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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-220
A.C. No. 42-01697-03581

v.

Bear Canyon No. 1

C.W. MINING COMPANY,
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the
Solicitor, U.S. Department of Labor, Denver,
Colorado,
for the Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah,
for the Respondent.

Before Judge Morris:

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, ("MSHA") charges respondent, C. W. Mining Company ("C.W.") with violating eleven safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act"). All of the orders herein were issued under Section 104(d) of the Act.

After notice to the parties a hearing on the merits commenced on June 7, 1989, in Salt Lake City, Utah.

The parties filed post-trial briefs.

The parties stipulated as follows:

Stipulation

1. C. W. Mining Company is engaged in mining coal in the United States, and its mining operations affect interstate commerce.

2. C. W. Mining Company is the owner and operator of Bear Canyon No. 1 Mine, MSHA I.D. No. 42-01697.

3. C. W. Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of C. W. Mining Company on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by C. W. Mining Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect C. W. Mining Company's ability to continue business.

8. The operator demonstrated good faith in abating the violation.

9. C. W. Mining Company is a small operator with 285,550 tons of production in 1987.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

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Order No. 3227202

This order alleged respondent violated 30 C.F.R.
75.1404.1

The order reads as follows:

The approved escapeway plan dated June 11, 1987 was not being complied with. The designated escapeway in the belt entry from the tailpiece for 4 feet 6 inches in length toward the surface has a walkway width of 24 inches. The approved plan states that 32 inches shall be maintained in width from the belt tailpiece to the surface. This condition existed in the main north section, Hiawatha seam (lower seam).

This order alleges respondent violated 30 C.F.R.
75.400.2

The order reads as follows:

Accumulations of loose coal and coal fines were allowed to accumulate in the active workings in the lower seam section in the following amounts and at the following locations.

(1) Loose coal and coal fines 24 inches high, 9 feet long and 6 feet wide at the tail roller for the section belt. The tail roller and bottom belt were running in the accumulations. This was on the walkway side of the feeder. Measurements on the off walkway side showed the accumulations of loose coal and coal fines to be up to 36 inches high and 14 feet long.

(2) Accumulation of loose coal and coal fines on the outby side of the stopping which the belt runs through - 26 inches deep, 5 feet long and 5 feet wide.

(3) Accumulations of loose coal and coal fines in front of the feeder breaker.

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Order No. 3075922

This order alleges respondent violation 30 C.F.R.
75.400.3

The order reads as follows:

Accumulations of loose coal and coal fines and float coal dust were found to exist on the Marietta Continuous Mining Machine in the lower seam. The machine has loose coal and coal fines on and around the electrical compartments and float coal dust from 0 - 1/4 of an inch deep. Section Foreman was standing at the machine.

Citation No. 3227145

This citation alleges respondent violated 30 C.F.R.
75.5124

The order reads as follows:

The weekly examination requirement had not been made on all electrical equipment in the lower seam section. The last recorded date of an examination was 1-15-88 as recorded in the approved book for such purpose.

Reference the following citations and orders:
3227149, 3227153, 3227155, 3227157.

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Order No. 3227149

This order alleges respondent violated 30 C.F.R.
75.601-1.5

The order reads as follows:

Short circuit protection was being provided for the 6 AWG trailing cable supplying 480 VAC #1 Roof Bolter being used on the Lower Seam working section.

The cable was plugged into a 100 amp circuit breaker with a trip range of 150-480 amps set on hi. The maximum allowable equals 300 amps. The cable was plugged in and energized. Refer to citations and orders 3044314, 3227145.

Order No. 3227153

This order alleges respondent violated 30 C.F.R.
75.512.6

The order reads as follows:

The 1000 KVA transformer being used in the Lower Seam working section was not being maintained in safe operating condition.

The following conditions existed:

- 1) 2 top covers were not secured, one cover was located over the 7200 VAC side of the transformer.
- 2) Cover over the top of the 7200 VAC side was bent.
- 3) The disconnecting handle for the blade switch was missing.
- 4) The lid switches were inoperatively wired.
- 5) The leads from the 995 VAC bus bar to the 995 circuit breaker had some of the stranded wires cut out.

Refer to citation and order 3044314, 3227145.

Order No. 3227155

This order alleges respondent violated 30 C.F.R.
75.512.7

The order reads as follows:

The heat lamp being used in the kitchen on the Lower Seam Working Section was not being properly maintained. The lamp is supplied 480 VAC.

The following conditions existed:

- 1) The bottom cover plates on the ends of the heater were missing, exposing the energized connection points for the elements.
- 2) The back of the lamp had a screw missing, exposing the internal connecting wiring. Persons may come in close proximity to these connections, approximately 8 inches on each end of the lamp when placing food on the bottom shelf to warm.

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Order No. 3227161

This order alleges respondent violated 30 C.F.R.
75.1704-2(d).8

The order reads as follows:

A map showing the section escapeway and main
escapeway from the Hiawatha Seam section was
not provided in the section for the miners.

Order No. 3227162

The order alleges respondent violated 30 C.F.R.
75.303(a).9

An inadequate pre-shift examination was conducted for
the 9 p.m. shift 01/28/88. The afternoon shift foreman,
Max Hanson, made the pre-shift for the oncoming shift.
He reported to the oncoming shift foreman, Ken Defa, that
the No. 1 and 2 Entries faces need to be bolted. It was
not recorded as required or signed nor countersigned by
the responsible qualified persons. Refer to citations
Nos. 3044314, 3075922, 3227163, 3227164.

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Order No. 3227163

This order alleges respondent violated 30 C.F.R.
75.400.10

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The order reads as follows:

Combustible hydraulic oil, cardboard boxes had been allowed to accumulate in the return (immediate) entry in the Hiawatha seam section for 3 crosscuts inby the bottom of the rock slope. There was 11 5-gallon cans (full of hydraulic oil), 29 cardboard boxes with roof bolt resin, 4 cardboard boxes containing fire hose and 1 box containing pipe fittings, 18 empty 5-gallon hydraulic cans open and dripping remaining oil on 5 empty cardboard resin boxes on loose coal on floor, and 3 empties next to the off-standard shuttle car dripping remaining on loose coal floor.

Order No. 3227166

This order alleges respondent violated 30 C.F.R. 75.400.11

The order reads as follows:

The rubber tired Lee Norse Model TA 1-29/431 26-2777A, SN 20691 was not being maintained in safe operating condition. Accumulations of coal fines, loose coal soaked with hydraulic oil and grease had been allowed to accumulate on the main controller belt, the lighting ballast box, main motors and conduits. There was float coal dust present also.

Witnesses

Robert L. Huggins, John H. Turner, Donald E. Gibson, and Fred L. Marietti, testified for the Secretary. Kenneth Defa, Nathan Atwood and Bill W. Stoddard testified for respondent.

The Secretary's initial witness testified as to Order No. 3227202. Other witnesses testified as to their knowledge of the facts relating to other orders.

In view of the broad scope of the evidence it is appropriate to set forth all of the evidence and then consider the contentions of the parties.

Summary of the Evidence

ROBERT L. HUGGINS, a Federal Coal Mine Inspector, is a person experienced in mining.

On February 11, 1988, he inspected the Bear Creek Canyon underground coal mine. The inspection was initiated as a result of a 103(g) complaint. During the inspection Mr. Huggins was accompanied by his supervisor, Mr. William Ponceroff and by company representative Ken Defa. The order involved here was issued in the area called the pit mouth where the belt extends to the outside. At this point the tailpiece and the feeder are just barely underground (Tr. 12-15).

The Bear Canyon Mine is an underground coal mine and employs 20 to 40 miners. On this particular day the miners were scattered throughout the lower seam section but no coal was being produced (Tr. 16-17).

In June 1987 the company had asked for relief because the company could not maintain its escapeway at a width of five feet by six feet. As a result of that request Mr. Huggins investigated. After the inspection it was agreed that the company would install two or three steps off the catwalk. They would also make a path like a walkway so the miners could get down (Tr. 18). These things were done and the escapeway was approved. The escapeway referred to in Exhibit P-2 is the same escapeway mentioned in Order 3227202. The purpose of the memo was to advise the District Manager that a man on a stretcher could escape the mine with no problems. In June 1987 the width of the escapeway was 32 inches in width and about 12 feet in length (Tr. 17-20).

When Inspector Huggins conducted his inspection in June 1987 he measured the escapeway to be 32 inches. It is the inspector's contention that from the time of his inspection in June until the date he issued his citation in February 1988 the escapeway had been narrowed by the company installing roof support steel beams and timber. These changed conditions blocked the escapeway since the average measurements dropped to 24 inches (Tr. 23, 24, 41).

The inspector personally could go through the escapeway but because of restricted turns a stretcher could not have been carried through it (Tr. 23, 24, 25, 38, 41).

The company's other escapeway went out to the return, up the slope to the upper seam, and out. These two escapeways were separated by a cinder block wall (Tr. 38). If a person had a

problem getting through there they could simply back up 50 feet and go out the other escapeway.

The inspector believed the violation was S&S. This route was the only escape route out of the mine as the other entry had not been driven. Any injured miner would have to be left behind (Tr. 25, 26). The inspector believed that it was reasonably likely that any injury could be fatal (Tr. 26). He also designated this violation as an unwarrantable failure and referred to the tracking system in the MSHA office when he wrote this particular order. The (d) sequence was in effect; this fact is recorded in the office (Tr. 27, 28, Ex. P-5). If there had been an inspection to take the mine off of the (d) sequence, the inspector would have been informed of it. The mine must have a complete inspection before the (d) series can be dropped (Tr. 28).

He designated this order as an unwarrantable failure because this particular area has to be pre-shifted. In addition, the memorandums back and forth between the company and Denver (MSHA District Manager), states that if there is any change the situation has to be re-evaluated. No doubt the company installed the steel beams.

Inspector Huggins agrees the escapeway "was probably 15 to 20 feet underground and maybe 4 1/2 to 5 feet in length" (Tr. 33).

Exhibits P-2, P-3, and P-4 contain evidence relating to the June 1987 approval of the escapeway.

JOHN R. TURNER, an MSHA underground coal mine inspector, has been so employed for 11 1/2 years. He is experienced in mining and has held various jobs in the coal mining industry (Tr. 43-45).

He has inspected C.W. once or twice a year for the past 10 years. The company was previously called Co-op Mining. Management has not changed over the last 10 years; however, the working personnel has changed drastically (Tr. 45-46).

On January 29, 1988, the inspector went to the Bear Canyon No. 1 Mine. He went to the mine at the direction of his supervisor who advised him Inspector Ted Farmer was having severe back pains and needed relief at the mine. The assignment was made by Fred Marietti, his supervisor. At the time, Inspector Farmer was an underground coal mine inspector working out of the Orangeville office. He served in the same capacity as the witness. Mr. Farmer has not been in the Orangeville office for approximately a year. The day before the witness went to Bear Canyon on January 28, he and Mr. Farmer were inspecting a different mine in Salina, Utah. Later that night, Mr. Farmer received a call to go to the mine.

The inspection team from MSHA consisted of Messrs. Farmer, Marietti, and Gibson. Mr. Gibson, at the time, was a trainee. The three men went to the mine on the evening of the 28th. It was at 7 a.m. that he was told to relieve Mr. Farmer because of his back pain. He arrived at the mine at about 8 a.m. and he saw Farmer who was then preparing to go home. Mr. Farmer left after he arrived. He then went underground to meet Messrs. Gibson and Marietti and to continue Mr. Farmer's part of the inspection.

He met Nathan Atwood, maintenance foreman for C.W., and located the other inspectors near the continuous mining machine. The mining machine was dismantled; it was very black in this area.

He then proceeded out the return entry and met some workers. They said the inspectors were outside. He was then in the return entry where it connected with the slope. He went back up the slope following the same pattern he had used to come down. When he first saw Messrs. Gibson and Marietti, they were writing citations and orders outside the mine. Mr. Turner's name appears as a signature on some of the orders, but he was not familiar with every one of the conditions listed in the orders (Tr. 46, 54); but the signature of the witness appears on some of the orders. Mr. Marietti asked the witness to sign these orders. Mr. Marietti did not sign them himself. Some of Mr. Turner's signatures appear on some of those orders. Mr. Marietti's card was in Arlington because of the supervisory situation. Mr. Gibson did not have an AR card at the time (Tr. 54-55).

The witness did not observe the condition noted in connection with Citation 3227145 (Tr. 55, 56). Mr. Gibson or Mr. Marietti observed the condition.

The inspector signed but did not observe the conditions described in the following orders: 3227149, 3227153, 3227155, 3227161, 3227162, 3227202 (Tr. 55-59).

In connection with Order No. 3227163, Inspector Turner walked through the area on his way up to the return slope. He observed cardboard boxes containing a fire hose, 18 empty five-gallon oil cans (open and dripping). This condition was in the connector entry to the return up the slope. This was a return entry (Tr. 59, 60).

Inspector Turner believed the above accumulations violation was S&S because there was a violation of the regulation. The hazard could cause injury to the workers underground. Scoops and electrical equipment could cause an ignition. A fire could quickly spread (Tr. 59, 60).

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Mr. Turner did not observe the condition described in Order Nos. 3227153 or 3227166 (Tr. 58, 59, 61); however, he saw the conditions described in Order No. 3227163 (Tr. 59).

The witness observed the conditions described in Order No. 3044314. He had not measured the loose coal and accumulations because Inspectors Marietti and Gibson had already noted these conditions. Based on his observation, he considered the loose coal and fines violated the regulation (Tr. 61). The violation was also S&S. This particular order was signed by Inspector Farmer (Tr. 61, 62).

Concerning Order No. 3075922, the witness did not measure the float coal dust; but he observed the dust and the blackness of the area. The "zero to quarter inch" description came from Mr. Gibson or Mr. Marietti. Mr. Turner considered this violation to be S&S (Tr. 62).

Most of the signatures on the orders are based on what the witness was told by other inspectors including Mr. Marietti, a supervisor. MSHA supervisors do not routinely sign orders or citations. It is part of the training for trainees that they write the body of the citations, which will be signed by a certified AR (Tr. 63). The AR Number must appear in the body of the order (Tr. 64).

Before he became a supervisor, Mr. Marietti was an underground coal mine electrical inspector (Tr. 64). When Mr. Turner signed these citations and orders, he had to believe these conditions existed. You could observe these conditions by walking through which he did when he was looking for Inspectors Marietti and Gibson. The orders he did not see he believes existed because he knew Mr. Marietti and his background as a competent electrical underground coal mine inspector (Tr. 65).

Mr. Turner agrees that the inspection began about midnight.

He signed the orders and citations because Mr. Marietti asked him to, also his boss Mr. Ponceroff said he should sign orders and citations that were issued. He was to take Mr. Farmer's part in the inspection (Tr. 65, 67).

Mr. Turner talked to Mr. Farmer about 15 minutes that morning (Tr. 68). It is not normal procedure to return the documents to the office and have Mr. Farmer sign them (Tr. 68).

Mr. Turner observed the condition of the accumulation of fines and coal dust on the miner and also saw the accumulation

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of boxes and oil cans and other things (Tr. 68-69). The area of the mine in which the cans and oil were located was not well rock-dusted; it was damp and it was in the return entry. He judged the accumulations in the area did not accumulate within a shift or a day but took a longer period of time (Tr. 70).

Some of the cardboard boxes were empty (Tr. 71). It is not a violation to have oil underground to meet the needs of one shift as long as it is in proper containers and there is no spillage (Tr. 71). The mine was damp but Mr. Turner did not remember the cardboard boxes lying in water (Tr. 70).

Concerning Order No. 3044314: the loose coal and fines had accumulated but the witness did not take the measurements but merely observed them as he walked through (Tr. 72-73). The accumulations were dry and the area was not well rock-dusted. However, he did not take a rock-dust sample as required by 30 C.F.R. 75.403 (Tr. 73).

Regarding accumulations on the miner, it would be better stated if the accumulations were described as a film. With reference to float coal dust, one-quarter of an inch is a very small piece of coal. Mr. Turner observed the float coal dust on the machine (Tr. 74).

Mr. Turner did not approach Mr. Farmer to ask him to sign some amendments to the violations (Tr. 75).

Mr. Farmer lives approximately two blocks from the Orangeville office (Tr. 76). Mr. Farmer could have been subpoenaed to come to the hearing to testify (Tr. 76). When the witness met Mr. Marietti and Mr. Farmer these orders had not been written. Mr. Gibson was also present (Tr. 77).

The orders were written the morning and afternoon of the inspection. Mr. Gibson wrote some, Mr. Marietta wrote some, and the witness wrote some (Tr. 78).

Inspector Gibson wrote No. 3227155, 3227153, 3227149, and 3227145 (Tr. 79). The witness did not know what Mr. Marietti wrote. The remaining orders and citations were written by Mr. Farmer (Tr. 80). Mr. Turner signed all the citations and orders at one time; they were dated January 29, 1988 (Tr. 80).

Witness Turner wrote Order No. 3075922 but no others (Tr. 80-81).

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Forty to 45 citations or orders were written that morning or afternoon and Mr. Turner signed all 40 or 45 of them (Tr. 81-82).

The witness signed most of them. He did not feel it was necessary to go back into the mine and review all 40 or 45 citations that had been written that day (Tr. 82).

Of the 40 to 45 violations that had been issued, approximately 20 have been dismissed (Tr. 83).

DONALD EUGENE GIBSON is an electrical inspector employed by MSHA for two years (Tr. 84). On January 29, 1988, he was a trainee coal mine inspector with a specialty in electrical work. His AR card was issued February 28, 1988. While he was a trainee he traveled with Mr. Marietti. The witness did not sign any citations while he was in training status but he would write such citations. They in turn would be signed by other coal mine inspectors (Tr. 84-87).

He inspected the company January 28th and 29th of 1988 with Fred Marietti and Ted Farmer (Tr. 87). Mr. Farmer no longer works for MSHA (Tr. 88).

This inspection came about due to a formal 103(g) complaint filed with the field office supervisor. A 103(g) complaint is a complaint from a miner or a representative of the miners if standards are being violated (Tr. 88).

The complaint had indicated that production was being performed on the graveyard shift. This is the reason the inspectors arrived at the mine at approximately midnight (Tr. 89). They found that coal was being produced. They reviewed the mine books and found that a pre-shift of the lower seam had not been performed. In addition, the electrical book was not up-to-date.

Inspectors routinely write citations as they see the violations (Tr. 91). They also looked for someone in charge (Tr. 91). It is a matter of the inspector's preference whether to write a violation underground or to write it on the surface. In any event, he serves the operator if he sees a violation (Tr. 91-92).

They came to an entry where the continuous mining machine was backing out of a place that was very dusty and there was a lot of coal dust in suspension. A silhouette of the mining machine and the miners was present. The witness then walked up behind Kenny Defa, who was the mine foreman in charge at that time (Tr. 92).

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Mr. Marietti told Mr. Defa they were conducting an inspection and he presented Mr. Defa with a copy of the 103(g) complaint. The copy does not have the complainant's name on it (Tr. 93). There were no line curtains up and there was no ventilation. The atmosphere in the mine was very warm. Everything was very black and coal dust was in suspension (Tr. 93).

Mr. Farmer said he could not get his anemometer to turn so they took a smoke-cloud test. There was no movement but suddenly there was ventilation because it got very cold in the mine; the temperature changed drastically. One of the items on the 103(g) complaint referred to ventilation (Tr. 94).

Order No. 3227145 is a (d)(1) citation. Mr. Gibson observed this condition, which is listed in the citation. This was one of the books that they examined before going underground.

The last date of the recorded examination was January 15, 1988. The regulation requires that examinations be made once a week, that is, once in a calendar week (Tr. 95). The last entry in the examination book was January 15, 1988 (Tr. 96). More than seven days had elapsed between the 15th and the time he saw the book. That would be 14 days that had elapsed (Tr. 96).

The inspectors wrote some 40 or 50 violations and orders during the course of the 29th until 6 or 7 o'clock that evening, that is, from midnight on the 29th until 6 p.m. on the 29th (Tr. 97). Many of these were electrical violations (Tr. 97-98). There was no record in the book of any weekly examinations. A qualified person who is usually an electrician conducts a weekly examination of electrical equipment (Tr. 98).

He observed the short-circuit protection set forth in connection with Citation 3227149 (Tr. 98-99). A qualified person could see this.

The conditions in Order No. 3227149 and No. 3227153 should have been observed by a qualified electrician. The top covers were bent down and a disconnecting candle for the blade switch was missing. These are obvious conditions.

In addition to the weekly examination cited in Order No. 3227145, the area was also subject to a pre-shift examination (Tr. 100).

Order No. 3227155: An entry should have been recorded in the examination book relating to the heat lamp used in the kitchen. Five orders were issued on this one heat lamp. Problems with the heat lamp were grounding and monitoring, and the short-breaker was set too high (Tr. 100-101).

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These items should have been seen on the weekly exam by a qualified person (Tr. 100, 101).

The qualified persons performing the examinations should have been Nathan Atwood, maintenance chief; Cyril Jackson, electrician; Ken Defa; and finally Owen (last name unknown) (Tr. 101). Mr. Atwood was not present when the inspectors arrived (Tr. 101-102).

Witness Gibson considered Order No. 3227145 to be S&S. It was highly likely that injuries could happen due to the lack of a weekly examination (and correction) involving the electrical equipment (Tr. 102, 104). There could be openings in explosion-proof compartments, headlight deficiencies, motor, fan motor, and conveyor motor cables could be damaged. These are arc sources (Tr. 102-103).

Voltage at 480 A.C. could produce arcs that could ignite methane or the coal dust mixture in the air or other mixtures (Tr. 103).

This could cause an electrical shock hazard to the miners. A weekly examination is done to prevent those kinds of hazards (Tr. 103). If various electrical conditions were not examined and corrected, the possibility of a mine fire could exist (Tr. 104).

On January 29, 1988, there was quite a bit of float coal dust in the mine (Tr. 104-105). Such dust would ignite more quickly than solid coal or coal accumulations (Tr. 105).

Mr. Gibson's handwriting appears on Order No. 3227145 (Tr. 105).

This was an unwarrantable failure because management knew that the equipment had not been examined. It was highly probable that an injury could result, the seriousness of which could be fatal.

Based on his review of the book, the weekly examination had been performed January 15, but none since that time (Tr. 106). There were qualified people present who could conduct such an examination (Tr. 106).

Witness Gibson wrote Order No. 3227149. He observed the conditions noted in the body of the order. They were producing coal when the inspectors arrived (Tr. 107).

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In this order (No. 3227149) Mr. Gibson said there was a trailing cable through the roof bolter (Tr. 108). The trailing cable went to the section transformer about 300 feet out back. The maximum length from the roof bolter to the transformer would be 500 feet (Tr. 108).

The energized cable was a No. 6 AWG. It was plugged into a 100 AMP circuit breaker with a trip range of 150 to 480 AMPS. That means there should be a short circuit between phases or phase to ground (Tr. 109).

If two phases short out then it is going to start the arcing or welding process. It will generate 1400 to 1700 degrees and burns can be caused by the arcing. Ignition can result.

This reading was set on 480 and it should have been set on 300 AMPS. Section 75.601-1 requires a setting of 300. This cable was lying on the mine floor in coal accumulations and coal dust (Tr. 110). Higher settings can be obtained but must be authorized by an AR of the Secretary after testing evaluation (Tr. 111). This was not done. The hazard involved here is causing the cable to heat; this could cause a fire.

Excessive heat could cause a mine fire, and a loose connection is always a heat spot. The witness has seen splices in trailing cables. They could blow apart, melt the installation off, and expose energized parts (Tr. 111).

A fire hazard could cause smoke inhalation, burns, and heart attacks (Tr. 112). There is a possibility of a shock hazard if the short circuit is set too high. A qualified electrician normally sets the short circuit protection (Tr. 113).

The inspector designated this violation as unwarrantable. This should have been checked by a qualified person. While 180 is not high, a person would be dealing with the effects of short circuit and, in view of that factor, it is extremely high (Tr. 114-115).

Order No. 3227153 was written by Inspector Gibson who observed the conditions listed in the order. The transformer was in one crosscut in by the feeder breaker on the lower seam. The feeder breaker was for the section. It is a 7200 volt primary and steps down to 480 volts. It is also stepped down to 995 volts AC, which would power the equipment being used in the section. The step down is to 480 and 995 volts (Tr. 115).

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Order No. 3227153 deals with the maintenance of the equipment; there were two top covers on the transformer, one of which was located over the connection point for the 7200 volt incoming power and was not secured. The top cover lid was not secured to the transformer (Tr. 116).

The purpose of the cover lid is to keep people from contacting exposed energized components inside the transformer box and to keep out foreign material. If someone lifted the cover lid when the transformer was energized, foreign material could fall in there causing an arc. A person could contact them and be burned with an entrance and exit wound (Tr. 117-118). The cover lids are subject to a weekly electrical examination (Tr. 118-119); they are also subject to 30 C.F.R. 75.900 which requires high voltage testing on a monthly basis.

This is an area required to be preshifted. The employees were also producing coal in this section (Tr. 119).

The second condition involved the top cover of the 7200 volt side. It was bent in a downward fashion close to the bus bars that went through the transformer. There was no air space for this cover vent (Tr. 119-120).

The copper bus bars were two inches wide and probably range from four to five, maybe six feet in length (Tr. 120).

The lid was bent close to the high voltage cable (Tr. 121). The thickness of the metal is usually about an eighth of an inch. Inspector Gibson did not see anything that could have bent the top cover (Tr. 122). The hazard created by this condition is that the cover could be resting against high voltage cable, that is, one of the leads from the high voltage side (Tr. 122).

In this mine the disconnecting switch was 800 to 1000 feet away. It is possible the vent cover could cause a shock hazard. This could energize the transformer.

The next condition was that the disconnecting handle for the blade switch was missing (Tr. 123). This is a small lever on a light switch which can disconnect if it is necessary to do repair work on the 480 or 995 volt side of the transformer. Internal arcing could be caused if there is no handle to disconnect. You can observe the disconnecting handle as you approach the transformer (Tr. 124).

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The absence of a handle should have been noted in a weekly electrical examination. This particular item could have been overlooked by the pre-shift exam (Tr. 125).

The fourth condition involved an inoperatively wired lid switch. A lid switch is a small toggle switch installed on the high voltage side of the transformers to activate the pilot switch that would de-energize the transformer if the lid is open (Tr. 126).

This would prevent someone from being in contact when the lid is open. In other words, someone had wired this so that the safety device, a switch, would not operate (Tr. 127). This condition should be detected on a weekly examination (Tr. 128).

The final condition involved leads where the breaker had a part of the wires cut out to facilitate a connection (Tr. 129).

Cutting away part of the cable decreased the diameter of the cable and also decreased its current carrying capacity. This could cause an internal heat problem in the transformer. This is a potential fire hazard and it would be like a loose connection. Each of the conditions Mr. Gibson listed creates a hazard which is reasonably likely to result in an injury. In each case the injury could be serious (Tr. 130).

The order was an unwarrantable failure of the operator to comply. It was unwarrantable because the transformer had deteriorated and it is unwarrantable not to maintain the equipment to prevent a safety or health hazard (Tr. 131).

The bent and unsecured top covers would be items a person could see when he walked by the transformer. There were trip-and-fall hazards around the transformer in the nature of trailing cables, boxes, and loose coal (Tr. 133).

Mr. Gibson wrote Order No. 3227155 and observed the condition noted in the order (Tr. 133-134). The kitchen was two crosscuts in by the feeder breaker in the lower seam working section and one crosscut above the section transformer. The first-aid equipment is stored there and also SCSR equipment. It is a congregation point for the working crew (Tr. 134).

The heat lamp was 36 to 42 inches long and about 10 to 12 inches wide and 4 to 5 inches high. It was hanging from the ceiling of the mine roof. There was wire mesh where food could

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be warmed. It was 4 to 5 inches from the lamp to the rack. The heat lamp was supplied by 480 volts AC. The lamp had filaments similar to mercury vapor industrial light three-eighths of an inch in diameter (Tr. 135).

On January 29, 1988, there was some food wrapped in aluminum foil lying on the lamp. The regulation was not being maintained because the bottom cover plates on the ends of the heater were missing exposing energized connection points for the elements (Tr. 136).

A copper pigtail was hanging down below the heat lamp. The copper wire was energized. If a person would contact it, he would receive a shock and could be burned. Persons placing their food on the bottom rack could contact the wire (Tr. 137).

Mr. Gibson designated this as an S&S because of the shock hazard and accessibility to the pigtails.

An additional condition involved the back of the lamp which had a screw missing, exposing the internal connecting wiring. The junction box on top of the heat lamp brought in the 480 volt power supply. The missing screw left all of the wiring exposed. Wires were energized (Tr. 138). If persons contacted them in the bare places they would receive a shock (Tr. 138-139).

There was a rickety table under the heat lamp. The lamp extended down 10 to 12 inches from the mine roof. If a person were six feet tall, he would be standing approximately level with the extended cord (Tr. 139).

Men in the working section, including the foreman, used the kitchen. The area should be pre-shifted (Tr. 140). The violation was unwarrantable because energized points were present. The section foreman is required to make on-shift examinations (Tr. 140-141).

The exposed wires were obvious to anyone who walked in the room.

The ground conductor was not securely fastened to the heat lamp and the short circuit protection did not comply with the law (Tr. 141).

Regarding Order No. 3227161: On January 29, 1988, during the inspection, Inspector Gibson could not find a map showing the designated escape routes from the coal mine. He did not see any map of the section. Normally it would be in the kitchen area (Tr. 144). He did not see any map underground. The workers did

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not know whether there was a mine map underground. The map is also required to have some markings on it which would show two distinct and separate escapeways (Tr. 145).

This order was non-S&S. The miners knew the escape route. The purpose of 1704(2)(d) is for the miners to familiarize themselves should any changes occur in the route (Tr. 146).

This violation was unwarrantable because the law is very plain and there were foremen or supervisors in the working section (Tr. 127).

The mine foreman in charge is usually responsible and would be held accountable. Management was cited on two previous occasions for the failure to provide a map (Tr. 148).

Regarding Order No. 3227162: Inspector Gibson observed the condition as described in the order. He found no evidence that the pre-shift had been recorded in the book (Tr. 149). Mr. Defa told him that Mr. Hanson did the pre-shift examination. Inspector Gibson did not see anything to indicate that Mr. Hanson had entered the examination in the book. It had been reported to Mr. Defa that two entry faces needed to be bolted but nothing else (Tr. 150).

There were accumulations of coal, coal fines, and coal particulates in and around the belt tailpiece. The feeder breaker condition should have been recorded. Accumulations also existed in the return entry. Oil cans and the hydraulic oil were stored in the coal accumulations. Also there was a non-permissible pump in the return entry which was being used. The sideboard on one of the shuttle cars stuck out about 18 inches from the main frame (Tr. 152).

The steel peg was sticking out in the area where the miner's helper would stand while the mining machine cut coal. These were all obvious hazards. They could cause serious to fatal injuries to miners (Tr. 152). This citation was written by Mr. Marietti. Mr. Gibson observed the described conditions. The results of the pre-shift were not recorded as required. The purpose of pre-shift is to alert the oncoming shift to hazardous conditions in the section and those things that need some type of corrective action (Tr. 153).

The oncoming foreman reviews pre-shift examination to alert him of hazardous conditions and he signs the book. Failure to note conditions found in pre-shift could probably result in injury, depending on the conditions observed (Tr. 154).

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Based on the inspector's observation of January 29, 1988, there were conditions not listed in the book that would create a hazard to miners going underground (Tr. 154-155). The conditions could cause serious injury. A pre-shift is required three hours before anyone enters the area. Hanson, a foreman, did the pre-shift examination in this case (Tr. 155).

This violation was unwarrantable because it violates the standard and there is a measure of safety involved. It is likely that a serious accident could result.

Management should be aware of conducting and recording a preshift (Tr. 156).

Order No. 3227163 involves coal and combustible accumulations located in an active working section. A part of the accumulation was around the corner where a shuttle car was parked; but basically, it was in the lower seam working section (Tr. 157).

There was some rock mixed in with the accumulations and Mr. Gibson helped count the containers. There were 11 five-gallon cans of hydraulic oil; 20 cardboard boxes with roof bolt resin; 4 cardboard boxes containing fire hoses, one box containing pipe fittings; 18 empty five-gallon hydraulic cans open and dripping oil on 5 empty cardboard resin boxes; loose coal on the floor; and 3 empty oil cans dripping oil on the loose coal on the floor.

Hydraulic oil and cardboard boxes are combustible (Tr. 158-159). The shift could use more than 11 five-gallon cans in one shift if they had some type of hydraulic failure. Also oil leaks in equipment could also cause loss of additional fluid. The accumulations did not appear to have occurred during one shift (Tr. 159).

This was not an oil station and there was no fire protection. Another source of electricity was the non-permissible pump cited in the area. This was a source of ignition. (Tr. 160). It looked like a K-Mart submersible 110 house pump (Tr. 161).

Accumulation of combustible materials, if continued unabated, is likely to cause an injury. The source of energy or the pump and the shuttle car could cause a fire. Oil could add to the intensity of a fire. There were coal fines in the area which would require less sparking to ignite than they would if they were a mere solid piece of coal.

This area is subject to a pre-shift exam and this violation was unwarrantable because of the amounts involved there (Tr. 162). It could not happen in a normal work shift but was more likely to occur over two or three shifts. There should have been several pre-shifts during that period and there should have been a weekly examination where it should have been noted. This accumulation was obvious and open. The foreman and mine management would have to pass through on a daily basis (Tr. 163-164). In two previous years the company has been cited for 30 violations of this regulation (Tr. 165).

Regarding Order No. 3227166: Inspector Gibson observed the conditions cited in the order. The Lee Nourse model is a roof bolter that was being used on the lower seam working section. Marietti was with him when he observed the roof bolter. This is the roof bolter that had the trailing cable also cited for having a high setting (Tr. 165).

This order was written by Mr. Marietti. Present were coal fines, loose coal soaked with hydraulic oil, grease that accumulated in the main controller box, the lighting ballast box, the pump motor, and conduits. There was also float coal dust present (Tr. 166).

Tools were used to take covers off but that is not done routinely. Usually they have the cooperation of the mine operator to do it for the inspectors. While checking this piece of equipment there were no miners present as they had left the mine (Tr. 167).

The float coal dust had settled on top of the roof bolter and mixed with other accumulations that were present under the shields and under various compartments in the roof bolt machine. A piece of the equipment looked black. The No. 1 and No. 2 entry faces had not been bolted as reported by Mr. Hanson to Mr. Defa. When they got there, they were going to start bolting (Tr. 167-168).

This roof bolting equipment would be walked by the preshifter (Tr. 168-169).

The equipment was where a foreman or management would walk by on that particular day. If these accumulations were allowed to continue, it was reasonably likely that an accident or an injury would occur (Tr. 169).

There could be a fire. Float coal dust is an ignition source and could ignite. Roof bolters, if they have a faulty trailing cable, could emit sparks. The trailing cable on this roof bolter had inadequate short circuit protection (Tr. 170).

A fire hazard would result (Tr. 170-171). An injury on this trailing cable would reasonably likely be fatal due to a fire.

This violation is unwarrantable. The amount of accumulations the inspectors observed was more than would occur during a normal work day. In the opinion of the witness it would take more than three shifts to acquire a similar amount (Tr. 171).

Order No. 3044314 is a violation for accumulation of combustible materials. This accumulation was in an active working section, the lower seam section, where the inspection was taking place (Tr. 172).

Inspector Gibson assisted Ted Farmer in taking the measurements. The order indicates accumulations at seven different locations: No. 1 accumulation was loose coal and coal fines 24 inches high and 9 feet long, 6 feet wide at the tail roller for the section belt. This was on the walkway side of the feeder. Measurements on the off-walkway side showed accumulations of loose coal and coal fines to be 36 inches high and 14 feet long. These are large accumulations (Tr. 172-173).

The belt itself was running in the accumulations. Loose coal and coal fines are combustible and there were two sources of ignition where the belt would be fractionable and the second source would be the feeder breaker set at an angle off the belt tail piece or tail roller. Electrical motors are there and there are two electrical motors on this particular machine (Tr. 174).

With the accumulations observed around the tail roller, which was in the intake air (Tr. 175), there could be a fire. Also there were bearings on the tail roller itself which were greased. This would be a third point of ignition. Coal fines are usually ignited because they are a fine grade of coal.

The condition described in No. 1 (tail roller), if continued unabated, would reasonably result in an injury or death due to smoke inhalation.

The second accumulation was at the first topping out by the box check (Tr. 176). This was a large accumulation. Again, the hazard was that the belt might catch fire. It is likely than an injury or fatality could occur from smoke inhalation.

The third item of the order was a large accumulation. This was on the back of the feeder where the shuttle cars were stopping and where they dump into the feeder. If the coal is dumped too fast from the shuttle car, a pile-up of coal occurs (Tr. 177-178). With regard to this hazard, the witnesses' testimony is the same as it was with regard to locations No. 1 and No. 2.

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Location No. 4 is at the crosscut in a piggy-back spot where the kitchen is located. It covers an area 70 feet long, 6 feet wide, and up to 10 inches deep. This was quite a bit of an accumulation (Tr. 179).

Basically, two shuttle cars dumped into one and a lot of spillage occurs here. In this instance the shuttle car closest to the working face had been loaded with coal by the continuous mining machine (Tr. 180). A substantial amount of spillage occurred.

The kitchen was located inby the section transformer and there are various sources of ignition in the area such as shuttle-car cables, mining machine cable and roof bolter cable. (Tr. 181)

Dumping from one shuttle car to another creates a lot of dust (Tr. 181-182)

On the shuttle car that was closest to the feeder breaker, MSHA issued an order for a violation of 75.503 for not being maintained in a permissible manner in that the front wheel was missing from this particular shuttle car. Damaged pieces in the cable would arc against this metal as it passed around it (Tr. 182).

At the anchor point of the off-standard shuttle car, which was on the other side of the entry at the piggy-back spot, one of the shuttle cars was anchored with a piece of 3/8 inch chain (Tr. 182-183). It did not have a brake source, a rubber tire, or anything like that to help take up the shock load. The chain was coiled around the trailing cable. The car would go back and forth in somewhat of a jerking motion. The inspectors observed that the trailing cable was being damaged. They didn't see any torn cable with exposed energized parts, but they saw the potential for exposing some energized portions of the cable (Tr. 183).

At location No. 5 there were loose coal and coal fines. This was a large accumulation. The same testimony applies as to the other locations.

At location No. 6 behind the line, curtain accumulations existed for a distance of 150 feet up to 18 inches wide and 18 inches deep. This was a large accumulation.

At location No. 7 and at the feeder breaker itself, the combustible oil and soaked into the coal. The feeder breaker has two electrical motors on it. (Tr. 183-185). The feeder

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breaker was on the conveyor belt tailpiece airway. In seven of the locations cited, there were miners and foremen in the area. These locations are also subject to a pre-shift examination. These accumulations were obvious (Tr. 186). On-shift examination should alert someone to the hazards created by these accumulations. The next available shift is advised by reading the preshift examination. Miners were three hours into their shift when the inspectors arrived for inspection on the 29th. Three hours of production would have been enough time to have accumulated the amount of coal at the piggy-back spot (Tr. 187-188).

The accumulation around the feeder breaker would have taken longer than three hours. It could have occurred during the three-hour period (Item 3). The No. 1 and No. 2 could have taken a little longer than a three hour-period. If it had taken longer it should have been there during the shift prior to the inspectors' arrival.

Regarding unwarrantable failure: The section foreman would have walked around this area during the shift when the inspectors arrived (Tr. 188-189).

Concerning Order No. 3044314: The locations in the order would have been subject to an on-shift examination. They should have been seen in such an examination. These were serious accumulations that could create serious hazards.

Order No. 3075922 alleges a violation of 75.400 for accumulations (Tr. 189-190).

These accumulations were found to exist on the Marietta continuous mining machine on the lower seam. Loose coal and coal fines are combustible. This was electrical equipment. This piece of equipment was very black. The machine was generating the coal dust. Continuous mining machines have sprays to keep down the dust and a few sprays may have been operating (Tr. 190-191).

The accumulations of loose coal and fines were under the shields around the electrical compartments in the electrical motors.

The measurements that the witness took and that Mr. Turner talked about called the film at 0 to a quarter or more in depth. A foreman was standing beside the mining machine while it was in operation. The witness could barely see the machine when he first approached it; when the dust settled down he could see it (Tr. 191).

FRED L. MARIETTI, a coal mine inspector in the Orangeville, Utah office, has been employed by MSHA for 11 years. He has been working in coal mines since 1973 and was experienced in mining and specialized training. He is a qualified electrician under 30 CFR in Utah; he also has fire boss papers.

Mr. Marietti accompanied Messrs. Gibson and Farmer on the inspection of January 28-29, 1988. At that time, he was in a supervisory capacity and was assigned to lead this team.

Messrs. Farmer, Gibson, and the witness arrived at approximately 11:45 p.m. on January 28. They chose that time because the 103(g) complaint said coal was being produced on the graveyard shift. When they arrived, they checked the books on the surface, one of which was for the weekly electrical exam (Tr. 289-308).

Inspector Marietti observed the conditions described in Order No. 3227145. Mr. Marietti heard Mr. Gibson testify and he agreed with him as to the conditions.

In view of the number of electrical infractions, they concluded that there had not been an examination, and if there had been one, it had been inadequate. The order was S&S. Given the conditions, it was reasonably likely that a serious accident could occur. Mr. Marietti agreed that the order was a (d)(1) citation. Messrs. Atwood and Defa should have noted the violations. Mr. Defa was present when they arrived. The miner was running when they arrived. When they entered, Mr. Marietti observed a considerable amount of float coal dust suspended in the air. When it is suspended, coal dust can cause an explosion. He observed the silhouette of the miner and Mr. Defa. The air seemed stagnant. He told Mr. Defa why they were there (Tr. 307).

Messrs. Gibson and Farmer proceeded to use chemical smoke to determine air velocity quantity. They followed Mr. Defa out, and as they did, the air seemed to change (Tr. 304-308).

The opening or closing of the curtain and the portal would change the air in the mine immediately. Mr. Marietti wrote the body of some of the citations but his signature does not appear on any of the orders. He did not sign because it is a standard practice that a supervisor accompanying inspectors does not sign violations (Tr. 210). Mr. Turner signed the citations.

Order No. 3227149 (short circuit protection). Mr. Marietti wrote this order and viewed the conditions listed in it. He agreed with Mr. Gibson's testimony. The short circuit should have been set on 300 instead of 480. This was an S&S violation.

If a fire occurs, miners can be overcome by carbon monoxide and fatalities and burns can occur. Burns can cause death. This violation is noted in the order as due to an unwarrantable failure. From past inspections Mr. Marietti issued numerous citations of a similar nature. It is apparent they were negligent in making this examination. It should have been seen by management. The electrician is supposed to make these changes. Mr. Defa, the qualified electrician, was near the trailing cable (Tr. 312-314).

Order No. 3227153 (transformer): Mr. Marietti observed these five conditions. He agreed with Mr. Gibson's characterization. These conditions created a hazard. Persons could get into the transformer and work on the secondary side without having an open visual disconnect. Hazards are for fire and shock. He considered this to be an unwarrantable failure because the area needs to be examined at pre-shift and on-shift. The lid was visible and it should have been maintained in the manner designed by the manufacturer. There is a possibility that the transformers could be hit by a roof fall.

Unwarrantable failure also existed here, due to the number of electrical violations, as well as to the operator's negligence in maintaining the electrical equipment (Tr. 315-318).

Order No. 3227155 (heat lamp): Mr. Marietti agreed with Mr. Gibson on the characterization of the conditions. He saw the bottom cover plates and the screw missing. The condition of the heat lamp created a hazard. Miners could contact energized parts which would constitute a serious shock hazard.

Miners could contact conductors called pigtailed. The violation was unwarrantable because section foremen enter this area. He believed the company was lax and negligent.

Seven people were affected. Other items contributed to the problem of the heat lamp. The same were described by Mr. Marietti. All of these things contributed to his determination that this was an unwarrantable violation (Tr. 319-322).

Order No. 3227161 (mine map not posted): Mr. Marietti did not see the map posted, nor did he see any kind of map. He considered this to be unwarrantable because management is responsible to see that a map is placed in a section. Mr. Defa said he didn't know where the mine map was located (Tr. 322, 323).

In the last six or seven years, mine management has been fairly consistent, that is, it had the same managers. Management personnel were Messrs. Defa, Nathan, and Kenny. Occasionally they changed job titles.

Order No. 3227162: Mr. Marietti agreed with Mr. Gibson's characterization. He talked to Mr. Defa regarding pre-shift exams. Mr. Defa said Mac Hanson made the pre-shift examination. He did not consider the report to be adequate. The citations issued here indicate obvious things that a pre-shift examiner would see. During the inspection, Mr. Marietti saw items that should have been pre-shifted. He believed the inadequate pre-shift was an S&S violation. The items that were missed created a hazard to the miners in the area. Such hazards could cause serious injury. Unwarrantable failure existed because it was made by the agent of the operator.

Mr. Marietti wrote this order. The failure to record part of the order was deleted. He didn't know what happened to the citation written by Mr. Farmer, that is, he didn't know what happened to Exhibit R-1 (Tr. 325-331).

Order No. 3227163: Mr. Marietti wrote this order. He observed the conditions with Mr. Gibson, with whom he agreed. The accumulations were in two crosscuts about 100 feet apart. They said they hadn't done any roof bolting so he assumed the resin was from a previous shift. It is not possible to have used that much hydraulic oil in one shift. These accumulations contribute to a fire hazard. An operator should not leave oil cans dripping on the floor. This appeared to be an oil storage area. This violation was unwarrantable because the area had to be pre-shifted for each shift and the section foreman should have walked by the area (Tr. 322-333).

Order No. 3227166: This order refers to accumulations and to the roof bolting machine. Mr. Marietti wrote this order. He agreed with Mr. Gibson in regard to the conditions listed in this order. The violation was S&S. A fire hazard was created. Float coal dust would contribute to the propagation of an explosion. A roof bolting machine is a source of ignition. The violation was unwarrantable because the equipment was parked in the face and the area would have to be pre-shifted. Regulation 303(a) says that if a pre-shifter observes a hazardous condition, it is to be noted in the book and the condition corrected (Tr. 334, 335).

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Order No. 3044314: This order was written by Mr. Farmer. The witness agreed with Mr. Gibson's testimony that each of these seven areas was a hazard. The intake air did not pass over the tailpiece of the feeder. Conditions 4, 5, 6, and 7 of the order were found in the intake air. When it is located in intake air, coal is more apt to burn and propagate a fire. The violation of Order No. 3044314 was an unwarrantable failure because the foreman would have passed these points three times so it should have been obvious to him.

Order No. 3075922: This order was written by John Turner, who observed the conditions. This was the mining machine he described as being in a silhouette. The mining machine, the cables, the bits, and the lack of sprays contributed to the serious hazard (Tr. 338-340). This was a fire and explosion hazard, as well as an unwarrantable violation, because the section foreman was standing right there. These things the company was cited for were obvious and displayed a negligent attitude (Tr. 341-342). When he saw the float coal dust in the air when he first walked underground, he was fearful that an explosion might occur (Tr. 338-342).

C.W.'s EVIDENCE

KENNY DEFA has been employed by Co-op or C.W. for a little over 20 years. He has performed almost all of the duties in the mine over that period. On January 28 and 29 of 1988, he was superintendent and in charge of a mining crew producing coal. He is certified.

The MSHA inspection team consisting of Messrs. Farmer, Marietti and Gibson arrived close to midnight. Mr. Defa met the three men about 70 feet from the face area. At this point they could not see the operation going on at the face (Tr. 391, 392).

The group was around the corner. There was a curtain between them and the face. They walked back toward the mining machine after Mr. Defa told them they were going to inspect the section. Mr. Defa instructed the men to go home because he had been informed the company would not be mining any more coal. The only time the mining machine was operating was when it was trimming out of the face area. The miners were not cutting coal because the buggy had not arrived from the last trip.

The air current was normal at about 9,000 CFM. In the face area there was probably a normal amount of accumulations that you get in a mining shift. They were in the second production shift since a maintenance shift. There were some coal accumulations. The entire mine was extremely wet due to ground water.

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To Mr. Defa's knowledge, they were keeping the ribs in the area rock dusted. Also the ventilation was being kept up and the trailing cables were out of the way of the buggies.

No one on the shift stopped or short circuited the flow of air. He did not notice any abrupt change in the air flow after the inspectors arrived.

Going in the direction the buggies had to travel it was approximately 600 feet from the belt line. This was longer than the buggies could travel so they would transfer from buggy to buggy about the half-way point. The second buggy would dump the coal on the belt. The general clean-up would have been done when they were not producing. The B-bag area, where the transfer was made from buggy to buggy, would be cleaned up several times a shift. If the area is not cleaned regularly, the buggies get stuck in it.

The previous clean-up would have been on the day shift between 6 and 3 o'clock the preceding day. Mr. Defa didn't recall if it was done on his shift. It would have to be cleaned up after about every 30 yards of coal had been moved (Tr. 393-397).

Mr. Farmer took a rock dust sample approximately 20 feet on the return side of the miner. This would show an extreme amount of combustibility because any coal dust would drift into the return. They never heard the results of the test.

The witness was not traveling with Mr. Marietti nor with Mr. Gibson because he understood Mr. Farmer was the qualified inspector.

Mr. Farmer said he was leaving because he wasn't feeling well. He was also disgusted with the way the inspection was being conducted, and the way Mr. Defa's personnel were being treated.

On several occasions Mr. Marietta called Mr. Defa a liar, a potential murderer with no regard for human safety. The witness didn't recall Mr. Gibson making any statements. Mr. Defa did not consider the condition in the face area to be dangerous. His son was running the continuous miner and Bill Stoddard's son was in the mine. The witness is conscientious and concerned with the safety of people.

C.W. has a safe mine and takes reasonably good care of it. He would not run a production shift without ventilation. The curtain the inspector was talking about is one used on occasion when the mine was idle. The weather was very cold. They did block off a portion of the air when the mine was idle.

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If the witness had wanted to shut the air off he would have simply closed some regulated doors instead of using a curtain (Tr. 398-402).

Order No. 3227202: Mr. Huggins was inspector on June 1987. Actually they carried Mr. Defa through this fairly narrow escapeway in about ten seconds on a stretcher to demonstrate passibility. Mr. Defa didn't recall the exact width of the escapeway. No one said the escapeway had to be maintained at 32 inches. It had to be approximately 4 1/2 feet long. He did not remember having to be turned. From June of 1987 until February 11, 1988, there were no changes made in the escapeway. Mr. Huggins said a stretcher carrying a man would not go through the area but the company did it once and they could do it again. It was fairly tight, but we made it. He was familiar with all of the construction in the mine during that period. From the date the test was made in June until February 1988, the escapeway had not been narrowed in the least degree. He would know about it if it had been (Tr. 403-407).

The examination was done weekly. It had been done on schedule for close to two years.

Mr. Atwood confirmed to Mr. Defa that he had made the inspection but he had forgotten to write it in the book. For the last two years it has been recorded on schedule. Co-op and C.W. did not receive any violations for not doing that for over the last two years. Also, no danger exists from not recording the weekly electrical examination (Tr. 407-408).

Order No. 3227149 (short circuit protection and trailing cable): Mr. Defa was with MSHA when they pointed out this violation. When it was pointed out he turned the dial back to the legal limits with a screwdriver. Mr. Marietti watched him do that. Anyone with a screwdriver can do it. There is no difficulty with the equipment tripping out. The trailing cable was cold. This is rock roof and it was wet in the 20 feet around the transformer.

Mr. Defa could not see any hazard. It was not likely the cable would have ignited anything in the area even if it overheated. The floor is also rock. The company does not, as a matter of practice, set circuit breaker protection higher than it should be. This circuit breaker had been in the mine as long as the transformer, about a year. The equipment is checked weekly by an examiner.

Mr. Defa questioned most of the men on his crew regarding the setting on the device and no one knew anything about it.

Mr. Defa questioned most of the men on his crew regarding the setting on the device and no one knew anything about it. It would have been easy for an ex-employee to have changed it. This was accessible to anyone in the mine (Tr. 409-412).

Order No. 3227153 (transformer covers): There are two bolts that secure each top cover; there was one bolt missing out of each of the two covers. One side still had a bolt in it. It was not difficult to remove the bolts. Mr. Defa didn't know why anyone would want to remove two bolts. The only changes made are the outbreakers or plugs in the transformer; otherwise no changes or alterations are made. He could not see any hazard in the bent cover. The hazard was if the plate were to come in contact with the live energized parts. There was at least a three-inch clearance from any parts inside the transformer.

There was about a two and one-half inch clearance between the bus bars and the inside of the transformer. The distance between the vent cover and the contact point was greater than the distance between the internal parts to the cover. The covers weigh close to 100 pounds. A person could not lift the cover without removing the remaining bolt that was securing it. Other than a qualified electrician, no one has attempted to get inside the covers. The only reason to get inside the covers would be if someone wanted to kill himself.

The transformer lacking a disconnect handle: Mr. Defa did not know how long the equipment had been without a disconnect handle but other inspectors had examined the transformer previously. C.W. had not received any prior notices for such a violation. This connect handle is used to de-energize the transformer in case some maintenance work needs to be done on it.

In the event of an emergency there is a red button by the handle which will disengage the power. It is faster and safer to push the button. The electricians carry a handle in their vehicles. Mr. Defa believed it is the same for all transformers. The electrician who would handle this matter would be John Tucker or Nathan Atwood. Mr. Marietti pointed out that one of the lid switches was corroded inside and malfunctioning. When the lid was lifted the switch did not open. The lid switch had been rewired to accomplish some sort of a short circuit.

C.W. has other transformers in the mine that do not have the lid switches. There is no difference between a transformer that has no lid switch and one with a lid switch that does not work. Mr. Defa was not aware of any regulation that requires a transformer to have a lid switch.

This machine has a 995 volt lead which goes to the bus bar and supplies power to the continuous mining machine. Someone cut four or five strands off the end of the wire where the ring tongue connected to the bus bar. This was a 4/0 cable which is slightly bigger than the witness's thumb.

The witness is experienced in helping electricians but is not certified as such. He has never had any problems from overheating or shock hazards with this transformer (Tr. 413-421).

Order No. 3227155 (heat lamp): Mr. Defa was present when this violation was pointed out. Two covers, which measured approximately 2 x 3 inches, were missing. The actual contact point where one could touch any energized screws would not be larger than the size of a quarter of an inch screw head.

Mr. Defa saw no pigtails and he didn't believe they were there. It would not be likely for someone to reach into this quarter-inch area and be burned.

The only reason to take the cover off would be to change an element. During weekly electrical examinations this equipment would definitely be checked, but he doubted if a pre-shifter would look at such a small unusual thing. There was a missing screw, which allowed one part of the heat lamp to sag from the other.

The witness observed the wires they claim were exposed, but the insulation was in good shape; there was no danger in allowing one section to hang down to expose the insulated wires. A person could not get shocked by this condition, so it was not a serious danger.

The wires running to both ends of the heat lamp were insulated because the lamp gets hot. There would be no danger in the fact that a screw was missing allowing one section to hang down exposing the insulated wires. No shock was possible if someone touched the wires. Missing covers are not a serious danger because it would be extremely hard for a man to make contact with these wires (Tr. 422-425).

Order No. 3227161 (failure to have a mine map): Mr. Defa did not think this was a big deal because one could see the escapeways from the underground portion of the mine. The secondary escapeway is four and one-half feet long, while the primary escapeway in the intake is two or three feet longer. Inspector Farmer said he wouldn't write a citation; Mr. Marietti disagreed.

Abatement occurred when the oncoming shift took a map underground and posted it in the kitchen. These miners were all experienced. Every six weeks the miners travel one of the escapeways and the next six weeks the other escapeway. CW has fire drills every 90 days to review the procedure.

If a person is at the very back of either of these escapeways, he can see the surface from both. The miners were not questioned if they knew how to get out of the mine. Inspector Farmer expressed aggravation that this citation was written. No danger was involved in the situation (Tr. 427-428).

Order No. 3227162 (pre-shift exam): At the time, Mr. Defa was both superintendent and shift foreman responsible for the pre-shift exam. The man responsible for the pre-shift was Max Hanson, the foreman on the preceding shift. Mr. Hanson had done the pre-shift and he was on his way out when Mr. Farmer came into the mine. He told Mr. Defa the first right and first left entries had not been bolted as was needed. He was to then go outside and write it in the book. When the inspectors arrived, they informed the witness there was no pre-shift in the book.

Mr. Hanson did not write it in the book. During the inspection they found Mr. Hanson's time, date and initials in the face area and Mr. Defa pointed this out to Mr. Farmer, who then entered this pre-shift in the appropriate book. The entry was made after midnight. Mr. Farmer wrote the violation because the proper entry was not in the book.

Other than two areas that needed to be roof bolted, there was nothing the pre-shift examiners should have entered in the book. Inspector Farmer and Mr. Defa did a complete new pre-shift examination. Other than the accumulation and the guard missing on the feeder breaker, Mr. Farmer did not point out anything else that needed correction. He didn't refer to any other notices of violation. Mr. Farmer abated the violation by saying the preshift had apparently been done adequately because he was there and it had been recorded. Mr. Defa did not see any danger in the way Mr. Hanson had recorded it, nor any danger in not recording the results in the book. They took care of these conditions (Tr. 429-432).

Order No. 3227163 (accumulations): The witness was present when the inspectors pointed out the combustible materials in a small area. Also, this was a new mine in this seam with only two entries into it. They were in the process of trying to mine a new intake portal out. They were cramped for storage area and had only one ingoing roadway. As noted, there was some roof bolt resin stored in the area as well as fire hose, pipe fittings, and also the oil storage.

Trash was also brought out of the face area to a collecting point at the end of the shift. One problem was there was no roadway into the area and everything outbound had to be carried to the surface by hand. The accumulations had been carried to the surface on the previous shift.

There were 11 five-gallon cans full of hydraulic oil stacked with the rest of the supplies. There were also two pallets of rock dust and a fire valve. The storage of the oil was temporary because the company usually kept what they would use through 24 hours, two production shifts. In addition to the 11 fivegallon hydraulic cans, full cans were stored in their original containers. The 24 cardboard boxes of roof bolts used underground were in their original boxes.

The four boxes of fire hose were in their original containers. Mr. Defa did not recall seeing any cans dripping oil but this coal mine is extremely wet. These cans were used at the first of the witness's shift when he came on. The continuous miner was low on oil and one of the buggies had to have oil added. All of the empties had been consumed in his shift. The five empty cardboard boxes had contained roof bolt resin. A good portion had been used during his shift.

The boxes being dripped on were definitely wet, due to the water in the mine. If Mr. Defa told Mr. Marietti the shift had not roof bolted during the shift, he (Defa) lied, because the roof had been bolted. They were on a 20-foot cycle. They were three hours into his shift and had 40 buggies of coal, so they would have had to have mined at least three faces of coal. There was no danger of fire from accumulations because there was no way to ignite a fire due to the wet conditions. This are was also rock dusted. There was no other danger at all (Tr. 433-438).

Order No. 3227166 (accumulations on the roof bolter): The witness had seen the roof bolter but was not aware of this item until the next day. Mr. Farmer did not claim it had to be cleaned off. It is hard to mine coal and not get a film of accumulations. The continuous miner generates a certain amount of coal dust so one of the main purposes of the return entries is to provide an exit for the accumulated dust and methane. C.W.'s maintenance program requires that all electrical equipment be cleaned off and washed with water during the two maintenance shift. In the last ten years, there may have been an occasion when it was not done. This violation notice was not proper because the equipment was cleaned at the last maintenance shift. Mr. Farmer didn't think there were many accumulations on the roof bolter. In fact, there was water dripping on the bolter so any accumulations would have been extremely wet. Inspector Farmer walked by it and did not say anything.

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Mr. Hanson had also written his time, date, and initials on the cab of the roof-bolting machine. It was believed that Mr. Atwood, who was in charge of maintenance, would have seen the equipment. Mr. Defa called Mr. Stoddard, the president of the company, to look at things because he did not agree with the accusations being made (Tr. 438-443).

Order No. 3044314 (loose coal and fines): The conditions were seen by Inspector Farmer and the witness. The tail roller protrudes into the mine exactly 4 1/2 feet. The violation could not have been for 14 feet, because the belt extends only a total of 4 1/2 feet into the mine. The only thing they could decide was that a lump of coal had been caught in the hopper. Normally C.W.'s maintenance program would have cleaned the belt on the maintenance shift, especially at the transfer points.

Mr. Defa did not walk by this particular point on this shift. In the previous shift, 24 hours earlier, the same problem existed and they cleaned it up. He believed the pre-shift or on-shift book states these things. The pre-shift examiner did not tell Mr. Defa there was a problem. These accumulations could have occurred within five minutes, if something were caught in the hopper.

The next area divided loose coal and fines on the outby side of the stopping through which the belt runs 26 inches deep, 5 feet long, and 5 feet wide (Tr. 445). In this outby area it would be on the same belt just out from the stopping and continuing to the surface. Mr. Defa helped the inspector make the measurements and wrote them down, so they are believed to be accurate. Mr. Gibson was not present when the measurements were taken.

The cause of accumulations: There was a small pile on one side of the stopping and another on the other side. There was a limited amount of clearance where the belt traveled through the stopping. This accumulation could be the result of an oversized lump of coal being wedged between the belt and the stopping. In mine, it could have happened in a short time during his shift.

Area No. 3 (accumulations of loose coal and fines in front of the feeder breaker 28 to 15 inches deep for 35 feet long and 20 feet wide): This area is a big mud hole. The water was approximately six to eight inches deep. The loose coal was definitely saturated with water and ice, mostly ice. On occasion they would clean it up during a production shift. Mr. Defa was not sure when it would have been cleaned up but it would have been on the day maintenance shift. It was not cleaned on his shift (Tr. 449).

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Area No. 4 (the crosscut at the piggyback spot distance of 70 feet long x 6 feet wide, and up to 10 inches deep): This is the area where one shuttle car was dumping into the back of the other shuttle car. Spillage always occurs. At the far end away from the transfer points he doubts if the depth was more than an inch. He had cleaned it out again when the inspectors came in; this would have been done for the second time on his shift. They were about three hours into Mr. Defa's shift.

Clearance for the buggies is about nine inches. If there is a 10-inch accumulation, it must be cleaned up. The coal was wet. The area may not have been rock-dusted, but there was rock dust on both sides of the ribs (Tr. 443-450).

Order No. 3044314 (accumulation of loose coal and coal fines in the left room outby the last open crosscut): This area was just in from the piggyback area. There was actually a water hole the width of the entry. The accumulations were in the water. However, the ribs were well rock dusted but the floor was covered with water. With the company's maintenance program in this area, it would be cleaned on the maintenance shift. There was no fire danger from this accumulation.

There was an accumulation of loose coal and fines in the light room behind the line curtain; actually, this was in the immediate return. Normally, the continuous mining machine leaves a small windrow along the rib line. The left side is easier to keep clean than the right side. The ventilation curtain prevents access. As a result, the maintenance shift cleans up this area. There was wet rock dust thrown behind the curtain at the time the company was mining. This was outby the line curtain for approximately 24 inches. The line curtain is fireproof. There was no danger of combustion.

No. 7 (accumulation of oil and oil-soaked coal): This was on the feeder breaker machine. Inspector Farmer pointed out to Mr. Defa that there was gauge broken off and was leaking oil. It had been broken off a long time, maybe during five or six loads of coal. The witness judged the gauge had been broken off within the previous hour. This occurred after the shift began and after the pre-shift exam. If this had not been pointed out to the inspector, the feeder breaker would have run out of oil before too long. If not, the maintenance shift would have seen the problem.

There is no way this could have been avoided. There is no danger of fire in this area because it is extremely wet. However, this is a fire outlet and there are two extinguishers and 250 pounds of rock dust at the location.

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On the feeder breaker itself there is a fire suppression system plus the belt that has its own system.

Two of the areas, that is, the water hole and the piggyback area, were in the intake. The area behind the line brattice would be in the return. The remainder of the areas under discussion would be in the neutral air which is fed directly into a return about 30 feet from the tailpiece. It had two panels that are lowered approximately 12 inches, which would leave a hole of 24 by 12 inches. If any air did happen to come through that way, it would bleed into the return. The regulator that bleeds off this area into the return was operable.

None of these violations constitute unwarrantable failure. Farmer went over each area to observe the wet condition (Tr. 444-459).

Order No. 3075922 (accumulation on the mining machine): Mr. Defa was not present when the inspectors checked the mining machine. The witness was with Inspector Farmer at the time. Mr. Farmer and he walked into the area while they were doing the pre-shift examination and the other inspectors mentioned the amount of accumulations present. Mr. Defa pointed out that there definitely was rock dust in the accumulations, which he estimated to be about 50 percent. That was one of the times Mr. Defa was called a liar. Inspector Marietti stated he didn't feel Mr. Defa was concerned about the safety of the miners since he had let such conditions exist. Inspector Farmer made no comments. Inspector Farmer did not feel that the continuous miner warranted a notice of violation.

In Mr. Defa's opinion, a notice of violation should not have been issued because there was no potential danger here. With an accumulation of 0 to 1/4 inch, a great deal of rock dust presents no hazard. However, if the entire machine is covered with 1/4 inch of coal float dust and no rock dust then there is a potential hazard.

The cleanup program on a continuous miner machine was the same as on the roof bolter, that is, it would be washed on the maintenance shift. This would occur directly after my shift.

An employee filed the complaint in this case because he bragged about it to several people at the mine. He had been terminated two days before the inspection (Tr. 459-463).

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Concerning the heat lamp violation: In the kitchen area there was a metal table 2 feet wide and 6 feet long. Mr. Defa looked at the area during the inspection and immediately afterwards. There was nothing on the shelf below the heat lamp. In addition, there was nothing in the aluminum foil.

After an inspection Mr. Farmer left because he didn't agree with the way Mr. Defa was being treated.

During an inspection, it is normal procedure to go along with the inspector. Inspector Marietti has always been very thorough; there isn't too much he misses. In this case, he did not attempt to take any rock samples or combustible content samples. Mr. Farmer, however, did take such a sample (Tr. 463-465).

Rock dust is normally white and has a gray tint. Someone looking at a continuous mining machine could not tell if it was rock dust mixed with the coal (Tr. 467). Mr. Defa arrived at the mine about 9 o'clock on January 28, 1988, and looked at the preshift book. There had not been a pre-shift. When Mr. Defa went into the mine, he passed Mr. Hanson on the way out (Tr. 468).

He believed there were six men working that night in the working section. He was in the area about three hours before the inspectors arrived. During the three hours he was in the section but not directly at the miner. He traveled the mine (Tr. 469).

There was one condition Mr. Defa considered hazardous from 9 to 12 p.m., which was the accumulations in the piggyback area of spillage, so they cleaned it up shortly after the shift started. He was returning to the area to check it again when the inspectors arrived. The piggyback area is the one referred to in Order No. 3044314 (Tr. 470).

The accumulations Mr. Defa saw with Mr. Farmer were excessive but were not a danger because of the wetness of these areas. He would say they were not excessive under the circumstances. Any accumulations left over at the end of Mr. Defa's shift would be cleaned up by the maintenance shift (Tr. 472-473).

Inspector Farmer did not believe the escapeway map was a violation. Inspectors Gibson and Marietti had a different opinion than Mr. Farmer.

Mr. Farmer wrote Order No. 3044314. He designated it as "S&S" and unwarrantable. He disagreed with that characterization (Tr. 474).

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During the three-hour period from 9 to 12 p.m., they had used the roof bolting machine. The operator was Robert Shumway. The operator had bolted in three places and had put in approximately 70 bolts. He also bolted places indicated by Mr. Hanson in his pre-shift (Tr. 475). He remembered Mr. Hanson telling him about the roof bolts but did not recall his telling him about anything else found on the pre-shift.

He observed some accumulation on the roof bolting machine and was sure there was a significant amount of accumulations (Tr. 476).

He recalls looking at the roof bolter during the inspection and he found Mr. Hanson's initials, time, and date on the machine. There may have been a skiff, that is a film, on the machine. It wouldn't have gotten your hands dirty if you touched it (Tr. 477). He did not dispute that there were 18 empty five-gallon hydraulic cans in that area (Tr. 477). They used at least 18 five-gallon cans during the first three hours of the shift. The empty cardboard boxes contained resin from roof bolting activity (Tr. 477).

He didn't believe the accumulation of oil and empty cans or cardboard boxes were a hazard or a danger because the area was wet. There was no possible way for a fire to ignite. There was a great amount of oil there and the cans do not hold a lot of oil. All of the cans in the area were empty. The full ones were stacked up off to the side. There was a small 110 pump in the area. Mr. Defa removed it at the inspector's request (Tr. 478, 479).

The purpose of the pump was to pump water but it was not a permissible pump. This area was right on the edge of the rock slope that returned to the upper seam.

It is the responsibility of the pre-shift examiner to make a pre-shift. Since January 1988 that would be Mac Hanson, who was a shift foreman (Tr. 480).

The operator is responsible for a mine map to be posted. Mr. Defa would be the one responsible on his shift (Tr. 481).

In 1972 Mr. Defa took a position as foreman. He received violations for the map not being up-to-date. There was an occasion when they received a violation because the engineer had not certified it as required every six months. The purpose of the map is to show the escapeways. It is not too important in this section because it would be hard to show on the map 2 1/2 feet on a scale of 200 feet to an inch (Tr. 482, 483).

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This escapeway changed after the company completed its intake entry, otherwise the escapeways remain pretty much the same (Tr. 483, 484). In this mine the intake is the one escapeway and the return is the other escapeway. The miners receive new miner training plus weekly safety meetings and regular fire drills; they also travel these escapeways every six weeks. New miner training includes training in the escapeways and what to do in case of an accident or a hazard. Several years ago Mr. Marietti withdrew miners for not being trained (Tr. 484).

Concerning the heat lamp: Mr. Defa did not see any hazard about its condition, nor did he see any danger to anyone being shocked or injured, but he did not dispute that there was a violation of a mandatory standard. He disputed the severity of the violation as an unwarrantable failure.

The kitchen or heat lamp is located where most men go to eat lunch during their shift (Tr. 485).

The transformer was installed three years ago. When you push the red button on the transformer you can hear it turn off (Tr. 486). There is a safety device which shuts off the fuel. If an electrician works on a piece of equipment, he has to get a handle (Tr. 487). The company has not made any changes on the transformer since it was acquired (Tr. 488).

Anyone could change the instantaneous setting but he was never told it was done by an ex-employee. Mr. Defa is not a certified electrician. A qualified person must change any instantaneous trip (Tr. 489). For the instantaneous trip, Mr. Defa disputed that it is unwarrantable (Tr. 490).

Messrs. Atwood and Tucker did the weekly electrical examinations; they recorded it for every single week except the one when the inspector appeared. The last date in the book was January 15, which this was two weeks earlier (Tr. 491).

Mr. Stoddard is one of the owners of C.W. His son and nephew work at the mine. Mr. Defa's son and nephew also work at the mine (Tr. 495).

Mr. Defa is the safety director at C.W. and has been for eight or nine years. He does not own an interest in the mine (Tr. 496).

There were 30 employees employed at the mine at the time of the inspection.

NATHAN ATWOOD, a certified electrician experienced in mining, has been employed by C.W. since November 1971. He also serves as the shift foreman (Tr. 506-508).

Mr. Atwood started doing the weekly electrical examinations the week following the 15th. John Tucker was the previous examiner. Mr. Atwood agrees he did not record the examination on the 22d. He was new and forgot to do it. There was no danger to anyone in not recording the inspection (Tr. 506-511).

Concerning the instantaneous setting set at 480 degrees rather than at 300 degrees: The witness was responsible to see that this trip was properly set. Mr. Atwood could not find out who could have set the trip incorrectly. He would have found and corrected this condition the morning of the MSHA inspection (Tr. 511-515).

Order No. 3227153 (transformer): Mr. Atwood is responsible for abating the violations as cited. This condition was pointed out by Mr. Marietti or one of the shift people.

When they were working on this transformer, Messrs. Marietti and Gibson were present. He removed the cover. There was one bolt in each cover. He agreed that two bolts were missing. You had to remove one bolt to remove a cover. The cover weighs about 100 pounds. That day he did not locate the missing bolts. The previous week the bolts were in the covers. He knows of no reason why anyone would remove them. He did not remove them.

The cover was noticeably bent. After the power was off, he measured the distance from the energized part in the transformer to the nearest part. The distance was at least three inches. There was a greater distance than between the bus bars. This cover was made of heavy metal and not easily bent. No one could push the cover closer to the energized parts.

Mr. Atwood did not consider the missing bolts a dangerous situation because a bolt still secured the lid. It had to be removed before the plate could be lifted off. After examining the bad cover it was apparent there was no danger.

Concerning the disconnecting handle for the plate switch: Mr. Atwood keeps a handle that fits into the transformer in his vehicle. There is no danger to anyone because of a missing handle since there is a red emergency button that cuts the power. It is considerably easier to push the button than to turn the switch off. No one on his shift would use a handle to visually disconnect the transformer. The handle he used is kept in his tool box or in his vehicle. There is no danger if that handle is not on the handle sprocket.

The witness does not recall the transformer ever having a handle attached to it. The inspectors had viewed it when they went through the mine. No one ever said there should be a handle on it.

Concerning lid switches: When the witness lifted the covers, he was able to examine the lid switches. They were hooked up. He removed the switch, pulled it apart, and showed Mr. Marietti the corrosion inside the switch. The equipment was properly wired, and he pointed that out to Mr. Marietti. They discussed the corrosion in the switch. No one would ever take the cover off when the power was on. The transformer hums. If the cover were taken off, the transformer would disconnect the power and lock it out. By not having a safety switch operating, the witness could foresee no danger to anyone. There were other transformers in the mine that do not have switches on the lids. They operate in the same manner as this transformer.

Mr. Atwood is familiar with the leads from the 995-VAC bus bar. The wires which were 4/0 had been cut but not changed by any personnel of C.W. The power from the transformer operates the continuous miner which requires a smaller 2/0 wire. The wires that were there would be in excess of the carrying capacity of a 2/0 wire even in cut condition. The cut wires presented no danger.

This should not have been an unwarrantable violation (Tr. 511-524).

Order No. 3227155 (heat lamp): Mr. Atwood abated the heat lamp violation when he first observed the condition the day of the inspection. He had inspected this at his last electrical the previous week. At that time he noticed the covers were there and the screw was not missing. A screw may not have been taken out, but may have fallen out because these heat lamps are of poor design and vibrate. He would not have noticed this in a preshift exam because the heat lamp gives off a bright light. Normally, the missing covers on the ends would not be seen, but the witness examined this at the weekly electrical exam. He turned on the heat lamp to make the examination.

A missing screw, however, presents no danger. Some wires had been dropped down but they were insulated with good quality insulation. No one could have been shocked or burned by contacting the wires.

The elements in the heat lamp and the screw connecting the elements recess about 1/2 inch into a porcelain part. This would be difficult to reach. If someone did that their fingers would

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get hot from the heat off of the lamp. A person would purposely have to put a finger through there. No one would accidentally touch the elements when warming food.

The danger of the covers was not serious. The wires were insulated and a person would not purposely want to touch the end. Mr. Atwood could not explain why the covers had been removed (Tr. 524-528).

Order No. 3227163 (combustible material): Mr. Atwood observed the condition before it was changed. The accumulations looked normal. This is the normal amount of garbage from a shift. The area of the accumulations was very wet. The water came from the floor and the roof. The area had been rock dusted.

There was a fire valve a pillar away or about 85 feet. The transformer was 92 to 150 feet away. There were two extinguishers at the transformer. There were two ballasts of rock dust in paper bags. The witness felt this should not have been a violation nor should it be unwarrantable (Tr. 529-531).

Order No. 3227166 (roof bolter): The electrician observed the roof bolting machine that day. It was cleaned on his shift. When he looked at it there was about a shift's worth of dust on the machine, which is acceptable.

Mr. Atwood did not take any measurements. The area was wet as were the accumulations. The machine accumulations were made up of rock dust rather than coal dust. There was no danger and this should not have been a violation nor should it have been unwarrantable. The trailing cables trip did not affect the roof-bolting machine. The machine has a separate circuit breaker (Tr. 531-533).

Order No. 3075922 (accumulations of loose coal and coal fines on continuous miner): Mr. Atwood observed this condition. It appeared there was a normal amount of coal dust and rock dust on the machine. The rock dust was obvious and the coal was wet. The mining machine was cleaned during his shift. The accumulations were not significantly different from any other maintenance shift. These machines are stopped during a maintenance shift.

Mr. Defa is a very safety-conscious foreman. The accumulations on the miner were non-serious; no danger of combustion existed (Tr. 534-536).

Order No. 3227202 (escapeway): Mr. Atwood has been in and out of the mine on a regular basis since June 1987. There has been no new construction or any changes in the escapeway from

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June 1987 through January 1988. No new pillars or supports had been installed (Tr. 536-537).

Mr. Atwood went through the escapeway on January 28th to look at the belt at the processing plant. He was also sure he went through the escapeway around February 11, 1988 (Tr. 537-538). The escapeway was the same on February 11, 1988, as it was in June 1987. He disagrees with Mr. Huggins' testimony. There was one continuous miner in the lower seam in January 1988. He did not remember any sprays missing from the machine on January 29. He believes wet coal can ignite (Tr. 538).

Some stockpiles outside a mine can catch fire. He has usually seen rock dust on the miner and the roof bolter. On the miner he ran his fingers through the quarter-inch to zero and it was obvious there was rock dust mixed with coal. He would guess it was 50 percent rock dust (Tr. 539). On the roof bolting machine he saw coal dust mixed with hydraulic oil in a normal amount (Tr. 540). The normal amount he saw was not particularly heavy for those two shifts (Tr. 540-541).

On January 1988 each shift carried out its own garbage. If an excessive amount was there the men would make more than one trip (Tr. 541-542).

Order No. 3227163 (oil and cardboard boxes): This condition was normal for one shift. C.W. normally stores rock dust in an area that is wet. The heat lamp is not supposed to be left unattended (Tr. 543). Anyone can turn on the heat lamp. He examined the lamp during the weekly examination as noted on January 22, 1988. He noticed the cover plates were on at that time (Tr. 544). Somehow they were missing at the time of the last inspection. It was not recorded in the book somewhere that the plates were missing on the heat lamp (Tr. 545). The condition inside an enclosure was not seen because it was behind the cover (Tr. 545-546).

Order No. 3227153: The law requires bolts on the covers (Tr. 546). In his electrical inspection on January 22, he noted the dented cover but did not feel it needed to be corrected.

Order No. 3227149: Prior to January 29, the trip device had been tested to determine if it tripped properly. The test indicated proper tripping (Tr. 548). Mr. Marietti is a fairly good inspector and in the past he has helped the witness with electrical training.

The continuous mining machine will hold over 100 gallons of hydraulic oil and it is not unusual to add 18 to 30 gallons during one shift (Tr. 550).

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The two shuttle cars, the feeder breaker, and roof bolter also use hydraulic oil (Tr. 551). Normally shuttle cars would take five gallons per car and the same amount for the feeder breaker. This whole section was wet (Tr. 551).

In this area of Emery County, Mr. Marietti was notorious for writing a citation when another inspector would not do so (Tr. 552).

Mr. Atwood did not know what the cans were used for (Tr. 553). Eighteen cans would hold 90 gallons of oil (Tr. 553).

BILL WEAVER STODDARD, President of C.W. Mining Company, is a person experienced in mining for over 42 years. He has assisted or gone with MSHA personnel on many inspections in the past. He received his foreman's papers in 1960.

On January 29, 1988, Mr. Defa called him and requested that he come to the mine. Mr. Stoddard arrived between 8:30 and 9 o'clock. Mr. Stoddard did not see Mr. Farmer as he apparently had gone home.

Mr. Stoddard was there when Mr. Turner arrived. Mr. Defa was not too happy about how the inspection was going and the way he was being treated. He stated he had been called a liar, a potential murderer, and that he wasn't qualified to hold the positions he had. When those statements were made, Mr. Marietti and Mr. Gibson were outside.

Each of the inspectors wrote some of the violations. They complained about Mr. Gibson's or Mr. Marietti's writing one and then having Mr. Turner sign it. He did not consider this to be fair. Mr. Turner had not observed the violations in his 20-minute trip through the mine.

He went underground to see the conditions for himself - to see if it was as bad as claimed, as he didn't want his mine to be in bad shape. Mr. Stoddard was alone when he went underground.

Order No. 3227202 (escapeway): Mr. Stoddard submitted the letter to MSHA requesting a variance. Before submitting the letter, he had an MSHA inspector assist him in running a test to see if it could be traveled safely. Mr. Turner was the inspector. He indicated a variance could be obtained if a stretcher could be carried through the area; it apparently passed the test.

Mr. Holgate, in Denver, told the witness that he would get a letter from the Orangeville office to verify this. When the test was made, Inspector Huggins sent his letter and Mr. Stoddard replied.

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The witness did not see Inspector Huggins' letter. Mr. Stoddard did not know the width of the escapeway.

At the time of the first test until February 1988, the escapeway had not been changed in any manner nor had any roof supports or wall supports been added (Tr. 560-563).

Mr. Stoddard observed the 1000 KVA transformer and saw its bent cover. This condition did not pose any danger. Mr. Stoddard at one time was a certified electrician. He saw nothing serious about the switch on the lid, cutting of the wires, and the missing handle. They did not pose any danger to anybody. The bolts missing from the cover plates would be a technical violation.

He didn't see any danger in connection with the heat lamp before it was repaired. There was no danger in the covers not being on or a screw being missing. Mr. Stoddard agrees that it was a technical violation because the covers were off.

Mr. Stoddard did not consider the heat lamp to be an unwarrantable failure (Tr. 563-565).

There was some rock dust on the ribs.

Order No. 3227163 (combustible material where various materials were stored): Mr. Stoddard observed this condition, which appeared to have the normal amount of refuse but it did not constitute any danger. This area was excessively wet. The area had been rock dusted and the ribs were wet as well as the rock dust. The roof was dripping. The standard practice at C.W. is that if there is garbage in one area, it is removed with each shift. The roof bolting machine was under normal conditions for two shifts and other inspectors have seen this condition and have not written a violation. There was no danger as the accumulations were wet. In fact, water was running out of several roof bolt holes (Tr. 565-568).

Order No. 3044314 (accumulations of coal and fines around the tailpiece of the belt and the feeder breaker): Mr. Stoddard looked at this area and these accumulations had probably occurred during the shift. There was no indication they had been carried over from a previous shift. Water running out of the port hole would freeze, but the water had not been there long enough to freeze.

Mr. Stoddard was familiar with the piggyback situation and also observed the continuous mining machine. He was accompanied by Mr. Atwood. It was obvious there was a lot of rock dust

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and float dust on the miner. Mr. Stoddard did not see any accumulations greater than a quarter of an inch. There were no fines and any lumps of coal there were very wet. The area appeared to be rock dusted. The accumulation there could have accumulated in a three-hour period and no danger was involved for the personnel underground.

After looking through the area underground, Mr. Stoddard did not think the condition was abnormal; it was, in fact, normal.

In Mr. Stoddard's opinion, Mr. Defa is a good foreman. There have never been any problems with his safety tactics. After hearing the testimony in this case, Mr. Stoddard would have no hesitancy about having his boy continue to work on Mr. Defa's shift.

Since this inspection, the witness talked to Mr. Farmer about the conditions that existed in the mine. Two weeks ago Mr. Farmer said that no one had talked to him about the hearing. He said the inspection had been conducted in a very unprofessional manner. He thought Gestapo tactics had been used. Mr. Farmer also indicated he was still employed by MSHA.

He also stated he didn't like the way Mr. Defa was treated when he was called a liar, a potential murderer, and not qualified to be superintendent (Tr. 568-574).

Mr. Farmer also mentioned the weekly electrical inspection. He stated that the inspection had been made, only not recorded, and he felt this was not an unwarrantable violation. Mr. Farmer was also upset about the map not being in the kitchen. The escapeway was only 4 1/2 feet long. Miners could drive their shuttle car to the feeder breaker and see daylight outside each time. Mr. Farmer didn't feel the failure to have a map was serious.

Mr. Stoddard was critical of the fact the Secretary had not brought in all of the inspectors who issued citations in this case.

The entries in this mine are about 600 feet from the surface. It would take Mr. Turner about 20 minutes to walk in and back out. Mr. Stoddard did not know of any complete inspection with a mine this size that would take as long as this particular inspection.

At this inspection MSHA appeared to pull every cover and check everything (Tr. 574-577).

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In cross-examination, Mr. Stoddard stated that Mr. Farmer didn't say he was terminated but said that he was "fighting with them" and was in litigation. Mr. Farmer was in the process of getting his job back and getting light duty (Tr. 579).

Order No. 3044314 (accumulations): Mr. Stoddard saw nothing that would have been caught in the feeder to cause a spill of this magnitude (Tr. 582).

The witness considers a violation to be unwarrantable if it is excessively dangerous (Tr. 582-583).

He did not know the width of the escapeway in June of 1987 but its width was the same in February 1988. He also didn't know what the measurements were. Other than as a President, he has no financial interest in C.W.. He is paid a salary and does not know who owns the company (Tr. 584-585). Mr. Stoddard is not involved in any other business but has been doing consulting work in Price, Utah (Tr. 586).

FRED L. MARIETTI recalled (Tr. 587).

He saw Mr. Stoddard about 8:30 to 9 a.m. at the continuous miner. He went to the roof bolter and cited it. Mr. Stoddard then accompanied the witness out of the mine (Tr. 588).

Since January of 1988 he has discussed the violations with Mr. Stoddard at the office of C.W. Inspector Huggins was also present (Tr. 589). Mr. Stoddard said with these violations they (MSHA) "caught us with our pants down." He was also glad they vacated them because he didn't think it was right that Inspector Turner had signed them and he would have contested them anyway.

This conversation about "pants down" was two or three days and maybe in the first week after the orders were issued (Tr. 591).

BILL W. STODDARD recalled:

Mr. Stoddard does not recall the conversation with Mr. Marietti where he admitted the violations occurred. He didn't think he ever told the inspectors C.W. got caught with their "pants down."

CONTENTIONS AND DISCUSSION

I.

C.W. contends that Citations/Orders Nos. 3227145, 3227149, 3227153, 3227155, 3227161, 3227162, and 3227166 should be vacated, as they were not properly issued.

In support of its position C.W. relies on certain statutory provisions, namely,

30 U.S.C. 814(a), which provides:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator, and

30 U.S.C. 815(d)(1) which provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter.

Further, C.W., citing 30 U.S.C. 814(d)(1), asserts the authorized representative must "find" a violation exists and said inspector must further "find" S&S and unwarrantable failure.

The evidence on this issue indicates Inspector Farmer left the mine because he was not feeling well. Inspector John R. Turner was directed to replace him. Mr. Turner did a quick walk-through of the mine but observed none of the conditions giving rise to the above-cited orders. However, Mr. Turner issued the orders based on what Mr. Marietti or Mr. Gibson told him. He signed the orders at the direction of his supervisor.

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C.W.'s position is contrary to established Commission precedent. The Commission has ruled that an inspector may sign a citation even where his supervisor made the determination that a violation existed. *Peabody Coal Company v. Mine Workers*, 1 FMSHRC 1785 (1979). The Commission has further determined that an inspector need not view a violation in order to write a citation. Instead, an inspector need only believe that a violation has occurred prior to issuing a citation. *Arch Mineral Corporation*, 5 FMSHRC 468 (1983).

In support of its position C.W. relies on *Pennsylvania Glass and Sand Corporation*, 1 FMSHRC 1191 (1979). The cited case is not controlling. Witnesses Marietti and Gibson observed all violative conditions and testified extensively as to the conditions they observed.

II.

C.W. further states that Citations/Orders 3227202, 3227163, and 3075922 should be vacated because the Secretary did not meet her burden of proof.

It is necessary to individually consider these factual situations as to these three orders.

Order No. 3227202: This order concerning an escapeway involves a credibility issue between the parties.

Inspector Huggins testified that in June 1987 the escapeway was 32 inches wide. When he returned in February 1988 additional structures, timbers, etc., has reduced the average width to 24 inches. On the other hand, witnesses Defa, Atwood, and Stoddard indicated the escapeway had not changed from when it was approved in June 1987.

I credit C.W.'s evidence. Messrs. Defa, Atwood and Stoddard all indicated no changes had been made in the escapeway. These witnesses working in this small mine on a daily basis would be knowledgeable as to any changes in the escapeway.

On the other hand, Inspector Huggins had not been in the mine since the escapeway was approved. In addition, he relied, in part, on an MSHA memorandum. The memorandum refers to a width of 32 inches but such evidence is not persuasive. The document was never circulated to any C.W. personnel. As a result, its evidentiary value is highly questionable.

For the foregoing reasons, Order No. 3227202 should be vacated.

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Order No. 3044314 (accumulations): The accumulations described in connection with this order are a dangerous hazard to the miners. C.W.'s defense that the condition accumulated during a single shift cannot prevail. The regulation provides that accumulations shall be "cleared up and not permitted to accumulate in active workings." This was not done.

Order No. 3044314 should be affirmed.

Order No. 3075922: This order alleged accumulations on the continuous miner. On the credibility issues, I credit C.W.'s evidence. The operator's witnesses testified that most of the accumulations were rock dust and not coal dust. One would expect a continuous miner to acquire some accumulations as a result of the mining process itself.

On the other hand, the Secretary's evidence indicates the accumulations were "from 0 to 1/4 inch deep." While the expression of "0 to 1/4 inch" may be a shorthand used by inspectors, "zero" is still "zero." Such a formula can easily equal "no" or "minimal" accumulations.

Order No. 3075922 should be vacated.

Order No. 3227162 (pre-shift examination not recorded): At the beginning of the inspection Messrs. Marietti and Gibson entered the mine together. Mr. Defa, the C.W. foreman, accompanied Mr. Farmer, who, he understood, was doing the inspection.

Mr. Farmer was underground for six or seven hours and he generally observed the same conditions as Messrs. Marietti and Gibson. Before Mr. Farmer left, he issued Citation No. 3044311 (Exhibit R-1). Mr. Farmer's citation was dated January 29, 1988, at 0005 hours. He terminated the citation at 0310 the same day. Mr. Marietti was unaware that Mr. Farmer had written Citation No. 3044311.

It appears from the uncontroverted evidence that Citation No. 3044311 (Exhibit R-1) and Order No. 3227162 involved the same factual situation. The citation and order are duplicative.

For this reason, Order No. 3227162 should be vacated.

III.

C.W.'s final contentions attack the Secretary's findings of S&S as to certain orders as well as her findings of unwarrantability as to all of the orders. C.W.'s further position that

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only nominal penalties should be assessed requires an assessment of appropriate penalties where a violation has occurred.

The civil law is well established as to S&S, unwarrantable failure and penalty criteria.

SIGNIFICANT AND SUBSTANTIAL

The Commission has indicated that a violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), aff'd, 824 F.2d 1071 (D.C. Cir. 1987). The Commission has further explained that the following formulation is necessary to support a significant and substantial finding:

(1) The underlying violation of a mandatory health health standard; (2) a discrete health hazard -- a measure of danger to health contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

UNWARRANTABLE FAILURE

The issue of unwarrantable failure can at times be illusive. Accordingly, it is appropriate to review some of the major cases on the subject.

In Emery Mining Corporation, 9 FMSHRC 1997 (1987) the Commission concluded that the statutory term of unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." In Emery four roof bolts had popped on a bearing plate. Further, this violation had existed for at least a week in an area where the operator's safety personnel should have known of the condition. In viewing the factual situation, the Commission stated that the popped bearing plate was a matter involving only ordinary negligence. As a result, in Emery the Commission vacated the finding of unwarrantable failure and modified the section 104(d)(1) order to a 104(a) citation.

In Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, issued the same day as Emery, the Commission upheld two unwarrantable failure findings. Specifically, the operator had been cited for a violation of its roof control plan (30 C.F.R. 75.200). Three days before the contested violation, a similar order had been issued. Pre-shift examinations had been conducted but violative conditions had not been reported. The Commission concluded as follows: "Given the prior violation of section 75.200 in the same area . . . only days before the violation at issue occurred and the extent of the violative condition, we find that Y & O's conduct in relation to the violation was more than ordinary negligence and . . . resulted from Youghiogheny & Ohio's unwarrantable failure."

In Youghiogheny & Ohio the Commission further upheld an unwarrantable failure regarding a "hole through" violation. Specifically, the Commission observed that "even if the 'hole through' was accidental, the roof control plan clearly prohibits cutting through into areas of unsupported roof and the section foreman is responsible for compliance with the plan," 9 FMSHRC at 2011.

In Rushton Mining Company, 10 FMSHRC 249 (1988), the Commission reversed the judge's conclusion that the company's failure to detect the broken wires was due to its inadequate procedure for examining the rope. The procedures followed by the operator were extensive and they are recited in the decision. In short, the Commission found no aggravated conduct within the meaning of Emery.

In Quinland Coals, Inc., 10 FMSHRC 705 (1988), the Commission upheld an unwarrantable failure violation of a roof control plan. After reviewing the underlying facts the Commission concluded that "(g)iven the extensive and obvious nature of the condition, the history of similar roof conditions and [the operator's] admitted knowledge of the conditions, we find that [the operator's] failure to adequately support the roof was the result of more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from . . . unwarrantable failure," 10 FMSHRC at 709.

In Helen Mining Company, 10 FMSHRC 1672 (1988), the Commission determined the operator's failure to comply was not due to the operator's unwarrantable conduct. In finding a lack of such evidence the Commission relied on evidence involving the design and function of the operator's shield system. Other factors supporting the operator included a lack of previous MSHA citations relating to the forepole pads of the shields. Further, even after the roof control plan was revised forepole pads were

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not required by MSHA. Finally, the operator reasonably believed that if cribbing was installed the miners involved in the installation would be placed at considerable risk.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties:

(1) The size of the business and the appropriateness of the penalty to the size;

(2) The effect on the operator's ability to continue in business;

(3) The operator's history of previous violations;

(4) Whether the operator was negligent;

(5) The gravity of the violations;

(6) Whether good faith was demonstrated in attempting to achieve prompt abatement of the violations.

The stipulation of the parties is self-explanatory and it resolves paragraphs 1, 2, and 8.

C.W.'s prior history is unfavorable, especially when its small size is considered. In the two years ending January 28, 1988, C.W. was assessed 264 violations, paid 181 violations and penalties of \$25,710. (Exhibit P-1 contains C.W.'s prior history.)

ADDITIONAL FINDINGS AND SUMMARY

Order No. 3227202 (escapeway): This order should be vacated.

Order No. 3044314 (accumulations of loose coal and coal fines): The clearly excessive accumulations described here establish conditions that could cause serious problems. A fire or explosion could quickly propagate throughout the mine.

Where an operator in the mining process causes a condition that is violative of a mandatory regulation and fails to remedy said condition, then said actions, unless excused, are unwarrantable within the meaning of the Mine Act. A similar situation also involving coal accumulations occurred in Utah Power and Light Company, 11 FMSHRC 710 (April, 1989) (pending before the Commission on review).

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Concerning a civil penalty: C.W. was negligent in permitting these accumulations to develop during the mining process. The situation as it developed should have been apparent to C.W. supervisors.

The gravity was high since accumulations of this type could quickly propagate a mine fire.

Considering the statutory criteria, a civil penalty of \$1,000 is proper.

Order No. 3075922 (accumulations of "0 to 1/4 inch"): This order should be vacated.

Order No. 3227145 (failure to record weekly electrical examination): This technical violation should be affirmed.

I credit the uncontroverted testimony of CW's electrician that this was his first week making electrical inspections and he forgot to record his findings.

In view of the foregoing factual scenario, I consider the negligence of CW's electrician to be low. Further, the gravity of this particular recording violation is likewise low.

A civil penalty of \$250 is appropriate.

Order No. 3227149 (short circuit protection): It is uncontroverted that the short circuit trip protection was improperly set. This order should be affirmed.

This was not an unwarrantable violation. I credit CW's uncontroverted evidence that the equipment had been checked shortly before it was observed by the MSHA inspector. In short, the evidence fails to show any "aggravated conduct" as required by Emery, supra. Accordingly, the allegations of unwarrantable failure should be stricken.

Concerning the assessment for a civil penalty: This was an open and obvious condition; it should readily have been observed. Accordingly, the operator was negligent.

I consider the gravity to have been high. The energized cable could have been subject to excessive energy without trip protection.

A civil penalty of \$500 is appropriate.

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Order No. 322753 (1000 KVA transformer): This order should be affirmed as the parties essentially agree on the underlying facts as to the condition of the equipment.

The initial three items (unsecured cover, bent cover, absent disconnecting handle) are minor violations of 75.512.

These three conditions are not S&S since the evidence fails to establish paragraph (3) and (4) of the Mathies formula.

The three initial conditions are likewise not unwarrantable failures to comply as no aggravated conduct has been established as required by Emery.

Allegations of S&S and unwarrantable failure should be stricken.

The two remaining items of the inoperatively wired lid switches and stranded wires cut from the leads present a more hazardous situation. These two items are S&S as they meet all the criteria required in Mathies. However, I credit the evidence that C.W. did not itself improperly interfere with the wiring. In view of this, no aggravated conduct appears in the record.

The operator was negligent in that the violative conditions should have been observed and corrected.

The gravity as to the initial three items was minimal but high as to incorrect wiring.

On balance, civil penalty of \$400 is appropriate.

Order No. 3227155 (heat lamp in kitchen): C.W. acknowledges this violation occurred as the cover was missing and a screw had dropped out. However, C.W. argues the violation was non-serious.

I conclude that no unwarrantable failure exists as to the heat lamp. Even though a condition violates a regulation, it is not unwarrantable unless some aggravated conduct is established. I find none in this record and the allegations of unwarrantability should be stricken.

The violative conditions themselves were, however, open and obvious. They should have been remedied. Accordingly, the operator was negligent.

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I consider the gravity to be high. In this regard I necessarily credit MSHA's evidence of the severity of the hazard. In addition, miners would, on a daily basis, be in close proximity to this heat lamp.

A civil penalty of \$400 is appropriate.

Order No. 3227161 (map showing escapeway not provided). It is agreed that no map was provided. The defense focuses on the issue that the miners all knew the escapeway routes and the escapeways themselves were side by side. C.W. cannot choose the regulations it is willing to accept or reject. This order should be affirmed.

This violation, however, is not S&S within the doctrine of Mathies since paragraphs (3) and (4) have not been established.

I further conclude the violation was not unwarrantable even though C.W. had previous citations for this regulation. "Aggravated conduct" as defined by Emery requires more than mere prior citations for the same condition.

The file reflects that the operator was negligent inasmuch as the requirements of 75.1704(2)(d) are well known to miners.

I consider the gravity to be low particularly due to the relatively short escapeway. The uncontroverted evidence establishes that miners in the coal seam could see outside the mine.

A civil penalty of \$100 is appropriate.

Order No. 3227162 (pre-shift examination not recorded): This order should be vacated.

Order No. 3227163 (combustible materials allowed to accumulate): This order should be affirmed.

The gravamen of this violation involves 18 empty hydraulic cans dripping oil on boxes and loose coal.

These several ignition sources presented a genuine mine hazard. The defense that these accumulations occurred on a single shift cannot prevail. The regulation seeks to prevent situations where combustibles accumulate in active workings.

In active working ignition sources such as trailing cables, continuous miner bits and electrical equipment are always at hand. The violative conditions cannot be deemed to be unwarrantable since no aggravated conduct is established in the record. Accordingly, allegations of unwarrantable failure should be stricken.

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In assessing a civil penalty, I conclude the operator was negligent since he knew of the violation conditions.

The gravity is high, since oil and cardboard boxes can cause a mine fire.

A civil penalty of \$1000 is appropriate.

Order No. 3227166 (accumulations of coal fines at various locations): This order should be affirmed. The presence of the described accumulations on the main controller belt, the ballast box, main motors, and conduits presented a definite danger.

I credit Inspector Marietti that these accumulations were black and excessive.

While C.W. claimed the mine and equipment were wet, I conclude that accumulations of float coal dust, coal fines, loose coal soaked with hydraulic oil and grease are items that should not be permitted in a coal mine. If such accumulations occur, a violation of 75.400 exists.

The record fails to establish unwarrantable failure, since no aggravated conduct, as required by Emery supra, has been shown.

In assessing a civil penalty: C.W. was negligent since these conditions could have been readily observed.

The gravity is high. As noted above, these accumulations can be an invitation to a mine fire and a resulting disaster.

A civil penalty of \$700 is appropriate.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Order No. 3227202: Vacated.
2. Order No. 3044314: Affirmed, and a civil penalty of \$1000 is assessed.
3. Order No. 3075922: Vacated.

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4. Citation No. 3227145: Allegations of unwarrantable failure are stricken.

The citation, as modified, is affirmed and a civil penalty of \$250 is assessed.

5. Order No. 3227149: Allegations of unwarranted failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$500 is assessed.

6. Order No. 3227153: Allegations of S&S are stricken as to paragraphs 1, 2, and 3.

Allegations of unwarrantable failure as to the entire order are stricken.

The citation, as modified, is affirmed and a civil penalty of \$400 is assessed.

7. Order No. 3227155: Allegations of unwarrantable failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$400 is assessed.

8. Order No. 3227161: Allegations of S&S and unwarrantable failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$100 is assessed.

9. Order No. 3227162: This order is vacated.

10. Order No. 3227163: Allegations of unwarrantable failure are stricken.

The order, as modified, is affirmed and a penalty of \$1000 is assessed.

11. Order No. 3227166: The allegations of unwarrantable failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$700 is assessed.

John J. Morris
Administrative Law Judge

AA

FOOTNOTES START HERE

1. The cited regulation provides:

75.1704 Escapeways
[Statutory Provisions]

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

2. The cited regulation provides:

75.400 Accumulation of combustible materials.
[Statutory Provision]

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

3. The regulation is set forth in connection with the previous order.

4. The cited regulation provides:

75.512 Electric equipment; examination, testing and maintenance.
[Statutory Provision]

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized

representative of the Secretary and to the miners in such mine.

5. The cited regulation provides:

75.601-1 Short circuit protection; ratings and settings of circuit breakers.

Circuit breakers providing short circuit protection for trailing cables shall be set so as not to exceed the maximum allowable instantaneous settings specified in this section; however, higher settings may be permitted by an authorized representative of the Secretary when he has determined that special applications are justified.

\$ Conductor size AWG or MGM Maximum allowable circuit breaker instantaneous settings (amperes)

\$	14	50	12	75	10	
	150	8	200	6	300	
4	500	3	600	2		
	800	1	1,000	1/0	1,250	2/0
	1,500	3/0	2,000	4/0		
2,500	250	2,500	300	2,500	350	
	2,500	400	2,500	450		
2,500	500	2,500				

\$

6. The regulation is set forth at Order No. 3327145, supra.

7. This regulation is set forth at Order No. 3227145, supra.

8. The cited regulation provides:

(d) A map of the mine, showing the main escape system shall be posted at a location where all miners can acquaint themselves with the main escape system. A map showing the designated escapeways from the working section to the main escape system, shall be posted in each working section, in order that the miners in the section can acquaint themselves with the designated escapeways from the section to the main escape system. All maps shall be kept up to date, and any changes in routes of travel, location of doors, or direction of air-flow shall be promptly shown on the maps when the changes are made and shall be promptly brought to the attention of all miners.

9. The cited regulation provides:

[Statutory Provisions]

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make

tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuous at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

10. This regulation was cited in connection with Order No. 3044314, supra.

11. The regulation was cited in connection with Order No. 3044314, supra.