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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 PROCEEDINGS
	Docket No. SE 89-113
	A.C. No. 01-00851-03718
v.	Oak Grove Mine
U.S. STEEL MINING COMPANY, INC., RESPONDENT	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks a civil penalty assessment in the amount of $1,000 for an alleged violation of mandatory safety standard 30 C.F.R. 75.316. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Birmingham, Alabama. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this proceeding include the following: (1) Whether the respondent violated the cited mandatory safety standard; (2) whether the alleged violation was significant and substantial (S&S); and (3) whether the alleged

violation cited in the contested section 104(d)(2) order resulted from an unwarrantable failure by the respondent to comply with the cited standard.

Assuming the violation is established, the question next presented is the appropriate civil penalty to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq

2. Sections 110(a), 110(i), 104(d), and 105(d) of the Act.

3. Mandatory safety standard 30 C.F.R. 75.316.

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

Stipulations

The parties stipulated to the following (Tr. 8-9):

> 1. The respondent is a large mine operator subject to the jurisdiction of the Act.
>
> 2. Payment of the civil penalty assessed for the alleged violation in question will not adversely affect the respondent's ability to continue in business.
>
> 3. The respondent timely abated the alleged violative condition in good faith.

Discussion

The contested section 104(d)(2) S&S Order No. 3188462, issued by MSHA Inspector Judy A. McCormick on February 1, 1989, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.316, and the condition or practice cited is described a follows:

> The current approved ventilation Methane and Dust Control Plan was not being complied with in the face of the No. 2 entry. The roof bolting machine was in the face and the blowing curtain was not being used. It was laying on the machine. The extendable line curtain (Bo Strip) had been taken down back to the permanent curtain which was 24 feet from the deepest point of

penetration of the face. This is the third such violation in 3 inspection shifts. The crosscut to the right was being turned in on the third cut.

Petitioner's Testimony and Evidence

MSHA Inspector Judy A. McCormick confirmed that she inspected the number two entry of the number 10 section on February 1, 1989. She stated that she found two roof bolters standing by an energized roof-bolting machine, and the ventilation extending exhausting line curtain was 24 feet from the face of the number two crosscut. This condition was a violation of the respondent's ventilation plan because the plan required the curtain to be maintained to within 10 feet of the deepest point of penetration of all working places except during the extraction of pillars (Tr. 13-15).

Ms. McCormick identified exhibit P-3 as the respondent's approved ventilation plan, and she stated that the provision which was violated appears at page 10, item H-1. She stated that this provision has been in effect for several years. She confirmed that the number two entry was a working face, and that pillars were not being mined because it was an advancing section (Tr. 16).

Ms. McCormick stated that the curtain must be maintained to within 10 feet of the face in order to provide ventilation to the face and to control methane and carry away dust, and if this is not done, there is a potential for methane build-up. The mine is a gassy mine and it is subject to weekly spot inspections. The average annual methane liberation through the five mine fans was in excess of 11 million cubic feet every 24 hours, and in the event the curtain is not maintained to within 10 feet of the face it is very likely that methane will accumulate at the face (Tr. 17-18).

Ms. McCormick believed that methane accumulations presented an ignition, fire, and explosion hazard, and that "bad burn" injuries would be highly likely in the event of a fire, explosion, or ignition. She confirmed that prior to her inspection MSHA conducted an investigation of a methane face ignition which occurred when a line curtain was not maintained within 10 feet of the face, and this resulted in burns to two people (Tr. 19-21, exhibit P-4).

Ms. McCormick identified exhibit P-5, as copies of two prior citations which she issued on the number 10 section during the day shift for failure to maintain the line curtain to within 10 feet of the face (Tr. 23-24). She also confirmed the issuance of a prior section 104(d)(2) order on the number 9 section where another order was still outstanding, and another occasion on that section when 1.4 percent methane accumulated at the face when a

curtain was taken down and the respondent was not aware of it because there was no methane detector available and the foreman had not tested for methane. She confirmed that she issued an imminent danger order in that instance (Tr. 26, Exhibits P-6 through P-8).

Ms. McCormick explained that she issued the unwarrantable failure order in this case for the following reasons (Tr. 27):

> A. I felt that it could have been a particularly hazardous situation and since this was true, the operator had a heightened duty to be aware of what electrical equipment was doing in the face. Also it was repetitious of previous violations on this section as well as in the mine.

Ms. McCormick further explained that the roof-bolting machine was an ignition source because it generates heat capable of igniting methane. Machine permissibility violations and friction from the drill bits would also be sources of ignition, and she considered these factors in the context of continued roof bolting work. She also considered the prior unwarrantable failure and imminent danger orders (Tr. 28-29).

Ms. McCormick confirmed that she determined the distance the extendable curtain was back from the face by measuring it with a tape, and she confirmed that she took a methane reading of 0.2 percent approximately 20 to 22 feet from the face. She would expect the methane reading to be higher at the face because of poor ventilation due to the distance of the curtain from the face (Tr. 30-33).

On cross-examination, Ms. McCormick confirmed that when she arrived at the area in question the roof bolters were not bolting and were performing no work. She stated that they told her that they had pulled the extendable curtain back and were preparing to start roof bolting after installing the blowing curtain. Ms. McCormick confirmed that the installation of the blowing curtain is a normal practice during roof bolting (Tr. 37). However, she stated that the extendable curtain should not have been pulled back prior to the installation of the blowing curtain, and that the roof bolters admitted that they were aware of this, but offered no explanation as to why they had done it out of sequence (Tr. 38). She stated that the roof-bolting machine was positioned to begin roof bolting (Tr. 42).

Ms. McCormick stated that the area in question was a working place, that coal had previously been extracted, and the place was being prepared to be roof bolted (Tr. 45-46). She reiterated that she based her unwarrantable failure finding on the fact that

the respondent had a heightened duty to insure that the cited practice was not occurring in the face area, particularly in light of the hazardous situation caused by the failure to maintain the curtain to within 10 feet of the face (Tr. 48).

Ms. McCormick stated that the section foreman was not with the roof bolters when she arrived on the section and she met him while leaving the section, but could not recall speaking with him (Tr. 50). She agreed that the owl shift and day shift were changing places, that a miner had just finished cutting coal and was going to another entry, and that the two roof bolters had just entered the area to begin bolting, but had not actually commenced bolting (Tr. 52-53).

Ms. McCormick agreed that the two roof bolters had been present in the area for a very short time, and that they would normally install the blowing curtain, withdraw the extendable curtain, and begin bolting. She confirmed that when she arrived in the area, the roof bolters had moved the extendable curtain back and had not put up the blowing curtain (Tr. 54). All that was required to abate and terminate the order was the installation of the blowing curtain. She confirmed that the blowing curtain was laying on the roof-bolting machine (Tr. 56).

Ms. McCormick stated that a ventilation curtain was up at the last row of permanent roof supports where she took the methane reading, and that the roof-bolting machine was being ventilated. She confirmed that she did not check the machine for any permissibility violations, assumed that it was permissible, and that no machine tramming or roof bolting was taking place (Tr. 59). She stated that any "S&S" finding would be based on continuing normal mining operations, and that she would have expected the roof bolters to start bolting (Tr. 59). She believed they would have installed the blowing curtain if they had intended to do so before commencing bolting, but conceded that she did not ask the bolters what they intended to do next or whether they intended to install the blowing curtain before they began bolting (Tr. 60).

Ms. McCormick did not know if the two roof bolters were involved in any of the previous citations, but she confirmed that Foreman Rollins was involved in the two prior citations on the number 10 section. There was no equipment in place in those instances, and the curtain had simply not been kept up after the bolting and servicing of the equipment had been completed, and no mining activity was taking place (Tr. 61-62).

Ms. McCormick agreed that the narrative statements supporting the "special" civil penalty assessment for the contested

order which indicate that roof bolting was taking place without the blowing curtain up, and that the blowing system of ventilation was not being used during roof bolting are incorrect (Tr. 67-69).

Ms. McCormick agreed that the roof bolters were present for 5 to 10 minutes at most before she arrived at the place in question, and she would not have expected the fire boss to see the condition and take corrective action. With regard to the section foreman, she believed that in light of the prior history of citations, the foreman "should check when equipment operators go into a place to make sure that they are legal before they start" (Tr. 73).

Ms. McCormick stated that even if the roof bolters had pulled back the extended curtain with the intention of putting up the blowing curtain they would still be in violation because one type of ventilation may not be removed in preparation of installing another type and the face ventilation must be maintained 10 feet from the face at all times (Tr. 77-78). In view of the fact that the blowing curtain was on the machine, Ms. McCormick concluded that no attempt was made to install the blowing ventilation system prior to moving back the exhaust system. The proper sequence would have been to put up the blowing curtain first before pulling the extendable curtain back. It may not be done in reverse order because the face would be left unventilated. In this case, the blowing curtain was simply laying on the machine. She explained that the curtain normally is stored on the machine, but that in this case it was there because it had not been installed to within 10 feet of the face (Tr. 79-81).

Ms. McCormick confirmed that the roof bolters told her that they had pulled back the blowing curtain, and even if they had told her they were going to install it, it would not have made any difference because there was no ventilation at the face (Tr. 85). She confirmed that the two roof bolters were from the "owl shift" and had not been replaced by the day shift, and that the shifts were just changing. She confirmed that the machines are not usually shutdown between shifts and they are usually in use between shifts. The midnight shift foreman, Mr. Rollins, was still in charge of the bolters (Tr. 87).

Ms. McCormick confirmed that the blowing curtain should have been installed on the last row of permanent roof supports and that this would have placed the curtain 22 to 24 feet from the face until the last two rows of bolts are installed and miners are pulling out (Tr. 88). She confirmed that the face area was not being ventilated by either the blowing ventilation system or the exhaust system. However, there would still be some air at part of the face, but not the amount which would normally be distributed if the line curtain were closer to the face. She

agreed that there was no activity within 24 feet of the face at the time the order was issued (Tr. 92).

Ms. McCormick confirmed that ventilation plan item 2 on page 10 was partially complied with in that the regular line brattice was installed to within 30 feet of the face, but the extended line curtain was not within 10 feet of the face as required by the plan provision at the top of page 11 which states "an extended line curtain to within 10 feet of the face as left by the continuous mining crew" (Tr. 93).

Respondent's Testimony and Evidence

Joseph Nogosky, Safety Manager, U.S. Steel, Southern Division, testified that he was aware of the circumstances surrounding the issuance of the contested order because he conducted an investigation immediately after the midnight shift came out of the mine. He spoke with the shift foreman Glen Rollins, and Mr. Rollins informed him that the inspector issued the order for not having the blowing curtain up while the roof bolter was operating. Mr. Rollins told him that he did not know what occurred because he spent most of the shift 500 feet from the face working on a problem at the feeder and was not aware that the inspector was on the section until she told him that she had issued the order (Tr. 107).

Mr. Nogosky stated that the two roof bolters in question were experienced, and he confirmed that during the course of his investigation regarding the contested order, the roof bolters informed him that while the roof-bolting machine was being trammed into the face area, it was turned toward the right corner of the entry at an angle and the ATRS at the front of the machine became entangled in the extendable line curtain. The machine was stopped, and the extendable curtain was retracted so that it could be disentangled from the machine. The roof bolter operator got out of the machine and was preparing to hang up the blowing curtain when Ms. McCormick appeared on the scene. The bolters tried to explain that the machine had hooked up on the curtain, but the inspector said it did not matter, left to make a methane check, and told the bolters to put the curtain up (Tr. 108-111).

Mr. Nogosky stated that the use of the blowing curtain is a ventilation plan provision imposed by MSHA as part of the approved mine ventilation plan, and he explained that the roof bolters would first position the roof-bolting machine where they were going to put up their first row of bolts. They would then extend the extendable curtain to within 10 feet of the face and then put up the blowing curtain and slide the extendable curtain back. In this case, in view of the fact that the extendable curtain got caught in the machine, they retracted it before putting up the blowing curtain. He stated that he would probably have done the same thing under the circumstances (Tr. 116). He

also stated that the roof bolters told him that they had just pulled the machine in "no more than a couple of minutes" before Ms. McCormick arrived, and that they intended to put up the blowing curtain and start bolting (Tr. 117-118).

In response to bench questions as to why the roof bolters in question were not called to testify in this case, Mr. Nogosky explained that they expressed a willingness to testify at the time the order was issued because they were upset that it was issued and they were afraid that they would be disciplined by the company. In view of their work records, and his belief that they were telling the truth about the curtain being entangled in the machine, Mr. Nogosky decided not to discipline the roof bolters. However, when he contacted them to testify in this case, they stated that they had changed their minds and did not wish to testify. Respondent's counsel indicated that it was then too late to subpoena the bolters for testimony (Tr. 120-123).

Mr. Nogosky did not believe that the violation was an unwarrantable failure because the foreman was not present, and the two roof bolters were trying to do the right thing when the curtain became entangled in the machine when it was operating in a narrow space. He stated that it is not unusual for ventilation to be interrupted by a rock fall, or a piece of equipment running into a curtain, and as long as such a situation is recognized and steps are taken to correct it, he did not believe that such an occurrence would constitute a violation of the ventilation standard (Tr. 126).

On cross-examination, Mr. Nogosky confirmed that he did not accompany Ms. McCormick during the inspection, and that section foreman Rollins was not aware that she was on the section. He confirmed that he conducted his investigation of the order the same day it was issued, and he confirmed that the chairman of the safety committee, the general mine foreman, and the acting mine superintendent were present during his inquiry. He confirmed that Ms. McCormick did not participate in his inquiry, and that he made no effort to contact her because on prior occasions when he has asked her to participate in such investigations she has declined (Tr. 129-133). Mr. Nogosky confirmed that he simply made notes of the investigation, which lasted "maybe a couple of hours," but that he prepared no formal report, and had nothing in writing to support his testimony concerning what the roof bolters told him (Tr. 134).

Mr. Nogosky conceded that the approved ventilation plan required the blowing curtain to be put up first before the extendable curtain was put up, and that in this case the blowing curtain was not up when the inspector was there. He disagreed

that this situation warranted an order, but that "if you go strictly by the letter of the plan without taking in any mitigating circumstances," he agreed that a section 104(a) citation would have been in order (Tr. 141).

Mr. Nogosky stated that one of the roof bolters told him that he had a hook which is used for hanging the blowing curtain in his hand when Ms. McCormick appeared, and Mr. Nogosky believed that one could assume that the roof bolter was going to put up the curtain (Tr. 143). Mr. Nogosky stated if the blowing curtain was not long enough to reach, it was possible that this prevented the roof bolters from putting it up. However, he conceded that this would depend on the prevailing situation, and that he was not present when the conditions were observed and cited by the inspector (Tr. 144-145).

Mr. Nogosky stated that he was not aware whether the two roof bolters in question were ever disciplined in the past by the respondent, and according to his review of their records, they were not. He conceded that they may have received verbal warnings which may not appear in their records. He confirmed that Milton Presley was the day shift foreman on the day the order was issued, but that he was not responsible for the two roof bolters. Since the violation did not occur on his shift, he did not interview him during his investigation. He stated that Mr. Presley normally would not have been at the location of the violation because his shift starts at 7:00 a.m., and it takes 35 to 45 minutes to get to the number 10 section (Tr. 145-148).

Mr. Nogosky confirmed that U.S. Steel has disciplined foreman Paul Boyd within the past 6 months for failing to have the line curtains within 10 feet of the face, and that this was in connection with the violation issued in October, 1988 (Tr. 149).

Mr. Nogosky explained that a "hot seat change out" is when the owl shift and day shift are exchanging places, and the owl shift does not leave until the day shift arrives and immediately takes over the work. He explained that the two roof bolters in question had not as yet ended their work, and at the time the order was issued, they would have been in the process of bolting since the day crew had not as yet arrived to change out with them (Tr. 151).

Mr. Nogosky stated that he prepared no formal written report of his investigation because everyone who would receive a copy was in the room during his inquiry, and no disciplinary action was ever taken against the roof bolters. He also confirmed that he did not participate in any MSHA civil penalty conference in this case because he has never prevailed and believes that it is a waste of time (Tr. 154). Mr. Nogosky conceded that even though the extendable curtain may have been torn down by the machine, the blowing curtain was not installed, and the roof bolters moved

the extendable curtain back just before the inspector arrived. He conceded that if they had installed the blowing curtain before withdrawing the damaged extendable curtain, there would have been no problem. He explained that the bolters did not put up the blowing curtain because they were concerned about positioning the machine so that they could put up the blowing curtain first and getting it untangled from the other curtain (Tr. 157).

Inspector McCormick was called in rebuttal by the petitioner, and she confirmed that she arrived on the section before day shift foreman Milton Presley, but that she met him when she was leaving the section after she issued the order. She could not recall seeing any other management personnel at that time, and did not recall speaking with Mr. Rollins. She confirmed that the two roof bolters in question gave her no explanation as to why the curtain was not up, and she saw no visible evidence that the curtain had been caught or ripped up in the machine. She further confirmed that after observing the violative condition, she did not leave the area immediately, and stayed for some minutes to allow the bolters sufficient time to install the blowing curtain. She stated that she observed them install the curtain and that it took approximately 5 minutes (Tr. 161).

Ms. McCormick stated that if the roof bolters had mentioned tearing down the curtain she would have taken this into consideration, but she did not know that it would have made any difference because any entangled curtain would not prevent them from installing the blowing curtain prior to pulling back any entangled extendable curtain (Tr. 166).

On cross-examination, Ms. McCormick stated that union safety committeeman Jerry Jones was with her during her inspection. She stated that on the morning of the hearing in this case, Mr. Jones told her that one of the roof bolters had "recently changed his story" and agreed with Mr. Nogosky's testimony regarding the torn curtain, but that the other roof bolter disagreed with this contention. She also stated that "originally they both disagreed with Mr. Nogosky" (Tr. 173). In response to further questions, Ms. McCormick stated that she personally observed the two roof bolters putting up the blowing curtain, but she could not recall seeing any hooks in their hands (Tr. 174).

Jerry Jones, electrician, and chairman of the UMWA mine safety committee, testified that he participated on "the tail end" of the investigation conducted by Mr. Nogosky. He stated that he met roof bolter Harvell after he had been interviewed, and that when he arrived at the meeting roof bolter Smith was at the end of his interview, and he could not recall what he said. Mr. Jones stated that he did not speak with the roof bolters until after the investigation was over. He stated that Mr. Harvell told him that they had not knocked the curtain down and "just actually got caught with the curtain down" (Tr. 177).

Mr. Jones did not speak with Mr. Smith at that time, but did speak with both roof bolters recently, and he talked to them separately. Mr. Harvell again told him that "they just got caught. They didn't knock the curtain down," and Mr. Smith told him that he knocked the curtain down and "was in the curtain" (Tr. 178).

Mr. Jones stated that he attempted to speak with Mr. Harvell and Mr. Smith together in order to reconcile their stories, but could not do so. He confirmed that he did not conduct his own investigation because he found out about the matter late, and that he did not tell Mr. Nogosky or management about the conflicting stories of Mr. Harvell and Mr. Smith because he was unaware of any investigation until it was nearly completed. Since the two men were not disciplined, he believed the matter was over (Tr. 181).

Mr. Jones stated that Mr. Harvell and Mr. Smith told him that they would appear at the hearing in this matter, and that he told them "if you get subpoenaed come and tell it like it happened" (Tr. 183). He confirmed that he suggested to them that if they were not subpoenaed they did not have to appear at the hearing (Tr. 183).

Findings and Conclusions

The Section 104(d) "Chain" Issue

The respondent would not stipulate that the contested order issued in this case was procedurally correct and met all of the statutory requirements for the section 104(d) sequence or "chain." The respondent takes the position that the petitioner made no showing that there was no intervening clean inspection of the entire mine since the issuance of the most recent order under section 104(d). In support of its argument, the respondent asserts that the contested order was based on an order issued on April 4, 1983, but that the most recent order of record was issued on October 11, 1988, and the inspector did not know of an unwarrantable failure order being issued between October 11, 1988, and February 1, 1989, and did not know whether the entire mine had been inspected during that same period.

Inspector McCormick explained the procedure that she follows in determining whether there has been any intervening clean inspection for purposes of the section 104(d)(1) and (d)(2) order "chain." She confirmed that each mine has a uniform file which contains information concerning the "d tracking system," including information as to when the initial citations and orders are issued. She stated that she reviewed the file for the mine in question, and found no intervening clean inspections prior to the issuance of the contested order in this case. Since her supervisors maintain the current inspection status of the mine, the

tracking system would not have been in the file if there were a clean mine inspection during the intervening period of time. She could not specifically recall whether she had issued any section 104(d)(2) orders between October 11, 1988, and February 1, 1989, but stated that "there were lost of D-2s issued during that quarter" (Tr. 98-100).

Respondent's counsel agreed that the mine would have been completely inspector from April 4, 1983, until the date of the issuance of the order by Ms. McCormick. Ms. McCormick confirmed that according to the mine file there were no intervening "clean" mine inspections during this time frame, and that to her knowledge the mine has been "on a d sequence" since April, 1983 (Tr. 101-102).

In view of the unrebutted testimony by the inspector, which I find probative and credible, and absent any credible evidence to the contrary, I conclude and find that the contested order issued by Inspector McCormick was procedurally correct and met all of the prerequisite statutory requirements for the existence of the "section 104(d) chain" of citations and orders.

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.316, because of its failure to follow its MSHA approved ventilation and methane and dust-control plan, in the number 2 entry of the number 10 section. The inspector found that an extendable ventilation line curtain was not being maintained to within 10 feet of the face as required by the plan, and that an available blowing ventilation curtain was not being used. Section 75.316, requires a mine operator to follow its approved plan, and it is well settled that the failure to do so constitutes a violation of this section. See: Co-op Mining Co., 3 MSHC 1206 (1984); Zeigler Coal Company, 3 MSHC 1661 (1984); Jim Walter Resources, Inc., 3 MSHC 1983 (1985); Monterey Coal Co., 3 MSHC 1315 (1984).

The inspector confirmed that the applicable face ventilation plan provision which was violated appears at page 10, paragraph H.1, and it states as follows: "The extendable line curtain or sliding tube will be maintained to within 10 feet of the face in all working places except when pillars are being mined" (exhibit P-3). Paragraph H.2 of the plan, pgs. 10-11, explains the plan provisions for the required installation and use of the extendable line curtain and blowing curtain during normal roof bolting operations.

The credible and unrebutted testimony of the inspector establishes that the cited location at the number 2 entry was a working face, and that pillars were not being mined because the section was an advancing section. The inspector's testimony also

establishes that the extendable ventilation line curtain was 24 feet from the face of the number 2 entry and that the blowing curtain was not installed and was laying on the roof-bolting machine. The respondent does not dispute the fact that the bolters took down the extendable line curtain before installing the blowing curtain, and that the plan required that the blowing curtain be installed before the extendable line curtain is retracted during normal roof bolting operations (page 4, post-hearing brief). Respondent's safety manager Nogosky conceded that the ventilation plan required the blowing curtain to be put up first before the extendable curtain was put up, and that in this case the blowing curtain was not up when the inspector observed the cited conditions. Mr. Nogosky's testimony does not rebut the inspector's credible testimony that she determined the distance of the extendable line curtain from the face by means of a tape measure.

The respondent takes the position that the facts presented in this case do not establish that it has violated its ventilation plan or section 75.316. In support of this conclusion, the respondent argues that its approved ventilation plan contains a provision that allows it to handle "abnormal conditions or situations" on a case-by-case basis, and that in the instant case the situation found by the inspector was abnormal, and that in the circumstances, it was handled properly by the bolters without violating the purpose or intent of the plan.

The respondent points out that the plan requirement for maintaining the extendable line curtain to within 10 feet of the face during roof bolting operations is for the purpose of providing adequate ventilation in the face area. The respondent maintains that the plan provision which requires the blowing curtain to be installed before the extendable curtain is retracted could not be followed in this case because the bolting machine became entangled in the extendable line curtain. The respondent concludes that the roof bolters acted wisely by electing to disentangle the extendable curtain and retract it rather than tearing it down while positioning the machine to begin bolting, and that the extendable curtain no longer served any ventilation purpose in its tangled state. Under these circumstances, the respondent further concludes and argues that the bolters logically were proceeding to install the blowing curtain when they were interrupted by the inspector. The respondent further points out that the roof bolting operation had not commenced when the inspector arrived at the scene, and that but for the inspector's interference, the blowing curtain would have been installed in a minimum amount of time, and there is no evidence that the bolters would not have installed the blowing curtain before commencing bolting.

The respondent asserts that the Commission has recognized that temporary interruptions in ventilation can occur without a

violation resulting. Citing Freeman United Coal Mining Co., 11 FMSHRC 161 (February 1989), the respondent argues that in that case the Commission considered a similar situation where an inspector directed a miner not to rehang a curtain which had been torn down by a shuttle car until the inspector could take an air reading, and found no violation. In Freeman, the Commission stated in relevant part as follows at 11 FMSHRC 165:

> [I]t is clear that in certain circumstances, including the unique factual circumstances presented here, a temporary interruption in the minimum air velocity delivered can occur without a violation of the Act resulting.
>
> While minimum air quantity or velocity requirements of ventilation plans and mandatory safety standards provide an objective test by which the adequacy of a mine ventilation system can be evaluated, other mandatory ventilation standards recognize that the dynamics of the underground mining environment occasionally interfere with attainment of constant minimum quantity or velocity levels. The other standards recognize that disruptions in mine ventilation inevitably occur and that the key to effective compliance lies in expeditiously taking those steps necessary to restore air quantity or velocity to the required level.
>
> For example, it is obvious that an unplanned power outage and the temporary shutdown of the main fan will reduce the quantity and velocity of air delivered to the face areas. Such a contingency is anticipated in the mandatory standards, however, and procedures for the restoration of air and the steps to be taken if ventilation cannot be restored within a reasonable time are outlined accordingly. See 30 C.F.R. 75.300-3(a)(2), 75.321, and 75.321-1.
>
> Similarly, and directly on point with the situation presented in this case, there are mandatory safety standards that anticipate the possible diminution in ventilation caused by damaged or downed line brattice. 30 C.F.R. 75.302, a standard drawn verbatim from the statute, 30 U.S.C. 863(c), requires that "[p]roperly installed and adequately maintained line brattice . . . shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation . . . . When damaged by falls or otherwise, such brattice . . . shall be repaired immediately." (Emphasis added.) Furthermore, 30 C.F.R. 75.302-2 provides that, "[w]hen the line brattice . . . is damaged to an extent that ventilation of the working face is inadequate, production activities in

> the working place shall cease until necessary repairs are made and adequate ventilation restored." These standards recognize that line curtains may be damaged or torn down and that ventilation at the working face may, as a result, be diminished. They also make clear, however, that absent any unusual circumstances, it is the operator's failure to take immediate steps to repair or replace the downed line brattice that constitutes a violation.

And at 11 FMSHRC 166:

> [C]ompliance with section 75.302-2 would have been achieved but for the inspector's order, mistaken as it may have been, to cease rehanging the line brattice. Had not the inspector intervened, the minimum air velocity would have been restored almost immediately. At the very least, the inspector's unwitting interference with Freeman's abatement skewed the results of the air measurement so as to render it invalid for purposes of establishing a violation insofar as the three-foot gap initially observed by the inspector is concerned. Under these circumstances we conclude that Freeman did not violate its ventilation plan.

Relying on the Freeman case decision, the respondent concludes that if the inspector had not interrupted the roof bolters, there is no reason to believe that they would not have installed the blowing curtains before they began to install the bolts, and that under these circumstances, there was no violation and the contested order should be vacated.

The petitioner takes the position that the evidence clearly establishes that the respondent violated the clear and explicit ventilation plan provision which required that the extendable line curtain be within 10 feet of the face, and that the plan, in clear and unambiguous terms, sets forth the sequence of installing/retracting line curtains during bolting operations. The petitioner argues that it is undisputed that the extendable line curtain was 24 feet from the face and not in compliance with the applicable plan provision, and that the No. 2 entry was a working place and pillars were not being mined. Under the circumstances, the petitioner concludes that the conditions described and cited by the inspector on the face of the order constitutes a violation of the respondent's ventilation plan.

With regard to the respondent's reliance on the Freeman decision as a defense to the violation, the petitioner concludes that it is misplaced, and points out that in the instant case there is no direct evidence of a curtain being torn or any "unwitting interference" by the inspector. On the contrary, the petitioner points out that the inspector asked the bolters if

they knew the proper curtain sequence and "why they didn't do it that way," and that the bolters offered no defense. The petitioner concludes that the respondent simply "got caught" with the curtain behind just as it had on six previous occasions.

In Consolidation Coal Company, 3 FMSHRC 2207 (September 1981), Judge Melick affirmed a violation of section 75.316, for the failure by the operator to ventilate an entry with a line curtain. Although the evidence established that the curtain had been in place 2-1/2-hours prior to the issuance of the citation, but had been taken down for some unexplained reason, the judge found that the absence of the curtain at the time the citation was issued was still a violation.

In Windsor Power House Coal Company, 2 FMSHRC 671 (March 1980), Commission review denied April 21, 1980, Judge Melick affirmed a violation of section 75.316 because of the operator's failure to maintain adequate ventilation at a working face as required by its ventilation plan. Even though the evidence showed that mining was temporarily halted in the cited area because of a mechanical breakdown, the judge found that the absence of the required ventilation constituted a violation.

In Co-Op Mining Company, 5 FMSHRC 2004 (November 1983), former Commission Judge Virgil Vail affirmed a violation of section 75.316, because of an operator's failure to install a line curtain as required by its ventilation plan. Although the judge considered the fact that the curtain may have been down for only a short time due to possible rib sloughage, he found that such an unusual occurrence was no defense. Citing Zeigler Coal Co., 4 IBMA 30 (1975), aff'd 536 F.2d 398 (D.C. Cir. 1976), and Consolidation Coal Co., supra, the judge found that when an operator departs from his ventilation plan, a violation of section 75.316, is established.

In Consolidation Coal Co., 8 FMSHRC 612 (April 1986), Judge Morris affirmed a violation of section 75.316, because of the operator's failure to maintain the proper air velocity at a face as required by its ventilation plan, even though the air reaching the face may have been interrupted for no more than 30 seconds because of a ventilation curtain being pushed against a rib by a shuttle car trailing cable.

In the Freeman case, the mine operator was cited for a violation of section 75.316, for failing to maintain the proper air velocity at the end of a the line curtain as required by its approved ventilation plan. The facts show that the inspector observed that the curtain which was installed across the intake entry directing intake air to the face was down in the corner of the room, causing a gap of approximately 3 feet in the curtain. When the inspector proceeded to the face to take an air reading, a trailing cable of a shuttle car became entangled in the line

curtain, tearing an 18 to 20 foot gap in it. A shuttle car operator heard the curtain tear, and after seeing the large gap, immediately prepared to rehang the curtain as he had been trained. At the same time, while the inspector was preparing to take his air reading at the end of the curtain at the face, he was informed that he would not get an accurate reading because outby in the entry, the line curtain was being rehung. The inspector then walked back from the face, into the room, and directed the shuttle car operator not to hang the curtain because he had to take an air reading at the face before the curtain could be rehung. The shuttle car operator testified that had he not been interrupted by the inspector, it would have taken him about 3 to 4 minutes to rehang the curtain. The inspector proceeded to take an air reading, found an insufficient velocity of air at the face, and issued the violation.

I find that the facts presented in the Freeman case are distinguishable from those presented in the instant proceeding. In Freeman, the evidence established as a fact that the ventilation had been temporarily interrupted by a torn curtain which occurred while the inspector was on the scene, and the operator was in the process of restoring the ventilation and abating the violation shortly before the citation was issued. Since the inspector had knowledge of these facts, but nonetheless intervened and ordered the operator not to rehang the curtain, which would have restored the ventilation and cured the problem, the Commission concluded that the inspector's interference with the operator's efforts to immediately abate the condition by rehanging the torn curtain could not support a violation.

In the instant case, the evidence establishes that the inspector had no personal knowledge that the extendable curtain had been purportedly snagged by the machine and that this may have caused a temporary interruption in the ventilation or somehow prevented the roof bolters from installing the curtain and having it in place at the time of her arrival on the scene. The inspector's unrebutted testimony reflects that when she arrived at the scene, the roof-bolting machine was positioned to begin bolting, the extendable curtain had been moved back and positioned 24 feet from the face, and the blowing curtain was lying on top of the machine.

Although the inspector conceded that if the bolters were to follow normal procedures, they would first install the blowing curtain, withdraw the extendable curtain, and then begin bolting, she found that the bolters had moved the extendable curtain back and had not put up the blowing curtain as required by the plan. Although she also believed that the bolters would have installed the blowing curtain if they had intended to do so before commencing bolting, she concluded that the bolters had not installed the blowing curtain before retracting the extendable curtain because the blowing curtain was lying across the machine and had not been

installed to within 10 feet of the face as required, and that the resulting reverse procedure followed by the bolters resulted in an unventilated face area. Further, while it is true that the inspector did not ask the bolters about their intentions, or whether they intended to install the blowing curtain before they began bolting, she confirmed that it would have made no difference since the removal of one type of ventilation in preparation for the installation of another type of ventilation would still constitute a violation because face ventilation was not being maintained at all times 10 feet from the face.

The inspector confirmed that she saw no evidence of any work being performed by the bolters, and that they were simply standing by the machine and offered no explanation as to why they had removed the ventilation curtains out of sequence, or why the curtains were not installed. She saw no evidence that the extendable curtain had been caught or ripped by the machine, and after remaining at the scene to allow the bolters sufficient time to install the blowing curtain, she observed this being done within 5 minutes. She confirmed that had the bolters told her that the curtain was torn down by the machine, she would have taken this into consideration, but that it would have made no difference since any entanglement of the extendable curtain would not have prevented the bolters from installing the blowing curtain before retracting the extendable curtain. The inspector further confirmed that union safety committeeman Jerry Jones was with her during the inspection, and that on the morning of the hearing, he told her that both roof bolters disagreed with Mr. Nogosky's contention that the curtain had been caught in the machine, but that one of the bolters had "changed his story" and confirmed that the curtain had been caught in the machine, but the other bolter told him that this was not the case.

The respondent's assertion that the extendable curtain had been caught in the roof-bolting machine is based on the hearsay testimony of its safety manager Joseph Nogosky. He testified that in the course of his investigation concerning the issuance of the order the roof bolters informed him that the extendable curtain became entangled in the roof-bolting machine while it was being trammed in the entry and that the curtain was retracted so that it could be disentangled from the machine. Mr. Nogosky stated further that the bolters told him that they retracted the curtain before putting up the blowing curtain, that they intended to install the blowing curtain before starting bolting, and were in the process of doing so when the inspector arrived on the scene, and that they tried to explain the circumstances to the inspector, but that she stated that it did not matter and instructed them to hang the curtain up before leaving. He also stated that one of the bolters told him that he had a hook in his hand preparing to hang up the blowing curtain, and that one could assume from this that the bolter was going to install the curtain.

Mr. Nogosky was not with the inspector during the inspection and issuance of the citation, and he confirmed that he made no formal report of his investigation and had nothing in writing to support his testimony concerning what the bolters purportedly told him. Although he indicated that he had made notes, they were not produced or offered during the hearing. The two roof bolters in question did not testify, and their pretrial depositions were not taken. Mr. Nogosky stated that the roof bolters initially expressed their willingness to testify, but later changed their minds, and it was then too late to subpoena them. Although Mr. Nogosky indicated that other individuals may have been present when he interviewed the roof bolters, the respondent failed to call any other witnesses for testimony. Mr. Nogosky confirmed that he made no effort to contact the inspector when the order issued to explain what the roof bolters purportedly told him, and that he did not seek a conference with MSHA with respect to the order.

Safety committeeman Jerry Jones testified that he was present at "the tail end" of the investigation conducted by Mr. Nogosky, and he confirmed that the two roof bolters gave him conflicting accounts with respect to whether or not the extendable curtain had been caught in the roof-bolting machine. Mr. Jones stated that one of the bolters told him that the curtain had not been caught in the machine, and the other bolter told him that he had knocked the curtain down with the machine.

Although relevant and material hearsay testimony is admissible in Mine Act proceedings, Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n. 7 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 77 L.Ed.2d 299 (1983), and Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-1137 (May 1984), Mr. Jones' testimony, which I find credible, concerning the conflicting accounts given to him by the two roof bolters, cast serious doubts in my mind with respect to the reliability and probativeness of the purported statements made by these bolters to Mr. Nogosky during his investigation, and I have given little weight to Mr. Nogosky's uncorroborated and undocumented testimony.

Having viewed the inspector during her testimony, I find her to be a credible witness and believe her testimony that she saw no evidence of the curtain being caught in the machine, and that the roof bolters offered no explanation as to why they had not installed the ventilation curtains in question. Further, even if I were to believe that the curtain had been torn, the evidence nonetheless establishes a violation because the blowing curtain was not installed and laying on the machine, and Mr. Nogosky conceded this was the case. Under all of these circumstances, I conclude and find that a preponderance of all of the credible and

probative evidence in this case establishes a violation of section 75.316, and the violation issued by the inspector IS AFFIRMED. The respondent's asserted defense and reliance on the Freeman case, supra, IS REJECTED. I cannot conclude that the circumstances presented were so abnormal as to absolve the respondent from its responsibility to insure that its ventilation plan was followed.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

The inspector's unrebutted credible testimony reflects that the respondent's mine is a gassy mine which freely liberates methane, and because of this, it is subject to weekly spot inspections by MSHA. She believed that the failure to maintain the ventilation curtain to within 10 feet of the face to control methane and carry away hazardous dust presented a potential for a methane buildup at the face, and that such methane accumulations presented an ignition, fire, and explosion hazard, and that in the event of such incidents, it would be highly likely that miners working in the affected area would likely suffer burn injuries.

At the time of the inspection, the inspector was aware of the fact that a methane ignition and fire had previously occurred on another section of the mine on September 19, 1988, and that two miners suffered burns as a result of that incident. MSHA's report of investigation of that incident reflects that the ignition occurred when a flammable methane/air mixture was ignited by heat and/or sparks generated from the cutting head of a continuous-mining machine while cutting top rock down (exhibit P-4). The report also reflects that at the time of the ignition, the ventilation line curtain was approximately 25 feet of the face, in violation of section 75.316, that the cutting sequence mandated by the approved ventilation system and methane dust-control plan was not being followed, and that the continuous-mining machine methane monitor was not properly calibrated.

The inspector also confirmed that she previously issued two citations on January 18, 1989, for violations of section 75.316, and the approved ventilation plan, because of the failure by the respondent to maintain the ventilation curtains to within 10 feet of the face, and that she also issued a citation and section 104(d)(2) order and imminent danger order on December 6, 1988, and October 11, 1988, citing violations of section 75.302-1(a), because of the failure by the respondent to maintain the ventilation curtains to within the required distances from the face (exhibits P-5 through P-8).

In the instant case, the inspectors testified credibly that at the time she observed the cited conditions, the roof-bolting machine was positioned to begin roof bolting, and that the machine was a source of ignition because it generates heat capable of igniting methane. She also believed that any permissibility violations with respect to the roof bolter, and friction from the drill bits, would also be potential sources of ignition.

Although she conceded that the two roof bolters had not actually commenced bolting when she observed the condition, and that no roof bolting was taking place, and she found no permissibility violations, since the mining machine had just finished cutting coal and would be moved to another entry, the two roof bolters were there to begin bolting, and she considered all of these factors in the context of continued mining operations, including her expectation that the roof bolters would normally have started bolting operations. Given her prior experience with previous citations which she had issued for not maintaining the ventilation curtains, I cannot conclude that the inspector's belief that the bolters would commence bolting operations without the required ventilation curtains in place was unreasonable.

The respondent asserts that while there was a momentary interruption to ventilation, little if any hazard resulted, and that the regular line brattice was in place within 24 feet of the face, no mining was taking place, and that 0.2 percent methane was present at the last permanent support 20-22 feet from the face. The respondent acknowledges that the roof-bolting machine was energized, and that the bolters told the inspector that they had pulled the extendable curtain back to prepare for bolting before installing the blowing curtain, and that they knew that the respondent's ventilation and dust-control plan required the blowing curtain to be installed before pulling back the extendable curtain.

The section foreman did not testify in this case. The respondent's safety manager Joseph Nogosky, who did not accompany the inspector and did not observe the cited conditions, conceded that the roof bolters had not as yet completed their work shift at the time the order was issued by the inspector, and that they would have been in the process of bolting since the day crew had not as yet arrived to "change out" with them. Mr. Nogosky also conceded that the ventilation plan required the blowing curtain to be installed first before the extendable curtain was installed, and that the blowing curtain was not up when the inspector observed the cited condition.

After careful review of all of the evidence and testimony, I conclude and find that the credible testimony of the inspector establishes that the violation was significant and substantial. The respondent's assertion that the "momentary lapse" of ventilation did not present a hazard is rejected. The respondent's assertions that no hazard existed because the roof bolter was not in operation and that only .2 percent methane was detected 20-22 feet the face is likewise rejected. In my view, it is highly likely that methane can rapidly accumulate at the face during "momentary lapses" of ventilation, and the inspector explained that higher methane readings may be expected in the face, particularly when a line curtain is not in place.

In United States Steel Mining Co., 3 MSHC 1282 (1984), the judge upheld a violation of section 75.316, and found that it was a significant and substantial violation because the reduced amount of ventilation air reaching the face as a result of a reversal in the air course made concentrations of methane more likely. In the instant case, the mine liberates methane freely and is on a weekly spot inspection cycle. A methane ignition and fire had previously occurred less than 5-months prior to the inspection in question, with resulting burn injuries to two miners. The prior failure by the respondent to maintain the ventilation curtains as required by its plan is evidenced by the prior violations issued by this same inspector. In view of all of this information which was available to the inspector, I conclude and find that her belief that roof bolting would have proceeded in the normal course of mining operations, and that it was reasonably likely that another methane ignition would have occurred because of the failure to properly maintain the ventilation curtains cited in this case, was reasonable in the circumstances. Accordingly, I agree with the inspector's significant and substantial finding, and IT IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The Petitioner's Arguments

In support of the inspector's unwarrantable failure finding in this case, the petitioner does not contend that violations are unwarrantable per se, when there exists prior violations of the same standard. The petitioner takes the position that "the unique factual history in this case, especially management's involvement," compels the conclusion that the respondent demonstrated "indifference" or "total lack of interest" regarding ventilation curtain violations, and that such indifference is demonstrated by management's condoning of the curtain violation in question.

In support of its argument, the petitioner asserts that Inspector McCormick was assigned to the subject mine in September, 1988, and that her initial involvement with curtain violations occurred when she terminated two section 104(d)(2) orders which had been issued on September 20, 1988, on the No. 9 section for violations of section 75.316, and the same ventilation plan at issue in the instant case (exhibit P-4). The petitioner points out that one of the orders was issued for a violation of the identical plan provision which was violated in this case (failure to maintain an extendable line curtain to within 10 feet of the face), that the violation contributed to a

methane ignition, that burned two miners, and that the respondent's section coordinator, Paul Boyd, was present during MSHA's investigation of that incident.

The petitioner asserts that 3 weeks after the aforesaid methane ignition, Inspector McCormick issued a section 104(d)(2) order on October 1, 1988, on the No. 9 section, for a violation of section 75.302-1(a), for failure to maintain a line curtain to within 10 feet of a face where a continuous-mining machine was in operation (exhibit P-6). Petitioner points out that the respondent's section coordinator Paul Boyd was in the working place at the time of the violation, and since Mr. Boyd had been involved in the previous MSHA investigation of the September, 1988, methane ignition, it concludes that Mr. Boyd condoned the violation issued by Inspector McCormick.

The petitioner asserts that the next experience Inspector McCormick had with line curtain violations was on December 6, 1988, when she issued a section 104(a) citation for a violation of section 75.302(a), after finding that a line curtain on the No. 9 section had bene partially removed by a scoop crew, and that this condition contributed to an imminent danger which she issued in connection with the citation in that 1.4 percent methane was detected at the face (exhibits P-7, P-8).

The petitioner states that the final line curtain violation detected by Inspector McCormick prior to the issuance of the contested order in this case occurred on January 18, 1989, when she issued two section 104(a) citations for violations of section 75.316, for the failure to install line curtains to within 10 feet of the face in the No. 3 and No. 4 entries of the No. 10 section. The petitioner asserts that these violations were not particularly hazardous because no equipment was in either place at the time. However, the petitioner views these citations as significant because Glenn Rollins, the owl shift foreman responsible for the two roof bolters in the instant case, was also "involved" with the two prior citations. Under the circumstances, the petitioner believes that the issuance of these citations had no deterrent effect because the order issued by the inspector in the instant case came 2 weeks later for a violation of the same regulation on the same mine section.

The petitioner believes that after the September ignition in which two miners were burned, "one would think that line curtain violations would be non-existent at the Oak Grove Mine." Yet 3 weeks after the ignition, the section coordinator condoned the same violative practice on the same section, and notwithstanding these two events, line curtain violations continued, and the inspector found three identical violations on the same section within three inspection shifts. The petitioner concludes that the serious nature of these violations and their recurring frequency demonstrates an "indifferent" attitude and a "total or

nearly total lack of interest" by the respondent and that it appears that the respondent considered the violations of "little consequence" as evidenced by their recurring frequency.

The Respondent's Arguments

The respondent argues that only a mine operator can commit an unwarrantable failure violation, and that under section 3(d) of the Act, an operator includes a person who operates, controls or supervises a mine but does not include a rank-and-file miner. Citing Rochester & Pittsburgh Coal Co., 11 FMSHRC 1978, 1983 (October 1989), the respondent takes the position that the conduct of a rank-and-file miner cannot be imputed to a mine operator for purposes of an unwarrantable failure finding and that the action of the two roof bolters in this case are immaterial in determining whether an unwarrantable failure occurred since the actions of the respondent's management personnel alone are relevant.

The respondent asserts that the inspector's belief that an unwarrantable failure occurred because "a particularly hazardous situation" existed that imposed a "heightened duty" upon the respondent "to be aware of what electrical equipment was doing in the face," and that she considered the fact that the line curtain was further than 10 feet from the face to be a particularly hazardous condition is impossible to reconcile with the ventilation plan which requires the extendable line curtain to be retracted before the first row of bolts is installed. Respondent asserts that as bolting progresses, the curtain is advanced to the first row of bolts outby the row being set, and that the curtain is not extended to within 10 feet of the face until bolting is completed. Under these circumstances, the respondent concludes that the "particularly hazardous situation" is an approved practice under its ventilation plan.

The respondent argues that the inspector's perception that the respondent had a "heightened duty" to be aware of what the equipment was doing in the face is based on an erroneous assertion that the day shift section foreman Milton Presley should have checked on the roof bolter operators (Tr. 48-51). Respondent points out that the cited incident occurred at 7:14 a.m., before the "hot seat" crew change took place and that the roof bolters were owl shift crew members who were supervised by that shift's section foreman Glen Rollins, and that Mr. Presley and his day shift crew had not yet arrived on the section (Tr. 51, 164-165).

With regard to the inspector's reliance on the respondent's history of prior violations, the respondent asserts that the fact that a similar violation occurred in the past does not establish inexcusable neglect if such a violation reoccurs. The respondent points out that the previously cited conditions in the No. 10

section were not similar to the conditions cited in the instant case and there was no equipment in the place where the curtain had not been maintained within 10 feet of the face. Further, there is no evidence that the two bolters in this case were involved in the prior incident. Under the circumstances, the respondent concludes that foreman Rollins had no reason to closely supervise two experienced bolters in the performance of routine work when they had exhibited no carelessness or neglect in the past, and he had no obligation to be present while they moved the roof-bolting machine into place to commence bolting, and that his failure to supervise their every move is not aggravated conduct amounting to an unwarrantable failure.

The evidence establishes that during a "hot seat" change between working shifts there is little or no interruption in the production cycle and the equipment is not shutdown and is generally in use between shifts. The inspector conceded that when she arrived at the scene, the shifts were in the process of changing, and that the two roof bolters were from the "owl shift" and were only present for 5 or 10 minutes prior to her arrival. Although the inspector also conceded that she would not have expected the fire boss to observe that the ventilation curtains were not in place and take appropriate action, she believed that in light of the prior history of citations, the section foreman should have checked on the roof bolters when they were in the cited area to insure that they complied with the ventilation plan.

The evidence further establishes that Inspector McCormick was on the section during the day shift. She testified that the section foreman was not on the section when she arrived and that he was "outby." She stated that she met him as she was leaving the working place, but she could not recall speaking with him, and she conceded that she made no inquiries to determine when the foreman had last been with the roof bolters. She identified the foreman as the day shift foreman Milton Presley, but she admitted that the owl shift section foreman who was responsible for the supervision of the roof bolters in question was Glen Rollins and that he was leaving the section as she was coming in (Tr. 48-52). Although the inspector testified on direct that she spoke with Mr. Rollins (Tr. 51), she later testified that she could not recall speaking with him (Tr. 160). She also confirmed that she encountered Mr. Presley after she had issued the violation (Tr. 159).

I find the inspector's expectation that day shift foreman Presley should have been present to observe the roof bolters to insure the proper placement of the ventilation curtains to be unreasonable. As the day shift foreman, Mr. Presley had no supervisory responsibility for the roof bolters who were under the supervision of Mr. Rollins, and at the time the inspector met Mr. Presley she had already issued the violation. With regard to

Mr. Rollins, although the inspector indicated that she was leaving the scene to find him (Tr. 61), her testimony that she may have spoken with him is contradictory, and there is no evidence that she ever discussed the matter with him or that she had any evidence that he was never present when the roof bolters may have been working on the section, or that he was aware of the fact that the ventilation curtains were not in place.

I find no support for the inspector's belief or suggestion that foreman Rollins should have been present when the roof bolters were performing their work to insure that the ventilation curtains were properly in place. There is no evidence that the roof bolters were other than experienced miners, nor is there any evidence that they were ever involved in any of the other previously issued citations relied on by the inspector as part of her unwarrantable failure finding. The inspector testified that the roof bolters would normally go about their business and install the ventilation curtains before beginning their roof bolting duties. In the absence of any evidence that the roof bolters were not properly trained, were ignorant of the requirements of the ventilation plan, or had engaged in previous acts of carelessness or neglect, I find no basis for concluding that Mr. Rollins should have been expected to be present when they were preparing to roof bolt in order to insure that the ventilation curtains were properly in place. Notwithstanding the issuance of the prior citations, and the fact that Mr. Rollins may have been aware of these citations, I find no reason why he should be required or expected to be present in each and every working place on the section to personally supervise his crew while they go about their work. If the petitioner believes that such a requirement may be necessary as part of the respondent's ventilation plan, it may wish to explore this further as part of the regulatory ventilation plan approval process.

With regard to Mr. Rollins' "involvement" with the previous citations issued by the inspector on January 18, 1989, no further testimony or explanation was forthcoming from the inspector as to the extent of Mr. Rollins' involvement other than that the citations were issued on the number 10 section. I take note of the fact that the citations were served on J. C. Simms, and that they were issued during the day shift at 9:30 and 9:35 a.m. (exhibit P-5). The inspector confirmed that these previously issued citations did not involve any roof-bolting machine in place in the face area, and in fact, the inspector conceded that no mining activity was taking place, and no equipment was in place in the cited areas, and the petitioner conceded that the violations were not particularly hazardous.

With regard to the petitioner's arguments concerning the respondent's section coordinator Paul Boyd, and his "involvement" with the prior citations in September, 1988, and October, 1988, the record reflects that Mr. Boyd's "involvement" with the

September, 1988 citations which resulted from the methane ignition, was limited to his participation in the MSHA investigation of that incident (exhibit P-4). Mr. Boyd's "involvement" in the October, 1988, was more direct in that Inspector McCormick served the violation on him, indicated in the face of the order that "the section coordinator" was in the place at the time the violative conditions were observed, and she testified that this was in fact the case (Exhibit P-6, Tr. 25, 33).

I take note of the fact that the prior citations concerning Mr. Boyd were issued on the No. 9 section, and not the No. 10 section where the violation in the instant case occurred. The October, 1988, citation concerned a violation of section 75.302-1(a), and a continuous-mining machine, rather than a roof bolter, was operating in the section. MSHA's report of investigation reflects that the September, 1988, citations concerned a methane ignition which occurred when a continuous-mining machine was cutting down top rock.

Although Inspector McCormick testified that a section coordinator, such as Mr. Boyd, had supervisory authority over all of the section foremen, she confirmed that his supervisory authority was limited to the foremen on the No. 9 section, and not to foremen on the No. 10 section, or foremen in general (Tr. 33). There is no evidence that Mr. Boyd exercised any supervisory authority over section foremen Rollins or Presley, the foremen on the No. 10 section at the time the violation in the instant case was issued.

I find no evidence to support the petitioner's conclusion that the respondent's section coordinator Paul Boyd condoned violations of the respondent's ventilation plan or violations of the previously cited safety standards. Such a conclusion concerns possible criminal conduct and should not be made or taken lightly. If the Secretary truly believes that a culpable section foreman or other member of mine management has engaged in any such egregious conduct with respect to violations of the law she should seriously consider instituting a section 110(c) proceeding against the offending party rather than "bootstrapping" such an unsupported conclusion as part of an unwarrantable failure argument. Further, if the Secretary also believes that a mine operator's mine management has exhibited "indifference" or a "total lack of interest" regarding repetitious violations, she should seriously consider the timely implementation of the "pattern of violations" provisions found in section 104(e)(1) of the Act. In my view, the use of these available statutory sanctions would provide a more direct and effective means of insuring compliance in an appropriate situation.

In the instant case, the unrebutted testimony of safety manager Joseph Nogosky reflects that the respondent took disciplinary action against Mr. Boyd as a result of the October,

1988, citation issued by the inspector (Tr. 149). The record also reflects that Mr. Nogosky conducted an investigation of the contested order in this case, and that the mine safety committee, the general mine foreman, and the mine superintendent were present during the inquiry. Mr. Nogosky confirmed that he spoke with foreman Rollins and the roof bolters in an effort to ascertain why the order had issued, and he stated that it is a common practice at the mine for management to investigate all unwarrantable failure orders (Tr. 109). Mr. Nogosky further confirmed that the roof bolters were not disciplined because he believed they reacted properly to an "abnormal situation" (Tr. 121).

In view of the foregoing, I cannot conclude that mine management was indifferent or "lacked interest" in the order issued by the inspector in this case. The record establishes that management disciplined section coordinator Boyd, and following its customary procedure, investigated the circumstances surrounding the issuance of the contested order by the inspector in this case. Further, the UMWA chairman of the mine safety committee Jerry Jones testified that he conducted no investigation of the incident, failed to tell mine management about the conflicting "stories" related to him by the two roof bolters, and no testimony was forthcoming from Mr. Jones about any of the prior citations or the asserted general neglect of ventilation curtain requirements on the part of mine management. I also take note of the fact that the cited conditions in this case were abated within 6 minutes, that the two prior citations issued by the inspector in January, 1989, were terminated within 10 and 20 minutes, and that the citation of December, 1988, was terminated within 13 minutes.

The petitioner in this case does not contend that repetitious violations of a mandatory standard may per se serve as the basis for an unwarrantable failure finding. Inspector McCormick testified that part of her unwarrantable failure finding was based on the respondent's prior violations (Tr. 27, 29, 61), but that this was but one factor that she considered (Tr. 29). The other factor which she considered was her belief that the respondent had a "heightened duty to be aware of what the electrical equipment was doing in the face" because in her view, the violative conditions presented a "particularly hazardous situation" which the respondent should have been aware of (Tr. 27, 47-48). In my view, the inspector's concern about any hazards associated with the cited conditions is relevant in the context of a gravity or "S&S" finding, rather than the unwarrantable nature of the violation.

The thrust of the petitioner's unwarrantable failure argument is its belief that mine management has engaged in a course of conduct which establishes that it condones violations of its ventilation plan and has clearly demonstrated an "indifferent" attitude and "lack of interest" in insuring compliance with the

mine ventilation plan. However, in view of the above findings and conclusions, and after careful consideration of the entire record in this case, I find no evidentiary support for the petitioner's arguments and conclusions concerning the conduct of mine management in this case. I cannot conclude that the petitioner has established any aggravated conduct on the part of the respondent with respect to the contested order issued by the inspector in this case. Under the circumstances, the inspector's finding in this regard IS VACATED, and the order IS MODIFIED to a section 104(a) citation, with "S&S" findings.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a large mine operator and that the payment of the civil penalty assessment for the violation will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Abatement

The parties stipulated that the violation in question was timely abated by the respondent. The record establishes that abatement was completed within 5 or 6 minutes when the roof bolters installed the required ventilation curtains. I conclude and find that the cited conditions were timely abated in good faith by the respondent.

Gravity

In view of my "S&S" findings, I conclude and find that the violation was serious.

Negligence

I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care to insure that the required ventilation curtains were installed and in place at the time the inspector observed the cited conditions, and that this failure on the respondent's part was the result of ordinary negligence.

History of Prior Violations

The petitioner did not produce or offer a computer print-out listing the respondent's prior compliance record. The pleadings include an MSHA Form 1000-179, which is a part of the proposed assessment "papers" served on the respondent, and the information contained therein reflects that the respondent was cited for 518 assessed violations during the 24-month period preceding the issuance of the contested order. However, in the absence of any

computer print-out or further information concerning the total number of section 75.316 violations, I am unable to make any specific conclusions or findings other than to take note of the total number of prior assessed violations attributable to the respondent. However, I have taken this information into consideration, including copies of the prior citations which are of record in this case, which reflect four prior violations of section 75.316.

Civil Penalty Assessment

The respondent took issue with the narrative findings of MSHA's "Special Assessment" office which indicates that the roof bolters were actually installing roof bolts at the time the inspector observed the cited conditions. The inspector agreed that these "assumptions" are incorrect and that the bolters were not installing roof bolts when she observed the violative conditions. The respondent also took issue with several other "assumptions" and "conclusions" which appear in the narrative findings, and he inspector agreed that some of these are incorrect (Tr. 67-73). It is clear that I am not bound by any "special assessment" made in this case, nor am I bound by the narrative statements made in support of the proposed civil penalty assessment made in this case. In any event, I find merit in the respondent's objections to the accuracy of these statements and have considered its arguments in connection with the civil penalty assessment which I have made in this case.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $500 is reasonable and appropriate in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $500 for the violation which has been affirmed in this case. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge