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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-278 A.C. No. 46-03805-03939
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 civil penalty assessments for five alleged violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and a hearing was held in Morgantown, West Virginia. Two of the alleged violations were settled by the parties, one was dismissed by the petitioner, and testimony and evidence was taken with respect to two alleged violations. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether two of

the alleged violations were "significant and substantial" (S&S), (3) whether the violations were the result of the respondent's unwarrantable failure to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, 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. 7-11; exhibit P-1):

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. A copy of an MSHA's Proposed Assessment Data Sheet (exhibit P-2) 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.

4. A copy of an MSHA computer print-out reflects the history of prior assessed violations issued at the Martinka No. 1 Mine for the period April 26, 1987 through April 25, 1989 (exhibit P-3).

5. The MSHA inspectors who issued the contested orders were acting in their official capacity when the orders were issued, and true copies were served on the respondent or its agent as required by the Act.

6. The respondent knows of no evidence to contradict the petitioner's assertion that the Martinka No. 1 Mine has not had a complete inspection free of unwarrantable failure violation since the issuance of Citation No. 0859286 dated September 1, 1981.

Discussion

The parties settled three of the contested orders in this case. The remaining two orders are as follows:

Section 104(d)(2) Order No. 3117868, May 23, 1989, cites an alleged violation of 30 C.F.R. 77.404(a), and the cited condition or practice states as follows:

> Based on a complaint investigation a D-7 caterpillar dozer company number 29423 had been operated from 5-15-89 to 5-19-89 with two broken cat pads, which are part of a walkway platform on which the machine operators walk to mount and dismount the machine. This condition had been known by the foreman in charge, Jim Richards, and had been recorded in the machine operator's daily examiners record book on 5-16-89.

Section 104(d)(2) Order No. 2944318, May 24, 1989, cites an alleged violation of 30 C.F.R. 75.1704, and the cited condition or practice states as follows:

> On B11 longwall, the intake escapeway is not maintained to insure passage of any person, including disabled persons. In the crosscut just inby station 22031, between the track and intake entries, there were the following obstructions:
>
> (1) Ten 5-gallon cans of hydraulic oil, two deep
> (2) 20 pieces of belt structure
> (3) 20 belt rollers
> (4) Mandoor from stopping
> (5) Two wooden pallets
> (6) A 3þ x 4þ x 4þ wooden crate full of pan line chain
> (7) Four 3/4" x 2þ x 4þ steel plates
> (8) A scoop Tire
>
> In the crosscut from the belt to the track, there was about 30 feet of water and mud 12 inches deep. One block outby in escapeway (outby station 22032) there was a water hole 40 feet long rib to rib, 12 inches deep, with a 2 foot drop off to water. The foreman stated that this crosscut was entrance to intake escapeway entry, and there was a green arrow escapeway

> sign hanging in track entry, pointing into this crosscut.
>
> Citation No. 2944303 was issued on 5-1-89 for obstructed intake escapeway on D-4 longwall. This should have caused operator to take effective action to prevent obstructed intake escapeways.

Petitioner's Testimony and Evidence (Order No. 3117868)

MSHA Inspector Bretzel Allen confirmed that he conducted a surface inspection of the mine on May 23, 1989, after receiving a section 103(g) complaint from a representative of the miners. The complaint concerned a D-7 bulldozer with broken cat pads being operated in the refuse dump area. He confirmed that the broken pads had been replaced prior to his inspection, but that he determined that they were previously missing through his discussion with the equipment operators, foreman Jim Richards, and the respondent's accident prevention officer, Wesley Dobbs. Mr. Allen identified exhibit P-4-E, as a copy of an equipment record book which reflects that the broken pads had been reported by the machine operator, and he stated that Mr. Richards confirmed that this had been done (Tr. 12-16).

Mr. Allen stated that he was informed that new replacement cat pads were ordered and received on May 17 or 18, 1989, and were installed on the dozer on May 19. The complaint was made because the dozer had not been taken out of service and was continuously used from May 15 to May 19. He confirmed that the primary purpose of the cat pads is to provide traction for tramming the dozer, and they are also used as a travelway for the machine operator to access and exit the cab of the machine. The operator walks along the pads to reach the left door of the cab which is normally used to get in and out of the machine. He confirmed that he has observed dozer operators enter and exit a dozer, and they always use the left track as a walkway (Tr. 16-19).

Mr. Allen stated that the pads normally break off at the location of the mounting bolts, and this leaves an opening 9-1/4 inches wide by 12 inches long. He believed that a missing pad would pose an injury hazard because the dozer tracks are slippery, and the operator normally takes short steps while walking across the cleats and he needs to hold onto a handrail or some part of the machine to get on off. The dozer in question can be expected to be used at night, and visibility of the tracks is poor because the dozer operates in a muddy and wet area and someone may not notice any missing pads because they may be covered or "caked" with mud. He believed that a slip or fall off the machine would result in "lacerations, strains, sprains, fractures, different things" (Tr. 23). He confirmed that dozer

operator Bill Bice lost 3 days of work when he slipped on a broken cat pad and received a back injury.

Mr. Allen stated that he based his unwarrantable failure finding on the fact that the respondent knew the pads were broken because the condition had been reported and recorded in the record book. Although replacement parts were ordered, the respondent continued to use the dozer with the broken pads instead of removing it from service until it could be repaired, and this did not comply with section 77.404(a). Mine management gave him no reason for not installing the cat pads on May 17 or 18, and replacement could have been achieved by removing and replacing four bolts. He confirmed that management was aware of Mr. Bice's injury because it promptly reported the incident to MSHA (Tr. 24).

On cross-examination, Mr. Allen stated that the operator's controls on the right side of the cab would hinder his exit from that door and that the manufacturer put two exit doors on the machine "in case of an emergency." He confirmed that a missing pad would leave an opening 9-1/2 wide by 12 inches long by measuring a pad which was on the machine. He also confirmed that the accident report concerning Mr. Bice reflects that he lost 1 day of work, and that weekends are not counted as workdays (Tr. 26).

Mr. Allen confirmed that he cited a violation of 77.404(a), because he believed that the two half-broken cat pads on the cited dozer rendered the machine unsafe to operate, and that the respondent should have immediately removed it from service once it knew the pads were broken (Tr. 26). He stated that the cat pad on the cited dozer is approximately 36 inches wide, from left to right, and that after counting the number of pads on a print of a D-7 dozer, he determined that there are 72 pads on the machine. He agreed that there could be a minimum of 77 pads on a dozer, but did not believe that the cited dozer had more than 77, but he did not count them (Tr. 29).

Mr. Allen confirmed that he has operated a D-7 dozer and he described the enclosed glass operating cab. He stated that the dozer is normally mounted from the back, and that the terrain where the machine is operated has some effect on whether or not the pads break. He believed that a dozer operator would not necessarily look for any broken pads, and he has not observed any employee exit from the cab onto the track and jump off the machine (Tr. 33). If an operator observed a broken pad, he could move the machine so that the broken pad is contacting the ground prior to dismounting, or he could use the other door. He confirmed that each operator is responsible "to a certain extent" for his own safety when he is mounting and dismounting the machine (Tr. 34).

Mr. Allen defined "unwarrantable failure" as "an unsafe condition or practice that the operator knew about or should have known about" (Tr. 35). He determined that the violation was an unwarrantable failure because Mr. Richards, the foreman in charge, knew about the condition of the dozer for a week, and that the surface superintendent, Richard Haught, also knew about the condition. Mr. Allen confirmed that he did not see or measure the broken pads because they had already been replaced at the time the order was issued (Tr. 36).

Mr. Allen stated that unless the dozer has been parked or cleaned up, it is normally slick because it operates in wet materials, and that a certain portion of the mud which adheres to the tracks is discharged because the machine is designed to do this (Tr. 48). He confirmed that getting on and off a dozer is hazardous and that an operator should be cautious and use "the grab bars" on the machine (Tr. 53).

Delbert Barnett, testified that he has been employed by the respondent as a mobile equipment operator for approximately 7 years. He operates a dozer at the coal refuse area where "it is the type of refuse which is real mucky" and black in color. He was aware of the injury to Mr. Bice when he fell through a pad on a dozer, and he confirmed that in 1989, there were problems with broken bolts on the pads. Complaints were made to management, but no action was taken until Mr. Bice was injured, and management then began repairing the pads. The safety department met with the operators and instructed them that no one was to operate dozers if a pad was broken off, and he was never required to operate a dozer with broken pads. However, the operators were required to operate the dozers when it was known that they were loose. He acknowledged that it was difficult to detect a loose pad unless one actually stepped on it, and when a loose pad was discovered, the foreman was notified, and he was supposed to contact a mechanic to fix it (Tr. 59-62).

Mr. Barnett identified exhibit P-4-E, as copies of equipment operator's checklists which he has filled out and left to be picked up by management. He identified a May 16, 1989, checklist which he filled out and it notes that "two pads broke, left side," and confirmed that he gave it to foreman Jim Richards, but that Mr. Richards took no action to repair the machine that day (Tr. 63). Mr. Barnett also confirmed that he made a notation on the form that the "pads was broke off the tracks" and that he "almost fell through the broken pads," and he further explained this incident (Tr. 64-67). He believed that missing cat pads pose a risk to him because when he is working on slopes or benches he should not have to worry about "stepping and falling through something" (Tr. 67). He stated that it is much easier to walk if there are no missing pads, and that at times, the tracks are so muddy that he cannot see the pads and that its "real

slippery" and "that is why we have so many hand bars on it to hold yourself as you're getting up on the machine" (Tr. 68).

Mr. Barnett stated that the cited dozer was operated "around the clock," and that he has operated it in the dark once or twice in the past year, and the only lighting was on the front and back of the machine. There are times when he cannot exit from the right side of the machine, and he uses the left side track for checking the machine oil, transmission, and water level at the start of the shift, and his gauges during the shift (Tr. 70). He uses the right exit of the machine more than the left because a parking brake on the left side is "a hassle" (Tr. 72).

Mr. Barnett explained that the problems with the pads began when the respondent decided to weld the mounting bolts to keep them from breaking and to save time replacing the bolts. However, the pads were crystallized when they were welded by a contractor, and most of them have been replaced to their original factory condition (Tr. 73).

On cross-examination, Mr. Barnett stated that he has always reported broken pads to management, and that his reports are left on a desk to be picked up by the foreman. He stated that he can observe the pads as they move around when the machine is operating, and can see any broken pads once the machine is moving (Tr. 74-80). He confirmed that the machine oil and water must be checked from the left side, and that the fuel is checked from the right side (Tr. 81). He confirmed that he can use the right side to exit the machine, or sometimes can move the machine forward to avoid broken pads, if he is aware of them (Tr. 83-84). He denied that he has ever jumped off a machine, and he has never observed anyone do so (Tr. 85).

Mr. Barnett confirmed that Mr. Dobbs, who is with the respondent's safety department, has instructed the dozer operators not to operate any dozers with broken pads, but that Mr. Dobbs told them this after the violation in this case was issued, and not before (Tr. 86). He also believed that the safety department stated that dozers with broken pads would be withdrawn after Mr. Bice was injured, but before Inspector Allen came to the mine (Tr. 86).

In response to further questions, Mr. Barnett stated that he had observed the broken pads which he had reported on the May 16, 1989, checklist during the shift, but that the respondent took the position that broken pads were not against the law and that "it wasn't no safety issue for us to run the machinery" with broken pads. He stated that "the company told us that we had to run them with broken pads," and that after Mr. Bice was injured, "they started shutting the machine down and fixing the pads" (Tr. 89). He could not recall why he did not report any broken pads on his checklist report dated May 17, 1989, and was not sure if

they had been repaired by that time (Tr. 90). He considered a dozer with broken pads to be unsafe when he had to use them as a walkway, checking his machine, or dismounting (Tr. 94). He confirmed that he would leave the machine from the right or left side, depending on where it would be parked, and whether there were any obstructions present (Tr. 95).

Dave Kincell confirmed that he has been employed by the respondent as a dozer operator for 7 years, and that he operates a dozer in the refuse area. He was aware that Mr. Bice hurt his tail bone a couple of times when he slipped off a dozer (Tr. 98). He was also aware of pad problems in the spring of 1989, when the pads were coming loose and the respondent decided to have them welded (Tr. 99). He confirmed that mine management instructed the dozer operators not to operate any dozer with a broken pad, and he believed that this statement was made after Mr. Bice was injured and before Inspector Allen issued the violation in this case (Tr. 100).

Mr. Kincell believed that missing cat pads pose a risk to him as the dozer operator, particularly before daylight during the winter when he cannot see any broken pad on the machine walkway. He stated that he can see one-third of the pad from his operator's cab, and that the pads are hard to walk on when they are wet and slippery, even if none of them are missing or loose (Tr. 101). At times, the mud is packed on the pads and "you wouldn't know it was there until you stepped on it or the mud fell out of it" (Tr. 101). He did not believe it was practical for him to remember if a pad is missing and act accordingly, because he is concentrating on operating his machine and not the pads (Tr. 103).

Mr. Kincell confirmed that the oil on a D-7 dozer is checked from the left side, and that he has worked as a mechanic and has repaired the pads. He believed that anyone can change the pads with the proper tools, and if the bolts were not required to be burned off, a pad can be replaced in 20 minutes, or in 35 to 45 minutes if the bolts had to be burned off. Such repairs are made by mine employees or contractors at the mine (Tr. 105).

On cross-examination, Mr. Kincell confirmed that Mr. Richards, Mr. Dobbs, and others told the dozer operators that they were not to operate the dozers with broken or chipped pads, and that this was said during a safety meeting the morning following Mr. Bice's injury. He stated that "they said if you get on your machine and you checked it out and it had a broken cat pad, notify them and they will find you something else to do until it was fixed, or it wouldn't run like that" (Tr. 108). He acknowledged that he can exit from the right side of the dozer, but that he cannot see the front and sides of the dozer tracks from the cab because the view is obstructed by a hydraulic tank and fender (Tr. 108-110). Mr. Kincell confirmed that he is more

careful in mounting and dismounting a dozer when operating under wet and slippery conditions (Tr. 111).

Mr. Kincell confirmed that he fills out an operator's checklist on a daily basis, and has reported broken dozer pads "quite a few times" (Tr. 113). He stated that he has operated a dozer knowing that the pad is broken if he knew that management would repair or replace it within "the next hour or so," but has refused to operate a machine when he knew that there were no replacement pads available, or he had to operate the machine on a slope (Tr. 113, 122-123). He conceded that he is responsible to watch out when climbing on a dozer or using the walkway (Tr. 114).

Bill Bice testified that he has been employed by the respondent as a mobile equipment operator for 10 years and operates a D-7 dozer. He confirmed that he was injured on March 2, 1989, when he stopped the dozer to obtain some oil and while leaving the machine he stepped into a hole created from a partially broken track pad, and strained his back when his foot went through the hole (Tr. 129; exhibit P-4-D). He confirmed that he had previously slipped on a track pad and broke his tail bone 3 to 4 years ago. There was nothing wrong with the pad, but it was slippery and his feet went out and he fell (Tr. 131).

Mr. Bice stated that management called him at home when he was injured on March 2, 1989, and informed him that dozers were not going to be operated with broken pads, and the following week or so, this was confirmed by the safety department during a safety meeting with equipment operators (Tr. 132). He confirmed that the cited dozer which prompted Inspector Allen's inspection had a broken pad, and he considered a broken pad to be a risk or hazard to him (Tr. 133-134).

Mr. Bice stated that it is not always easy to see whether a pad is broken because of poor ground conditions or lighting, and that it is easier to leave the machine from the right side because of the brake which is located on the left side. He confirmed that he has exited the machine from both sides, but that it is normally easier for him to leave by the right door, but there are times when he leaves from the left door depending on the circumstances presented (Tr. 136).

On cross-examination, Mr. Bice confirmed that if he were aware of a broken pad and "was thinking about it" he could move the machine forward before leaving, or use the opposite door to exit. He confirmed that Mr. Richards assigned him to operate the dozer which was cited by Inspector Allen, but he was not sure of the date. He confirmed that he observed the broken pads, but that he did not make the safety complaint because he did not know the pads were broken until a day after the complaint was made when he came to work. He believed that half of the pad was

broken off, and stated that there is a fender over half of the pad along the cab of the dozer, and that he would step on the fender and onto the track and would normally walk to the back of the machine to dismount (Tr. 139).

Mr. Bice confirmed that prior to the violation in question he operated a dozer with broken pads, and that this condition does not render the machine inoperable and it would still have traction. He could not recall whether he has ever jumped off a dozer, but has observed other operators jumping off. He agreed that a dozer operator is responsible for being careful while mounting and dismounting a dozer, and that his usual practice is to use the grab bars on the back of the machine (Tr. 141). He did not believe that he was instructed not to use the cited dozer after the order was issued, but he was not sure (Tr. 141).

Respondent's Testimony and Evidence

Frederick L. Ware, Field Service Mechanic, Beckwith Machinery Company, was called as a witness out of turn by the respondent at the conclusion of the hearing of May 1, 1990, in another docket involving these same parties. He testified that he is a journeyman and master mechanic with 23 years of experience, and he has worked on and operated D-7 dozers. He recalled working on a D-7 dozer with broken pads at the mine between May 19 and 23, 1989, and he identified a copy of a work order dated May 19, 1989, (exhibit R-2-1). The order reflects that he replaced three broken pads, and he believed that they were broken on the inside of the rail, but he was not sure (Tr. 197). He confirmed that the upper portion of the D-7 dozer tracks is utilized as a walkway for the operator to mount and dismount and it is the only way one can get on the machine. The operator usually mounts the machine from the front because there are fenders on the back end and the handrails are on the front. He identified exhibit R-2-C as a photograph of the dozer.

Mr. Ware stated that it would be difficult for the dozer operator to see a broken pad on that portion of the track which is on the ground, but that he could see the portion of the track which is not hidden by the ground. He confirmed that the operator can see the front portion of the tracks from inside the cab, but not that portion directly under him (Tr. 199). He confirmed that the pads are properly attached to the D-7 dozer by bolts, and that the respondent welded the bolts so that they do not vibrate as an added safety feature or precaution. He stated that there are 38 pads on each side of the dozer, and that this is a standard track. Some dozers have extended roller frames which can accommodate two more pads on each side (Tr. 200).

In response to a question as to whether or not two half-broken pads would render the D-7 dozer unsafe to operate "in

any way as far as traction" is concerned, Mr. Ware responded as follows (Tr. 201-202):

> Q. Mr. Ware, in your opinion, would two half-broken cat pads, would that render this piece of equipment unsafe and unable to safely operate in any way as far as traction?
>
> A. We're talking about the operation of the machine?
>
> Q. That is correct.
>
> A. No, it wouldn't.
>
> Q. There is no way this would render this piece of equipment unsafe?
>
> A. No. There is nowhere it states in any of our books a broken pad is a reason for not operating a machine, as far as operation of the machine is concerned.
>
> Q. And two half-broken cat pads would not render the tracks loose, or you would not lose (sic) traction in any way?
>
> A. No.

On cross-examination, Mr. Ware confirmed that "anybody can bolt on a track pad," and that the pads were welded on the dozers to prevent the bolts from loosening. He did not believe that the heat generated by the welding process affected the pads in any way, but that some pads which were welded "underneath on a pad to the link" caused a break problem. He could not recall whether the pads that he repaired had this problem (Tr. 204). He confirmed that "there are different things on different sides you have to look at on this machine at times." He stated that "I think the right track is to refuel. Maybe to check the oil from the right side. I don't know" (Tr. 204). He believed that a broken pad would be visible to the operator during the daytime, but not at night (Tr. 205).

In response to further questions, Mr. Ware stated that depending on the terrain, it is not unusual for D-7 dozer pads to break occasionally, and that the track pads are 32 inches extra wide and have a tendency to break on the outside regardless of who makes them or how they are installed (Tr. 205). The primary function of the pads is to provide traction (Tr. 206).

Delbert Linville, respondent's refuse supervisor, testified that he is a master electrician and has mine foreman's papers. He explained the terrain at the refuse pile and confirmed that it consists of coal waste which is always wet and very slippery. In

his opinion, two half-broken pads on a D-7 dozer would not render it unsafe to operate, and such a condition would not affect the tracks, and the loss of traction would be minimal (Tr. 146). He believed "that a man getting on or off the machine should pay particular attention to how he is stepping and where he is stepping" (Tr. 148).

Mr. Linville stated that in his 27 years of experience he was unaware of any serious injuries involving broken pads on a dozer, and was not aware of any orders ever being issued by MSHA for such a condition, or for half-broken pads or any other reason (Tr. 150-151). He stated that the major purpose of the pads is to provide traction for the machine, and that they are not designed for a walkway (Tr. 151). He confirmed that night lighting at the refuse pile is provided by a portable light plant, and there are six to eight lights on each dozer, and although the lighting on the machine may not be adequate when an operator initially mounts it, once he turns the machine lights on, "he can see fine" (Tr. 152).

On cross-examination, Mr. Linville confirmed that although the pads are primarily used for traction, the only way for an operator to reach the cab would be to "step on one to get up there." He stated that it might take 4 days to repair pads if they were not in stock, but he indicated that they are stocked and that the supplier is located 15 to 18 miles from the mine (Tr. 156). He confirmed that he was not the foreman when the order was issued, and that he never had two broken pads on a dozer and let it go for 4 days without repairing it (Tr. 156). He confirmed that a dozer operator may have to use both tracks to perform certain maintenance services (Tr. 157).

Mr. Linville considered broken pads to be a normal wear and tear item, and stated that "in due time we would replace them, in a timely manner. If we didn't have them in stock, then we had to buy it or order it and then replace it" (Tr. 159). He confirmed that in the past he would not have shut a machine down for broken pads. He was not aware of any inspector citing a machine when he observed a broken pad, nor was he aware of any inspector inspecting the pads on a dozer and say anything about them (Tr. 159). He did not consider the machine with a broken pad that Mr. Bice stepped through to be in an unsafe condition because he believed that Mr. Bice should "try to get off as easy as he can, as safe as he can," and that he should have been looking and able to see the broken pad (Tr. 160).

Petitioner's Testimony and Evidence (Order No. 2944318)

MSHA Inspector Spencer Shriver confirmed that he conducted an inspection on May 24, 1989, in the company of Mr. Dobbs and miner's representative Pat Grimes. Referring to a sketch of the cited area, he described the parts, supplies, and other materials

which he observed in a crosscut on the intake escapeway, including water and muddy holes approximately 1 foot deep. The water holes were not bridged or being pumped, and he concluded that all of the accumulated materials, including the holes, obstructed the escapeway and constituted a violation of section 75.1704.

The inspector believed that the cited standard requires that an escapeway be maintained in such a condition so as to allow travel by miners, including disabled persons who may be carried out on stretchers. He stated that he had to climb over the materials in the crosscut, and he believed that in an emergency, injured or disabled miners, as well as miners assisting those who may be injured, would be exposed to a danger of falling while attempting to travel through the obstructed area. He also believed that the slippery and muddy waterholes obstructed the escapeway, and presented a slip and fall hazard, including drowning. Miners would also have difficulty reaching some of the self rescuers stored in the area because they would have to climb over the accumulated parts and materials (Tr. 169-175).

Mr. Shriver stated that if an emergency were to occur, and miners had to use the obstructed escapeway, particularly while carrying out any injured miners, it would be reasonably likely that an injury would occur. In the event of a longwall dust ignition, a fire on a track locomotive, or a major disaster, smoke would course through the area and would affect visibility. If an injured miner attempting to travel the escapeway where the water holes were located was unaware of the holes, he could slip and fall and conceivably be drowned or knocked unconscious out (Tr. 177-178).

Mr. Shriver stated that longwall foreman Larry Morgan admitted that he knew that the escapeway was impeded and informed him that the midnight crew had knocked down the stopping in the crosscut to prepare the changing of the escapeway. He stated that Mr. Morgan explained that the respondent's policy is to initially clear any existing obstructions, then knock down the stopping, and hang check curtains. Mr. Shriver also determined that a supply scoop had difficulty travelling over a 2-foot dropoff at one of the water holes, and that a chain had been used over a 3-day period to pull the scoop over the hole. He concluded that the supplies and materials in the crosscut had been there since approximately 8:00 a.m. on the day of his inspection, and that the water hole had been there for 2 or 3 days. He concluded that "it had been there a relatively long time, and I consider it to be a serious violation" (Tr. 179-181).

Mr. Shriver stated that he had previously visited the longwall area on a "prestart" inspection and informed the respondent of the hole which had a 3-foot "stepup" and that a ladder or steps should be installed. When he returned on May 1, 1989, two bags of rock dust were in the hole but they were broken and "of

no consequence," and he cited the condition. He informed the respondent of a possible problem with the escapeway and that additional attention should be given to it so that it did not become unpassable. He further stated that Mr. Morgan admitted that he was aware of the situation "but just hadn't really got around to having it cleaned up." Under all of these circumstances, Mr. Shriver concluded that the violation was an unwarrantable failure (Tr. 182).

Mr. Shriver confirmed that some of the bricks and blocks from the stopping which had been knocked out by the midnight shift had been removed, and that three curtains had been hung. He observed no work being performed to remove the accumulated materials, and the longwall was in operation. Mr. Shriver believed that the material was being "warehoused" back in the crosscut when the stopping was still intact, and he confirmed that at that time, that location was not a designated escapeway and the material did not have to be cleaned up. Once the stopping was knocked out to reroute the escapeway, it became an escapeway "at that precise moment," and it was required to be free of debris (Tr. 186).

Mr. Shriver also believed that the waterhole in the intake escapeway entry constituted "unwarrantable conduct" because he was informed that it had been there for several shifts and that men were seen pulling a scoop out of the hole for 2 or 3 days using a chain over the top of some roof bolts. He observed the rusted and broken bolts, and concluded that the water hole had been there for several shifts. During this time, the hole was in the escapeway, and the escapeway was being re-routed to the area where the stopping had been knocked out. Since the escapeway had to be walked weekly, and since the scoop was there, and it required an electrical inspection, he concluded that mine management should have known that the hole was there (Tr. 192).

On cross-examination, Mr. Shriver confirmed that his initial gravity finding that it was reasonably likely that a fatality would occur, was subsequently modified to "permanently disabling" during an MSHA conference that he normally does not attend (Tr. 196). He also confirmed that there are several miles of escapeways on the section, and that self rescue devices are stored all along the working faces and it would not be necessary to use the ones near the obstructed escapeway in question (Tr. 196).

Mr. Shriver confirmed that when he encountered the three miners in the dinner hole who advised him about the water holes, they told him that they were informed by their supervisor to clean up the escapeway once the ventilation was moved up (Tr. 198). He also confirmed that there are other available escapeways out of the section other than the one that was being re-routed (Tr. 200). He agreed that there are no regulations establishing any time limits for a section supervisor to move the

ventilation or clean up an escapeway once he arrives on the section (Tr. 201).

Mr. Shriver confirmed that there was a pump located in the track entry, and a 2-inch line was installed over the water hole. However, the pump was not working, and he was told that it was inoperative since at least the morning of his inspection. He concluded that the area was a "natural sump area" and that the water drained to the area of the hole (Tr. 204).

Mr. Shriver stated that the partially obstructed escapeway constituted a significant and substantial violation, because the presence of the "three different sets of obstructions" which he found could reasonably likely result in injuries and that if a person "was disabled himself or assisting a disabled person, there could be further injury to his injury" (Tr. 204). He confirmed that he climbed over the accumulated material "with some care and great difficulty," and although there was a walkway present, the area was still obstructed with materials. He agreed that there were three escapeways on the section, namely, at the intake, track, and belt, and that the other escapeways can be used in an emergency (Tr. 205). He also agreed that self rescuers are available along the face where the longwall operator and shield men would be working (Tr. 206). With regard to four visitors who were on the section, Mr. Shriver confirmed that they were required to be hazard trained by the respondent, and he was informed that they had all been trained (Tr. 208).

With regard to his prior citation at the 3-foot "stepup" location, Mr. Shriver stated that he discussed it with the respondent during his April pre-start inspection, and when he returned on May 1, rock dust bags had been thrown in the hole for someone to step on, and some effort had to be made to address the problem. He confirmed that he advised the assistant longwall coordinator at that time that "you best be getting a grip on this escapeway situation" (Tr. 222).

Patrick Grimes testified that he is employed by the respondent as a mechanic and serves on the union mine safety committee. He confirmed that he accompanied the inspector on May 24, 1989, and the parties agreed that his testimony concerning the conditions cited by the inspector would be the same as the inspector (Tr. 228). Mr. Grimes confirmed that the stopping had been knocked down on the previous shift and that the miners in the dinner hole confirmed that they were assigned to clean up the accumulations and were not busy doing other work (Tr. 229). Mr. Grimes stated that foreman Larry Morgan informed them that he was aware of the water, that a water pump was present in that area, but Mr. Grimes did not know whether Mr. Morgan knew that the pump was not operating. Mr. Grimes stated that the escapeway had been used to bring supplies to the section and that a scoop had been pulled through the hole (Tr. 231).

On cross-examination, Mr. Grimes stated that the mine pumps millions of gallons of water a day, and that the water hole was approximately a foot deep. Mr. Morgan informed him that the water was being pumped from the hole, that the stopping had been knocked out on the midnight shift, and that the ventilation had been moved up, but nothing had been done to clean up the accumulated materials (Tr. 234).

Respondent's Testimony and Evidence

Larry Morgan, section supervisor, testified that he was the supervisor on the longwall section on May 24, 1989, when the inspector issued the order. He confirmed that the shift began for him at 9:30 a.m., and that he instructed his crew to move the ventilation and help clear the walkways. Referring to a mine map, exhibit R-5-A, Mr. Morgan identified the location of the alleged obstructed escapeway, and he stated that once the stopping was knocked out, he could observe the escapeway, and he confirmed that it was partially obstructed. He stated that there was a 30-inch walkway through the area, that "you could walk through it," and there were no blocks in the walkway (Tr. 247). He first learned that the escapeway was partially obstructed "after we knocked the stopping out for the ventilation move" (Tr. 247). Although he believed that establishing ventilation and cleaning up walkways are both important, he would first establish the ventilation to keep any gas off the face and then address the walkways (Tr. 248).

Mr. Morgan confirmed that he observed the cited water and mud condition one block outby when it was brought to his attention by the inspector. He stated that the location of the hole was in a low part of the heading, and the water drains into the hole. A pump was installed to pump off the water, and a scoop had traveled over the area. The pump was pumping when the inspector came to the area, but it was not pumping efficiently (Tr. 250). He could not recall whether the inspector asked him whether the pump was effectively draining off the water, and when he informed the inspector that he had instructed his crew to clear the walkway, the inspector said "that's how it was whenever he come in and that's the way it's going to be" (Tr. 251).

Mr. Morgan did not believe that any miner was exposed to a hazard at the time of the inspection, and he received no complaints from any miners regarding the alleged hazardous condition of the escapeway or the water. When he learned that the pump was not working, he requested that a pumper be sent to the section to check it, and prior to this time the pump was adequately pumping the water. He described the hole as "slope like" and "a low place," and that it was not a hole that anyone could fall into (Tr. 252).

On cross-examination, Mr. Morgan stated that other than a notation as to when he arrived on the section, he had no other notes concerning the cited conditions. He confirmed that he did not fire boss the water hole, noticed that there was a pump on the section, and knew that the hole existed, but did not know when he first became aware of it or how long the pump had been there (Tr. 254). He was aware that a scoop was used to bring materials to the section up the escapeway, but was not aware that any vehicles got stuck in the hole (Tr. 255).

Mr. Morgan stated that the walkway was off to the left side, and he disagreed with the testimony of the inspector and Mr. Grimes that they had to actually walk over the accumulated materials. He confirmed that he made no notes or drawings and that his testimony is based on his recollection. He denied that he had to step over anything when he walked the area, and he believed that anyone who was disabled in an emergency could safely pass through the area. He confirmed that he did not observe the materials when he fire bossed at 8:50 a.m., because the stopping was still in place at that time and the materials were on the other side of the stopping (Tr. 257-258).

In response to further questions, Mr. Morgan stated that there are four escapeways on the section, and he identified them as the main, track, belt, and return escapeways, and that "the others" were not obstructed and the men could have gone out the other three escapeways (Tr. 263). After the stopping was knocked out, the materials behind it had to be moved with a scoop, and if they were to remove the materials before knocking out the stopping, the materials would have to be carried out by hand because the scoop could not get around to the area. He was aware of back injuries resulting from people carrying heavy materials in the mine (Tr. 264).

Mr. Morgan admitted that a scoop could have reached the area where the materials behind the stopping were located, and that any handling of the materials by hand would be limited to moving them out of the way so that they could be loaded on the scoop and moved to another location, and that the materials would not be hand-carried out of the section (Tr. 264-267). He was not aware that all of the accumulated materials cited by the inspector were behind the stopping until it was knocked down. When asked whether he was surprised that the materials were there, he stated that "I didn't realize there was that much there" and was not aware of "all of it" (Tr. 269). He stated that while there was a clear walkway to the left side of the area, the walkway had not been established as such, and that he was in the process of doing this when the inspector arrived. He conceded that none of the material had been removed before the inspector saw them (Tr. 269-270).

Mr. Morgan stated that he instructed his crew to clean up the materials during the first part of the shift after the stopping was knocked out, and that "whenever we move up, we just automatically knock out stoppings" (Tr. 273). He assumed that the materials were moved to the location in question with a scoop "and then hope to get them out of the mine" (Tr. 273). He stated that the inspector was mistaken when he testified that he (Morgan) told him that the stopping in the crosscut between the track entry and the intake escapeway was the one that was knocked out by the night shift, and that the stopping knocked out by the night shift was the belt stopping (Tr. 274).

Inspector Shriver was recalled, and he testified that it was his understanding through his conversation with Mr. Morgan that the stopping between the track and the intake entry had been taken down by the night shift, and that during this conversation, he, Mr. Grimes, Mr. Dobbs, and Mr. Morgan were all looking into the area where the accumulated materials were located, and that this occurred at approximately 11:45 a.m. Mr. Morgan told him that the night crew had knocked the stopping down, and that he had assigned men to clean it up (Tr. 281).

When asked whether there could have some confusion over which stopping was taken down by the night shift, Mr. Shriver stated as follows (Tr. 286):

> THE WITNESS: Well, both stoppings were done, and the one that we were discussion had the accumulation of parts and junk behind it, and we were all standing there looking at it, and Mr. Morgan --
>
> JUDGE KOUTRAS: Well, it becomes critical because if it was knocked out the midnight shift, there may have been an hour or two interval in there where -- you obviously believed it was done at midnight. You felt that between that time and the start of the day shift they should have had it cleaned up.
>
> THE WITNESS: That's right.
>
> JUDGE KOUTRAS: If it was knocked down shortly before you got there, then certainly they didn't have enough time to clean it up. Do you follow?
>
> THE WITNESS: Yes.

On cross-examination, Mr. Shriver confirmed that he did not specifically ask Mr. Morgan which stopping was knocked down by the night shift because "we were standing there looking at this area" (Tr. 286). He also confirmed that Mr. Morgan did not ask him why he was issuing the order or indicate to him that he had just knocked the stopping down, and that Mr. Morgan stated "the

stopping was knocked down by the midnight and we hung the ventilation curtains" (Tr. 288). Mr. Shriver stated that he did not ask the men on Mr. Morgan's shift who informed him that they were assigned to clean the area whether or not they had knocked down the stopping (Tr. 289). He also did not ask Mr. Morgan whether they had just knocked the stopping down (Tr. 290).

Wesley Dobbs testified that he is employed in the respondent's safety department as an accident prevention officer, and he confirmed that he arrived on the section at approximately 11:00 a.m. on the day of the inspection and was with the inspector and Mr. Grimes. After confirming that they were on the intake escapeway, the inspector told him that "there could be a problem" and Mr. Dobbs left to get Mr. Morgan. When they returned, the inspector informed Mr. Dobbs that he was issuing a section 104(d)(2) order for obstruction of the walkway to the intake, and at that point Mr. Morgan informed the inspector that he had removed the intake stopping and had installed a check curtain (Tr. 298). Mr. Dobbs identified the two stoppings in question, and stated that Mr. Morgan informed the inspector that he had removed the stopping between the intake and track entry, and Mr. Dobbs surmised that the midnight shift had removed the belt and track stopping (Tr. 299-300).

Mr. Dobbs stated that there is a priority for removing stoppings, and that the belt and track stopping has to be removed first so as to avoid warm air and dust in the loading area (Tr. 301-302). If he were advancing the face, he would remove that stopping first, but he could not recall the inspector asking Mr. Morgan which stopping he removed. The inspector informed him (Dobbs) that he was issuing the order because of the obstructions on the walkway and that people could not pass through (Tr. 303). Mr. Dobbs observed the cited conditions, and he stated that the materials were on the right side and that there was a 30-inch opening on the left side which he measured with a tape, and that the area was only partially obstructed. He believed that a miner could walk through the opening and that the inspector himself walked through it and he is a "large man" (Tr. 305).

Mr. Dobbs confirmed that he observed the water in the intake escapeway and he described the location as a "low place in the entry." He also observed an area along the left rib where it appeared that "the scoop had been trying to push some dirt, or something, so that the dirt was up on the left rib where persons, that you could see, had been walking on that dirt going up the intake" (Tr. 306). The water was draining to the low spot, and a pump was functioning and pumping water, but because of a problem with the bearings, it was "not pumping as it should be" (Tr. 306).

On cross-examination, Mr. Dobbs stated that when he discussed the order with the inspector after it was issued, he did

not give the inspector the impression that the stopping had been knocked out on Mr. Morgan's shift. He recalled that Mr. Morgan gave that impression to the inspector, but that he (Dobbs) had no underground notes to confirm this, and that the only notation he made underground was in reference to the walkway opening that he had measured (Tr. 311-312).

Mr. Morgan was recalled, and he confirmed that during a ventilation move, the belt and track stopping would be removed first to keep the face ventilated and to avoid gas on the face (Tr. 315). He confirmed that when he was discussing the matter with the inspector, they were standing in the track entry near the location where the accumulated materials were observed (Tr. 316).

Inspector Shriver was recalled, and he stated that he did not see Mr. Dobbs make any measurements of the walkway area in question. He did not observe Mr. Morgan and Mr. Dobbs walk through the area unimpeded, but did not know whether they may have done so out of his presence (Tr. 317). He agreed that it was quite possible that Mr. Dobbs and Mr. Morgan had one stopping in mind, and that he had another one in mind at the time of their discussion underground (Tr. 320). He also agreed that the belt and track stopping should have come down first, and assuming that it was taken down by the night shift, he would be looking at the other stopping when he arrived on the section, but that Mr. Morgan did not tell him that his shift had removed any stopping (Tr. 321).

Findings and Conclusions

Fact of Violation - Order No. 3117868, 30 C.F.R. 77.404(a)

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.404(a), for operating a dozer with two broken "cat" or track pads. The cited standard provides as follows: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The issue presented here is whether or not the evidence establishes that the broken dozer pads in question placed the machine in an unsafe condition while it was being operated. If it is found that the dozer was in an unsafe condition, section 77.404(a), would require it to be removed from service immediately. In defense of the violation, the respondent relies on the testimony of its two witnesses who were of the opinion that the primary purpose of the pads is to provide traction for the dozer, and that operating it with two partially broken pads is not unsafe.

The respondent's characterization of Mr. Ware and Mr. Linville as "expert witnesses" is inaccurate. I have reviewed the transcript and find that these witnesses were not offered or accepted as "experts." The record reflects that Mr. Ware has 23 years of experience as a journeyman and master mechanic, and he has serviced and operated D-7 dozers. However, I take note of the fact that when he was describing the servicing aspects of the machine, he "thought" that the right track was used to refuel the machine, and that "maybe" it was used for checking the oil, but did not know. If he were an "expert," one would reasonably expect him to know with more certainty the locations where this work would be performed.

With regard to Mr. Linville, he is a certified electrician with 27 years of experience "working with or around heavy equipment." He confirmed that he was not the foreman when the citation was issued, and I find nothing in his testimony to indicate that he has ever personally operated a D-7 dozer or personally performed any maintenance work on one. Under the circumstances, I have not considered Mr. Ware or Mr. Linville as experts, and cannot conclude that their testimony is entitled to any greater weight than the other witnesses who testified in this case.

In response to a question as to whether he believed that the operation of a dozer with two half-broken pads would render the machine unsafe to operate, Mr. Ware responded "no." However, he went on to explain his answer, and stated that there was nothing in his "books" (I assume he was referring to some kind of an operation manual), to suggest that a broken pad is a reason for not operating the machine. He further qualified his answer when he stated "as far as operation of the machine is concerned," broken pads would not loosen the tracks or affect their traction. The thrust of Mr. Ware's testimony focuses primarily on the operation of the machine, rather than the safety implications of broken pads.

Mr. Linville was of the opinion that dozer tracks are not designed to be utilized as a "walkway," and that their primary purpose is to provide traction. He believed that two half-broken pads would result in a minimal loss of traction, and would not render the machine unsafe to operate. Mr. Linville's view of the safety hazards concerning a dozer which is operated with broken pads, and his opinion that operating a machine in that condition is not unsafe, may be summarized by his statements that a dozer operator should watch where he is stepping, and that Mr. Bice's injury, which occurred when he stepped through a hole created by broken track pads, could have been avoided if he were looking where he was walking.

Mr. Ware agreed that the "upper portion of the track" on a D-7 dozer is utilized as a walkway for the operator to mount and dismount the machine, and stated that the use of the tracks "is<<PCITE, 12 FMSHRC 1648>>about the only way you can get in" the machine. He also conceded that a broken pad would not be visible at night. Although he stated that an operator "usually"

mounts the machine from the front, the machine operators who testified credibly in this case indicated that they would mount and dismount the machine from either side, depending on the prevailing conditions, and used the tracks to reach the operator's compartment or to perform preshift and onshift servicing such as refueling or oiling, or to check the transmission or water levels.

Mr. Linville conceded that the only way a dozer operator can reach the operating cab of the machine is to step up and on the tracks, and that the machine lighting may not be adequate for an operator operating the machine at night when he initially mounts the machine, and before he has an opportunity to turn on the lights.

I conclude and find that the dozer tracks, including the pads, are and integral and functional part of the machine, and that the tracks and pads were used by the operators to facilitate the mounting and dismounting of the machine, as well as for servicing the machine as required. Even though the tracks and pads may have been designed to provide machine traction, their regular and normal use by the operators in the manner described may not be divorced from the safety requirements found in section 77.404(a).

The respondent's assertions that the inspector did not view the cited conditions, was not an expert, and should have cited another standard if he believed that the broken pads presented a stumbling or tripping hazard are not persuasive. The issue is whether or not the broken pads rendered the machine unsafe within the meaning of section 77.404(a), and whether there is a preponderance of credible and probative evidence to support a violation.

Dozer operator Barnett, who had recorded the cited broken pads on his operator's checklist, testified and noted that he "almost fell through the broken pads," and he believed that missing pads pose a risk to his safety because he wanted to concentrate on the operation of his machine when he is working on the slope and bench areas, and did not wish to be distracted by worrying about any broken pads. He testified that he used the dozer tracks to service the machine, and that he mounted and mismounted the machine from both sides.

Dozer operator Kincell believed that missing or broken pads posed a risk to him, particularly during the winter season before daylight when he cannot see any broken pads on the track walkway. He also testified that the tracks are inherently dangerous when they are wet and slippery, and that when the mud from the refuse area where he operates his machine adheres to the tracks, he

would be unaware of a broken pad unless he stepped on it or the mud fell out of it. He also believed that it is impractical to expect him to recall whether a pad is broken, particularly when he is concentrating on operating the machine. Mr. Kincell confirmed that he has worked as a mechanic and has repaired dozer pads.

Dozer operator Bice testified that he strained his back when he stopped his machine to oil it and stepped into a hole created from a partially broken pad while he was attempting to leave the machine. Mr. Bice confirmed that 3 or 4 years earlier, he slipped on a slippery track pad which was otherwise in good condition, and broke his tail bone. He believed that a broken pad posed a risk or hazard to him, and that it is always not easy to see a broken pad because of the ground conditions and poor lighting. He also confirmed that he used the tracks on both sides of the machine as a means of exiting the machine depending on the circumstances presented.

Having viewed the equipment operators in the course of their testimony, I find them to be credible witnesses. After consideration of all of the testimony presented in this case, I conclude and find that the testimony of the equipment operators who operated the D-7 dozers clearly establishes that the broken pads on the cited dozer rendered it unsafe to operate, and that the respondent's failure to immediately remove it from service when the condition was discovered and reported constitutes a violation of section 77.404(a). Further, the fact that no other inspector had previously cited broken pads as a violation did not estop the inspector in this case from making such a finding. See: King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (June 1980); Midwest Minerals Coal Company, Inc. 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983); Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Tenth Circuit's Affirmance of the Commission's decision at 5 FMSHRC 1400 (August 1983).

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. Accordingly, the violation issued by the inspector IS AFFIRMED.

Fact of Violation - Order No. 2944318, 30 C.F.R. 75.1704

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.1704, for failing to maintain the cited intake escapeway free of obstructions so as to insure passage of miners or disabled miners. The cited standard provides in relevant part as follows:

> Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways

> which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. * * * (emphasis added).

In support of the violation, MSHA takes the position that the inspector's testimony, as corroborated by the detailed notes which he made at the time of his inspection, establishes that the intake escapeway was obstructed by the materials which he observed and inventoried in the escapeway crosscut, as well as the deep waterhole and ledge which he found in the intake entry one crosscut outby the location of the materials. Notwithstanding the respondent's testimony which contradicts the inspector's belief that the accumulated materials in the escapeway crosscut obstructed and impeded travel through the area, MSHA believes that the inspector's fully documented account of the conditions should be credited over the respondent's undocumented account of the conditions.

With regard to the waterhole, MSHA asserts that the fact that a scoop was undeniably stuck in the waterhole and had to be winched out would tend to support the inspector's conclusion that the waterhole was large enough and deep enough to prevent travel by a crawling or limping miner using the escapeway in an emergency. MSHA maintains that the intake escapeway is designated to be the most assuredly safe means of escape since the other entries (track, or belt) have equipment that may be the source of smoke or fire. Citing two decisions by Commission Judges affirming violations of section 75.1704, MSHA concludes that standing water of the depths found in the present case constitutes hazardous conditions. See: Consolidation Coal Company, 3 FMSHRC 405 (February 1981), and Mid-Continent Resources, Inc., 11 FMSHRC 2456, 2499 (December 1989).

In support of its case, the respondent argues that the requirements of sections 75.1704 and 75.1704-1(a), are not mandatory, and it cites the Commission's decision in Utah Power and Light Company, 11 FMSHRC 1926 (October 1989), in support of this conclusion. I have reviewed this decision, and for the reasons which follow, I find that it is distinguishable from the instant case and that the respondent's reliance on that decision is misplaced.

In the Utah Power and Light Company case, the operator was initially cited for a violation of section 75.1704-1, and the citation was subsequently modified to allege a violation of section 75.1704. The operator was cited with a failure to meet

the criteria by which MSHA was to be guided in approving escapeways (5 foot height requirements). Apart from the alleged failure by the operator to comply with the criteria, the parties stipulated that the cited portion of the escapeway was fully passable by all persons, including disabled persons. On the basis of these stipulations, Judge Morris vacated the citation on the ground that the criteria relied on by the inspector in support of the violation were not mandatory requirements, and that the proper test for determining the adequacy of escapeways pursuant to section 75.1704, is whether they are maintained to insure passage at all times of any person, including disabled persons.

The Commission affirmed Judge Morris' decision, and agreed with his findings that section 75.1704-1(a) does not impose a mandatory duty on a mine operator to either maintain escapeways in accordance with the subject criteria or to seek prior approval from MSHA for non-conformance with the criteria. However, the Commission, at 11 FMSHRC 1930, stated that the relevant language found in section 75.1704, was plain and unambiguous and established a general functional test of "passability" as enunciated by Judge Morris.

I take note of the fact that the Commission affirmed Judge Morris' decision in a companion Utah Power and Light Company case upholding a violation of section 75.1704, on the basis of evidence establishing that an escapeway was obstructed with loose coal and a 6-inch water line which was angled across the escapeway, resulting in tripping, slipping, and falling hazards. In his decision at 10 FMSHRC 71, 78 (January 1988), Judge Morris observed that "In an emergency, men traveling the route will need the best possible avenue of escape, and their lives may depend on how well the escapeway is marked and maintained." In his decision in Mid-Continent Resources, Inc., supra, at 11 FMSHRC 2499, Judge Morris rejected the operator's contention that miners, or miners carrying a stretcher, could pass through a 3-foot walkway on the "up-dip" side of a water hole obstructing an escapeway without coming into contact with the hole, and he stated as follows: "I reject the operator's views; escapeways can often be filled with smoke and involve confused miners. And what of a mine crawling the escapeway. Is he to somehow find a three-foot walkway on the up-dip side?"

In the instant case, the respondent is not charged with a violation of the escapeway criteria rejected by the Commission in the Utah Power and Light Company case, and the inspector did not rely on that section or the escapeway height criteria when he issued the violation. Accordingly, the respondent's reliance on that decision is rejected. I take note of my prior decision in Southern Ohio Coal Company, 11 FMSHRC 1705, 1728 (September 1989), affirming a violation of section 75.1704, which was issued at the Martinka No. 1 Mine. In that case, I concluded that

section 75.1704, contains two basic requirements, namely, (1) that an escapeway be maintained to insure passage of miners at all times, and (2) that escapeways be maintained in a safe condition. I reaffirm and adopt those conclusions as the parameters under which the application of this standard should be considered in this case. See also: Peggs Run Coal Company, 1 MSHC 1342, 1346 (1975), affirming a Judge's decision that an operator failed to comply with the standard where water and roof conditions posed difficulties and risks to disabled miners; U.S. Steel Company, 6 FMSHRC 310, 313-314 (February 1984), holding that it is imperative that escapeways be maintained in a manner that they may be available and usable to escape from hazardous conditions; and Consolidation Coal Company, 2 FMSHRC 1809 (July 1980), holding that section 75.1704 imposes an absolute duty on a mine operator to assure that escapeways are maintained in a safe condition.

In further support of its case, the respondent relies on the testimony of Mr. Morgan and Mr. Dobbs who indicated that the accumulated materials were only partially obstructing the escapeway, and that there was a clear 30-inch walkway at the left rib which was readily passable. With regard to the water hole in question, the respondent does not dispute the existence of the water or the hole and concedes that the water accumulation was present at the first outby crosscut. However, it maintains that the water was a natural condition located in a low area of the mine where water accumulated, and that it was being pumped out. Respondent also points out that a considerable amount of water is pumped from the mine and that the inspector did not dispute this fact.

Section Foreman Morgan did not dispute the existence of the conditions. However, he testified that there was a 30-inch walkway through the left side of crosscut area which would allow someone to walk through, and he observed that nothing was blocking the walkway. He conceded that the walkway had not been established as such, claimed that he was in the process of establishing the walkway when the inspector arrived on the section, but conceded that none of the materials had been removed before the inspector observed them.

Mr. Morgan disputed the testimony of the inspector and Mr. Grimes that they had to step over the accumulated materials, and denied that he had to step over any of the materials when he walked the area. In his opinion, a disabled miner could safely pass through the area in an emergency. He confirmed that he did not observe the accumulated materials when he initially fire-bossed the section because they were located behind the stopping which was still intact, but conceded that the escapeway was partially obstructed, and that he observed this condition after the stopping was knocked down. He further confirmed that after knocking down a stopping, his first priority would be to

establish the ventilation, and he would next attend to and clean up any walkway accumulations.

Mr. Morgan confirmed that he made no notes or sketches at the time of the inspection and that his testimony was based on his "recollection." When asked if he was surprised about the existence of the materials behind the stopping before it was knocked down, Mr. Morgan responded "I didn't realize there was so much there." Although he indicated that he had instructed his crew to clean up the materials during the first part of the shift when the stopping was knocked down, the respondent called no crew members to testify about any cleaning up of the materials.

Mr. Dobbs testified that the materials accumulated behind the intake escapeway stopping were on the right side as one looked into the area from the entry, and that he measured a 30-inch opening or walkway on the left side. He characterized the area as "partially obstructed," and stated that the inspector walked through the opening. Mr. Dobbs also observed the water in the intake escapeway, and he described it as a "low place in the entry" where the water was draining to the low spot, and although he believed that a pump in that area was functioning, he conceded that it was "not pumping as it should be." He also described an area along the left rib where he believed that a scoop had attempted to push some dirt, and that people had walked on the dirt going up the intake. Mr. Dobbs confirmed that with the exception of a notation which he made with respect to his measurement of the 30-inch "walkway," he made no other notes at the time of the inspection.

The testimony of Inspector Shriver is documented by his detailed notes and sketches made at the time of his inspection, and the information recorded by the inspector with respect to the accumulated materials and the accumulated water and water hole were detailed in the order which he issued. The inspector's comprehensive testimony detailing these conditions was corroborated by one of the respondent's employee's (Patrick Grimes), a member of the mine safety committee who accompanied the inspector during the inspection.

Although Inspector Shriver confirmed that there was a walkway present in the area where the accumulated materials were discovered, he stated that the area was still obstructed with the materials and that he had to climb over them with care and difficulty. He did not observe Mr. Morgan measure the walkway opening, nor did he observe Mr. Morgan or Mr. Dobbs walking freely through the opening, and I take note of the fact that Mr. Morgan conceded that the so-called "walkway" had not been established as such and that none of the materials had been removed before the inspector observed them. I find both Mr. Grimes and Inspector Shriver to be credible witnesses, and their testimony is corroborated by the detailed notes made by the inspector at the time of

the inspection. I credit their testimony over the testimony of Mr. Dobbs and Mr. Morgan, and reject their contention that the walkway presented a clear and unobstructed passageway through the accumulated materials.

I further find the inspector's testimony regarding the existence of 30 foot area of water and mud 12 inches deep, and a water hole approximately 40 feet long, rib-to-rib, 12 inches deep and with a drop-off of approximately 2 feet, to be credible, and I reject Mr. Dobbs' suggestion that there was a clear passageway along the rib to allow clear passage of people at this location. I accept as credible the inspector's belief that the intake escapeway area which was obstructed by the accumulated materials, and the areas obstructed by the slippery and muddy waterholes or areas, presented potential hazards to any injured or disabled miners, including miners assisting them, in the event they had to use the escapeway in an emergency situation.

Section 75.1704, requires that an intake escapeway be maintained to insure passage at all times, and that it be maintained in a safe condition and properly marked. Although the escapeway was properly marked and designated, I conclude and find that it was not maintained in a safe condition, nor was it maintained to insure passage at all times by those miners who may have had a need to use it in an emergency to escape from the mine. Although there were other available escapeways, the cited intake escapeway in question was not maintained as required by section 75.1704. Accordingly, I conclude and find that MSHA has established a violation by a preponderance of the credible and probative evidence adduced in this case, and the contested violation IS AFFIRMED.

Significant and Substantial Violations

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).

Order No. 3117868 - 30 C.F.R. 77.404(a)

I have concluded and found that the broken dozer pads cited by the inspector rendered the cited dozer in an unsafe condition while it was operated in that condition. Inspector Allen testified credibly that the inability of an operator to see a broken pad because of poor visibility, or because of the presence of caked mud, would likely result in a slip or fall off the machine, and that should this occur, it would result in injuries such as lacerations, strains, sprains, or fractures. He also believed that such occurrences were likely in view of the fact that the dozer operates in the refuse area of the mine which is muddy and wet, and that even in cases where the pads are not broken, the tracks are slippery as a result of operating under such conditions.

The evidence establishes that dozer operator Bice suffered a strained back when he stepped through a hole created by a partially broken pad while leaving the machine. Dozer operator Barnett testified that he nearly fell through a broken pad, and both he and the other equipment operators testified credibly that

a broken pad exposed them to hazards. Under the circumstances, I conclude and find that the partially broken pads in question constituted a condition which would reasonably likely contribute to an injury, and that it was reasonably likely that the injury would be one of a reasonably serious nature. Accordingly, the inspector's significant and substantial (S&S) finding IS AFFIRMED.

Order No. 2944318 - 30 C.F.R. 75.1704

Inspector Shriver testified credibly that the cited obstructed escapeway areas in question exposed miners, as well as disabled miners, to tripping, falling, or slipping hazards while attempting to travel the obstructed escapeway, and that miners would have difficulty reaching some of the self rescuers stored in the area because they would have to climb over some of the accumulated materials to reach them. He believed that any miners using the obstructed escapeway in an emergency, particularly while carrying out any disabled miners on stretchers, would reasonably likely suffer injuries. In the event of a mine disaster, their visibility would be affected if any smoke coursed through the escapeway while they were attempting an escape, and they could be unaware of the existence of the water and water hole and have difficulty in traveling through those areas and could conceivably be drowned or rendered unconscious if they were to fall or slip in these areas.

Although it may be true that other escapeways were provided, and they were equipped with self rescuers, and that the mine visitors in question had received training, the fact remains that the cited intake escapeway was not maintained in a safe condition, and was not maintained free of obstructions so as to permit safe travel at all times. Under the circumstances, I conclude and find that the evidence establishes that the violation was significant and substantial, and the inspector's finding in this regard 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. * * *

Order No. 3117868 - 30 C.F.R. 77.404(a)

Inspector Allen confirmed that he based his unwarrantable failure finding in this case on the fact that the cited broken pads condition was known to foreman Richards and superintendent Haught, and that the dozer was permitted to continue to operate and was not taken out of service. The evidence made available to the inspector at the time of his inspection reflects that the broken pads were reported by the dozer operator on May 16, 1989, and that Mr. Richards acknowledged that this was the case. New

replacement pads were ordered and received on May 17 or 18, but were not installed on the dozer until May 19, 1989. The inspector confirmed that mine management gave him no reason for not installing the pads when they were received, and he believed that the pads could have been readily installed by removing and replacing four bolts.

Mr. Richards and Mr. Haught did not testify in this case. Mr. Ware identified a copy of a work order dated May 19, 1989, which reflects that he replaced three broken pads on the dozer, and he testified that he performed the work between May 19 and 23, 1989. Mr. Linville, who was not the foreman at the time the order was issued, considered broken pads to be normal "wear and tear" items, and although he contended that broken pads would be replaced "in due time," he confirmed that in the past he would not shutdown a machine because of broken pads.

Dozer operator Barnett testified credibly that he reported the broken pads condition on May 16, 1989, when he filled out an operator's checklist, and gave this information to Mr. Richards. Even though Mr. Barnett made a notation on the form that he "almost fell through the broken pads," Mr. Richards apparently took no action to repair the machine that day or to take it out of service. As a matter of fact, a "safety contact" made by Mr. Richards with an employee on May 19, 1989, reflects that Mr. Richards was aware of the two broken pads on the cited machine as of that date, and he simply cautioned the employee to insure that the pads were down when he stopped his machine, and instructed him to leave the machine from the right side (exhibit R-2-J). Mr. Richards' failure to take the machine out of service or to timely repair the pads corroborates Mr. Barnett's unrebutted testimony that prior to Mr. Bice's injury, the respondent permitted or instructed the equipment operators to operate the dozers with broken pads.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the inspector's high negligence and unwarrantable failure findings were justified. I find nothing of record to mitigate the respondent's failure to timely repair the dozer or take it out of service when the condition was first reported to mine management. The respondent knew of Mr. Bice's injury some 2 or 3-months earlier, and its accident prevention officer Dobbs filed an accident report which specifically points out that Mr. Bice strained his back when he stepped into a hole "created from a partially broken track pad" (exhibit P-4-D). Mr. Barnett's report of May 16, 1989, to Mr. Richards informed him that the cited dozer had two broken pads, and the report contained a notation by Mr. Barnett that he "almost fell through broken pads" (exhibit P-4-E). Rather than taking immediate or more timely action to correct an obviously hazardous condition which it was clearly aware of, mine

management not only permitted the equipment to continue to operate with broken pads, a condition which was the proximate cause of Mr. Bice's injury and Mr. Barnett's "near miss," it expected the operators to continue operating the equipment in that condition. Under all of these circumstances, I conclude and find that mine management's failure to act was unjustified and inexcusable, and constitutes aggravated conduct. The inspector's unwarrantable failure finding is therefore AFFIRMED.

Order No. 2944318 - 30 C.F.R. 75.1704

Inspector Shriver's unwarrantable failure finding was based on his belief that the water hole had existed for 2 or 3 days. He observed evidence that a scoop had difficulty traveling through the hole, and he was informed that a chain was used to pull the scoop through the area for 2 or 3 days. Although he believed that the hole had been present for "several shifts," there is no evidence that he reviewed any of the shift or preshift reports to determine whether the condition had been reported. He confirmed that section foreman Morgan appeared surprised at the existence of the hole. The evidence establishes that the hole was located at a low spot where water naturally drained, that the mine released a great deal of water, and that a pump had been installed in the area as a means of controlling and pumping the water. Although the pump may not have operating at peak efficiency, I cannot conclude that the respondent ignored this condition, and the existence of the pump establishes that some effort was being made to address the problem.

With regard to the 3 foot "stepup" location, Mr. Shriver indicated that he had previously visited the area during a "prestart" inspection, and next returned on May 1, 1989, when he found that the respondent had placed some rock dust bags in the area to provide a means of crossing the "stepup." He issued a citation after determining that the bags were "of no consequence," and informed the respondent of a "possible problem" and that additional attention should be given to the escapeway. The inspector conceded that the respondent had made some effort to address this problem.

With respect to the accumulated materials which were in the crosscut area where the escapeway was being rerouted, the testimony is in dispute as to whether or not the stopping at that location had been knocked down by the previous night shift or during foreman Morgan's day shift. The inspector believed that the stopping which concealed the accumulated materials had been taken down by the night shift, and although his notes do not specifically identify the stopping, he believed it was the stopping between the track entry and intake entry. Foreman Morgan testified that the belt stopping had been knocked down by the night shift, and that his day shift knocked down the stopping which concealed the materials. If the stopping had been knocked

down by the night shift, the inspector believed that there was enough time to clean up the materials during the 2 or 3 hour interval between shifts. If the stopping were knocked down during Mr. Morgan's shift, the inspector conceded that there was insufficient time to clean up the accumulated materials.

The inspector confirmed that he did not ask Mr. Morgan whether the stopping which had concealed the accumulated materials had just been knocked down on his shift, and he made no inquiries of the miners on the shift as to whether or not they had knocked the stopping down on their shift. The inspector conceded that it was quite possible that Mr. Morgan and Mr. Dobbs had one stopping in mind, and that he had another one in mind at the time of their discussions underground, and he agreed that the belt and track stopping should have been knocked down first. Assuming that this were the case, he further agreed that he would have been looking at the other stopping, which Mr. Morgan claimed was the stopping which concealed the materials, when he arrived on the section.

The inspector confirmed that there is no time limitation with respect to the removal or clean up of accumulated materials, and given the fact that the escapeway was being rerouted, the uncertainty as to whether the stopping was knocked down during the night shift or day shift, and the fact that the respondent was establishing the ventilation on the section, I cannot conclude that the respondent was dilatory in removing the accumulated materials, or that it was aware of the materials over any inordinate period of time. Coupled with the fact that the respondent was making an effort to address the other conditions which obstructed the escapeway, I cannot conclude that the violation was the result of any aggravated conduct on the part of the respondent. To the contrary, I conclude and find that the violation resulted from mine management's inattention and failure to exercise reasonable care. Under the circumstances, 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 assessments for the violations 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-3), shows that for the

period April 26, 1987 through April 25, 1989, the respondent paid $251,000 for 1,047 violations issued at the Martinka No. 1 Mine. One-thousand and sixteen (1,016), were for violations found to be significant and substantial (S&S), and twenty-five (25) were for violations of section 75.1704. No prior violations of section 77.404(a), are noted. MSHA has not argued or suggested 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. In any event, I have considered this compliance history in the assessments which I have made for the violations which have been affirmed.

Good Faith Compliance

The record reflects that the escapeway violation was abated within 2 or 3 hours of the issuance of the order on March 24, 1989, by the removal of the accumulated materials and the building of bridges over the water accumulations. With regard to the broken dozer pads violation, the record reflects that the condition had been corrected at the time the violation was issued. I conclude and find that both violations were timely abated by the respondent in good faith and I have taken this into consideration.

Negligence

On the basis of my unwarrantable failure finding with respect to the broken dozer pads violation, which are incorporated by reference, I conclude and find that the violation resulted from a high degree of negligence on the part of the respondent. With respect to the escapeway violation, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

In view of my "S&S" findings and conclusions, which are incorporated by reference, I conclude and find that both of the contested violations were serious.

Civil Penalty Assessments

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 the proposed civil penalty assessment of $1,000, is reasonable and appropriate for a violation of mandatory safety standard 77.404(a), as stated in section 104(d)(2) Order No. 3117868, May 23, 1989. I further conclude and find that a civil penalty assessment of $675 is reasonable

and appropriate for a violation of mandatory safety standard 75.1704, as stated in the modified section 104(a) Citation No. 2944318, May 24, 1989.

Settled Violations

The parties settled three of the contested section 104(d)(2) orders in this case (Nos. 3112683, 3112684, 3118284). MSHA filed a posthearing motion pursuant to Commission Rule 30, 29 C.F.R. 2700.30, seeking approval of the proposed settlement. Order No. 3118284 was modified to a section 104(a) citation, and the proposed civil penalty assessment was reduced from $1,000 to $395. With regard to Order No. 3112684, MSHA confirmed that the respondent has agreed to accept the findings of the inspector and has agreed to pay the full amount of the proposed civil penalty assessment of $950 for the violation in question. With respect to Order No. 3112683, MSHA has agreed to vacate the order.

MSHA submitted a discussion and disclosure as to the facts and circumstances surround the issuance of the orders in question, and a reasonable justification for the settlement disposition of the violations. MSHA also submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act, and it believes that the resulting cumulative civil penalty assessment of $1,345 for the two orders which have been settled is fair and reasonable and will effectuate the purposes of the Act.

After careful review and consideration of the pleadings, and the submissions in support of the motion to approve the settlement disposition of these orders, I conclude and find that it is reasonable and in the public interest. Accordingly, the motion is granted, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay the following civil penalty assessments for the aforementioned violations which have been affirmed and/or settled in this proceeding:

Citation/Order No.	Date	30 C.F.R. Section	Assessment
3118284	05/15/89	75.220	$ 395
3117868	05/23/89	77.404(a)	$1,000
2944318	05/24/89	75.1704	$ 675
3112683	05/30/89	75.1403	Vacated
3112684	05/30/89	75.303	$ 950

Payment of the aforementioned civil penalties shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge