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SOL (MSHA) V. MID-CONTINENT RESOURCES
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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 88-276 A.C. No. 05-00301-03652
v.	Dutch Creek No. 1 Mine
MID-CONTINENT RESOURCES, INCORPORATED, RESPONDENT	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Delaney & Balcomb, P.C., Glenwood Springs, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Mid-Continent Resources, Inc. (Mid-Continent) with eight violations of mandatory standards and proposing civil penalties totaling $10,700 for the violations.

Mid-Continent filed a timely answer to the Secretary's proposal for penalty denying the violations. After notice to the parties an evidentiary hearing on the merits was held in Glenwood Springs, Colorado, on September 20 and 21, 1989. Both parties filed helpful post-hearing briefs and submitted the matter for decision.

I

At the September 1989 hearing the parties reached a settlement of Citation No. 03223646 which alleges a Section 104(a) violation of 30 C.F.R. 75.301. The parties agreed that Mid-Continent would pay as a civil penalty for this violation $1,020. In addition, prior to the hearing, the parties agreed to settle six of the eight citations/orders originally charged in this docket by payment of 60 percent of the initial proposed penalty as follows:

Citation/Order No.	Proposed Penalty	Amended Proposed Penalty
03223176	$ 800.00	$ 480.00
03223542	$1,300.00	$ 780.00
03223598	$1,700.00	$1,020.00
03223641	$1,300.00	$ 780.00
03223644	$1,100.00	$ 660.00
03223647	$1,300.00	$ 780.00

The parties agreed that each citation/order accurately reflects a violation of the standard as alleged therein, and that each penalty as amended is appropriate for the corresponding violation under section 110(i) of its Act.

At the hearing, the parties advised that all eight citations/orders have been abated. I have considered the representations and documentation submitted and I conclude that the proffered settlement disposition of the seven citations/orders referenced above is consistent with the criteria in 110(i) of the Act. I therefore assess the approved amended proposed penalties specified above.

II

Section 104(d)(2) Order No. 3223214

The remaining issues all involve Order No. 322314 which charges a 104(d)(2) violation of 30 C.F.R. 75.1105.

Issues

The issues presented in these proceedings include the following:

1. Whether the conditions cited constitute a violation of the safety standard as alleged in the order and notice of civil penalty.

2. If a violation is found, whether it is of a "significant and substantial" nature.

3. If a violation is found, whether the contested 104(d)(2) order resulted from an unwarrantable failure by Mid-Continent to comply with the cited standard.

4. The appropriate civil penalty that should be assessed, taking into consideration the statutory civil penalty criteria found in section 110(i) of the Act.

Stipulation

At the hearing the parties entered the following stipulations into the record:

1. Mid-Continent is subject to the jurisdiction of the Act and the Commission;

2. The Dutch Creek No. 1 Mine is located near Redstone, Colorado, and had for the year 1987 - 277,194 tons of coal production.

3. At the time 104(d)(2) Order No. 3223214 was issued Mid-Continent was validly within a so-called "d" series provided for by section 104(d) of the Act.

4. The condition underlying the subject orders have been timely abated.

Factual Background

Federal Coal Mine Safety and Health Inspector Phillip R. Gibson conducted an inspection of Mid-Continent's Dutch Creek No. 1 Mine. At that time, the Dutch Creek No. 1 Mine was one of two underground coal mines actively operated by Mid-Continent--the other was the Dutch Creek No. 2 Mine. The Dutch Creek No. 1 Mine operated solely in the so-called Coal Basin "B" coal seam. The Dutch Creek No. 2 Mine operated in the Coal Basin "M" seam, the upper of the two coal seams mined by Mid-Continent.

These two mines were subsequently conslidated by the interception, at depth, of the two mines by the so-called Rock Tunnels Project/Coal Basin Adit.

During the inspection of the Dutch Creek No. 1 Mine, Inspector Gibson issued 104(d)(2) Order No. 3223214 alleging a violation of mandatory safety standard 30 C.F.R. 75.1105. The narrative allegations of this order reads as follows:

> The underground permanent pump for the airlock doors between No. 6 and No. 7 slopes in in crosscut No. 64 was not housed in a fireproof structure or area. The intake air was coursed over the permanent pump installation and not coursed directly into the return (No. 7 slope).

On the order form [MSHA Form 7000-3, Mar-85 (Rev.)], the inspector checked the Gravity (Form Item 10) as follows: Injury or illness as "Reasonably Likely," Injury or illness [which] could reasonably be expected as "Permanently Disabling," and the number of Persons Affected as "10." The inspector checked that the Negligence (Form Item, 11) was "High."

30 C.F.R. 75.1105, a verbatim restatement of section 311(c) of the Act, 30 U.S.C. 871, provides:

> 75.1105. Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.
>
> [STATUTORY PROVISIONS]
>
> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction. [Emphasis added.]

The Situs of the Alleged Violation

In the Dutch Creek No. 1 Mine there are seven slope entries which constitute the slopes section. These entries are driven down-dip into the coal seam from its surface outcrop. The entries are numbered, from left to right (as one faces the coal face) Nos. 1 through 7. Slope Entries Nos. 1 and 7, the two outside entries, are return aircourses through which ventilating air is "sucked" by separate exhausting fans. Entries Nos. 2 through 6 are intake aircourses. No. 4 Entry contained the conveyor belts which had historically hauled mined-coal upward, out of the mine via the portals at the surface outcrop of the coal seam.

The airlock doors referred to in the order consist of two heavy metal doors, each of which standing alone effectively controls the passage of air through the entry in which they are located between Nos. 6 and 7 slopes. These airlock doors are

situated just outby the 103 longwall tailgate return entries at the 64th-crosscut of the slope section.1

By raising and lowering the airlock doors mobile equipment can travel through the airlock from the intake side to the return side, or vice-versa, without short-circuiting the mine ventilation between intake and the return air courses. Thus, the doors separate and prevent the interception of the airflow between the number 6 intake air course and the number 7 return air course.

The "permanent pump" identified in the subject order and which definition frames the issue to be decided in this proceeding provides the hydraulic power which raises and lowers the airlock doors.2

This hydraulic power unit or pump (sometimes hereinafter referred to as the "unit") is located next to the airlock doors in the number 6 slope which is an intake air course. The air traveling in the number 6 air course passes over the unit and on into the face area, longwall 103, which is the only active area in the mine. The air is then returned to the exhaust fan, away from the working face through the return air course, slope No. 7. It is undisputed that the hydraulic power unit was ventilated into the intake air and not into the return air of the number 7 slope.

When asked how the airlock doors operate, Inspector Gibson testified:

A. These doors operate by hydraulic pressure supplied from a hydraulic pump which was powered by an electric motor. The hydraulic pump supplied hydraulic fluid to a cylinder to which one end was attached a wire rope. The other end of the wire rope was attached to the door and a directional valve was engaged causing the cylinder to raise or lower the door.

The hydraulic unit was located approximately 1000 to 1500 feet from the 103 longwall area, the only active working area of the mine. Any air coursing over the unit would normally continue down the six slope entry toward the working face.

The unit was fastened to a metal platform or skid that was resting on the coal floor. The unit had a 10 horse power electric motor, a hydraulic pump with a hydraulic reservoir. The entire unit was 30 inches wide and 36 inches long and appoximately 18 to 20 inches high. The unit was stationary, not of the type that is moved around the mine. It contained a control box with circuit breakers and various electrical components. It is undisputed that it was not a permissible pump. At the time of inspection it was not housed nor enclosed in any structure.

The hydraulic unit in question is sold as a stock item by the equipment manufacturer and is described in the manufacturer's sales brochure entitled "Belt Conveyor Systems for Mining and Construction Industry" (Ex. R-4) as follows:

HYDRAULIC POWER UNITS

> The Continental hydraulic take-up power unit provides an accurate, reliable system for proper tensioning of your belt system. Improper tensions, whether high or low, are severely damaging to the belt, as well as other components such as pulleys, shafts and bearings. A system of pressure sensing switches provides constant monitoring of the hydraulic circuit. The low pressure switch starts the hydraulic pump when a minimum safe operating level is reached. The high pressure switch stops pump action when the maximum level is attained. This system provides an intermittent operating motor and pump as opposed to a continuous system. This results in greatly reducing maintenance problems. All units are factory set and tested based on the individual customer's tension requirements.

> All hydraulic unit components including the accumulator are integrally mounted on a common welded steel skid type base. The unit is designed to be compatible with either water-in-oil type fire resistant fluids or standard hydraulic fluids. Units are available in either 440 volt, 550 volt A.C., or 250 volt D.C. (Emphasis added).

Discussion

The prime issue before me is whether the power unit that raises and lowers the airlock doors is a "permanent pump" within the meaning of 30 C.F.R. 75.1105. If the inspector's characterization of the power unit as a permanent pump is accurate and proper, 30 C.F.R. 75.1105 is applicable, and the basic allegations of the subject order must be deemed valid. The facts are uncontroverted that the enclosure and ventilation requirements of this regulation were not met. If, however, this unit is not a "permanent pump" with the meaning of 30 C.F.R. 75.1105, the section is, of course, inapplicable and the subject order must fail.3

Mid-Continent, on the other hand, asserted throughout the hearing and in its briefs that this installation is not a "permanent pump" within the proper meaning of 30 C.F.R. 75.1105, but rather a "hydraulic power unit" which is not subject to the enclosure and ventilation requirements of this regulation. In support of its position, Mid-Continent presented expert testimony by a registered, professional engineer, a graduate of the Colorado School of Mines, concerning the differences between the operation of the airlock doors' power unit and what is normally associated with a pump. Mid-Continent also introduced an equipment manufacturer's descriptive literature which described this type of unit as a "hydraulic power unit."

Mid-Continent also presented evidence of what it asserts to be the inconsistency between Inspector Gibson's interpretation under 30 C.F.R. 75.1105 and MSHA's demonstrated enforcement policies over the past 10 years. It was Mid-Continent's position that such inconsistency further demonstrated the inapplicability of 30 C.F.R. 75.1105 to this airlock door's power unit.

The Secretary presented the testimony of MSHA Inspectors Gibson and Elswick with regard to the characterization of this installation as a permanent pump. Inspector Gibson testified as follows:

> Q. Now, your order refers to this being a pump. Tell us why you called it a pump.
>
> A. It's several components together. It's looked at as a pump. Since the hydraulic pump that pumps the hydraulic fluid out of the hydraulic reservoir is powered by the electric motor, the entire composition is referred to as a pump. [Emphasis added.]

The testimony of the electrical specialist, Inspector Elswick, on this important issue was limited to the following:

> Q. The pump that you observed and the one Mr. Gibson described, will you tell us please what--describe that pump. What's its makeup? What does it include?
>
> A. Includes electrical control box, a 10 horsepower electrical motor, hydraulic pump, and a hydraulic tank reservoir mounted on a main frame.
>
> Q. Okay. Now, Mr. Gibson referred to this particular item we're talking about as a pump. Is this something you would refer to as a pump?
>
> A. Common miner's language it's a belt take-up unit.
>
> Q. Okay. Is it a pump, though?
>
> A. Yes, it is a pump.
>
> Q. Okay. And, is it a permanent pump?
>
> A. Yes.
>
> Q. Mr. Elswick, as a mine inspector, do you recognize a permanent pump when you see one?
>
> A. Yes, I do.
>
> Q. Okay. Is there any doubt in your mind that this was a permanent pump?
>
> A. No.

Mid-Continent asserts that no foundation was laid nor evidence presented which would establish that either Gibson or Elswick possessed any expertise in the area of hydraulics. Their opinions were basically ultimate conclusions. It is Mid-Continent's position that their unsupported opinion regarding the designation or characterization of the airlock doors' power unit is not entitled any special or the controlling weight as urged by the Secretary. Mid-Continent argues that the inspector's testimony merely begs the question absent any clear basis for their opinion that this installation is subject to the requirements of 30 C.F.R. 75.1105.

The designation of the airlock doors' power unit as a "permanent pump" by Inspectors Gibson and Elswick is contradicted by the opinion of Mid-Continent witness David A. Powell, an employee of Mid-Continent, who is a Registered, Professional Engineer in the State of Colorado and a graduate of the Colorado School of Mines. Mid-Continent asserts that contrary to Gibson and Elswick, his education and training, as well as his background in heavy equipment maintenance, establish that Powell possesses expertise in the field of hydraulic equipment and hydraulic systems similar to the air lock doors' power unit in issue.

While describing the functions of the various components of this unit, Powell stated that the airlock door's power unit is, in engineering parlance, normally described as a hydraulic motor. In the literature provided by a manufacturer, this unit is described as a "Hydraulic Power Unit" (Mid-Continent Exhibit R-4).

Mid-Continent contends that, as evidenced by past enforcement, MSHA had not, prior to Gibson's issuance of the subject order, viewed hydraulic power units on either the airlock doors or the belt take-up units as permanent pumps for enclosure and return air ventilation purposes under 30 C.F.R. 75.1105.

The evidence is uncontroverted that hydraulic power units identical to the one in issue have been used to power airlock doors in the Dutch Creek No. 1 Mine since 1978, and that such units are presently being used throughout the Dutch Creek No. 1 Mine in conveyor belt entries as belt-tensioner or belt take-up units. These belt take-up units are not housed in fireproof enclosures nor is the intake ventilating air specially coursed back into a return air course. This has been the practice since 1983 when Powell came to Mid-Continent Inspector Gibson recalls this practice as far back as approximately 1977.

Prior to the interception of Dutch Creek No. 1 Mine by the Rock Tunnels Project, seven (7) of these hydraulic power units were located in the 4-slope beltline entry; presently, three (3) such units are operated in the Dutch Creek No. 1 Mine. None of these beltline hydraulic power units have been, nor are they currently required by MSHA to comply with the enclosure and ventilation requirements for "permanent pumps" of 30 C.F.R. 75.1105.

Finally, Mid-Continent contends that Inspector Gibson's interpretation that this hydraulic power unit is a "permanent pump" under 30 C.F.R. 75.1105 is contrary to MSHA policy set forth in MSHA Program Policy Letter No. P89-V-10, dated April 13, 1989, "Application of 30 C.F.R. 75.1105." (Mid-Continent Exhibit R-3). In clarifying the regulation section in question, this Program Policy Letter states:

> Permissible Pumps
>
> Permissible pumps installed in a permanent manner, with their associated permissible switchgear, are designed, constructed, and tested to assure that such equipment, when properly maintained, will not cause a mine fire or explosion. Therefore, permissible pumps and associated permissible switchgear are of "fireproof construction" and require no further fireproofing. Permissible pumps and associated permissible switchgear will be required to be ventilated directly into a return aircourse.

Mid-Continent asserts that from this policy letter, it becomes apparent that MSHA intended that the requirements of 30 C.F.R. 75.1105 affecting permanent pumps applies only to "permissible pumps installed in a permanent manner."

As previously stated, the undisputed evidence clearly shows that the power unit in question is not a permissible pump.

The Secretary's response to Mid-Continent argument that MSHA has not enforced the requirements of the cited standard on other hydraulic power units like the one in question is that this is an argument without substance. The Secretary points out (1) these other pumps may be in violation but are not subject to a current citation, and (2) the other pumps are located in the belt entry, an area that is subject to a separate section of the law, and as is the case here, subject to a petition for modification.

With respect to Mid-Continent's argument, that the unit described in Mr. Gibson's citation is not a pump, the Secretary points to the Bureau of Mines Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of Interior, which defines pump as "a machine used to impart flowing motion or to accelerate a fluid stream (gas, water, pulp, slurry)." David Powell, a mining engineer for Mid-Continent agreed with this definition and on questioning by Ms. Miller testified in part as follows:

> Q. (by Ms. Miller) . . . In general engineering terms, will you tell us what a pump is.
>
> A. A pump would be a device that would impart acceleration to a fluid stream.
>
> Q. . . . is there any part of this take-up unit that Mr. Gibson cited that does--have that function?
>
> A. I would say yes, yeah. (Tr. 173).

Conclusion and Finding

Although the hydraulic unit in question has several components, there is no question that at least one significant and essential component of the cited unit is a pump. I find that the unit is a permanent pump and subject to the requirement of the cited regulation. This finding is supported by the testimony of Inspectors Gibson and Elswich, as well as by Mr. Powell, and is consistent with the definition of a pump as defined in the Bureau of Mines Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of Interior, 1968.

Significant and Substantial

It is the Secretary's position tha Mid-Continent's failure to enclose and vent the airlock doors' power unit in issue in conformance with 30 C.F.R. 75.1105 constituted a significant and substantial violation of the regulation. The Secretary asserts that the conditions underlying the subject order were such that the electrical components of this airlock doors' power unit could generate a fire which could spread to the working face thereby causing injury to the 10 or more miners working in that area.

Mid-Continent controverts these assertions. It alleges that various mitigating factors, which were not taken into consideration by Inspector Gibson during this overall gravity determination, surround the subject order and reduce the risk of a fire/

smoke hazard being generated by this installation to a de minimus level.4 Mid-Continent asserts that the low probability of this hazard was admitted on cross-examination by Inspector Gibson. Mid-Continent argues that the speculative nature of the hazards the inspector relied upon is inconsistent with a significant and substantial hazard as defined in Secretary of Labor, MSHA v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

Both the Secretary and Mid-Continent correctly cite Cement Division, National Gypsum, Co., 3 FMSHRC, supra, as controlling law regarding the elements of a significant and substantial violation. There the Commission described the nature of such a violation as follows:

> [F]or the reasons that follow, we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.
>
> The position advanced by the Secretary--that a violation is of significant and substantial nature, so long as it poses more than a remote or speculative change that an injury or illness will result, no matter how slight that injury or illness--would result in almost all violations being categorized as signifcant and substantial. Such an interpretation would be inconsistent with the statutory language and with the role we believe the significant and substantial provisions are intended to play in the enforcement scheme. [Emphasis added.].

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the Mathies formula requires "that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had contiued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and subtantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMRSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, 2011-12 (December 1987). Finally, the Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

The Secretary states in her brief, "The inspectors noted that the hazard--contamination of the escapeway in an emergency situation--was reasonable [sic] likely to occur and that subsequent injuries could be anywhere from smoke inhalation to death. (Secretary Brief, 7-8).

Both Inspectors Elswick and Gibson testified that they are aware of mine fires that have started from electrical equipment/motors "similar" to that in place at the airlock doors' power

unit. If a fire were to start at this power unit, such fire could ignite the surrounding coal ribs. Because the airlock doors' power unit is located on intake air, a fire at this location could contaminate the 103 longwall mining section.

As pointed out in Mid-Continent's brief, the Secretary's analysis overlooks a number of relevant considerations. For example, in her analysis, the Secretary fails to acknowledge that the electrical components of the airlock doors' power unit were equipped with safety features designed to protect against the very malfunctions urged by the Secretary. Under the requirements of Subpart I of 30 C.F.R., the electric motor on the airlock doors' hydraulic power unit possessed ground fault, short-circuit, and motor overload protections; it was subject to regular weekly inspection. There was no evidence that these protection systems were not operating properly.

Also overlooked is the fact that, because of the purpose it served - that of providing access for mobile equipment to the return of the 103 longwall, the airlock doors' power unit operated only intermittently, for short periods of time. It ordinarily operates only in the presence of a mobile equipment operator, which equipment, in accordance with the regulations, was required to have at least one portable fire extinguisher on it.

Given these important factors, the possibility of a fire occurring at this airlock doors' power unit appears to be just that--a mere possibility. Neither inspector in 16 and 18 years of underground coal mining experience had ever seen one of these hydraulic units catch on fire.

When considered with other evidence presented by Mid-Continent, particularly the ability to short-circuit intake air directly into the 7-slope return at these airlock doors, see fn. 4, ante, the possibility that such ignition could adversely affect any miners appears even more remote. As established in part through the testimony of Inspector Elswick, all of the component parts of the airlock doors' power unit were of incombustible steel construction and the hydraulic fluid contained within it was fire-resistant.

Furthermore, although the coal ribs were exposed, the record establishes that Mid-Continent's coal, a medium volatile metallurgical coal, possesses properties which are not susceptible to spontaneous combustion and which, as a general matter, make it extremely difficult to ignite.

Under these facts, the likelihood of a fire/smoke hazard being created by this airlock doors' power unit is nothing more than a possibility. Inspector Gibson testified as follows:

> Q. And you say that a fire at this installation was reasonably likely to occur?
>
> A. Yes, sir.
>
> Q. To me, reasonably likely means that it's probable that you're going to have a fire there. Is that what it means to you?
>
> A. I would probably include possible also.
>
> Q. Well, then, if it's possible, what does unlikely mean?
>
> A. That it's not possible.
>
> Q. Well, if unlikely means not possible, what does no likelihood mean?
>
> A. No--not possible.
>
> Q. Okay, then, when you say that the occurrence was reasonably likely, what you're saying is that that occurrence was possible?
>
> A. Yes.
>
> Q. You are not saying that the occurrence was probable?
>
> A. That's right.

Under the Cement Division, National Gypsum Co. requirements, the conditions underlying a given violation must present more than a "mere possibility" of injury to miners. This requirement has not been met in this case. When applying the standard determined by the Commission, judges must assume that the words used must be equated to their normal, ordinary usage. United States v. Raynor, 302 U.S. 540, 58 S.Ct. 353, 82 L.Ed. 413 (1938); United States v. Cooper Corp., 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941).

The American Heritage Dictionary (Houghton Mifflin, 2d College Ed. 1976) defines "likely" as "possessing or displaying the qualities or characteristics that make something probable . . . . " [Emphasis supplied].

Under the precedent cited above and based upon my independent review and evaluation of all the evidence, I find the evidence presented is insufficient to establish that Mid-Continent's violation of the cited standard was significant and substantial in nature. I find the evidence presented fails to show a reasonable likelihood that the hazard contributed to will result in an injury of a reasonable serious nature.

Unwarrantable Failure

In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. The Commission stated that, while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

As recognized by the Commission in Emery, the chain of citations and withdrawal orders provided under section 104(d) of the 1977-Mine Act to address an operator's unwarrantable failure to comply is one of the Secretary's most powerful instruments for enforcing mine safety. The heightened negligence standard by the Commission in Emery necessarily limits the application of section 104(d) by the Secretary to situations where an operator's aggravated conduct toward an unsafe condition justifies imposition of severe sanctions.

The Secretary justifies the imposition of this stringent enforcement measure on the basis that Mid-Continent was aware of the violative condition of the airlock doors' power unit prior to the issuance of the present order and did nothing to correct it. In fact, the Secretary asserts that Mid-Continent had, at that time, been "instructed" by MSHA to correct this violative condition.

Responsively, Mind-Continent argues that they had no reason to believe that the airlock doors' power unit had been installed improperly. Mid-Continent further argues that had MSHA, indeed, given Mid-Continent any notice, that oral communication of such notice was wholly inadequate.

In her case in chief, the Secretary asserts Mid-Continent had been informed by MSHA of its change in policy concerning the applicability of 30 C.F.R. 75.1105 to the hydraulic power unit installations of the type in issue. Such notification was alleged to have been given orally to a former Mid-Continent employee by Inspector Elswick during a prior inspection of this airlock doors' power unit.

According to his testimony, Inspector Elswick gave his oral notification to Mid-Continent after reading the decision allegedly altering the definition of "permanent pump" under 30 C.F.R. 75.1105 in Judge Fauver's decision in Southern Ohio Coal Co., Docket No. WEVA-86-R, slip op. at 6 (Decision, Aug. 14, 1986) (Mid-Continent Exhibit R-10) (Tr. 110). According to Inspector Elswick, he had received no other policy memoranda or communication which addressed this policy change.

Inspector Elswick's testimony in this regard is questionable. According to Inspector Elswick, this notification was given Mid-Continent about six weeks prior to January 14, 1988. However, as evidenced by the date stamp on the face of Mid-Continent Exhibit R-10, the decision in Southern Ohio Coal Co., was not received by the Denver MSHA District Office until February 14, 1988,--a date post-dating the subject order by 27 days. Further, this decision was not disseminated down to the MSHA field office level by the subdistrict manager until July 5, 1988.

Thus contradicted by the document on which he ostensibly relied, Mid-Continent asserts that it is difficult to grant any credence to Inspector Elswick's testimony concerning the justification for or the oral communicaton of this ostensible notice which had the net effect of changing at least 10 years past practice and interpretation of 30 C.F.R. 75.1105 with respect to its applicability to the cited hydraulic power units.

Whether such notice was given by Inspector Elswick, however, is not dispositive of the issue. I agree with Mid-Continent's argument that such informal, conversational notice is wholly inadequate to justify sanctions under section 104(d) of the Act. As established at trial, hydraulic power units identical to the one in issue have been used to power airlock doors in the Dutch Creek No. 1 Mine since 1978. These units have also been and are currently being used in the beltline entries of this mine for belt take-up functions. As Mid-Continent points out, identical hydraulic power units on the 4-slope beltline, approximately 200 feet away from the unit in question, are not housed in fireproof enclosures and vented to a return air course. Cf. Deibold, Inc., v. Marshall, 585 F.2d 1327, 1335-1338 (6th Cir. 1978).

Considering the record as a whole, I find that Mid-Continent had a mistaken but good faith belief that the hydraulic power unit in question was not a pump that was subject to the enclosure and ventilation requirements of the cited regulation. In making this finding and conclusion, I have considered all the evidence including that evidence that fairly detracts from an unwarrantable failure finding. Mid-Continent was negligent but its conduct does not amount to aggravated conduct exceeding ordinary negligence. See Utah Power and Light Co. v. MSHA, Docket No. WEST 89-161-R (May 24, 1990); Florence Mining Co., 11 FMSHRC 747, 752-54 (May 1980); Southern Ohio Coal Company, 10 FMSHRC 138, 142-143 (February 1988). See also Westmoreland Coal Co., 7 FMSHRC 1338, 1343 (September 1985).

Civil Penalty

In accordance with the mandate of section 110(i) of the Act, I have considered the statutory criteria in section 110(i) of the Act. With respect to size, I have considered the parties' stipulation that the Dutch Creek No. 1 Mine produced 277,194 tons of coal during the year prior to the issuance of the citation and that overall, as stated in the joint document the parties filed on August 16, 1989, Mid-Continent produced a total of 666,582 tons of coal during that year. The proposed penalty would not adversely affect Mid-Continent's ability to continue in business.

The computer printout, Exhibit P-1, shows Mid-Continent's assessed violation within the two-year period prior to the inspection.

The operator demonstrated good faith by the timely abatement of the violations cited in this docket. The gravity of the violation and the operator's negligence has been covered under the discussion regarding the issue of whether the violation was of a significant and substantial nature and whether the violation was a result of Mid-Continent's aggravated conduct constituting more than ordinary negligence.

Everything considered, I find $100 to be the appropriate civil penalty for Mid-Continent's violation of 30 C.F.R. 75.1105.

ORDER

In view of the foregoing findings and conclusions, it is ORDERED that Section 104(d)(2) Order No. 3223214 be MODIFIED to delete the significant and substantial designation and the inspector's determination that this violation resulted from Mid-Continent's unwarrantable failure to comply with the mandatory safety standard 30 C.F.R. 75.1105.

Accordingly, this enforcement document (Order No. 3223214) is MODIFIED to change its nature from a Section 104(d)(2) order to a Section 104(a) citation. As modified to a 104(a) citation, it is AFFIRMED.

The remaining seven citations/orders are also AFFIRMED and Mid-Continent is ORDERED to pay the assessed civil penalty of $5,620 in satisfaction of the eight violations charged in this case. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt or payment, this matter is dismissed.

August F. Cetti
Administrative Law Judge

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FOOTNOTES START HERE

1. This is not a heavy traffic area; the heavy traffic is in the headgate area.

2. Mid-Continent asked for and received early on a continuing objection to the reference by the Secretary's witnesses of the hydraulic power unit as a "permanent pump." Therefore, this repeated characterization does not per se carry any evidentiary weight.

3. Mid-Continent challeges both the "significant and substantial" and "unwarrantable" characterizations of the alleged violation. These issues are reached, however, only if a violation of 30 C.F.R. 75.1105 is first established.

4. One important factor is that, should both airlock doors be raised simultaneously, intake air entering the mine via 4-, 5-, and 6-slope entries would short-circuit into 7-slope entry (a return aircourse) and be pulled out of the mine by the exhausting ventilation fan. It would bypass completely the single active mining section in this mine, the 103 Longwall, and never reach the section or the miners working in the section. This location and ability to divert contaminated air (if, for example, containing smoke) directly into the 7-slope return aircourse without exposing the mining section and the miners to the danger or any smoke significantly reduces any potential danger and likelihood of serious injury.