

CCASE:
SOL (MSHA) V. SOUTHERN OHIO COAL
DDATE:
19900802
TTEXT:

~1597

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. WEVA 90-12
A.C. No. 46-03805-03933

v.

Martinka No. 1 Mine

SOUTHERN OHIO COAL COMPANY,
RESPONDENT

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
Rebecca J. Zuleski, Esq., FURBEE, AMOS, WEBB &
CRITCHFIELD, Morgantown, West Virginia, 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), seeking a civil penalty assessment in the amount of \$850
for an alleged violation of mandatory safety standard 30 C.F.R.
77.807-3, as stated in a section 104(d)(2) "S&S" Order No.
2944317, served on the respondent by an MSHA inspector on May 22,
1989. The respondent filed a timely answer contesting the alleged
violation and a hearing was held in Morgantown, West Virginia.
The parties filed posthearing briefs, and I have considered their
arguments in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the
condition or practice cited by the inspector constitutes a
violation of the cited mandatory safety standard, (2) whether the

~1598

alleged violation was "significant and substantial" (S&S), (3) whether the violation was the result of the respondent's unwarrantable failure to comply with the cited standard, and (4) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 8-10, exhibits P-1, P-1-A, P-2):

1. The respondent is the owner and operator of the Martinka Mine, and the operations of the mine are subject to the Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. MSHA Mine Inspector Spencer Shriver was acting in his official capacity when he issued the contested order, and a true copy of the order was served on the respondent or its agent as required by the Act.
4. A copy of an MSHA's Proposed Assessment Data Sheet (exhibit P-1), which sets forth (a) the number of assessed non-single penalty violations charged for the years 1986 through February, 1989, (b) the number of inspection days per month in said period and (c) the mine and controller tonnage for year 1988, is admitted for the record in this case, and the respondent has no facts to contradict the accuracy of this information.
5. The respondent does not contest the fact that the Martinka Mine has not had a complete inspection free of unwarrantable violations since the issuance of Citation No. 0859286 dated September 1, 1981.
6. A prior violation alleging a violation of section 77.807-3, was issued to the respondent at the Martinka Mine on or about February 2, 1989.

7. A copy of an MSHA computer print-out reflecting the history of prior assessed violations issued at the Martinka No. 1 Mine for the period May 30, 1987 through May 29, 1989, may be admitted as part of the record in this case (Tr. 10, exhibit P-1-a).

8. Assuming the petitioner establishes that a violation of section 77.807-3, occurred in this case, the parties agree that the violation is significant and substantial (S&S) (Tr. 28).

Discussion

This case concerns a section 104(d)(2) "S&S" Order No. 2944317, issued on May 22, 1989, by MSHA Inspector Spencer Shriver, alleging a violation of mandatory safety standard 30 C.F.R. 77.807-3. The cited condition or practice states as follows:

At about 11:30 a.m., on May 19, 1989, an electrical accident occurred at the North Mains drift substation, while spreading gravel north of the substation fence, an LTL 9000 Ford triaxle truck operated by Robert Radabaugh of Radabaugh Trucking Inc., contacted an energized 34,500-volt powerline with the elevated bed of his truck. None of the truck drivers on this job had received hazard training on maintaining clearance from high voltage lines. There were no plans or prints available at the job site giving the height of the powerline above ground. Also, Citation No. 3106019 was issued by Edwin W. Fetty on February 2, 1989, for failure to maintain 10 feet clearance of 34,500-volt circuit over trucks with elevated beds at the refuse area. This should have caused mine management to take effective action to prevent contact of truck beds with high-voltage lines.

Petitioner's Testimony and Evidence

MSHA Inspector Spencer A. Shriver testified that he is an electrical engineer and holds bachelor's and master's degrees from the West Virginia University. He confirmed that he went to the mine on Friday, May 19, 1989, after his supervisor informed him that a dump truck had contacted a high voltage line, and when he arrived at the mine he met Paul Zanussi, a company safety representative, and he confirmed that an accident had occurred. Mr. Spencer stated that he observed a Ford tri-axle dump truck under the high voltage line, and that several tires had been apparently blown out by the electrical contact with the line. A mechanic for the trucking company was changing the tires to prepare the removal of the truck. Mr. Spencer concluded that a

~1600

violation of section 77.807-3, occurred because section 77.807-2, prohibits the operation of equipment within 10 feet of an energized overhead powerline, and if this should occur, section 77.807-3, requires the powerline to be deenergized or other precautions. Since the truck contacted the powerline, resulting in considerable damage to the truck, he concluded that a violation had occurred (Tr. 13-17).

Mr. Shriver spoke with the respondent's project engineer, James Barton, and to the foreman of the general contractor, Mike Powers, who were eye witnesses to the incident. Mr. Barton told him that he had observed three or four trucks "tailgating gravel" through the area in question, and that the last truck through, which was driven by Robert Radabaugh, contacted the overhead neutral line with the truck bed overhang, pulling the two wooden support structures close together, and when the phase conductors dropped down and contacted the truck, a "fairly spectacular short circuit" occurred (Tr. 18).

Mr. Shriver stated that Mr. Powers informed him that he was following the trucks, and was positioned to the left of Mr. Radabaugh's truck watching the flow of gravel out of the truck, and he explained that as the truck's continue travelling and laying down a layer of gravel, the driver has to continue raising the truck bed to keep the gravel flowing out. Mr. Powers was observing the truck in question to make sure that the gravel was not being spread too thick or too thin, and he was also watching for contact with high voltage lines. When Mr. Powers saw that the truck bed had hooked the overhead neutral conductor, he signaled for Mr. Radabaugh to stop, and another driver yelled for him to stop. However, before stopping, Mr. Radabaugh's truck pulled the support structures together, and the conductors dropped down and contacted the truck resulting in a short circuit (Tr. 19).

Mr. Shriver stated that Mr. Radabaugh was taken to the hospital as a precautionary measure, and that he spoke with him 3 days later when he was back at the job site. Mr. Radabaugh confirmed that Mr. Powers was following behind him giving him hand signals, and he also confirmed that he was told not to drive past a wooden footbridge across a gully near the one-pole structure which supported the overhead powerlines. Mr. Radabaugh also stated that when he was near the northeast corner of the substation, he became concerned that he would go over the bank and was standing up in the cab of his truck in order to look out over the engine to see how close he had come to the bank, and that while doing so hooked the neutral conductor which resulted in the short circuit (Tr. 20). Mr. Shriver identified a memorandum which he prepared for the MSHA district manager concerning his accident investigation findings, and a copy of his notes and a sketch of the accident sketch which he prepared (exhibits P-5 through P-7).

~1601

Mr. Shriver believed the violation resulted from an unwarrantable failure on the part of the respondent because it did not know how high the voltage line was above the ground, did not know how close the trucks could come to the high voltage line, and did not know how high the truck bed would be when it was fully raised. He confirmed that Mr. Barton had no knowledge of any of this information, and although they found several prints or drawings of the area in the contractor's trailer, they did not show how high the voltage line was above the ground. Mr. Shriver believed that the respondent was negligent for not having this information. He also confirmed that another MSHA electrical inspector (Fetty) had previously issued a citation at the site on February 2, 1989, because a truck was under the same voltage line, within 10 feet of the line, and that this should have caused the respondent to take steps to insure that no vehicles are within 10 feet of the line (Tr. 29).

Mr. Shriver stated that when he previously worked for a power company, any time vehicles were in the area of high voltage lines, he knew the height of the truck and the lines, and that if there were any questions about this, someone would be assigned to stop a vehicle before it got too close to a line, or barricades or flagged and roped barrels would be put up to warn a driver (Tr. 30).

Mr. Shriver stated that Mr. Barton did not inform him how long he had been present at the site, or whether it was his first visit there. Mr. Shriver confirmed that when he spoke with Mr. Radabaugh and his brother, they informed him that they had not received any hazard training with respect to overhead lines. However, the following Monday after the accident, a company official gave all of the truck drivers hazard training concerning overhead powerlines (Tr. 31).

On cross-examination, Mr. Shriver stated that with respect to the "other precautions shall be taken" language found in section 77.807-3, and assuming that one knew that a truck would come within 10 feet of an energized powerline, he would expect a barricade with a rope or flags to be installed so that a truck could not pass through the area, or as a minimum precaution, someone should be stationed in the area so that he could stop the truck. Any such precautions would have to be as effective as deenergizing the powerline (Tr. 32).

Mr. Shriver confirmed that his notes reflect that Mr. Powers told him that he had instructed Mr. Radabaugh not to go past a wooden footbridge near the last pole of the high voltage circuit, which would have kept the truck bed about 15 feet from the power conductors, and that Mr. Radabaugh admitted that he had received this instruction (Tr. 34). Mr. Shriver also confirmed that

~1602

Mr. Powers told Mr. Radabaugh not to go beyond the wooden footbridge so that he would not contact the powerline, and if Mr. Radabaugh had not gone beyond that location, he would not have contacted the power conductors (Tr. 36).

Mr. Shriver confirmed that he issued the contested section 104(d)(2) order to the respondent, and also issued section 104(d) citations to Radabaugh Trucking and the contractor (Coal Fuel Services), and that they were all essentially identical (Tr. 37). He also confirmed that he was not familiar with MSHA's hazard training policies, and that he included the lack of training as part of his order because Mr. Radabaugh contacted the powerline and told him that he had not been trained. Although Mr. Shriver issued no citation for failing to hazard train Mr. Radabaugh, he considered the lack of training as part of his unwarrantable failure finding because he believed the driver needed training because he contacted the powerline (Tr. 41).

Mr. Shriver confirmed that he issued a section 107(a) imminent danger order to the contractor, Coal Field Services, and that he did indicate to respondent's personnel on the day of the accident that he did not believe that the respondent was negligent. He concluded that the respondent was negligent on the Monday following the accident after again speaking with Mr. Powers, Mr. Barton, and Mr. Radabaugh, and with his supervisor and MSHA's chief of engineering services (Tr. 44).

Mr. Shriver confirmed that the prior citation issued by Inspector Fetty was one of the factors on which he based his unwarrantable failure finding, and that the other factor was the fact that Mr. Barton, the respondent's project engineer, was watching Mr. Radabaugh bring gravel under the high voltage line (Tr. 44). Mr. Shriver acknowledged that Mr. Fetty's prior citation concerned one of the respondent's trucks operating in the mine refuse area, and he assumed that the driver was employed by the respondent and under the control of one of its supervisors. He believed that both situations were "similar enough" because once the respondent was on notice of the danger of a truck getting into a powerline it should have been alerted by the prior citation and taken effective steps to preclude this from happening again (Tr. 45).

Mr. Shriver acknowledged that he was aware of the fact that the general contractor's employee, Michael Powers, was directly supervising the hauling and dumping of gravel, and that Radabaugh Trucking was the subcontractor hired directly by the general contractor (Tr. 46). Mr. Shriver confirmed that Mr. Radabaugh told him that he had been involved in a prior incident of contacting a high tension line with his truck, and that he knew he should not leave his truck when such contact is made (Tr. 47).

~1603

Mr. Shriver defined an unwarrantable failure as follows: "it is aggravated negligence or conduct on the part of the operator. I think the question of repeat violations enters into it and knowing that something occurred and failing to take some effective action to stop an accident" (Tr. 48).

In response to further questions, Mr. Shriver stated that the powerline in question was approximately 27 feet 4 inches above the ground, and that the height of the truck bed when fully raised was 24-1/2 feet. The neutral wire was 4 to 5 feet under the other wires, and the overhang of the front of the truck bed hooked the neutral wire. The neutral wire is not considered a high voltage wire because it is basically at ground potential and carries no voltage. However, the bed of the truck, when it is fully raised, would contact the neutral wire, and if it did, it would be within 10 feet of the high voltage line. If the truck bed had not been raised, it would not have contacted the neutral wire, and other trucks had already passed under the wires (Tr. 53-54).

Mr. Shriver confirmed that the instructions to Mr. Radabaugh not to go beyond the footbridge were given so that he would not be within 10 feet of the powerline. He had no reason to believe that the instructions were not given, and Mr. Radabaugh admitted that he was so instructed (Tr. 56). With regard to Mr. Fetty's prior citation, Mr. Shriver confirmed that it did not involve any truck contact with a powerline, and that the trucks were simply within 10 feet of a high voltage line (Tr. 56). A copy of this prior citation, (exhibit P-8), reflects that the cited trucks were parked in a raised position directly under energized high voltage transmission lines near the refuse bin, and the citation is a section 104(a) "S&S" citation, with a moderate negligence finding (Tr. 58).

Mr. Shriver confirmed that the height of the high voltage line itself was in compliance with the required standard, and if a truck had driven under it without the bed raised, there would be no chance of contact with the wire, and it would be in compliance. However, in the instant case, the truck, with its bed raised, contacted the neutral wire and pulled it down, causing the two poles supporting the high voltage lines to come together in "a looped position," and they contacted the truck. If the raised truck bed had pulled down only the neutral wire, without causing the tires to blow out, a citation would still have issued because the truck bed which hooked the neutral line would have been within 5 feet of the energized powerline, and the standard requires that equipment not be within 10 feet of such a powerline (Tr. 60-61).

Respondent's Testimony and Evidence

Michael L. Powers testified that he is employed by Coal Field Services, and that he was the field work supervisor at the site at the time of the accident. He confirmed that Coal Field was the general contractor of the project, under contract with the respondent. He stated that all contractor employees working on the project were hazard trained on the first day they were on the job, and he identified copies of the "hazard training slips" for the employees (Tr. 76; exhibits R-1-B, C, and D). He confirmed that Coal Field hired Radabaugh Trucking to haul and dump gravel at the site, and also hired C. W. Stickley to do the actual grading work. He was in direct control, and supervised the work of Radabaugh Trucking. Mr. Barton came to the site to make sure that the work was being done in conformance with the contract specifications, and he occasionally came to the site three or four times a day. The truckers employed by Radabaugh did not leave their vehicles at any time while at the site, and the respondent advised Mr. Powers that they were not required to be hazard trained because they only came to the site to dump gravel and would leave (Tr. 76-78).

Mr. Powers stated that he was serving as the truck spotter, and that he instructed the drivers where they were to dump their gravel loads each time they came to the site. He told them to watch for any powerlines, and remained behind the trucks and used hand signals to show them where to dump and how much to dump (Tr. 78-79). He estimated that the powerlines were located approximately 10 to 15 feet past the end of the foot bridge, and he described how the incident occurred (Tr. 80-83). He specifically told Mr. Radabaugh not to go past the footbridge, and that one of the other drivers called Mr. Radabaugh by radio and told him that he was getting too close to the powerlines. Mr. Powers stated that he was using hand signals in an attempt to stop Mr. Radabaugh from moving further, but instead of stopping, he continued to move his truck forward, and as he did, the truck bed hooked the neutral line, bringing the poles together. Mr. Radabaugh told him that he knew better than to attempt to jump from the truck after it contacted the wires because he had previously contacted some powerlines with his truck "on a highway somewhere around Fairmont" (Tr. 85).

Mr. Powers confirmed that Coal Field Services has its own MSHA I.D. number, and it was his understanding that MSHA policy does not require hazard training for pickup and delivery drivers, and that only those drivers who were at the site and out of their trucks were required to be trained (Tr. 86). He stated that Mr. Barton had visited the site on two occasions on the morning of the accident "to check to see how things were going," and came out again before lunch to ask him to have dinner with him (Tr. 87).

~1605

On cross-examination, Mr. Powers stated that prior to the accident, Mr. Barton came to the site four or five times a day to check the progress of the work and to see if the contract was being followed. They discussed safety practices on quite a few occasions, and Coal Field Services conducted its own safety meetings when it had people at the site (Tr. 89, 91). Mr. Powers explained the procedures for dumping and spreading the gravel at the time of the accident, and he confirmed that when he was preparing to start the project he did not gather any data as to how high the voltage lines were from the ground (Tr. 92-95). He confirmed that the first three or four trucks which preceded Mr. Radabaugh backed under the powerlines, and as they started forward, they opened their truck gates, and raised their truck beds as they traveled away from the lines. None of the other trucks contacted the neutral powerline and there was ample room to clear the lines over the neutral line (Tr. 98).

Mr. Powers confirmed that he told Mr. Radabaugh not to go beyond the footbridge because of the powerlines, and because of other transformer lines in the area. He stated that he carefully maneuvered Mr. Radabaugh away from the transformers, started him in the other direction toward the footbridge, but told him not to go past the footbridge where it was necessary for him to back up because there was no room to turn around. He stated that Mr. Radabaugh told him that he went beyond the footbridge because he was distracted by the other driver who was yelling at him and that he lost contact with him while he was signalling him to stop and had his head out of the window trying to determine the location of the powerline (Tr. 99).

Mr. Powers stated that he had prior experience working around overhead powerlines. He confirmed that he knew how high the lines were above the truck beds, and how much the beds could be raised to stay away from them and stay outside of the 10 foot minimum distance required by the standard, but he did not know the distance between the neutral line and the other lines. He knew by "instinct" that the trucks would clear the wires by backing in and using the reverse spreading procedure, and he confirmed that he did not discuss the powerlines with Mr. Barton before the accident while he was at the site (Tr. 102). He confirmed that Coal Field did not employ any of the truckers hauling gravel (Tr. 105).

Robert W. Radabaugh testified that he is employed by Radabaugh Trucking, and that it is owned by his parents. He confirmed that he was operating the truck when it contacted the high voltage lines on May 19, 1989, and that he was hauling limestone that day for C. W. Stickley, a subcontractor of Coal Field Services. Mr. Powers was instructing him where to dump his load on that day, and was serving as his truck "spotter." Mr. Radabaugh stated that he backed into the area where he started to dump his load, and that Mr. Powers instructed him "to

~1606

go toward the bridge and spread it as far as it would go" (Tr. 114). He did not recall that Mr. Powers told him not to go beyond the footbridge, but that he did tell him "to be careful, there are wires everywhere" when he made his first trip to the job site that morning (Tr. 114). He denied that Mr. Powers was giving him hand signals or directing him where to dump the gravel, and that Mr. Powers was behind his truck when he began spreading gravel.

Mr. Radabaugh stated that Mr. Powers backed him into the area where he started to dump his gravel load, and told him "to go on." Since he was spreading gravel to a depth of 4 to 6 inches, Mr. Radabaugh believed that he would have traveled approximately 120 to 180 feet, and that during this time, it would have been impossible for him to see Mr. Powers in his mirror when he first started to move out of the area where he had backed in. At the same instant that he felt the neutral line catch his truck, he heard another driver calling him over the radio telling him that he was into the power wires (Tr. 116).

Mr. Radabaugh denied that he had directly contacted a powerline with his truck on a prior occasion, and stated that he has had "experience with wires before" while spreading asphalt, and that he was "in the machine, and the power arced from the wire to my bed." The individual who was on the machine was shocked and his feet were burned, and after seeing the arc, Mr. Radabaugh drove his truck out and dumped the asphalt, and "saved the man's life" (Tr. 117). Mr. Radabaugh confirmed that he was driving the truck when this incident occurred.

On cross-examination, Mr. Radabaugh stated that he had made a prior trip to the site during the morning spreading gravel on a parking lot, and that Mr. Powers was directing him where to start and where to go to spread his loads, and that he asked Mr. Powers to give him signals if he were spreading the gravel to thick or too thin (Tr. 120). He stated that when he "felt" that he was in the neutral wire at the time the other driver alerted him, "the first thing I did was to make a quick look to see if the wire was big enough that I could break it" and that he had no indication at that time that there was power in the wire or that it had arced. When he saw that he would not break the wire, he looked to both sides and put the truck in reverse, and when he looked into his mirror, he saw Mr. Powers running up behind him motioning for him to stop, and that he did. Mr. Radabaugh denied that he was aware of the powerlines before starting to move forward, and the last instructions that he heard from Mr. Powers was "to go toward the bridge as far as the gravel will go" (Tr. 121). He confirmed that he was standing up on his truck watching to see if the truck would empty by the time he got to the downgrade or bank (Tr. 123).

~1607

Mr. Radabaugh confirmed that he appealed the citation served on Radabaugh Trucking because he disagreed with the assertion that he had acknowledged that Mr. Powers told him not to go beyond the footbridge, but that his father decided to pay the civil penalty assessment because "it was not worth missing another day's work." Mr. Radabaugh denied that he ever told Inspector Shriver that he received instructions not to pass the bridge, and he stated that he had not received any such instruction (Tr. 128).

Mr. Powers was recalled by the respondent in rebuttal, and he stated that he accompanied the Radabaugh Trucking drivers with each load and gave them directions and hand signals once they started to spread their load, and that they were under his control at all times. The only trucks that he did not stay close to were those which were in an open area where "there was nothing they could get into," and he let them know when their trucks were empty. He reiterated that he stayed to the rear and left of Mr. Radabaugh at all times, and that he could see his face in the truck mirror while he was watching him. Mr. Powers further explained Mr. Radabaugh's movements, and he confirmed that Mr. Radabaugh acknowledged that he was told where to stop during the interview with Inspector Shriver and a state inspector, and in the presence of Mr. Barton (Tr. 133-141).

James Barton, testified that he was employed by American Electric Power, as a civil engineer in its design and construction group, and that he holds a B.S. degree in mining engineering and has served as a mining engineer and as a strip and surface foreman in West Virginia and Ohio. He stated that his duties as the project engineer for the work being performed for the respondent on May 19, 1989, entailed assuring that the contract specifications for the quality of the work being performed were being followed, and that he was there that day to oversee the remainder of the surfacing project. He confirmed that Coal Field Services was hired as the general contractor for the work, and that the work was being supervised by Coal Field's employees, and he identified the contract provision in this regard (Tr. 143-147; exhibit R-1-(f)). The contract called for Coal Field to insure that the work was completed in a safe manner, including the work of subcontractors, and that Coal Field was responsible for enforcing all applicable safety laws (Tr. 148-149).

Mr. Barton stated that he maintained no control over the procedures or manner in which the gravel was being hauled, dumped, or spread by Radabaugh Trucking, and that Radabaugh Trucking was not hired by the respondent to do the work (Tr. 149). He confirmed that he observed three to five gravel trucks on the morning of the accident in order to insure whether the proper amount of gravel was being spread, and that the trucks were under the control of Mr. Powers by means of hand and verbal

~1608

communication. He stated that he did not see Mr. Powers directing Mr. Radabaugh's truck and was paying no particular attention to it because he was in another area. He did not see Mr. Radabaugh's truck contact the powerline, but when it did, he turned and saw that his truck had contacted the wires, and heard the "electrical shorting sound" (Tr. 149-152).

Mr. Barton stated that he spoke with Inspector Shriver regarding the incident on May 19, 1989, but he could not recall whether the inspector informed him that the respondent would be held liable or negligent for the incident. He confirmed that he was not concerned about the manner in which the work was being done because it appeared that the dumping and spreading of the gravel was being controlled by Mr. Powers, and the drivers were complying with his hand signals (Tr. 154). He confirmed that in the event he observed any drivers engaging in any unsafe acts he had the authority to put a stop to it (Tr. 155).

On cross-examination, Mr. Barton confirmed that the respondent is a subsidiary of American Electric Power, and that he was present at the mine site for approximately a week. During that week, he observed and saw to it that safety standards were met, but he did not meet with any contractor employee to discuss any measures to be taken to insure that the gravel would be spread in a safe manner. He confirmed that he went to the site on the morning of the incident to see how the job was progressing and to have lunch with Mr. Powers. He confirmed that he was concerned that elevated trucks would be used around high powerlines, but trusted the contractor because the work was being done in a very controlled manner. He did not provide the contractor with any data concerning the height of the powerlines, and this data was not available to him even though he was the direct contact representative between the respondent and the contractor (Tr. 158-159).

Mr. Barton stated that since the trucks were under the control of each driver, he would expect the driver to visually look out for the powerlines. He believed that the accident resulted from a failure in communications, and that short of being the direct supervisor over the job, he could not be there at all times. In hindsight, he agreed that if he knew that the trucks could not clear the powerlines, the gravel may have been spread in a different manner, and he further agreed that the contractor should alert the drivers to stay clear of the lines (Tr. 161).

Larry G. Massey testified that he was employed by the respondent as the mine staff electrical engineer. He confirmed that he investigated the incident in question and spoke with Mr. Radabaugh. He stated that Mr. Radabaugh told him that he had contacted the power wires and did not leave his truck after making contact because "he had got into high voltage lines before

~1609

at another time" (Tr. 163). Mr. Massey confirmed that he spoke with Inspector Shriver on the day of the incident, and that at no time did Mr. Shriver indicate that the respondent would be held liable for the incident. When he again spoke with Mr. Shriver on the Monday following the incident, Mr. Shriver informed him that he issued the unwarrantable failure order to the respondent because the incident occurred on mine property and it was the total responsibility of the respondent. Mr. Shriver also informed him that the incident was similar to a prior violation issued by Inspector Fetty (Tr. 164).

Paul S. Zanussi, testified that he was employed in the respondent's safety department as an accident prevention officer, and that he became aware of the incident when he received a telephone call from the superintendent of engineering. He confirmed that he investigated the incident, and he described what he observed when he arrived at the scene shortly after the incident. He confirmed that the footbridge in question was not located directly under the overhead powerlines, and he estimated that it was located approximately 10 feet away (Tr. 166-168).

Mr. Zanussi confirmed that the inspector did not issue any order to the respondent on the day of the incident, but that the contractor received an order that day, and that the inspector told Mr. Zuleski, the respondent's mine safety and health manager, that he decided to issue an order to the contractor (Tr. 169-170). Mr. Zanussi stated that it was his understanding that the contractor was taking responsible precautions and had a spotter watching the truck and that the drivers knew of the dangers and their responsibilities (Tr. 175). Mr. Zanussi confirmed that no one from the mine safety department was assigned to be at the job site to insure that the work was being done safely, and that he received no instructions to visit the site (Tr. 177).

Inspector Shriver was called in rebuttal by the petitioner, and he stated that on the basis of his diagram of the accident scene, and Mr. Zanussi's testimony that the footbridge was 10 feet in front of the neutral overhead wire, if Mr. Radabaugh had stopped his truck at the point where he looked out of the window of his truck, he would have been within 10 feet of the phase conductor. If Mr. Radabaugh had stopped his truck "as he was driving, right by the bridge," Mr. Shriver still believed that his elevated truck bed would be within 10 feet of the wire (Tr. 179).

On cross-examination, Mr. Shriver stated that he was aware of no MSHA regulations requiring that plans or prints be made available on the job site in question in this case. He confirmed that his inspection notes confirm that Mr. Powers told him that he instructed Mr. Radabaugh not to go past the footbridge (Tr. 183). He again confirmed that he issued "unwarrantable failure

~1610

type papers" to Radabaugh Trucking, Coal Field Services, and the respondent (Tr. 185). He explained his reasons for doing so as follows at (Tr. 186-188):

Q. How was the driver here, Mr. Radabaugh, guilty of aggravated conduct?

A. According to statements made to me by other parties, he had been told not to go past the bridge, and on Monday he conceded he had gone past it. You know, I don't know whether I caught him cold, or what, but he had just dismounted from the truck and --

Q. And he confirmed that he had been told?

A. Right. He later said at a conference on the citation that he had not really said that.

Q. The contractor here, how was the contractor guilty of aggravated conduct?

A. The general contractor, while having the people, the trucks, travel under high voltage lines, he did not put up an effective barrier to prevent him from going past it.

Q. So, if the contractor didn't prevent the driver from doing it, and if the driver himself did it knowing or flaunting the instruction not to do it, and both of that is aggravated conduct, how does Martinka come on the receiving end of aggravated conduct also?

A. Well, again, Mr. Barton, the project engineer, on Friday -- and I believe again on Monday, I talked to him on Monday -- stated that he had watched these trucks go through there and he had watched this particular truck go through, and he had made no effort to ensure that it was low enough to get under, or the power lines were high enough for them to get under, without trouble.

The second thing was that he as the project engineer did not have any knowledge of how high the line was and therefore from my standing there, looking at it, it was very difficult for me to tell how high the line was. I would hesitate to tell a truck driver that he could drive that through there with his bed down. It is highly misleading when you look up if you don't actually know how high the line is. It is very risky

~1611

to go under it. And also, he had no knowledge of how high the truck beds were.

The third was Mr. Fetty's citation on a similar violation for having the refuse trucks under this same circuit; not the same identical line.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.807-3, which provides as follows:

When any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than that specified in section 77.807-2 for booms and masts, such powerlines shall be deenergized or other precautions shall be taken. (emphasis added).

The respondent does not dispute the fact that the raised bed of the truck which was operated by Mr. Radabaugh on its mine property did in fact come within 10 feet of an energized powerline. Indeed, the truck bed contacted the wire, causing an electrical short circuit and arcing, and the contact damaged the truck tires. The inspector concluded that a violation of section 77.807-3, occurred because the raised truck bed contacted the overhead energized powerline causing considerable damage to the truck. Since the clearance between the raised truck bed and the powerline was less than the 10 feet clearance mandated by section 77.807-2, and since the powerline was not deenergized and no other precautions to avoid contact were taken, as required by section 77.807-3, the inspector found a violation of that standard.

Section 77.807-3, requires that certain clearance distances be maintained when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high voltage powerline. Section 77.807-2, which is incorporated by reference as part of section 77.807-3, requires a 10 foot clearance or separation between the booms and masts of equipment and an energized overhead powerline. I conclude and find that the cited truck in question was a piece of "equipment" within the meaning of sections 77.807-2, and 77-807-3. I further conclude and find that the device used to raise the truck bed was a "boom or mast" within the meaning of section 77-807-2, and that the raised truck bed which contacted the powerwire was "part" of the truck, and within the meaning of section 77.807-3.

~1612

Although the parties have not directly raised the issue as to whether or not the truck was required to pass under the overhead energized powerline, the respondent takes the position that the truck driver was specifically instructed not to go beyond the area of a footbridge in the proximity of the powerlines. The evidence establishes that Mr. Powers, the individual who was serving as a truck spotter, and who was directing the traffic flow and the dumping and spreading of the gravel, was aware of the powerlines and had instructed the drivers to watch out for them. Mr. Powers relied on his visual observation of the powerline and his "instinct" that the trucks would clear the power wires by backing under the wires and using a "reverse spreading procedure." As a result of the traffic pattern utilized to dump and spread the gravel under the control of Mr. Powers, three or four trucks which proceeded Mr. Radabaugh's truck backed under the power wires, and Mr. Powers instructed them to begin raising their truck beds as they traveled away from the wires. Mr. Radabaugh testified that following Mr. Powers' instructions, he backed his truck up, and as he proceeded in a forward direction to spread his gravel load, he contacted the wire after traveling approximately 120 to 180 feet. Under all of these circumstances, I conclude and find that in the process of spreading the gravel, all of the aforementioned trucks, including Mr. Radabaugh's, were required to pass under or by energized overhead power wires.

The respondent's defense to the violation focuses on the unwarrantable failure finding made by the inspector, the respondent's alleged negligence for the violation, and whether or not a production operator, such as the respondent, may properly be cited for a violation attributable to an independent contractor. The respondent takes the position that it should not be held liable for the violation of its independent contractor because it did not contribute to the violation, or let it exist, none of its miners were exposed to any hazard, and it retained no control or supervision over the contractor's work or the alleged violative condition. In support of its arguments, the respondent cites the Commission's decision in Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (August 1984), and a court decision in Brock v. Cathedral Bluffs Shale Oil Company, 796 F.2d 553 (D.C. Cir. 1986). The respondent maintains that the facts and evidence presented in this case do not support MSHA's position that it was properly cited pursuant to the Act, as well as MSHA's independent contractor regulations and policies.

In the Cathedral Bluffs Shale Oil Company case, the Commission affirmed a Judge's decision vacating a citation issued to a production operator on the ground that MSHA improperly applied its newly promulgated and adopted independent contractor enforcement policy. The Commission found no credible evidence in that case to support any conclusion that the production operator's employees were exposed to any hazard as a result of the

~1613

violation, or that the operator exercised sufficient control over the work activities of its independent contractor so as to establish a link or nexus with the contractor's violation. MSHA appealed the decision, Brock v. Cathedral Bluffs Shale Oil Company, and the Court reversed the Commission's decision, and held that the Commission improperly regarded MSHA's general independent contractor enforcement policy as a regulation which MSHA was required strictly to observe. The Court clearly recognized that MSHA retained broad discretion to cite a mine operator, as well as contractors, for violations, and stated that "the statement here in question pertains to an agency's exercise of its enforcement discretion - an area in which the courts have traditionally been most reluctant to interfere," 796 F.2d 538, and the cases cited therein. The court further stated as follows at 796 F.2d 538:

* * * * *

[W]e see no basis for overturning the Secretary's judgment that his independent contractor enforcement guidelines do not constitute a binding, substantive regulation. The language of the guidelines is replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit. The statement characterizes itself as merely a "general policy" to "be used by inspectors as guidance in making individual enforcement decisions." At its very outset it warns production-operators that nothing it contains should be regarded as altering their basic compliance responsibilities:

Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to work being performed by independent contractors at the mine. As a result, independent contractors and production-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors. (Emphasis added).

It seems clear to me that production operators are jointly and severally liable for violations involving independent contractors at their mines. Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981). It is also clear that a mine owner-operator is liable for the independent contractor's safety violations without regard to the owner's fault. See:

~1614

Consolidation Coal Company, 10 FMSHRC 745, 749 (June 1988), and the decisions cited therein by Judge Weisberger. The Commission affirmed Judge Weisberger's findings that MSHA's discretion was not abused in citing both the production operator and its contractor, and took note of the Court's decision in Brock v. Cathedral Bluffs Shale Oil Co., supra, with respect to MSHA's wide enforcement discretion, 11 FMSHRC 1439, 1443 (August 1989).

There is no evidence in this case that any employee of the respondent was exposed to the hazard presented by the violation. The work was being conducted and directly supervised by the contractor's supervisor, Michael Powers, pursuant to a contractor with the respondent. The respondent points out it did not hire the contractor and sub-contractor employees performing the work, and only "monitored the contractor's work performance." Mr. Barton testified that pursuant to the contract, the contractor was responsible for the safe completion of the work as well as the enforcement of all applicable safety laws. Although not specifically raised by the respondent as an issue, I reject any notion that a production operator may contract away or delegate its statutory duty to prevent safety hazards or violations which may occur on its property or its strict liability as established by the Act.

MSHA takes the position that as an owner-operator, the respondent is charged with the responsibility of assuring contractor compliance with the safety requirements of the Act and its safety regulations, and that the respondent may be cited for the acts and omissions of its contractor. MSHA relies on its independent contractor enforcement policy guidelines which state that it is appropriate to cite the owner-operator as well as the contractor when the ". . . production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work or . . . when the production operator has either contributed to the continued existence of a violation committed by an independent contractor. . . .".

MSHA maintains that the respondent contributed to the violation by failing to provide wire height information to its contractor, by failing to meet with the contractor to systematically enforce the safety provisions of its contract with the contractor, and by wrongly advising the contractor that it did not have to train its drivers. With regard to Mr. Barton's role in connection with the violation, MSHA points out that the work area in question was an electrical substation and that a high voltage line accident was clearly the most likely and foreseeable hazard faced by the drivers. Since Mr. Barton was an employee of American Electric Power, and was a trained and experienced civil and mining engineer, MSHA believes that he should be held to a higher standard of prudence and care than a regular mine supervisor or a lay person.

~1615

MSHA further argues that Mr. Barton had the responsibility of overseeing the contract performance of the contractor retained by the respondent, and that the contract required the work to be performed in a safe manner under competent supervision. MSHA asserts that Mr. Barton apparently did nothing to assure contractor compliance with this contract provision, did not meet with the contractor regarding safety measures to be taken, and did not ascertain whether the contractor had familiarity with wire heights or truck bed heights, or whether it was familiar with the hazard inherent in the job. MSHA points out that Mr. Barton apparently never advised Mr. Powers that he was contractually responsible for the safety of the project, and that Mr. Powers testified that he was not familiar with its safety provisions.

Finally, MSHA suggests that the respondent must bear derivative liability for the acts or omission of Mr. Powers. Since the contractor was apparently delegated the sole responsibility for safety considerations pursuant to the contract, MSHA concludes that the contractor became the respondent's agent as that term is used in section 3(e) of the Act and stands in the shoes of its' directly employed supervisory agents, and is accountable for the acts or omissions of Mr. Powers.

In the instant case, the inspector cited and found three separate entities who he believed were responsible for the violation in question. In addition to the respondent, he also issued section 104(d) citations to the respondent's general contractor (Coal Fuel Services), and the contractor's sub-contractor (Radabaugh Trucking Company). The inspector explained his reasons for citing all three of these parties. His reasons for citing the respondent are summarized as follows:

--- The violation occurred on the respondent's mine property.

--- The respondent's project engineer, James Barton, was at the work site and observed the trucks (including Mr. Radabaugh's truck) spreading gravel under the powerlines, and made no effort to ascertain the clearance distances between the trucks and the power wires.

--- The respondent's electrical prints, which were available at the site, did not reflect the height of the power wires above the ground, and Mr. Barton did not know the height of the power wires, how close the trucks would drive to the power wires, and did not know the height of the truck bed when it was in a fully raised position.

--- The respondent was previously cited for a violation of section 77.807-3, on February 2, 1989, for failing to maintain a 10-foot clearance between its trucks which were parked under energized highvoltage lines which was part of the "electrical circuit" involved in the instant matter. The inspector believed that this prior citation should have alerted the respondent to be aware of the potential hazard and take appropriate action.

--- The lack of training for the truck driver (Radabaugh) whose truck contacted the overhead power wires in this case

Mr. Barton confirmed that he was present at the work site for approximately a week during the course of the work being performed by the contractor. Contrary to the respondent's assertions that "there is no testimonial evidence establishing the duration of the visits nor what specifically was observed" (pgs. 9-10, posthearing brief), Mr. Barton testified that one of the reasons for his visits during the week was to see to it that safety standards were met, and he confirmed that he was at the site on the morning of the accident and observed three or four trucks spreading gravel under the direction of Mr. Powers. Although Mr. Barton denied that he observed Mr. Powers directing Mr. Radabaugh's truck, and stated that he did see the truck contact the power wire because he was in "another area," he was apparently close to the scene of the accident because at the moment of contact, he turned and saw the truck and heard the "electrical shorting sound." Mr. Powers testified that prior to the accident Mr. Barton came to the site four or five times a day to check the progress of the work, and that he had visited the site on two occasions on the morning of the accident to "see how things were going" and returned again that day to ask him to have lunch or dinner with him.

Although Mr. Powers testified that he and Mr. Barton discussed "safety practices" during Mr. Barton's visits to the work site, he admitted that they did not discuss the powerlines during any of Mr. Barton's visits prior to the accident. Mr. Barton testified that during the week of his visits to the work site to observe whether all safety standards were met, he did not meet with any contractor personnel to discuss measures for insuring that the gravel was spread in a safe manner, and although he had observed the trucks coming and going, and spreading the gravel, he was not concerned about the methods being used because he believed that Mr. Powers had matters under control.

Mr. Barton confirmed that he was concerned that elevated trucks were being used around high powerlines, and Mr. Powers was apparently also concerned because he testified that he instructed

~1617

the drivers to "watch out" for the overhead wires. Notwithstanding these concerns, Mr. Barton and Mr. Powers never discussed the hazards of trucks operating at the electrical substation area where the presence of overhead energized powerlines was readily obvious and apparent. Further, even though electrical prints and drawings were subsequently found by the inspector and Mr. Barton in a contractor's trailer, they did not include any information with respect to the height of the powerlines above the ground. Although he was acting as the respondent's direct contact representative with the contractor, Mr. Barton was ignorant of the height of the powerlines, and he apparently made no effort to obtain this information and communicate it to the contractor.

Mr. Barton expected each truck driver to visually look out for the overhead power wires, and Mr. Powers relied on his "instinct" and the "reverse spreading" procedure as a means of preventing a truck from contracting a wire. I conclude and find that the failure by Mr. Barton and Mr. Powers to make any meaningful determination as to the safe working parameters for the trucks which were working in a rather confined electrical substation area around overhead powerlines, or to specifically determine the height of the overhead power wires, prior to the beginning of the work in question, and to discuss and exchange such information with each other, constituted omissions on their part which contributed to the violation.

Respondent's safety representative, Paul Zanussi, testified that he was never instructed to be at the site, and that no one from the safety department was assigned to be present to insure that the work was done in a safe manner. While there is no evidence that Mr. Barton was aware of the previous citation issued some 3 months earlier for a violation of the same standard cited in this case, I believe that one may reasonably conclude that the safety department was aware of it. Although the presence of a safety representative may not be required on a daily basis at the site where a contractor is performing work, given the fact that Mr. Barton was concerned about the trucks working around overhead powerlines, and the fact that the respondent had recently been charged with a similar violation, I believe that it is not unreasonable to expect at least some communication between the respondent's safety and engineering departments and the contractor to insure that the work was being done in a safe manner and that truckers were not exposed to potential hazards. As noted earlier, the respondent may not absolve itself of all of its statutory safety responsibilities by simply "contracting them out" to a contractor.

Although Mr. Barton took the position that the contractor was responsible for insuring that the work was performed in a safe manner, and was responsible for enforcing all applicable safety laws, he conceded that he had the authority to act or intervene if he observed any drivers engaging in any unsafe acts.

~1618

He also conceded that part of his responsibilities during his site visits was to insure that all safety standards were met, and in "hindsight," he agreed that if he knew that the trucks could not clear the powerlines, the gravel would have been spread in a different manner. It seems to me that if Mr. Barton had the authority in "hindsight" to dictate the manner in which the gravel was spread if he believed that the spreading methods used exposed the truck drivers to a hazard of contacting the overhead powerlines, he also had that authority prior to the time of the accident. Under all of these circumstances, the respondent's suggestion that it had no safety responsibility for the work being performed by the contractor, and that Mr. Barton's presence at the work site was for the limited or sole purpose of insuring contract compliance with only the job specifications is rejected.

I conclude and find that Mr. Barton had an obligation and duty, which were inherent in his position as the project engineer on the job, to insure that the contractor work being performed in and around the electrical substation area which was located on the respondent's property, an area which was rather confined, and where energized overhead powerlines and other electrical equipment were located, was done in a safe manner. I conclude and find that Mr. Barton's failure in this regard constituted omissions which contributed to the violation.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has established a violation by a preponderance of the credible and probative evidence adduced in this case. I also conclude and find that the respondent was properly cited in this case, that the inspector's reasons for citing the respondent were reasonable and proper in the circumstances and were in compliance with MSHA's independent contractor policies and guidelines, and that the inspector did not act arbitrarily by citing the respondent as well as the contractor and its subcontractor. Accordingly, the contested violation IS AFFIRMED.

Significant and Substantial Violation

The parties stipulated that in the event the violation is affirmed, it was indeed a significant and substantial violation. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure Violation

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 than 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. * * *

In my view, the direct and proximate cause of the accident was the result of the truck driver's failure to adhere to the instruction by Mr. Powers not to drive beyond the footbridge. Although Mr. Radabaugh denied that he was so instructed, I find the testimony of Mr. Powers to be more credible. In addition,

~1620

the inspector had no reason to believe that the instructions were not given. Indeed, he testified that Mr. Radabaugh admitted that he was so instructed, and the inspector's notes made at the time of the incident reflect that Mr. Powers informed him that he had instructed Mr. Radabaugh not to go beyond the footbridge and that Mr. Radabaugh admitted that this was in fact the case. The inspector also confirmed that the reason Mr. Powers instructed Mr. Radabaugh not to go beyond the footbridge was in order to avoid contact with the powerwire, and if Mr. Radabaugh had complied with the instruction he would not have contacted the wire. Under the circumstances, I do not believe Mr. Radabaugh's testimony that he was not instructed not to proceed beyond the footbridge.

The evidence establishes that the incident in question was not the first time Mr. Radabaugh had contacted an energized power wire with his truck. Although Mr. Radabaugh denied that he saw the power wire as he proceeded away from the area where he had dumped gravel while under Mr. Powers' direction, he testified that when he truck initially made contact with the neutral wire, another driver alerted him to this fact. Although the neutral wire did not arc, and there was no indication that the wire had any power on it, rather than stopping his truck at that point, Mr. Radabaugh looked at the wire to determine whether he could break it, and when he determined that he could not break it, he put his truck in reverse, and as he backed up he saw Mr. Powers through his rear view mirror running toward him and motioning him to stop. Although Mr. Radabaugh stopped, the neutral wire which he initially caught with his truck bed brought the power line support poles together causing the neutral wire to contact the energized power wire and the truck. In my view, if Mr. Radabaugh had simply stopped his truck and not attempted to break the wire with his truck by moving it further, the accident may have been avoided.

Inspector Shriver confirmed that in addition to the respondent, he also charged the contractor and its sub-contractor with unwarrantable failure violations in connection with the accident in question. He believed that the respondent was guilty of aggravated conduct because Mr. Barton informed him that he had observed the trucks, and in particular, Mr. Radabaugh's truck, travelling under the powerlines while spreading gravel, Mr. Barton's lack of knowledge of the height of the overhead wires or the height of the raised truck beds, and the prior citation issued by another inspector for parking trucks with their raised beds under the same overhead power circuit. He also considered Mr. Radabaugh's admission that he had received no training with respect to overhead powerlines.

Although the evidence establishes that Mr. Barton observed the gravel trucks operating in the area of the overhead powerlines on the day of the accident, Mr. Barton testified that he

~1621

did not observe Mr. Powers directing Mr. Radabaugh's truck and paid no particular attention to it because he was in another area. Mr. Powers testified that three or four trucks preceded Mr. Radabaugh and backed under the wires. Mr. Shriver's notes reflect that Mr. Barton told him that he had observed three or four loads of gravel spread in the area north of the substation fence, and this information was incorporated in an accident memorandum submitted by Mr. Shriver to MSHA's district manager on June 1, 1989. Although Mr. Radabaugh was spreading gravel at the area noted in the notes and memorandum, the information contained in these documents do not reflect that Mr. Barton specifically observed Mr. Radabaugh's truck. They simply reflect that Mr. Barton "watched three loads of gravel spread north of the substation fence" (exhibits P-5 and P-6). Mr. Radabaugh confirmed that he had made an earlier trip to the site spreading gravel on a parking lot.

While it is true that Mr. Barton conceded that the trucks operating and spreading gravel in the area of the powerlines cause him some concern, his credible testimony reflects that he relied on the fact that Mr. Powers was serving as the truck spotter directing and supervising the spreading of the materials, and that he trusted Mr. Powers judgment that the work was being done in a safe manner. Mr. Powers had previous experience working around powerlines, and he cautioned each driver as they arrived at the site to be aware of the lines. Although I have concluded that Mr. Barton had a duty to communicate with the contractor in order to insure the availability of information regarding the height of the powerlines and the height of the raised truck beds, in the circumstances then presented, including the fact that Mr. Radabaugh disregarded a direct order by Mr. Powers not to go beyond the footbridge, I cannot conclude that Mr. Barton could have reasonably anticipated that Mr. Radabaugh would not follow instructions and place himself in a position to contact the powerlines. Under all of these circumstances, I conclude and find that Mr. Barton's failure to act when he initially observed the truck was the result of inattention rather than aggravated conduct.

With regard to the prior citation issued by Inspector Fetty, I am not persuaded that this singular violation supports, or contributes to, a finding of aggravated conduct. The prior citation concerned a different factual situation, and I find no evidence that Mr. Barton was aware of it.

With respect to Mr. Radabaugh's lack of training, I take note of the fact that the inspector did not issue any violations for lack of training, and I find no probative evidence that the respondent was required to train Mr. Radabaugh. The un rebutted testimony of Mr. Powers establishes that the contractor hazard trained its employees, and I assume that Radabaugh Trucking Company, who was also a contractor, had some responsibility for

~1622

training its own drivers. Although it may be true that the respondent advised Mr. Powers that the truckers employed by Radabaugh Trucking were not required to be trained, there is no evidence that Mr. Barton gave this advice, and even if he did, I am not convinced that the basis for this opinion was incorrect. Mr. Powers confirmed that the truckers did not leave their vehicles at any time while at the work site, and it was his understanding that MSHA's training policy did not require hazard training for pickup and delivery drivers who remain in their vehicles. The policy referred to by Mr. Powers, exhibit R-1, supports this conclusion, and I find no evidentiary basis for concluding that the advice given to the contractor by the respondent was other than a reasonable and good faith opinion based on the work being performed by contractor truckers.

I take particular note of the fact that Mr. Shriver admitted that he was not familiar with MSHA's training policy and that he abated and terminated the violation after the respondent stated that it would provide hazard training for contractor truckers, and that it "will ensure that contractors provide this hazard training to trucking subcontractors." Thus, it would appear that the inspector put the onus on the contractor to train its own subcontractors. Under all of these circumstances, I cannot conclude that Mr. Radabaugh's lack of training supports, or contributes to, a finding of aggravated conduct by the respondent.

In view of the foregoing findings and conclusions, I conclude and find that the violation was a result of the respondent's inattention and failure to exercise reasonable care rather than aggravated conduct. Accordingly, the inspector's unwarrantable failure finding IS VACATED, and the order IS MODIFIED to a section 104(a) citation with significant and substantial (S&S) findings, and as modified, the citation IS AFFIRMED.

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

I conclude and find that the respondent is a large mine operator and that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The respondent's history of prior violations, as reflected by an MSHA computer print-out, (exhibit P-1-a), shows that for the period May 30, 1987 through May 29, 1989, the respondent paid \$251,308 for 1,047 violations issued at the Martinka No. 1 Mine. One-thousand and fourteen (1,014), were for violations found to be significant and substantial (S&S). No prior violations of section 75.807-3, are noted. MSHA has not argued or suggested

~1623

that the respondent's compliance record warrants any additional increases to its proposed civil penalty assessments, and I assume that it considered the respondent's history of compliance when the assessments were initially made. However, I have considered this compliance history in the penalty assessment which I have made for the violation which has been affirmed.

Good Faith Compliance

The record reflects that the respondent timely abated the violation by providing hazard training to contractors, and insuring that the contractors will provide hazard training to its subcontractors. I conclude and find that the respondent timely abated the violation in good faith.

Negligence

Although the record reflects that the height of the powerlines were otherwise in compliance with MSHA's regulations, I conclude and find that the failure by Mr. Barton or the respondent to make any determination as to the height of the raised truck beds operating in the area of the powerlines, or to otherwise discuss the matter with the contractor, or to communicate this information to the contractor in advance of the start of the project, constitutes a lack of reasonable care amounting to ordinary negligence.

Gravity

As noted earlier, the respondent stipulated that the violation was significant and substantial. The truck contact with the energized powerline caused considerable damage to the truck, and Mr. Radabaugh was fortunate that he was not seriously injured or killed. I conclude and find that the violation was serious.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$500 is reasonable and appropriate for a violation of mandatory safety standard 30 C.F.R. 77.807-3, as noted in the modified section 104(a) "S&S" Citation No. 2944317, May 22, 1989.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$500 for the violation in question, and payment

~1624

is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge