the mine property in a pickup or delivery truck and who did not leave their vehicles were not required to be hazard trained. He confirmed his belief that coal haulers who do not leave their vehicles are not required to be hazard trained by the mine operator, but if they do leave their vehicle, they are required to be trained with respect to the hazards that they are exposed to while out of their vehicles (Tr. 257).

Mr. Grissett explained his reasons for citing Mr. Fortney and Mr. Hina for lack of hazard training as follows at (Tr. 258-260):

> Q. Okay. Now, you indicated that the reason you issued the citation with respect to Mr. Fortney and Mr. Hina as far as hazard training goes is because it was determined they were out of their vehicle; is that right?
>
> A. Yes.
>
> Q. Okay. So, if -- if you had determined they had stayed in their vehicles, that citation would not have been issued with respect to those two individuals; am I correct?
>
> A. I'm not sure whether -- there was more thinking into that than that before I issued that citation. I know what I said in the deposition. I don't know. I recognize it there, and I must have said it, and I've reread it, and possibly -- apparently I did say it that way. And so, I'll have to go with it.
>
> Q. So, to make sure I am not mischaracterizing your testimony, you do agree that your prior testimony on this issue is that coal haulers who remain in their vehicles need not be given hazard training, correct?
>
> A. That's the way that it reads, yes.

Q. And that's the way you were interpreting 48.31(a), at least as of December 2nd, 1988?

A. Yes.

Q. And because Mr. Fortney and Mr. Hina, you ascertained were out of their vehicles, you deemed they needed hazard training?

A. Fall into that area, yeah.

Q. Fall into the area of?

A. Requiring hazard training.

Q. Okay. Specifically, did you know where Mr. Hina was when he was out of his vehicle on December 2nd? Did you determine where ---

A. I don't---

Q. ---where he was in particular that day?

A. No.

Q. Okay. How did you determine he was out of his vehicle?

A. I don't know whether we determined that or not. We determined he hadn't been hazard trained.

And, at (Tr. pgs. 263-264; 266, 267-268; 273-274):

THE WITNESS: I have gotten totally confused as to actually what I did that day like entering this policy into it, and I'm not too sure -- I know what the deposition says. I don't know -- I don't recall whether we was talking policy at that time or not when we was in Cleveland.

But I know that we enforce if a man comes to the mine on a regular basis and delivering a product such as this was -- this was a delivery of a product -- and is exposed to hazards while performing that, he has to be hazard trained.

Now, the policy -- and I know it gets -- it gets very confusing -- but we try to get to the meat of it and sometimes we have to stay away from that policy because its confusing.

All I did to refer to that policy is to make sure I was in the right area of addressing hazard training. I briefed through that, and I talked to Jim Myers; am I in the right direction here. And he said, yes.

But as far as enforcement, when we're talking delivery, when a man from Penn Ohio delivers towels to the mine, we don't require him to have hazard training. He generally pulls in the parking lot, and walks into the shop area or office area. * * *

* * * * * * *

A. The way I enforce it is that if they come there on a regular basis and are exposed to hazards, they have to be hazard trained with the exception of personnel who comes around the mine office or mine shop just in a delivery capacity such as a mailman.

* * * * * * *

THE WITNESS: Right, the policy. But I don't enforce the policy. That was my interpretation of the policy in the deposition.

BY MR. LAING:

Q. And you rely on the policy in making a decision whether to issue a citation or order?

A. No.

Q. You don't rely on the policy?

A. No, sir.

Q. Didn't you testify to Mr. Zohn that you do refer to the policy?

A. We refer to the policy because it's a guideline. I carry the policy in my vehicle. I've gotten in problems with the policy. It -- you cannot enforce it.

* * * * * * *

Q. Okay. Mr. Grissett, with respect to the order that you issued on the other Ross trucking drivers who didn't receive hazard training, did you make a determination that they were out of their truck, also, while at Conesville?

A. We made a determination they had not received hazard training.

Q. Okay. Was there any determination made as to whether they were out of their truck?

A. No.

Q. Okay.

A. There might have been on Orville Parks. That question may have been asked.

Mr. Grissett stated that item #6 of the Conesville hazard training plan applies to the possibility of a truck tipping over and that such an occurrence is not unique to the Conesville preparation plant. He confirmed that the truck drivers were aware of this hazard and that they are most concerned when they are dumping (Tr. 278). He confirmed that at the time of the accident Conesville had an approved hazard training plan in effect for truck drivers, that hazard training was part of the plan, and that many drivers had been trained (Tr. 278, 282). He confirmed that he issued the citation because he could find no evidence that the drivers identified in the citation were hazard trained (Tr. 281). He also confirmed that he had no problem with the hazard training "checklist" used to train the drivers, but that Conesville missed some drivers when it came to hazard training (Tr. 282). He stated that Mr. Leppla's statement concerning a "problem" with training concerned "knowing which ones are and which ones are not trained" (Tr. 284).

In response to further questions, Mr. Grissett confirmed that Conesville never raised any policy distinctions concerning training for truck drivers who did not leave their trucks, and that this issue was never raised by Conesville. He stated that "they were trying to get their truck drivers trained" (Tr. 290). He confirmed that he issued the two training violations because Conesville had a "flaw" in its hazard training program and had not in fact hazard trained some of the truck drivers (Tr. 290). He stated that when he referred to the MSHA policy discussed with Mr. Myers, he decided not to follow it because it did not address the situation and that he was enforcing the law and not the policy and it made no difference to him whether or not the drivers got out of their trucks while they were dumping coal (Tr. 291). When asked whether the policy contradicts section 48.31(a), Mr. Grissett responded as follows at (Tr. 292):

A. It didn't apply there where you have truck drivers whether they got out or not, even though we did establish that some of them got out. So, it really didn't apply to that because you -- they were exposed to -- they were exposed to hazards while in their vehicle.

> So, we couldn't -- we just couldn't use that there. We had to -- we had to just go with what the law stated, that if they're on a regular delivery there, a regular basis, and are exposed to the hazards, then they have to be hazard trained.

Mr. Grissett stated that since the "cone and lane" system has been in effect at the coal dumping location there have been two incidents of trucks upsetting without any injuries, and he believed they were caused by a wheel or a broken scope or pin (Tr. 303). He stated that the mine operator has the responsibility to foresee the possibility that at any given time a truck will upset at a coal dumping location and that it must insure that proper separation is maintained between the trucks that are dumping (Tr. 311). Conesville's Testimony and Evidence

Randy B. Miller, testified that he is the administrative manager of the preparation plant, and that part of his duties include recordkeeping. He was aware of the prior truck tipping incident, and confirmed that the safety director showed him a picture of the truck and informed him that it turned over because of a mechanical problem involving a broken pin. He further confirmed that he attended meetings with the mine safety committee, but he could not recall the committee ever proposing that a three truck dumping cycle be used at the raw coal dumping pile (Tr. 325-327).

On cross-examination, Mr. Miller confirmed that he was also aware of a truck upsetting at the coal pile subsequent to the accident of December 2, 1988, and while there may have been other such incidents, he was not personally aware of them since these are matters which would be investigated by the safety director. He stated that he was at the meeting with the safety committee held on March 1, 1988, following the truck tipping incident in February, 1988, but he could find no "union safety write-up" or record of any discussion concerning the trucks. He also checked the minutes of similar meetings held from January through December, 1988, and found nothing in this regard (Tr. 331). He denied that Mr. Clyde Parks ever suggested to him that Conesville should implement a three truck dumping cycle at the coal pile, and he agreed that Mr. Parks would not necessarily discuss this with him and that it would more appropriately be brought up with the safety director (Tr. 333).

William Lyon, testified that he retired as the plant safety director, training instructor, and staff electrical engineer on June 1, 1989, and that he served in these capacities for Conesville from February, 1985, until his retirement. He confirmed that the plant opened in January, 1985, and he explained what is done there (Tr. 339-342). He stated that as of the

December 2, 1988, accident the plant had 50 employees. He confirmed that there were four signs posted at the raw coal dumping area at the time of the accident stating "Danger Open Hopper," and he identified exhibit MX-33, as the approved training plan for the plant as of the time of the accident. He stated that MSHA inspector and training specialist Jim Myer spoke with him in November, 1986, and informed him that he had to have an approved training plan, and that Mr. Myer volunteered to put a plan together for him. Mr. Myer prepared the plan, including the last page, which is the hazard training plan, presented it to him, and it was subsequently adopted by Conesville and approved by MSHA (Tr. 342-345).

Mr. Lyon identified exhibit G-3, as a copy of the plant hazard training logbook used for the coal haulers as of the time of the accident. The book contains a copy of the hazard training checklist, the names of the drivers, their truck numbers, the identification of the vendors, and the person who conducted the training (Tr. 326). He stated that Conesville began hazard training coal haulers in January, 1988, when MSHA informed him that he had to maintain a log of all hazard training, but that prior to this time MSHA inspectors advised him that coal truck drivers did not have to be hazard trained if they were not outside of their trucks (Tr. 346-347). Mr. Lyon confirmed that he made the notation "when outside of trucks & driving haul road" which appears at the top of the checklist, and that he underscored the critical checklist items that truck drivers should be aware of while outside of their trucks, and he believed that these items applied to truck drivers. He did not believe that item #6, which cautions persons to "stay clear of all raised equipment (dozer blades, front-end loader buckets, etc)" applied to truck drivers because they would not be next to that equipment (Tr. 348-349). He explained that he made the notation in question because truck drivers normally did not get out of their trucks, and if they did, they had to be aware of the underscored items on the checklist (Tr. 349).

Mr. Lyon stated that it was his understanding in 1988 from MSHA that hazard training was only required for coal haulers when they were outside of their cabs. He confirmed that no determinations were made as to which drivers got out of their trucks because "most" of them did not do so. However, since there were periodical truck breakdowns and a driver would have to make a phone call, all truck drivers were trained because they would have to get out of their trucks. Although it was his understanding that this training was not required, he made the decision to hazard train all coal haulers (Tr. 350).

Mr. Lyon stated that prior to the accident he reprimanded "quite a few" coal haulers for not following the hazard training checklist items, particularly with respect to the use of hard hats, and that MSHA inspectors, including Mr. Grissett, were

present when this was done. He confirmed that he organized the log book procedures, and that the drivers logged in the book were trained by the scale master Rick Shuck, under his direction. He stated that he also trained quite a few of the drivers, was present when Mr. Shuck trained them, and he explained how the training was given and the names entered into the log (Tr. 352-356).

Mr. Lyon stated that prior to the accident he was not aware of any problems with the system that he implemented for hazard training coal haulers, and he was not aware of any drivers coming to the mine property that were not being hazard trained (Tr. 356). He denied making any statements that Conesville was not able to keep up with the training (Tr. 357).

Mr. Lyon stated that Conesville had no involvement in determining who delivered coal to the preparation plant. He explained that Cravat Coal Company had a contract with the Conesville Power Plant, through Columbus Southern Power Company, to furnish coal which was washed at the Conesville plant, and that Cravat Coal contracted with the Crooksville Coal Company to ship some of its coal to the plant, and that Crooksville contracted with Ross Brothers, who in turn contracted with Cox Farms, to haul the coal to the plant (Tr. 358).

Mr. Lyon stated that at the time of the accident the raw coal dumping area was approximately 250 feet long, and he was not aware of any time when it was significantly less than that (Tr. 358). The only other prior tipping incident that he was aware of occurred on February 26, 1988, because of a broken pin on the jack used to raise the truck bed, and the truck did not hit anything and no one was injured. He denied making any statements that there were more truck tipping incidents prior to the December 2, 1988, accident (Tr. 359). He perceived no hazard from the incident which occurred in February, 1988, because "it was a mechanical problem with the truck." He recalled no recommendations from the mine safety committee as a result of that incident, and denied that Mr. Parks or anyone else from the safety committee ever approached him about implementing a three-truck dumping cycle (Tr. 360).

Mr. Lyon stated that Conesville did not file an MSHA accident report Form 7001, regarding the accident in question, and that the form was filed by Ross Brothers. He stated that the imminent danger order and citation for a violation of section 77.1600(c), were abated by providing three dumping lanes spaced 60 feet apart, and that this distance was determined by the State of Ohio Division of Mines who also investigated the accident, and that MSHA agreed with it (Tr. 361). He confirmed that in February, 1989, Conesville received a certificate from MSHA for 600 days without a lost time accident, and that it was signed by Inspector Myer and Inspector Grissett's supervisor Jack Cologie.

He also stated that other mine inspectors, including Mr. Grissett and Mr. Myer, have commented to him that "they enjoyed coming up to inspect our plant because we had such a safe operation" (Tr. 362). He confirmed that prior to the accident, other inspectors, including Mr. Grissett, inspected the coal dumping area, and that no citations or orders were ever issued for not providing adequate side clearance at the dumping pile (Tr. 362).

On cross-examination, Mr. Lyon confirmed that Conesville's hazard training plan, (exhibit MX-33), is representative of a plan that he was familiar with when he was trained at the Central Ohio Coal Company, and that MSHA adopted the plan. He stated that he made no independent research in putting the plan together, and relied on Mr. Myer (Tr. 366). He confirmed that when he decided to train all coal haulers, he made no distinctions between whether a driver got out of his truck or not and decided to hazard train all truck haulers delivering coal to the plant (Tr. 366). He confirmed that he did not call any of the coal haulage vendors listed in the hazard training log book to determine whether they had trained their drivers "because they had to be trained at each individual site" because "each mine is different than any other mine" and he felt some obligation to train the drivers at the mine site because "a truck could have an accident or a mechanical problem and the driver would have to be out on the ground" (Tr. 367-368). He confirmed that at the time of the accident, he had no specific knowledge that Ross Brothers was delivering coal to the plant, and he would have no reason to call them about any hazard training for their drivers (Tr. 368).

Mr. Lyon did not believe that the prior truck tipping incident presented any hazard or safety problems other than to the driver in the truck, and he stated that neither he or the safety committee saw a need to discuss it further, and even though the committee was aware of the incident, it was not discussed with him (Tr. 371). He confirmed that prior to the accident, there were no truck spacing controls in effect and it was left to each driver to determine the safe distance for backing up and dumping loads at the coal pile. He also confirmed that there were no physical barriers in place, or flagmen to direct traffic, but that signs were posted to keep personnel out of the coal pile because of the hoppers under the pile (Tr. 374). He confirmed that it was Mr. Shuck's responsibility to train the coal haulers, maintain the log, and to determine if there were new drivers who had not been hazard trained (Tr. 375).

Mr. Lyon stated that subsequent to the February, 1988, truck tipping incident, he did not find it necessary to emphasize item #6 of the hazard checklist, but that he and Mr. Shuck were told about it. He stated that when a new truck showed up at the site with a new driver, he would be trained. The contractor controlled the numbers on the truck, and he had no direct contact with the contractors to advise them of any responsibility to

inform him of any changes in drivers, and he believed that it was reasonable to assume that if there were any driver changes, he would be informed. He agreed that at least six drivers "got through the system and were not hazard trained," and that it was obvious that he was not told that some drivers were not hazard trained. He confirmed that the truck numbers were used to determine whether a driver had been trained, and that in the event a different driver were used on a truck which had a number indicating that another driver had been trained, he had no way of knowing that the new driver had in fact received training (Tr. 377). He conceded that while he had no control over which truck drivers the contractors were using, he was responsible for training the drivers that came to the site to dump at the coal pile (Tr. 378). He also confirmed that he had no reason to believe that Mr. Parks would be less than honest when he testified about a prior meeting when the trucks were discussed, but reiterated that he had no recollection of any such meeting (Tr. 378).

Mr. Lyon stated that it was his understanding of MSHA's training regulations that truck drivers delivering coal to the plant would not have to receive annual or task training under the definition of "miner" found in section 48.22(a)(1), but would have to be hazard trained under the definition found in section 48.22(a)(2). He confirmed that Mr. Leppla was not involved in any hazard training prior to the time of the accident. He also confirmed his understanding that each contractor truck driver had a different truck number and he was not aware that there could be more than two drivers with the same number (Tr. 392).

Mr. Lyon confirmed that for almost 2 years after the plant started in operation, until he was first informed by MSHA that he needed a training program, coal haulers were delivering coal to the plant but nothing was done to train them (Tr. 395). He confirmed that at the time of the tipping incident in February, 1988, it did not occur to him to address the matter of truck clearance, but that after the accident of December 2, 1988, "everyone then said we had better separate the trucks" (Tr. 397). He confirmed that he abated the unwarrantable failure violations concerning the untrained drivers by reviewing the checklist with them, and discussing each of the items listed, so that they were aware of any problems they could encounter while at the site (Tr. 398).

Richard T. Shuck, scalehouse operator, testified as to his duties, including controlling truck traffic at the dump site and conducting the hazard training of the drivers. He confirmed that coal is delivered to the plant 3 days a week and that this has been the normal practice during the 4 years that he has worked as the scalehouse operator. He estimated that there are 200 trucks a day delivering coal to the plant, and that there are 50 to 60 drivers engaged in this work. He described the procedures for the delivery and dumping of the coal, and stated that four trucks

are permitted to dump at the pile during each dumping cycle which he controls. He confirmed that these procedures were in effect at the time of the accident, and that he never received any complaints from the drivers about these procedures (Tr. 399-403). He stated that there are "peak hours" for dumping, and that there are many times when there are less than four trucks in the dumping area (Tr. 404).

Mr. Shuck confirmed that he was involved in the training of the coal haulers, and that beginning in 1988 Mr. Lyon instructed him to hazard train all drivers coming to the dump site, and that he trained them by reviewing the hazard checklist items with the drivers. Mr. Lyon also provided him with a spiral notebook which contained the list, and the drivers signed their names in the book after they were trained indicating that they understood the items on the list (Tr. 409, exhibit C-3). He confirmed that the names in the log book reflect the drivers who were trained during 1988 up until December 2, 1988. He did not believe that checklist item #6 pertained to coal haulers or to the possibility of a truck tipping over at the dump site (Tr. 410). He confirmed that he reviewed every listed item with the drivers, emphasizing those which were underscored. He confirmed that Mr. Lyon instructed him to train all drivers without exception (Tr. 411).

Mr. Shuck explained that each driver who was trained signed the log book and wrote in his truck number, and he determined who had been trained and not trained by the truck number that is placed on their "scale ticket." It was his understanding that the truck number stayed with the driver, and that prior to the accident he was not aware that different truckers were using the same number (Tr. 413). He was not aware that he had missed some of the drivers and never told anyone that he could not keep up with the training of the drivers. He stated that he first learned that some of the drivers had not been trained after the accident occurred, and that prior to that time he had trained approximately 80 drivers (Tr. 414). He believed that Mr. Hina had been hazard trained "because when I went through the list the truck number was next to what I thought was his name. I didn't know any different until after the accident. I thought that was the man's name" (Tr. 414). He learned after the accident that Ross Brothers was switching drivers on a given truck number (Tr. 415). He confirmed that he was aware of only one truck tipping over prior to the accident, and that it was his understanding that a broken scope pin caused it to tip over. He was not aware of any three truck dumping cycle which was implemented after this prior incident, and was aware of no recommendations in this regard by the safety committee (Tr. 416).

Mr. Shuck stated that approximately half of the drivers who haul coal to the plant stay in their trucks because they can raise and lower the truck bed from their cabs, and that prior to

the accident he saw no MSHA inspectors inspecting the haulage trucks, but has seen them do so after the accident (Tr. 416).

On cross-examination, Mr. Shuck confirmed that he never asked the truck drivers about their knowledge of the safe operation of their vehicles, and that since he stayed in the scalehouse the trucks may have been inspected by MSHA prior to the accident without his knowledge (Tr. 418). He conceded that his job does not require him to attend union and company safety meetings, and that he would not have necessarily been present if any meetings were held to discuss limiting the number of trucks at the coal dumping site (Tr. 419). He explained his procedures for controlling the truck traffic at the dumping site. He confirmed that the hazard training program was controlled by the number on the truck which was displayed on the passenger side front window where he could see it. He also indicated that the majority of the drivers would inform him of their numbers over their C.B. radios, but they were still required to have a number in their window (Tr. 420-423). He would rely on his memory, visual recognition of the driver, or the log to determine which drivers were hazard trained. The drivers would call him on the C.B. radio if they did not have the training, and he would train them (Tr. 424). He conceded that if he saw the truck number and the contractor had used another driver without removing the number, he would have no way of knowing that there was a new driver, and that it was possible for a driver to use a number even though he had not been trained (Tr. 424-425). Other than making inquiries of the drivers as to whether they had been trained, he had no method for safeguarding against new drivers using other numbers (Tr. 425).

Mr. Shuck stated that there may be 30 or 40 trucks in line on any given day waiting to dump their loads, and while they are waiting he makes inquiries over the C.B. radio as to whether or not the drivers have received training. He confirmed that he still follows this same procedure, and that some drivers have lied to him about their training (Tr. 437). He identified a photograph of Mr. Fortney's truck with a placard on the windshield with the number 555, and although he could not recall seeing the number on the day of the accident, he stated that Mr. Fortney would have given him the number over the C.B. radio (Tr. 435). In response to a statement that Mr. Fortney obviously got by without being hazard trained, Mr. Shuck responded "more than one, but I honestly believed that I had every one of them" (Tr. 435). Mr. Shuck stated that driver Tom Clark, who had number 576 listed in the log, left it in his truck, and Mr. Hina drove the truck with Mr. Clark's number (Tr. 450).

Inspector Grissett was recalled and he confirmed that he had previously observed the dumping operations at the coal pile with Mr. Lyon but saw nothing wrong or hazardous. He also stated that he never observed Mr. Lyon reprimand any driver or employee while

he was present (Tr. 453). Mr. Grissett further confirmed that the first time he discussed the December 2, 1988, accident with Mr. Parks was within the past month, and he did not speak with him during his investigation or prior to issuing the citations and orders. He stated that he went to the mine within the past month to speak with Mr. Parks and some of the safety committee members in preparation for the hearing in these proceedings (Tr. 453-458). He confirmed that he is aware of no other citations ever being issued in his district citing an operator because coal trucks were too close together while dumping coal (Tr. 463).

James F. Myer was called in rebuttal by MSHA, and he confirmed that he is an education and training specialist and not an inspector, and that he is not authorized to issue citations or orders. He identified exhibit MX-33 as part of Conesville's training program but denied that he drafted it (Tr. 468). He explained that MSHA drafted a generic training plan for operators to use, and that Conesville's plan is the same as the MSHA generic plan. He confirmed that the last two pages of the plan deal with hazard training, and that Conesville had the option of developing its own plan or using the one developed by MSHA (Tr. 470). He believed that item #6 on the hazard checklist which states "stay clear of all raised equipment (dozer blades, front-end loader buckets, etc)," applies to trucks dumping coal and that drivers are required to stay at a clear enough distance so that if a truck tips over it will not strike another truck or driver. In his view "the statement is broad and it has an et. cetera in there which you can include a lot of things" (Tr. 478). When reminded that item #6 on the hazard checklist is not underscored or emphasized by Conesville because it does not believe that it applies to coal haulage drivers, Mr. Myers agreed that this may "possibly" be a difference of opinion (Tr. 479).

On cross-examination, Mr. Myer confirmed that he provided Mr. Lyon with an MSHA generic training program which is the same as the one which was approved for Conesville. He also confirmed that the hazard training checklist, with the 20 listed items, was part of the plan which he provided to Mr. Lyon, and when asked whether he suggested any modifications to the checklist, Mr. Myer stated "I told most people that this is what you have to do to comply with the regulations" (Tr. 480). He stated that Conesville had an approved hazard training program in effect at the time of the accident, and that the training citations were based on its failure to train certain drivers rather than any inadequate content of the training program (Tr. 489). He confirmed that Conesville was recently commended by MSHA for 600 work days without a lost time accident and that he signed the certificate and also indicated to Conesville at a recent training program that its preparation plant was one of the safest facilities in Ohio (Tr. 490).

Findings and Conclusions

Docket No. LAKE 89-30-R

Section 104(a) "S&S" Citation No. 2950068, December 5, 1988, 30 C.F.R. 77.1600(c)

In this case, the inspector cited Conesville with an alleged violation of mandatory safety standard 30 C.F.R. 77.1600(c), for failing to insure that adequate side clearances were provided between the trucks dumping coal at the cited raw coal dumping location. Section 77.1600(c), provides as follows:

> (c) where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers.

The inspector's interpretation of section 77.1600(c), is that it required Conesville to "provide adequate and safe side clearance on raised equipment" (Tr. 185). He believed that Conesville was required to insure that adequate clearances are maintained between the trucks when they are dumping so that in the event one should tip over, it would not strike another truck (Tr. 218). He would require Conesville to increase the spacing between the trucks or to enlarge its dumping area so as to provide ample spacing between trucks (Tr. 218). He confirmed that he issued the violation because Conesville had no established dumping guidelines or procedures, and had no clearly defined designated dumping areas which would provide safe side clearances between the trucks (Tr. 185). MSHA has suggested that Conesville should have used designated dumping lanes marked off with traffic cones, or used a flagman or other employee to direct and control truck traffic at the dumping location.

It seems clear to me from the inspector's testimony that he believed a dumping hazard would exist only when trucks dumping coal were close enough that one truck could possibly tip over and come in contact with another truck. In the inspector's view an "adequate" spacing distance between trucks to prevent such an occurrence would be "in the neighborhood of 40 to 50 feet" (Tr. 212). Although the standard, on its face, only requires the posting of warnings where side or overhead clearances pose hazards to miners, the inspector indicated that the posting of a warning sign stating "warning, possible side clearance hazard if truck topples" would "not be adequate at all" to satisfy the requirements of the standard (Tr. 214).

With respect to the physical aspects of the cited dumping location, the inspector confirmed that in the absence of trucks,

there were no inherent side or overhead clearance hazards presented at the dumping facility (Tr. 221). Although he indicated that exposed coal hoppers would always present a hazard, he confirmed that the citation was not based on the existence of hoppers. He confirmed that Conesville had hopper warning signs posted at the dumping pile, and that in the event any of the hoppers are exposed, Conesville takes appropriate action by flagging the area so that the truck drivers can see them (Tr. 221).

The inspector stated that compared to the other mines which he inspects, which have much smaller dumping areas, Conesville's operation is unique in that large volumes of coal are dumped at the site, resulting in a high volume of truck traffic as compared to the other smaller dumping operations (Tr. 464-465). When asked what he would have done if he had observed a truck parked 15 feet from another truck which was dumping, the inspector indicated that he would talk to the drivers, and then decide what action to take (Tr. 463).

Although MSHA's standards for dumping facilities found in section 77.1608, contain several requirements to insure adequate protection at such locations, they do not include any information or requirements for maintaining any kind of spacing between trucks while they are dumping. The inspector confirmed that he discussed the citation with his supervisor, and after reviewing the standards applicable to dumping facilities, they found they did not apply and decided to cite section 77.1600, the general loading and haulage standards (Tr. 464-465). In this regard, when referring to the absence of any guidance in section 77.1600, the inspector commented "I do wish there were more regulations in that" (Tr. 466).

Conesville argues that the incongruity of MSHA's interpretation of the standard is underscored by the fact that the alleged hazard and violation is entirely dependent upon the location of the coal trucks utilizing the coal dumping area, and in essence presents a situation where there is a "moving" violation which occurs only when two coal trucks happen to be in such proximity (less than 40 or 50 feet apart according to the inspector) that one could come in contact with the other should it tip and fall during the dumping process. Under these circumstances, Conesville asserts that whether or not there is a violation of section 77.1600(c) could, and will, vary from day to day, hour to hour, or even minute to minute without any physical change in the dumping area.

Conesville argues that the plain language of section 77.1600(c), only requires that the purportedly hazardous clearance be "conspicuously marked" and that warning devices be installed "when necessary," and does not require Conesville to provide adequate and safe side clearance on raised equipment.

Further, in light of the fact that the inspector confirmed that a warning sign or device at the dumping area would not be enough to comply with section 77.1600(c), Conesville maintains that the inspector not only extended this standard to a factual scenario never envisioned by its drafters, but has also imposed on Conesville an affirmative duty that is clearly beyond any obligation imposed by the standard.

Conesville argues that the inspector's interpretation and application of section 77.1600(c), is an impermissible expansion of the plain meaning of the standard, and that the application of the standard to the facts presented fails to give fair warning that the allegedly violative conduct was prohibited. In support of its argument, Conesville cites Phelps Dodge Corp v. FMSHRC, 681 F.2d 1189, 1192 (9th Cir. 1982); Ideal Cement Co., 11 FMSHRC 1776, 1783-1784 (September 1989). Further, citing Diamond Roofing Co., Inc. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976); Ideal Cement Co., supra, 11 FMSHRC at 1783; and American Fed. of Govt. Employees v. FLRA, 593 F. Supp. 1203 n. 15 (D.D.C. 1984), Conesville further argues that a regulation which subjects a party to civil sanctions cannot be construed to mean what an agency intended but did not adequately express, and that a safety regulation must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

With regard to the deference to be accorded an agency's interpretation of a mandatory safety standard, Conesville asserts that the court is required to give effect to the actual words and objective meaning of the regulations and is not bound by the agency's "hidden intentions and idiosyncratic interpretations," and cites the Commission's decision in Western Fuels-Utah, Inc., 11 FMSHRC 278, 284 (March 1989), where the Commission stated as follows:

> While the Secretary's interpretation 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 regulations. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945)). . . . 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.

MSHA takes the position that it has established that Conesville's failure to maintain adequate truck side clearances at the raw coal pile created a hazardous condition and constitutes a violation of section 77.1600(c). In support of this

conclusion, MSHA argues that the evidence clearly establishes that despite the fact that a truck had tipped over at the dumping location 10 months earlier, Conesville did not use designated dumping lanes, did not mark off the lanes with traffic cones, did not use a flagman or other employee to direct or control traffic, and did nothing to assure that trucks dumped with safe distances between them.

The record reflects that the citation issued by Inspector Grissett was the first of its kind that he or any other inspector in his district had ever issued for a violation of section 77.1600(c), for failure to insure adequate side clearance between trucks. The failure by an inspector to issue any citation during prior inspections does not estop him from issuing a citation during any subsequent inspections. See: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983); Emery Mining Corporation, 5 FMSHRC 1400 (August 1983), aff'd by the 10th Circuit Court of Appeals, 3 MSHC 1585. However, an inspector's issuance of a citation, such as the one in this case, is subject to scrutiny to determine whether or not, as argued by Conesville, the inspector's interpretation and application of the standard was unreasonable and beyond the scope and intent of the standard, and whether or not it imposed an affirmative duty on Conesville beyond that required by the plain meaning of the standard.

During a colloquy with counsel in the course of the hearing with respect to the regulatory or legislative intent of section 77.1600(c), MSHA's counsel stated that he could find nothing in the legislative history to shed any light on the meaning and intent of the standard, and he confirmed that he was unaware of any relevant MSHA policy guidelines concerning the interpretation and application of the standard (Tr. 216). In response to my inquiry as to whether or not truck tipping incidents of the kind which occurred in this case have been the subject of any MSHA "accident fatal-grams," the inspector indicated that accidents have been reported in situations where a truck driver has traveled over a hill while dumping his load (Tr. 217).

The inspector confirmed that he had previously issued a citation for a violation of section 77.1600(c), in a situation where he believed that there was a possibility that a dump truck would come in contact with a high voltage line when it raised its bed to dump its load (Tr. 222-223). In Valley Camp Coal Co., 7 FMSHRC 1197 (August 1985), I affirmed a violation of section 77.1600(c) after finding that the operator failed to conspicuously mark or install a warning device at a haulage roadway location where the roadway was reduced from 25 feet to 14 feet. I concluded that the narrowing of the roadway by nearly 11 feet presented a clearance hazard and that a warning sign or device should have posted to alert a driver of the clearance hazard. In

situations of this kind where there is a clearly definable side or overhead clearance hazard, such as a narrowed roadway, an overhead high voltage line in close proximity to a truck when its bed is raised, or an inherent truck over-travel hazard, such as an unprotected embankment or hill at a dumping location, I do not find it unreasonable to require an operator to post a sign or warning device warning truck drivers of the hazard. Indeed, the standard on its face requires no less, but I take note of the fact that it only requires the posting of such warning devices.

On the facts of this case, it seems clear to me that Conesville is not charged with a failure to post a warning sign or other device. As a matter of fact, the inspector clearly indicated that he would not accept a warning sign as compliance, even if it warned of the specific hazard of two trucks possibly colliding if one were to tip over while dumping. The inspector believed that the standard required Conesville to physically separate the trucks for a distance of 40 to 50 feet, to insure against any contact should one truck tip over, or to provide designated dumping lanes to insure that the trucks are far enough apart in the event of a tipping incident of the kind which occurred in this case. The inspector also suggested that the enlargement of the dumping area would have provided ample room between the trucks while they were dumping, and in its posthearing brief, MSHA suggested that Conesville should have provided a flagman or another employee to direct and control traffic when the trucks were dumping. Although I cannot conclude that all of these "suggestions" for compliance are unreasonable, the fact is that the plain wording of the standard does not require them. In my view, if MSHA believes that something more than the posting of warning signs is required in situations where side or overhead clearances at any dumping location present a hazard, it should promulgate a standard to clearly and directly address not only the perceived hazard, but also the duty imposed on the mine operator for compliance.

The record in this case reflects that Mr. Fortney's truck tipped over because of an imbalance caused by frozen coal which remained in the raised truck bed after the coal was dumped from the truck. Unlike other drivers who were aware of such a hazard and used anti-freeze or diesel fuel to line their truck beds, Mr. Fortney did not take such measures to guard against frozen coal in the truck bed of his truck. The record also reflects that the prior truck tipping incident occurred when the rear wheel sank into the mud and the truck tipped over. The incident was not reported because no one was injured. Some of the drivers who testified in this case alluded to the fact that they always seek out a level spot while dumping, particularly where the ground is wet and muddy, to avoid possible tipping accidents due to adverse ground conditions.

Although I find some merit in Conesville's argument that the standard is intended to apply in situations where the inherent physical characteristics of a dumping location present a reasonable likelihood of side clearance hazards, and that in the absence of any trucks, the inspector found no inherent hazards with the dumping location, the fact remains that potential tipping hazards do exist in the event a truck should experience a mechanical breakdown, or a driver fails to insure against frozen coal in his raised truck bed, or happens to back over uneven or soft or wet ground while dumping his load. Under these circumstances, I believe the standard is broad enough to cover trucks which may be dumping coal at a dumping location, and which are close enough to place them in jeopardy of being struck by a tipping truck if adequate side clearances are not maintained. However, I do not believe that the standard, as promulgated, requires, or imposes a duty on a mine operator, to do anything other than post a warning sign or other warning device. On the facts of this case, I agree with Conesville's position that the inspector's interpretation and application of section 77.1600(c), which he believed required it to do more than what was required by the clear wording of the standard, was clearly beyond any reasonable interpretation and application of the standard and was erroneous and arbitrary. Under the circumstances, I conclude and find that MSHA has failed to establish a violation, and the contested citation IS VACATED.

Docket No. LAKE 89-29-R

Imminent Danger Order No. 2950067, December 5, 1988

Inspector Grissett issued the imminent danger order after finding that Conesville "did not insure that adequate side clearance was provided at the raw coal pile dumping location." The order reflects that a coal truck leased to independent contractor Ross Brothers, Inc., overturned while dumping coal, and that the bed of the truck fell on the cab of another truck, also leased to Ross Brothers, Inc., and which was parked, causing fatal injuries to the driver in the parked truck. The inspector also noted that another truck had overturned at the same dumping location on February 26, 1988.

Conesville argues that since it did not violate section 77.1600(c), the imminent danger order based on the alleged violation is improper. In addition, Conesville asserts that prior to December 5, 1988, MSHA had never issued an imminent danger at the coal dumping area in question even though Inspector Grissett had previously inspected the facility, two times a year, including a regular inspection from September 20, 1988 to September 28, 1988, and confirmed that he never saw anything wrong or hazardous with the way the trucks were dumping.

Conesville concludes that any objective assessment of the alleged "condition" or "practice" precludes a determination that it could reasonably be expected to cause death or serious physical harm before it could be abated. Conesville maintains that the inspector believed an imminent danger existed not because of any physical hazard with respect to the dumping area, but only because Conesville did not require that trucks maintain a specific minimum side clearance between their respective vehicles. Conesville points out that the dumping area was an area 250 feet in width, that no more than four trucks were permitted to dump in that area at one time, and that on many occasions there were less than four trucks in the dumping area. In addition, one of the truck drivers, Norman Fortney, testified that the coal haulers typically tried to leave 40 to 50 feet between their trucks when dumping. Conesville also points out that although the mine safety committee had the right to declare the dumping area an "imminent danger," and to withdraw miners, it has never done so.

Conesville further points out that prior to December 2, 1988, there had been one incident in 4 years in which a truck tipped at the dumping area in question. This incident was due to an unforeseen mechanical malfunction of the vehicle, and it did not strike any other vehicle or result in any injuries. Further, the December 2, 1988, incident was due to frozen coal remaining in the bed of Mr. Fortney's trailer. However, this hazard was well known by coal haulers and precautions were generally taken to guard against such a hazard. Under the circumstances, Conesville asserts that the incident of December 2, 1988, was a freak accident precipitated by the fact that Mr. Fortney, unlike the other truck drivers who testified in these proceedings, did not use diesel fuel or anti-freeze for his trailer.

Conesville argues that the inspector's perception of an imminent danger was not based on any inherently dangerous condition or practice at the dumping pile, but only on a perceived hazard ultimately relating to two most unlikely events-mechanical malfunction and/or frozen coal-which would cause a coal truck to tip. Given the freak nature of the accident, the physical characteristics of the dumping area, and the precautions taken by the coal haulers to prevent tipping, Conesville concludes that the inspector's opinion should not be taken at face value and it does not indicate a condition or practice which could reasonably be expected to cause death or serious physical harm before it could be abated.

Citing Judge Morris' decision in Ideal Cement Co., 11 FMSHRC 1783 (September 1989), Conesville maintains that contrary to the inspector's interpretation of an imminent danger, the occurrence of a fatality is not synonymous with an imminent danger, and that

such an occurrence does not prove a violation of the cited standard. In the Ideal Cement Co. case, Judge Morris stated as follows:

> A fatality in a case, in and of itself, does not by its mere occurrence prove a violation of the regulation, Lone Star Industries, Inc., 3 FMSHRC 2526, 2529, 2530 (1981); Texas Industries, Incorporated, 4 FMSHRC 352 (1982).
>
> The law is clear that a safety regulation that imposes civil penalties for its violation must give an employer fair warning of the conduct it prohibits or requires and must further provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

MSHA takes the position that during his accident investigation, the inspector determined that Conesville "had a very haphazard system for the delivery and dumping of coal." MSHA asserts that after a truck had its coal load weighed at the scalehouse, the driver would then try to find an open spot at the coal pile to dump his load, and Conesville never controlled how the drivers spaced their trucks while dumping coal. MSHA points out that Conesville had no designated traffic lanes or traffic cones marking out lanes, and had no flagman or any employee directing traffic to control the spacing of trucks prior to the accident.

MSHA further points out that a prior tipping incident had occurred 10 months earlier on February 26, 1988, and that the pile was closed by a section 103(k) order issued by the inspector on December 2, 1988. In view of the fact that this order terminated when the accident investigation was completed on December 5, 1988, and Conesville could continue the condition or practice of dumping without any traffic controls in place, MSHA concludes that the inspector had no choice other than to issue an imminent danger order.

MSHA asserts that Conesville had permitted a dangerous practice to exist by allowing coal trucks to dump without taking any measures to assure adequate side clearance. The trucks were within 10 feet of each other, "a common practice," even though the extended trailer of one cab was 17 feet. Since Conesville showed no effort to correct the condition after the prior tipping incident, MSHA concludes that the inspector could not be reasonably assured that the condition would be abated before another serious accident occurred. Under the circumstances, MSHA further concludes that the inspector provided a cogent and compelling rationale for issuing the order, and the facts presented support and meet the legal standard for the issuance of the order.

Section 3(j) of the Mine Act, 30 U.S.C. 802(j), defines an "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonable be expected to cause death or serious physical harm before such condition or practice can be abated."

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operation Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." In the Old Ben Corp. case, the court stated as follows at 523 F.2d at 31:

> 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).

The Commission stated as follows at 11 FMSHRC 2164:

> In addition, R&P's focus on the relative likelihood of Coy being injured while under the moving belt ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

The fact that a section 103(k) order affectively closes the scene of an accident, or miners are withdrawn from the work site, does not affect the validity of an imminent danger order issued pursuant to section 107(a) of the Act. See: Itmann Coal Company, 1 FMSHRC 1573, 1577 (October 1979). Further, the validity of an imminent danger order is not dependent on whether or

not a violation of any mandatory safety standard has occurred. Conesville's arguments to the contrary are rejected. While it is true that the inspector believed that Conesville's "ongoing and continuing" violation of section 77.1600(c), created the imminent danger (Tr. 209), the thrust of MSHA's case is its contention that the absence of any established procedures instituted by Conesville to insure that truck drivers maintained safe distances between their trucks, coupled with the practice of drivers being permitted to dump their coal loads without any spacing controls to preclude one truck striking another truck if it were to overturn or tip over, presented an imminently dangerous situation at Conesville's dumping location.

MSHA's accident report in this case reflects that the trucks involved in the accident were 10 feet apart when Mr. Fortney's truck tipped over on top of the cab of Mr. Hina's truck. Mr. Fortney's truck was 30 feet long, and the truck bed was raised for a vertical distance of 17 feet at the location of the bed hoist at the time it tipped over. Inspector Grissett testified that during his prior inspection visits to the dumping location he never observed any trucks as close as 10 to 15 feet to each other and that they were always spaced further apart. He also confirmed that he never previously observed anything wrong or hazardous in the manner in which the trucks were dumping, and that if he did, he would have issued a violation (Tr. 453, 462). In my view, given the great number of trips made by truckers on any given day over a protracted period of time to the dumping location in question, the fact that the inspector found no hazardous conditions present during two prior inspection visits does not preclude a finding of imminent danger based on an otherwise established practice of drivers dumping their coal loads precariously close to each other.

Conesville's former safety director testified that prior to the accident there were no truck spacing controls in effect at the dumping location and each driver used his own discretion in determining the "safe" distances for backing up and dumping their loads. Truck drivers St. Clair and Lent testified that they received no hazard training from Conesville, and were never instructed as to the methods and procedures to follow while dumping their loads at the dumping location in question. The driver of the truck which tipped over and struck Mr. Hina's truck (Norman Fortney), testified that while there were occasions when he observed trucks spaced 40 to 50 feet apart while dumping, during a period of approximately 200 deliveries to the Conesville facility, the trucks were usually spaced 10 to 12 feet apart. Mr. Fortney confirmed that prior to the accident, there was no fixed truck spacing requirements while coal was being dumped, that he never received any dumping instructions from the scalemaster, and that the drivers used their own discretion in determining a safe location to dump.

Conesville's scalemaster Shuck, who had never operated a coal truck or backed one up to a dumping location, testified that during peak dumping hours, 50 to 60 trucks a day come to the site to dump coal, and although only four trucks are allowed in the dumping area at any given time, and 30 or 40 were waiting in line, he did not continually monitor or visually observe the dumping process. He confirmed that once the drivers left the scalehouse, they were "basically on their own" while backing up and finding a place to dump their loads (Tr. 422, 436).

Although Conesville's witnesses believed that the prior truck tipping incident of February, 1988, was caused by a broken truck telescope pin, the driver of the truck, James Stull, testified that the truck tipped over when the right rear wheel sunk into the mud. He confirmed that the telescope broke after the truck tipped over, and that the truck fell for a distance of 30 feet. Mr. Stull testified that while he was hazard trained after the accident occurred, he had not previously been instructed by Conesville as to how he should dump his coal loads.

Although Conesville's assertions that mechanical truck malfunctions and frozen coal are "unlikely events" which would cause a truck to tip over may be true, the fact is that these are the types of hazards which are readily recognizable and known, and which have in fact occurred at Conesville's dumping location. Indeed, Inspector Grissett confirmed that even after abatement and the institution of the dumping lane system, there were two additional incidents of truck upsetting because of mechanical failures. Conesville's plant manager Miller testified that he was aware of another truck tipping incident after the accident in question. Given the fact that truck tipping incidents per se are not required to be reported to MSHA unless there is an injury, it is altogether possible that other such incidents have occurred and were not reported. As noted earlier, driver Stull confirmed that his truck tipped over because of adverse ground conditions and that he was "lucky" that another truck was not positioned to his right side when he tipped, and if it had "somebody would have got it" (Tr. 123). Mr. Stull testified that he had observed trucks closer than 10 to 12 feet of each other while dumping at the site, and that when his truck tipped over, it covered a distance of approximately 30 feet (Tr. 123, 126).

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that MSHA has established by a preponderance of the evidence that Conesville had no effective means or controls in place to insure that safe and adequate truck spacing distances were maintained while the trucks were permitted to dump their loads at its dumping location. I also conclude and find that Conesville's lack of truck spacing controls, and permitting the drivers to dump at their own discretion, without regard to the potential hazards presented in the event a truck tipped over, constituted an unsafe

and hazardous practice which exposed the drivers to the potential risk or serious injury at any time in the normal course of their work of dumping coal. I further conclude and find that in the absence of the imminent danger order, this practice would have continued and could reasonably have resulted in further serious or fatal injuries. Under the circumstances, I believe that the inspector acted reasonably in issuing the order and that his decision in this regard was justified. Accordingly, the contested imminent danger order IS AFFIRMED.

Docket No. LAKE 89-31-R. Section 104(d)(1) "S&S" Citation

No. 2950069, December 5, 1988. 30 C.F.R. 48.31(a).

Docket No. LAKE 89-32-R. Section 104(d)(1) "S&S" Order No.

2950070, December 5, 1988. 30 C.F.R. 48.31(a).

In these cases, Conesville is charged with a failure to provide hazard training for the two contract coal truck drivers who were involved in the accident of December 2, 1988, as well as four additional contract drivers. The inspector issued the violations after determining that there were no entries in the hazard training log book maintained by Conesville at the mine to confirm that the cited drivers had received hazard training as required by section 48.31(a). The record reflects that the accident victim (Dale Hina) was an employee of Cox Farms, and had been contracted to Ross Brothers, Inc., to haul coal to the Conesville preparation plant, and that the other driver involved in the accident (Norman Fortney), was the owner of the truck which tipped over and that he had contracted his truck to Ross Brothers, Inc. to haul coal to the plant. The other four cited drivers were employees of Ross Brothers, Inc., and they too hauled coal to the plant.

The cited training standard section 48.31(a), provides as follows:

> Operators shall provide to those miners, as defined in 48.22(a)(2) (Definition of miner) of this subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:
>
> (1) Hazard recognition and avoidance;
>
> (2) Emergency and evacuation procedures;
>
> (3) Health and safety standards, safety rules and safe working procedures;
>
> (4) Self-rescue and respiratory devices; and,

(5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

MSHA's section 48.31, policy statements are found in its Administrative Manual 30 C.F.R. Part 48-Training and Retraining of Miners, July 1, 1985 (Exhibit M.X.-31), and they state as follows:

> The exposure to mining hazards varies according to task. The greater the hazard exposure, the greater the need for training.
>
> Hazard training should be:
>
> 1. Mine specific, so that persons are advised of the hazards they may encounter at a particular mine; and
>
> 2. Conducted each time a person enters a different mine.
>
> Section 48.31 requires operators to give hazard training to persons who are exposed to mine hazards. For example, a person driving a vehicle onto mine property to pick up a load of material who remains in the vehicle at all times would ordinarily not be exposed to hazards peculiar to the mine, and consequently would not be required to receive training under Part 48.
>
> * * * * * * *
>
> Although the amount of required hazard training will vary, the following are examples of appropriate hazard training:
>
> Pickup and Delivery Drivers
>
> 1. Persons coming onto mine sites to pick up mined materials or to deliver supplies and who remain inside their vehicles need not be given training. If they leave their vehicles they must be given hazard training.

The definition for miners who are required to be trained under 30 C.F.R. 48.31(a) is set forth in 30 C.F.R. 48.22(a)(2) which states as follows:

> Miner means, for purposes of 48.31 (Hazard training) of this Subpart B, any person working in a surface mine or surface areas of an underground mine

> excluding persons covered under paragraph (a)(1) of this section and Subpart C of this part and supervisory personnel subject to MSHA approved state certification requirements. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine. (Emphasis Added).

MSHA's section 48.22(a)(2), policy statements as found in the manual provides as follows:

> For purposes of hazard training (Section 48.31) a "miner" is a person who is exposed to mine hazards for a short time (five or less consecutive working days) and who will not be exposed to these hazards on a regular basis. Regular exposure is a recognizable pattern of exposure on a recurring basis.
>
> The required training should be commensurate with the expected exposure to hazards.

Conesville argues that it is not disputed that at the time of the accident of December 2, 1988, it had an MSHA approved training program in effect and that the citation and order were premised solely on its failure to hazard train the cited drivers, and not on any deficiencies in its hazard training program. In support of this conclusion, Conesville cites the testimony of Inspector Grissett who confirmed that Conesville had an approved hazard training program, that he found no problem with the training checklist that was used to hazard train the truck drivers, and that Conesville simply "missed some of the drivers when it came to hazard training" (Tr. 281-282).

Conesville asserts that in compliance with MSHA's instructions, it commenced the hazard training of all coal haulers in January, 1988, and as of December 2, 1988, had hazard trained more than 80 drivers.

Conesville admits that the names of the cited drivers were not in the log book which reflected the drivers who had been hazard trained in 1988. However, it contends that the citation and order for an alleged violation of section 48.31(a) were improper because (1) the cited individuals are not "miners" within the definition found in section 48.22(a)(2), (2) responsibility for the hazard training lies with Ross Brothers, Inc., and (3) Conesville was "providing" hazard training as required by section 48.31(a).

Conesville argues that the testimony of the inspector establishes that the cited coal haulers in question were regularly

exposed to mine hazards and accordingly fall within the definition of "miner" found in section 48.22(a)(1). Since they were exposed to mine hazards on a regular or recurring basis over an extended period of time, Conesville concludes that this distinguishes them from those individuals who are within the definition of "miner" as referenced in section 48.22(a)(2). Conesville suggests that MSHA's attempts to categorize these individuals with "office, scientific worker or occasional, short-term maintenance or service workers" pursuant to section 48.22(a)(2) is incongruous and inconsistent with its own policy statements which provides that for purposes of hazard training pursuant to section 48.31, a "miner" is a person "who is exposed to mine hazards for a short time (five or less consecutive working days) and who will not be exposed to these hazards on a regular basis."

Assuming that the cited individuals are found to be "miners" within the definition found in section 48.22(a)(2), Conesville argues that Ross Brothers, Inc., should be held accountable and should be sanctioned for any violation of section 48.31(a). Conesville points out that despite the fact that Conesville had no involvement in determining who delivers coal to its facility and had no contractual relationship with Ross Brothers, Inc., that coal is delivered to Conesville's preparation plant by a half dozen different vendors at the rate of approximately 200 trucks a day, and that approximately 50 to 60 different drivers deliver coal each day, the inspector placed the onus on Conesville, rather than the trucking companies, to hazard train each and every trucker entering the mine premises.

Conesville asserts that even though the inspector confirmed that Ross Brothers, Inc., is subject to MSHA jurisdiction while on mine property as an "independent contractor," he issued no citations or orders to Ross Brothers, Inc., despite their undisputed failure to provide hazard training to any of the cited coal haulers. Citing my decision in Harman Mining Corp., 3 FMSHRC 45 (January 1981), review denied (February 1981), Conesville asserts that rather than issuing withdrawal orders to mine operators for failure to hazard train trucking company employees, the more effective sanction, and one which should enhance safety and further support the underlying purpose of section 48.31(a), is to cite the trucking company itself that fails to provide hazard training to its employees or fails to take any affirmative steps to insure that its employees are in fact hazard trained.

Conesville argues that the more appropriate sanction would be to cite Ross Brothers, Inc., for failure to hazard train its employees or insure that they received the hazard training being provided by Conesville. Conesville suggests that such a result is necessitated by the fact that it provided hazard training to coal haulers and had in fact hazard trained more than 80 coal haulers in 1988. Requiring the trucking company to hazard train

or insure the training of its employees would enhance and promote safety at Conesville, particularly since 50 to 60 coal haulers deliver coal to that facility each day. Rather than holding Conesville strictly liable for any coal hauler that happens to avoid detection by Conesville (and thus avoids hazard training) an enforcement scheme directed at Ross Brothers, Inc., and other trucking companies delivering coal to Conesville more fairly addresses the issue from the standpoint of culpability and enhances the hazard training of all "miners."

Conesville further argues that assuming the cited coal haulers are "miners" and that it is responsible for satisfying the hazard training obligations set forth in section 48.31(a), it nonetheless provided the training required by section 48.31(a). Conesville points out that it had an MSHA-approved training program in place, including a hazard training program, and that MSHA's concern was not with the content of its training program, but, rather, that several individuals had not been hazard trained. Conesville further points out that even though MSHA had advised it that only those coal haulers exiting their vehicles need to be hazard trained, (Tr. 349-250), it undertook a program to train all coal haulers who entered its premises.

Conesville asserts that the fact that several employees employed or contracted by Ross Brothers, Inc., eluded hazard training that was made available by Conesville, does not establish a violation of section 48.31(a), and that MSHA has failed to prove that it failed to provide such training.

Finally, Conesville takes issue with the inspector's contention that the failure to hazard train the accident victim and to advise him to "stay clear of all raised equipment (dozer, blades, front-end loaders, etc.)" contributed to the accident. Conesville points out that the particular item from the hazard training checklist does not advise, and was likely never intended to advise, coal haulers to "stay clear" --i.e., a 40 to 50 foot clearance--of other coal trucks unloading coal. Conesville points out that scalemaster Shuck, the individual providing the training to most of the coal haulers, testified that this "checklist" which was provided by MSHA, does not apply to coal haulers, and that each coal hauler who testified unequivocally indicated their prior awareness of a tipping hazard associated with coal trucks.

Conesville also emphasizes the fact that the inspector testified at his deposition and at the hearing that coal haulers need only be trained as to hazards encountered while out of their trucks, and that there is no dispute that the accident victim was in the cab of his truck when it was struck by Mr. Fortney's trailer. Thus, Conesville concludes that there was no obligation to hazard train Mr. Hina with respect to this "hazard," and that any allegation of a causal nexus between the accident and an

alleged failure to hazard train Mr. Hina defies reality and is nothing more than an after-the-fact attempt to find blame and justify a clearly improper citation and order.

MSHA asserts that there is no dispute that the names of the cited six truck drivers were not listed in Conesville's training log book and that they were not hazard trained. MSHA argues that the controlling definitional regulation for those "miners" required to be hazard trained is found in section 48.22(a)(2), which sets forth a listing of workers to be hazard trained, including "delivery" workers. Since the six cited drivers were working at Conesville's surface facility by delivering coal to the raw coal pile, MSHA concludes that they met both the situs and the occupation requirements set forth in section 48.22(a)(2), and had to be hazard trained.

MSHA argues that Conesville's reliance on MSHA's policy is specious. With regard to Conesville's reliance on the policy distinction of whether drivers get out of their trucks while on mine property, MSHA points out that Conesville itself drew no such distinction and that its safety director confirmed that when Conesville started to hazard train in January 1988, it decided to train all truck drivers, regardless of whether they got out of their truck.

MSHA argues that the policy guideline itself does not relieve Conesville of the duty to hazard train drivers regardless of whether they got out of their trucks, and that three drivers testified that they had to get out of their trucks while dumping at the raw coal pile. MSHA points out that the policy states that "a person driving a vehicle onto mine property to pick up a load of material who remains in the vehicle at all times would ordinarily not be exposed to hazards peculiar to the mine, and consequently would not be required to receive training under Part 48." However, in the instant case, MSHA asserts that the truck drivers were exposed to the peculiar hazards at the coal pile even if they remained in their vehicle, and that the peculiar hazard was that of Conesville failing to maintain safe and adequate side clearance for the trucks dumping at the pile. Since Mr. Hina was fatally injured because of the failure to maintain an adequate side clearance between his truck and Mr. Fortney's truck, MSHA concludes that it did not matter whether Mr. Hina got out of his truck since he was subjected to the peculiar hazard of raised equipment, to wit, the trailer of Mr. Fortney's truck.

Finally, MSHA argues that MSHA's policy is not law and is not binding, and that the inspector's duty is to enforce the law, and not a guideline which is a general policy statement used for guidance, Brock v. Cathedral Bluffs Shale Oil Co., 4 MSHC 1033 at 1035, 1036 (D.C. Cir. 1986).

The definition of "miner" found in section 48.22(a)(1), for purposes of the comprehensive training requirements of sections 48.23 through 48.30, includes any person working in a surface mine who is regularly exposed to mine hazards. MSHA's policy manual guidelines with respect to persons who are regularly exposed to mine hazards adds the term "frequently" so that the definition reads "regularly or frequently exposed to mine hazards" (Policy Manual, pg. 13). The policy further states that "Regular exposure is a recognizable pattern of exposure on a recurring basis. Exposure to hazards for more than five consecutive days is frequent exposure" (Policy Manual, pg. 14). The policy further states that "If the individual . . . is infrequently or irregularly exposed to mine hazards, or is inconsequently exposed to mining hazards, then appropriate 48.11/48.31 hazard training is required."

Inspector Grissett testified that Mr. Hina and Mr. Fortney, the truckers who were involved in the accident, were exposed to mine hazards on a daily basis during each of their trips to the Conesville dumping location. He believed they were exposed to hazards from the coal hoppers at the dumping pile, and to hazards from other truck or bulldozer traffic at this location. He also believed that they were exposed to hazards regardless of whether they remained in their trucks while dumping coal. He confirmed that the other cited drivers who came to the facility to deliver their coal loads did so on a regular basis and were also regularly exposed to mine hazards.

The record in this case, including MSHA's posthearing proposed findings of fact, reflects that Mr. Fortney began delivering coal to the Conesville dumping site in August 1988, and that between August of 1988 to December 2, 1988, Mr. Fortney had made approximately 200 coal deliveries, and that during this time frame it was necessary for him to get out of his truck to trip his tailgate release. Mr. Fortney testified that he delivered coal to Conesville on an average of three loads a day, 3 days a week, and that Mr. Hina's delivery schedule was approximately the same as his (Tr. 39-40).

The record also reflects that truck driver St. Clair had delivered coal to Conesville for 4-1/2-years prior to December 2, 1988, made approximately 2,000 deliveries, and found it necessary on occasion to get out of his truck to facilitate the dumping of coal. Truck driver Lent had delivered coal to the dumping location for approximately 2-months prior to December 2, 1988, and he too found it necessary to get out of his truck to facilitate the dumping of coal. A statement taken from truck driver Orville Parks during the accident investigation (joint exhibit-1), reflects that he began delivering coal to Conesville in April, 1988, and that he made three trips a day, 3 days a week.

Conesville's scalehouse operator Shuck testified that coal is delivered to the dumping location in question 3 days a week, and that this has been a normal practice during the 4 years of his employment at Conesville. Mr. Shuck estimated that 200 trucks a day deliver coal to the site, and that approximately 50 to 60 contractor drivers are engaged in this work. MSHA's accident investigation report (exhibit M.X.-30), reflects that the preparation plant operated 3 days a week on Wednesday, Thursday, and Friday, and that each day approximately 7,000 tons of coal from other mines are transported to the facility for processing at the preparation plant.

In support of the imminent danger order issued by Inspector Grissett, MSHA argued that by allowing coal trucks to dump coal without taking any measures to assure adequate side clearances between the trucks, Conesville permitted a dangerous practice to exist, exposed all of the drivers who were at the dumping location to hazards, and that the practice would have continued unabated had the inspector not issued the order. The inspector confirmed his belief that Conesville's "ongoing and continuing violation of section 77.1600(c), created the imminent danger" (Tr. 209).

Notwithstanding all of this evidence, which I conclude and find clearly establishes regular and frequent exposure to potential mine hazards to the contract truck drivers who regularly, frequently, and routinely delivered coal to the Conesville facility approximately 3 times a day, 3 days a week, over a relatively long period of time, Inspector Grissett nonetheless concluded that these drivers were not "miners" pursuant to section 48.22(a)(1), because (1) they performed no contract work for a period of 5 days, (2) were not employed at the mine, and (3) "they were just contracted to deliver a product to the mine."

The fact that the drivers in question were contract employees and were not employed by Conesville is in my view of no consequence. They were in fact persons working in a surface mine while on mine property with coal trucks. Although it is true that the drivers may not have been present at the mine site more than 5 consecutive days, they were certainly there frequently and regularly, and were frequently and regularly exposed to mine hazards. In Kelly Trucking Company, 11 FMSHRC 2441 (December 1989), Judge Maurer affirmed a violation of training Section 48.25(a), where an untrained employee of a trucking company had performed work at a mine site for 3 or 4 days.

Inspector Grissett believed that independent trucking companies, such as Ross Brothers, Inc., who employed or contracted

the drivers working at the Conesville site, were not obliged to hazard train the drivers and that Conesville was responsible for this training since it is responsible for the safety of any person entering its mine. Inspector Grissett's reliance on the definition of a "miner" required to be hazard trained pursuant to section 48.31, is based on his belief that the contract truck drivers in question were "delivery" workers, a category included within the definition of section 48.22(a)(2), for miners who are required to be hazard trained. That section defines such a "miner" as "any person working in a surface mine," but it excludes persons covered under section 48.22(a)(1), and says nothing about any regular exposure to mine hazards. Thus, any person working in a surface mine who is regularly exposed to mine hazards would be required to receive the types of comprehensive training found in sections 48.25 through 48.28, rather than hazard training. MSHA takes the position that since the truck drivers in question were delivering coal to the Conesville site, they met the situs and occupation requirements for "delivery workers" found in section 48.22(a)(2), and therefore had to be hazard trained.

With regard to MSHA's reliance on the "delivery worker" included in the definition of a miner required to be hazard trained, I take note of the fact that MSHA's own explanatory policy guideline with respect to "pickup and delivery drivers" is directed at persons who come to the mine to pick up mined materials or deliver supplies. The evidence in this case does not reflect that any of the truckers in question were picking up any mined materials, nor were they delivering "supplies," as that word is commonly understood. In my view, if MSHA had intended coal haulers to be included in such a category it would have included the delivery of mined materials, as well as the pick up of mined materials, as part of its policy.

I also take note of MSHA's policy manual guidelines found in Volume III, Part 45, July 1, 1988, concerning independent contractors. Pages 9 and 10 of that policy includes a listing of the types of services or work performed by independent contractors at mine sites which would require them to have MSHA independent contractor ID numbers. One of the specific work activities (item #8, at page 10 of the policy), which is relevant to the work performed by the independent coal haulers who delivered coal to the Conesville plant, describes the work as follows: "Material handling within mine property; including haulage of coal, ore, refuse, etc., unless for the sole purpose of direct removal from or delivery to mine property." Although the evidence in these proceedings clearly establishes that the sole purpose of the work performed by the Ross Brothers, Inc., truckers in question while on Conesville's property was the delivery of coal to its property, Ross Brothers, Inc., had an MSHA ID number, even though this policy would seemingly not require it to obtain one. Although the parties do not address

this particular policy, I believe it illustrates the contradictions found in MSHA's policy statements which are intended to provide guidance to its inspectors, as well as to mine operators.

In a recent case concerning a violation of MSHA training standard 30 C.F.R. 48.28, by an independent contractor where the definition of "miner" was in issue, MSHA relied on its policy manual and urged the judge to accept the policy definition of "maintenance" or "construction" work in support of its case. See: Secretary of Labor v. Frank Irey Jr., Inc., 11 FMSHRC 990, 993 (June 1989). In Dacko Corporation, 10 FMSHRC 1259 (September 1988), a case involving an independent contractor charged with a violation of training section 48.25(a), for failing to train one of its employees performing work at a surface preparation plant, the inspector relied on MSHA's manual policy guidelines with respect to the distinction between construction maintenance and repair work, and the "miner" definitions found in section 48.22(a)(1).

In Lancashire Coal Company v. Secretary of Labor, Docket Nos. PENN 89-147-R, etc., decided by me on February 27, 1990, MSHA relied on its Part 45 Independent Contractor Program Policy Manual in support of its interpretation of the language found in the cited mandatory standard in issue in those proceedings, and indeed relied on, and cited its policy in rendering certain advisory opinions with respect to the application and interpretation of the standard. In the instant proceedings, MSHA argues that its policy manual is simply a guideline which is not binding on the inspector. MSHA cannot have it both ways. I find it basically unfair to allow MSHA to rely on a policy guideline and urge the judge to accept it as binding on the parties, when it supports its position, and in another case where the policy may contradict MSHA's position, to take the position that it is not controlling and is simply extraneous and non-binding.

The "policy question" case cited by MSHA, Secretary of Labor v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (August 1984), reversed and remanded by the Court of Appeals for the District of Columbia Circuit, July 29, 1986, 4 MSHC 1033 (D.C. Cir. 1986), concerned MSHA's general policy statements concerning its discretionary enforcement authority with respect to whether it should cite a production operator or an independent contractor for violations of its mandatory health and standards. The court found that the Commission improperly regarded MSHA's general enforcement policy as a binding regulation which it was required to strictly observe.

In the instant case, MSHA's policy statements with respect to the classes of people required to be hazard trained pursuant to section 48.31, do not concern the discretionary enforcement duties of an inspector. An inspector is obliged to issue a

citation or order if he finds a violation of any mandatory standard. However, when an inspector interprets or applies any standard, particularly when it results in the issuance of a citation or an order, I believe he should be bound by the policy interpretation with respect to the meaning and application of the standard. MSHA's policy statements are clearly intended to provide notice to a mine operator with respect to what is required for compliance, as well as guidance for an inspector to follow with regard to MSHA's intended meaning and application of the law. In King Knob Coal Company, 3 FMSHRC 1417 (June 1981), although the Commission rejected a mine operator's reliance on an explanation of the cited standard contained in an MSHA Interim Mine Inspection Manual, and held such manual commentary to be without legal effect, it noted as follows at 3 FMSHRC 1422-1423:

> We emphasize that our decision prospectively obviates future confusion surrounding the meaning and scope of 77.410. The decision will also alert the public to the need for using the Manual, and similar materials, with caution. We also express the hope that this opinion will encourage MSHA to use its Manual in a responsible manner. In our view, such materials should contain, at the least, a precautionary statement warning users of their informality and non-binding nature. As this case unfortunately demonstrates, less than careful dissemination of such materials can cause enforcement and compliance confusion and, at worst, can diminish the protection of the Act and implementing regulations.

Despite the Commission's admonition, MSHA's current policy manual contains no disclaimers or cautionary instructions, and simply states that it "is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." In any event, notwithstanding MSHA's policy statements, on the facts and evidence adduced in these proceedings, and after careful consideration of the arguments advanced by the parties, I conclude and find that the cited independent contractor truck drivers were not "delivery workers" within the definition of "miner" found in section 48.22(a)(2), and that they were excluded from the class of persons required to be hazard trained pursuant to section 48.31(a).

I further conclude and find that the inclusion of "delivery workers" and the other occasional and short-term classes of workers found in section 48.22(a)(2), is intended to reach and cover persons who may visit a mine site on an irregular or casual basis to deliver parts, supplies, or other mine-related or unrelated goods. These individuals would have a limited and rather short-term exposure to mine hazards, and there would be a need to hazard train them so that they are aware of potential

hazard exposure while on mine property. The cited drivers were performing work at the mine site on a routine, regular, and frequently scheduled basis, 3 times a day, 3 days a week, week after week, over a rather protracted period of time. During this period of time, they were regularly and frequently exposed to mine hazards while in and out of their trucks at the Conesville dumping location which they visited during each of their trips. Accordingly, I conclude and find that they fall within the definition of "miner" found in section 48.22(a)(1), and would be subject to the comprehensive training requirement found in sections 48.25 through 48.28. Under the circumstances, I further conclude and find that MSHA has failed to establish that Conesville violated the hazard training requirements found in section 48.31(a), and the contested citation and order ARE VACATED.

I take note of the fact that all of the cited truck drivers were either self-employed independent truckers, or directly employed by, or contracted to, the independent contractor Ross Brothers, Inc., who had an MSHA assigned I.D. No. V71. Independent contractors are "operators" subject to the Mine Act, as well as to MSHA's training requirements found in Part 48, Title 30, Code of Federal Regulations. Section 104(g) of the Act provides withdrawal sanctions directly against an independent contractor whose employees are not properly trained. In the instant proceedings, Inspector Grissett confirmed that no citations or orders were issued to any of the independent trucking concerns or mine operators who employed the drivers. The inspector made no determination as to whether or not Ross Brothers, Inc., had trained its employee or contractor drivers, and he confirmed that the contractor who employed the accident victim (Cox Farms), had not trained all of its drivers.

In Harman Mining Corporation, 3 FMSHRC 45 (January 1981), review denied, 3 FMSHRC (February 1981), I vacated a citation charging the mine operator with a violation of the training requirements of section 48.31, for failing to hazard train an employee of a railroad company who was performing work on mine property. In the course of that decision, I noted as follows at 3 FMSHRC 61, 62:

> As I observed during the course of the hearing in this case, MSHA apparently has made no effort to enforce the training requirements provided for in the Act or in its mandatory regulatory training requirements directly against a railroad until the unfortunate accident which occurred in this case. Once the accident occurred, immediate focus was placed on the lack of training and the fact that there was no confirmation of the fact

> that the railroad employee who met his demise was not trained to stay clear of an oncoming trip of loaded coal cars.
>
> * * * * * * *
>
> Since an independent contractor is in fact a mine operator under the Act, and since MSHA has indicated it will treat railroads such as the Norfolk & Western on an equal basis with other operators, then it seems to me that MSHA should hold all such railroads accountable on an equal footing with other mine operators and the railroad should be required to train its own employees or suffer the consequences of having its untrained personnel barred from mine property through the sanction of a withdrawal order served directly on the railroad company.

In Old Dominion Power Company, 6 FMSHRC 1886 (August 1984), the Commission affirmed a judge's decision finding an independent contractor liable for a violation which was issued following a fatal accident which occurred on the mine operator's property. The Commission stated as follows at 6 FMSHRC 1892:

> We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id. Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that "the interest of miner safety and health will best be served by placing responsibility for compliance . . . upon each independent contractor." 45 Fed. Reg. 44494, 44495 (July 1, 1980).

In the instant case, the proximate cause of the truck tipping over was the failure by the truck driver to insure that his raised truck bed was free of frozen coal. Yet, Conesville's MSHA approved hazard training "checklist" makes absolutely no mention of this potential hazard, and contains no warnings to drivers alerting them to this potential hazard. Even though one driver previously tipped a truck over after backing into a muddy ground area, the approved checklist contains no warnings concerning such adverse ground conditions at dumping locations.

Although there are nine items in the checklist which are underscored and intended to be emphasized to coal haulers on mine property, item #6 which states "stay clear of all raised equipment (Dozer Blades, Front-end Loaderbuckets, etc.)" is not underscored. Indeed, scalemaster Shuck, the person responsible for training the drivers, and former safety director Lyon did not believe that this item even applied to truck drivers. MSHA's training specialist James Myer, the individual who provides Conesville with a generic checklist identical to the one adopted as its checklist, believed that item #6 was broad enough to include truck drivers under the reference to "etc" found in item #6. When reminded that item #6 is not even underscored, and that Conesville did not believe it applied to truck drivers, Mr. Myer commented that "may be a difference of opinion." In short, rather than requiring and approving a hazard training checklist that is clear, concise, and directed to potential hazards faced by truck drivers while dumping coal, the parties have mutually adopted a checklist which makes little practical sense for the drivers which it is intended to cover.

Truck driver Fortney, the individual involved in the accident, believed that checklist item #6 was limited to loaders and dozers and not to a truck backing up and dumping coal at the dumping location in question. Driver St. Clair believed that many of the items on the checklist did not apply to truckers who dumped at the site. Driver Stull, the individual who overturned a truck during a prior incident when he backed into soft ground confirmed that he may have signed and received a copy of the checklist after the accident of December 2, 1988, and although he indicated that he keeps the checklist in his truck, he did not know what it covered and stated that he forgot or could not recall what the checklist covered.

In addition to the lack of mutual understanding of the hazard training checklist, there was also confusion and misunderstanding as to whether or not drivers who stayed inside their trucks were required to be hazard trained. Relying on MSHA's policy statements, Conesville believed that drivers who stay in their vehicles are not required to be hazard trained. In his prehearing deposition, as well as his testimony during the hearing, Inspector Grissett initially conceded that drivers who do not leave their trucks need not be hazard trained. He later recanted and stated that he was confused by MSHA's policy statements. Although he confirmed that he made no determination as to whether or not any of the cited untrained drivers were out of their trucks while at the Conesville site, he nonetheless concluded that they had to be hazard trained.

In my view, requiring independent trucking companies who are in the business of regularly and frequently hauling coal for production operators to train their own drivers, and holding them accountable when they do not, would provide a more effective

means of avoiding the kinds of truck tipping incidents which are reflected by the record in these proceedings. The use of rather obscure hazard training checklists of the kind approved for and adopted for Conesville's dumping operations, rather than comprehensive training which would train drivers in such areas as hazard recognition and avoidance, safe operating procedures while hauling and dumping coal, review of accidents and causes of accidents, and accident prevention, does little to foster safety.

Although I enjoy the benefit of hindsight, I nonetheless believe that if truck driver Fortney had been trained and required to use anti-freeze or some other substance to prevent coal from freezing in his truck, and were trained to keep a safe distance from other trucks while dumping his coal load or raising his truck bed, the accident would not have occurred. While it is true that Conesville had control of the dumping location, it is also true that there are no mandatory safety standards requiring it to insure safe and adequate truck spacing. As noted earlier, section 77.1600(c), only requires the posting of a sign or warning at dumping locations where "side or overhead" clearances are hazardous.

ORDER

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

1. Docket No. LAKE 89-29-R. Section 107(a) Imminent danger Order No. 2950067, December 5, 1988, IS AFFIRMED, and Conesville's contest IS DENIED.

2. Docket No. LAKE 89-30-R. Section 104(a) "S&S" Citation No. 2950086, December 5, 1988, citing an alleged violation of 30 C.F.R. 77.1600(c), IS VACATED, and MSHA's proposed civil penalty assessment (Docket No. LAKE 89-75) IS DENIED AND DISMISSED.

3. Docket No. LAKE 89-31-R. Section 104(a) "S&S" Citation No. 2950069, December 5, 1988, citing an alleged violation of 30 C.F.R. 48.31(a), IS VACATED, and MSHA's proposed civil penalty assessment (Docket No. LAKE 89-75) IS DENIED AND DISMISSED.

4. Docket No. LAKE 89-32-R. Section 104(d)(1) "S&S" Order No. 2950070, December 5, 1988, citing an

alleged violation of 30 C.F.R. 48.31(a), IS VACATED, and MSHA's proposed civil penalty assessment (Docket No. LAKE 89-75) IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge