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

BLUE DIAMOND COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. KENT 89-258-R Order No. 3370844; 8/16/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. KENT 90-68-R Order No. 3372825; 12/11/89
	Docket No. KENT 90-79-R Order No. 3372824: 12/11/89
	Docket No. KENT 90-80-R Order No. 3372827; 12/12/89
	Docket No. KENT 90-81-R Order No. 3372371; 12/12/89
	Scotia Mine
	Mine ID 15-02055

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 90-67 A.C. No. 15-02055-03658
v.	Docket No. KENT 90-170 A.C. No. 15-02055-03669
BLUE DIAMOND COAL COMPANY, RESPONDENT	Scotia Mine

DECISION

Appearances: Randall S. May, Esq., Barret, Haynes, May, Carter & Roark, P.S.C., Hazard, Kentucky, for the Contestant/Respondent;
Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Blue Diamond Coal Company (Blue Diamond), has filed notices of contest challenging the issuance of section 104(d)(1) Order No. 3370844 (Docket No. KENT 89-258-R), section 104(d)(2) Order Nos. 3372825, 3372824, and 3372827 (Docket Nos. KENT 90-68-R, -79-R, and -80-R, respectively) and section 107(a) Order No. 3372371 (Docket No. KENT 90-81-R) at its Scotia Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $4000 for the violations charged in the above four contested "d" orders. No penalty was assessed, of course, for the section 107(a) order.

Pursuant to notice, these cases were heard in London, Kentucky on May 30, 1990 (Docket Nos. KENT 89-258-R and KENT 90-67) and August 7, 1990 (the other five). They are consolidated here for purposes of decision as they are related matters, particularly with respect to the applicability of the "d" chain.

At the hearing on August 7, 1990, Blue Diamond moved to withdraw its application for review in Docket No. KENT 90-81-R. There was no objection heard from the Secretary and thus I approved that withdrawal on the record. That proceeding is therefore dismissed without further consideration. The section 107(a) order will, of course, be affirmed.

STIPULATIONS

The parties have agreed to the following five stipulations, which I accept (Gov't Ex. No. 1):

1. The operator produced approximately 1,315,000 tons of coal at the Scotia Mine in 1989.

2. The operator employed approximately 300 workers at the Scotia Mine during the final quarter of 1989.

3. The civil penalty assessment will not affect the operator's ability to continue in business.

4. The operator has another mine of approximately the same size as the Scotia Mine.

5. The presiding administrative law judge has jurisdiction to hear and decide this case.

I. Docket No. KENT 89-258-R; Order No. 3370844

On August 16, 1989, Order No. 3370844 was issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of

1977, 30 U.S.C.   801 et seq. (the Act) and alleges a violation of the regulatory standard at 30 C.F.R.   75.220(a)(1) and charges as follows (Government Ex. No. 4):

> The approved roof control plan for the mine, revised 05-23-89, which requires that if travel is blocked from the longwall section to the tailgate entry, the miners will be notified and re-instructed regarding escape procedures in the event of an emergency, and location and availability of self-contained self-rescue devices, is not being complied with in the MMV, 040-0 longwall shear section. Access to the tailgate entry is blocked as a result of the longwall face conveyor being off center. The tailgate is located approximately 5 feet outby the solid coal rib line, and as mining progresses the crushed coal and other material is being left behind preventing access to the tailgate entry. According to the Section Foreman, Bill Vann, the miners have not been notified and instructed as required by the roof control plan.

The crux of the matter is that the inspector states that passage from the longwall face area to the tailgate entry was blocked. He maintains that coal was "stacked in" from the floor to the roof. There was no access into the tailgate entry, except a small opening up near the face of the wall, about 12 by 14 inches.

The fact that a tailgate entry is blocked does not in and of itself violate the regulations. The alleged violation herein is a failure to comply with the roof control plan. More specifically, a provision of the plan requires that where travel out of the section through the tailgate side of the longwall section is prevented by a ground failure, the operator must take several steps. Among them are to notify the affected miners that the travelway is blocked and re-instruct these miners regarding escapeways, escape procedures and the availability and location of self-contained self-rescue devices. The complete list is contained on page 15, item 6 of Government Ex. No. 2.

This case turns on the condition precedent to the above roof control plan provision. Did the operator have a duty to perform these functions? Was the tailgate entry blocked? The answer depends on the assignment of credibility to the various witnesses. The Secretary's witnesses state it was definitely blocked. The operator's witnesses state just as definitely that it was not.

Inspector Davis, who wrote the order, of course testified to the effect that with the exception of the small opening alluded to earlier, the tailgate entry was blocked and travel out into the tailgate entry was therefore precluded. However, his

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testimony is weakened somewhat by his own admission that he made this observation from a distance of approximately fifteen feet away, at shield 141. There are 144 longwall shields, each five feet wide, to hold up the roof across the face area.

Photographs of the area in question introduced by Blue Diamond through the testimony of Mr. Childers, who was and is the longwall coordinator, depict the impossibility of seeing the clearance the company says was there from too far away. Mr. Childers testified using one of these photos at Tr. 147:

> A. Okay. This photograph here is inside the shield line looking out into the tailgate entry.
>
> MR. LUCKETT: And that is marked BD Exhibit 5.
>
> (BY MR. MAY) So for the judge's edification, Mr. Childers, if one were 15 feet back up in here, this pretty clearly shows the view how one would not be able to determine access into the tailgate entry if you didn't go any further?
>
> A. If you didn't go any further to look at, you couldn't, because the way the shields are, the shield range--they start out here, and they're about 6 inches thick. They go right on down to maybe a foot thick at the back ends of 'em. If they have any material at all on top of them, they are lower than the roof line. And when the shear cuts out and piles the coal up, if you look--just stand back there and look straight down like you're looking out into the tail entry, you'll just see a pile of coal. If you don't go to the end of the shields, you can't see over the top of the coal that's been piled up.

Mr. Tommy Engle, a field office supervisor and a former underground coal mine inspector, also testified on behalf of the Secretary. He also, like Inspector Davis, was on the subject longwall section on August 16, 1989. He states that coal had accumulated in the area of the tailgate entry to the point it had totally blocked passage into the tailgate entry. The coal was packed from the mine floor to against the roof, with a slight opening near the roof at the end of the longwall face. This opening was approximately twelve by twelve inches. This testimony is perfectly congruent with that of Inspector Davis.

There is some discrepancy in Mr. Engle's testimony, however, as to where he made this observation from. At trial, he emphatically stated that he went up to the last shield, up to the accumulation and even tried to push his way through the accumulation. However, his deposition testimony, given on May 2, 1990, was to the effect that he stopped 14 feet from the area

where MSHA alleges the tailgate entry was blocked, stood there for three or four minutes evaluating whether he could see over the top of the accumulation and then turned around and went back towards the headgate entry. It was while he was there in that position that he determined that the coal was stacked to the roof and the travelway was totally blocked off (Engle Deposition Tr. 6-7). Therefore, I find Mr. Engle's trial testimony on this point to be impeached by his prior inconsistent statement.

Mr. Billy Vann, a longwall production foreman, testified that he took a spad measurement and a methane reading out in the tailgate entry at approximately 1:45 a.m. on August 16, 1989. At that time he had between 2 and 3 feet of clearance between the loose coal and the roof going into the tailgate entry. Mr. Vann was again at the tailgate exit area at approximately 6:00 a.m. At that time, only one pass or cut-out of coal had been done by the longwall. Vann stated that at this time the tailgate entry was not blocked and was accessible, there still being approximately 2 to 3 feet of clearance.

The subject order was issued at 8:35 a.m. and Vann testified that he informed Inspector Davis at 8:45 a.m. that the tailgate entry was not blocked in his opinion but that Davis said he thought it was and turned and asked Supervisor Engle his opinion. Engle stated that he felt the same way as Davis even though all of this conversation took place at approximately 8:45 a.m. in the headgate entry area and Engle had not even been to the tailgate entry area yet. He didn't go there until approximately 9:15 a.m.

Mr. Vann also opined that if one merely stopped at shield 141 and looked as Inspector Davis did, the bottom of the shield would have been just about even with the loose coal and the clearance would not have been visible from there.

James S. Owens was a repairman on the longwall section on August 16, 1989. He, along with fellow repairman, Rex Conley, did repair work in the tailgate exit area until approximately 4:00 a.m. that morning. They both saw Bill Vann go over into the tailgate entry to take his measurements and methane check that morning. They testified to the effect that Vann had no trouble going into the tailgate entry and that it was not blocked. They also both indicated that they likewise would have had no difficulty getting in the tailgate entry if there had been any need.

Donald Walker was the tailgate shear operator on the longwall on August 16, 1989. Walker testified that one pass or cut-out was made by the longwall the entire third shift and he was right at the tailgate entry area at approximately 6:00 a.m., after the one cut-out or pass had been made. At this time and until 8:00 a.m., Walker stated the tailgate entry was never

blocked and that it was accessible without the necessity of shoveling.

Ricky Campbell was the headgate shear operator on the longwall on August 16, 1989, working the third shift. Campbell first went to the tailgate exit side of the longwall at approximately 6:00 a.m. At that time one pass or cut-out had been done and Campbell stated he could see that the tailgate entry was not blocked and he could have gotten over into the entry.

Sam Foutch was a shield puller working the day shift (7:00 a.m. to 5:00 p.m.) on August 16, 1989. Foutch explained that a shield puller advances the shields on the longwall as the pan advances. On August 16, Foutch worked on pulling shields 96 to the end of the tailgate, or shield 144. He was performing this work at approximately 9:00 a.m., around shield 144 next to the tailgate entry, and he states that the tailgate entry was not blocked at this time. This is some 25 minutes after the order was written. In fact, Foutch stated that he shoveled loose coal and rock off the pontoons of the shields over into the tailgate entry and thus, he knows the tailgate entry could not have been blocked. This witness also stated he saw Bob Childers go over into the tailgate entry at approximately 9:00 a.m. to get a measurement to see how the longwall was running.

Doyle Cornett was a production foreman on the longwall face August 16, 1989, working the day shift. Cornett first got to the section around 8:00 a.m, accompanied by Inspector Davis. He reaffirmed that Davis only went as far as shield 141 and did not go on down to the last shield by the tailgate entry which would have been 15 to 18 feet away in his estimation. Cornett also opined that one could not see behind the shields into the tailgate entry from that position.

James Robert (Bob) Childers was the longwall coordinator on August 16, 1989, working the day shift. Childers was accompanied underground at approximately 7:15 a.m., by Inspector Davis and Supervisor Engle. He stayed at the headgate area of the longwall with Engle while Davis and Doyle Cornett travelled toward the tailgate exit area at approximately 8:00 a.m. Between 8:45 a.m and 9:00 a.m., Childers went to the tailgate exit area himself after the order had been issued. Childers explained that he went to check the tailgate entry himself because he had been told that Inspector Davis didn't go all the way to the end of it. He stated that his own examination revealed that the tailgate entry was not blocked and was accessible and he even went out into the entry himself through a 2 foot by 2 foot clearance.

While heading back toward the headgate area after his examination he ran into Engle coming down the panline. Together they went back toward the tailgate entry. Engle stopped at

shield 141 according to Childers and never went further. Childers stated that Engle never was out of his sight during this time and that Engle did not go to the tailgate entry and try to push his way through as Engle has testified to.

Before leaving the stand, Childers also reiterated the almost universally held position that one would not be able to determine if the tailgate entry was blocked or not from shield 141 or 15 feet away because of the obstructed view and line of sight.

Based on my thorough review of this trial record once again, I find the evidence to be simply overwhelming in favor of Blue Diamond's position on the ultimate factual issue. I likewise make the credibility choices in their favor and I find as a fact that the tailgate entry was not blocked; it was at the time the order was issued, open and passable, accessible to the affected miners.

It therefore follows that Blue Diamond did not violate 30 C.F.R. 75.220 (a)(1) as charged and Order No. 3370844 will accordingly be vacated.

II. Docket Nos. KENT 90-68-R, -79-R AND -80-R; Order Nos. 3372825, 3372824 and 3372827

All three of these orders were issued pursuant to section 104(d)(2) of the Act. However, because I informed the parties that I was going to vacate section 104(d)(1) Order No. 3370844, the Secretary, at the hearing on August 7, 1990 moved to convert Order No. 3372824 to a section 104(d)(1) Citation, Order No. 3372825 to a 104(d)(1) Order and Order No. 3372827 would remain a (d)(2) Order. This would have the effect of re-starting the "d" chain on December 11, 1989.

Order No. 3372824 alleges a violation of the mandatory standard found at 30 C.F.R. 75.400 and charges as follows (Government Exhibit No. 3):

> Loose coal and fine dry coal dust have been permitted to accumulate 3" to 9" inches in depth, (as measured with a standard measuring tape) in the Nos 2, 3 and 4 entries of the MMV 032-0 beginning at the section loading point and extending inby for a distance of approximately 180 feet. The accumulations are intermittent and the coal has been crushed and pulverized by the 105C Joy Shuttle Cars during haulage operations.

Inspector Davis was again the inspector who found this violation and he testified to the effect that he observed

accumulations of loose coal and fine, dry coal dust in the roadways from rib to rib in Nos. 2, 3 and 4 entries. He measured these accumulations and found them to be 3 to 9 inches in depth beginning at the section loading point and extending inby for a distance of approximately 180 feet. These black accumulations were intermittent and were pulverized by the shuttle cars traveling in the roadways.

He also testified that the danger presented by these accumulations is a mine fire or a mine explosion. Furthermore, where you have accumulations of combustible materials, there is always the possibility that you will have a methane ignition in the face area and these accumulations would cause the ignition to probably spread or propagate into other areas of the mine, depending how fine, dry and pulverized the accumulations are. There was a lot of electrical equipment on the section at the time as well. A power center was located just 30 feet from the accumulations. He felt that serious injuries were reasonably likely to occur to the section crew such as smoke inhalation in the event of a mine fire, which occurrence he also believed to be reasonably likely. He further opined that if you had a methane ignition which propagated into a mine dust explosion, then it could be fatal. Therefore, he believed the violation was "significant and substantial".

He also marked the negligence as "high". He felt this was an "unwarrantable" violation as well as "S & S". He estimated the accumulations had been there for at least two production shifts based on the pulverized condition of the accumulations and their depth. However, when directly asked on cross-examination, he had to admit that he did not know how long the accumulations had been in the roadways.

Inspector Carlos Smith corroborated Davis' factual testimony regarding the description of the accumulations, estimating the depth as between 8-10 inches of loose, pulverized coal. But he likewise couldn't say for sure how long these accumulations had existed, but he estimated that they had been there for a shift or two.

There is no doubt that a violation of 30 C.F.R.   75.400 existed as the inspectors described it. Furthermore, I also believe the violation was "significant and substantial" (S & S).

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 (August 1985), 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).

In this regard, I fully credit the unrebutted and essentially unopposed testimony of Inspector Davis on the issues of gravity, seriousness and S & S.

In several relatively recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission has 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." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company,

9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

Although I find the allegation at bar to be an S & S violation of the mandatory standard charged, I cannot go along with the inspector's alleged finding of "unwarrantability." His finding is based almost solely, if not entirely on the measured depth of the accumulations. He himself admits he doesn't know how long they were there. That is the government's only evidence on the issue of negligence and unwarrantability. I find that to be insufficient to sustain the Secretary's burden of proof on this point. Accordingly, the proposed section 104(d)(1) Citation, nee 104(d)(2) Order No. 3372824, will be modified to and affirmed as an S & S section 104(a) citation.

If Order No. 3372824 cannot be converted into a "d" citation and becomes an "a" citation, as it has, then proposed Order Nos. 3372825 and 3372827, being non-S & S allegations to begin with also become section 104(a) citations, wherein the only issues are the fact of violation and the civil penalty to be assessed, if any violation(s) is/are found.

Order No. 3372825 alleges a non-S & S violation of the mandatory standard found at 30 C.F.R.   75.316 and charges as follows (Government Exhibit No. 5):

> The approved ventilation system and methane and dust control plan for the mine, which requires that the line of permanent stopping separating the intake and return aircourses shall be maintained up to and including the 3rd connecting crosscut outby the faces, is not being complied with in the MMV 032-0 working section. The line of permanent stopping separating the Nos. 1 and 2, intake and return aircourse entries is only being maintained up to and including the fourth connecting crosscut outby the faces. The quantity of air passing through the last open crosscut outby the faces is 42,826 cfm. The maximum amount of CH_4 detected was 0.2%.

Inspector Davis testified that he observed a violation of the approved ventilation plan for the mine which requires that they (the operator) maintain the line of permanent stopping separating the intake and return air courses up to and including the third connecting crosscut outby the working faces. The line of permanent stopping providing this separation in the affected section he found was only being maintained up to and including the fourth connecting crosscut outby the faces.

The foregoing establishes a non-S & S violation to my satisfaction and after modification, section 104(a) Citation No. 3372825 will be affirmed as modified.

Order No. 3372827 alleges a non-S & S violation of the mandatory standard found at 30 C.F.R. 75.1105 and charges as follows (Government Ex. No. 7):

> An energized 480 Volt A.C. battery charger located adjacent to the return aircourse stopping line at a point approximately 20 feet inby station spad No. 15325, is being used to recharge the batteries on an Eimco coal scoop in the MMV 032-0 working section, and the battery charger is not being ventilated into the return aircourse. The newly constructed permanent type stopping located between the battery charger and the return aircourse, is not provided with a ventilation regulator, (opening) to permit direction of the air current.

Inspector Davis once again testified on behalf of the Secretary. On December 12, 1989, he found that a new stopping had been constructed in the third connecting crosscut outby the working faces to correct the previously discussed violation. However, they (the operator) had an energized battery charging station immediately in front of the stopping and had not provided a means in the stopping or a regulator to direct the air current directly into the return.

The cited regulation requires that battery charger stations be ventilated directly into the return air course. Instead, the inspector found that the air was going to the return aircourse in a roundabout way. The air was not going across the charger. There was nothing to direct it across the charger and there was no regulator in the stopping to provide a low pressure drop across the charging station, which would have been necessary in order to ventilate this charging station directly to the return aircourse.

The foregoing testimony establishes a non-S&S violation of the cited standard and after modification to a section 104(a) citation, Citation No. 3372827 will be affirmed as modified.

With regard to the civil penalty assessments herein, I am not bound by MSHA proposed civil penalty assessments, and once a penalty is contested and Commission jurisdiction attaches, my determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record developed in the adjudication of the case. See: Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd., 736 F.2d 1147 (7th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate in the circumstances of this case:

Citation No.	Date	30 C.F.R. Section	Assessment
3372824	12/11/89	75.400	$400
3372825	12/11/89	75.316	$150
3372827	12/12/89	75.1105	$100

III. Docket No. KENT 90-81-R; Order No. 3372371

Order No. 3372371 was issued pursuant to section 107(a) of the Act. Contestant filed an application for review. However, at the hearing on August 7, 1990, counsel for Blue Diamond stated on the record at Tr. 100-101 that: "[M]y client has informed me that the recommendations made pursuant to that order. . . were good ones and that they are complying with that." Therefore, he sought permission to withdraw their application for review. There was no objection and the request was granted. The order will be affirmed.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 3370844, contested in Docket No. KENT 89-258-R, IS VACATED.

2. Order No. 3372824, contested in Docket No. KENT 90-79-R properly charged a violation of 30 C.F.R.   75.400 and properly found that the violation was significant and substantial. However, the contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a section 104(d)(2) order or

as later proposed, a section 104(d)(1) citation. Accordingly, Order No. 3372824, IS HEREBY MODIFIED to a 104(a) citation, AND AFFIRMED.

3. Modified Citation No. 3372825, contested in Docket No. KENT 90-68-R, IS AFFIRMED as a non-S&S violation of 30 C.F.R. 75.316.

4. Modified Citation No. 3372827, contested in Docket No. KENT 90-80-R, IS AFFIRMED as a non-S&S violation of 30 C.F.R. 75.1105.

5. Order No. 3372371, contested in Docket No. KENT 90-81-R, IS AFFIRMED.

6. The Blue Diamond Coal Company IS HEREBY ORDERED TO PAY a civil penalty of $650 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge