CCASE:
SOL (MSHA) v. BEECH FORK PROCESSING
DDATE:
19910108
TTEXT:

~9

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 90-116 A.C. No. 15-16162-03529
v.	Docket No. KENT 90-162
BEECH FORK PROCESSING INCORPORATED, RESPONDENT	A.C. No. 15-16162-03527 Docket No. KENT 90-163 A.C. No. 15-16162-03528
	Mine No. 1

DECISIONS

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Craig S. Preece, Comptroller, Beech Fork Processing, Inc., Lovely, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed 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), charging the respondent with twenty (20) violation of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations. The respondent filed timely contests and hearings were held in Pikeville, Kentucky. The parties waived the filing of posthearing briefs, but I have considered all of their oral arguments made on the record during the hearings in my adjudication of these matters.

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.

Issues

The issues presented in these proceedings are (1) whether the cited conditions or practices constitute violations of the cited mandatory safety and health standards; (2) whether several of the cited violations were significant and substantial (S&S); (3) whether one section 104(d)(1) violation in Docket No. KENT 90-116, was unwarrantable; and (4) the appropriate civil penalty assessments to be made for the violations which have been affirmed.

Stipulations

The parties stipulated to the following (Tr. 7-8):

1. The respondent does not dispute the fact of violations in these proceedings.

2. The history of prior violations is reflected in an MSHA computer print-out (exhibit P-1).

3. The proposed civil penalty assessments for all of the violations are appropriate to the size of the mining operations conducted by the respondent.

Docket No. KENT 90-116

This case concerns one section 104(d)(1) citation and four section 104(a) citations issued by MSHA inspectors during the course of their inspections, and they are as follows:

Section 104(d)(1) "S&S" Citation No. 3369907, October 4, 1989, 30 C.F.R. 75.316 (Exhibit P-2): "The air reaching the face in the No. 2 left brk. where the 12 CM Joy continuous-mining machine was being operated could not be measured with an approved and calibrated anemometer."

MSHA Inspector Carlos Duff confirmed that he issued the citation and he described the conditions he found which prompted him to do so. He stated that he detected less than 100 cubic feet of air per minute in the cited area which had been driven to a depth of 120 feet without establishing the required ventilation of 6,000 cubic feet a minute as provided by the ventilation plan (exhibit P-3).

Mr. Duff confirmed that he detected no methane in the area but that the absence of ventilation resulted in "real dusty" conditions which created visibility problems. He stated that the

mining machine, shuttle cars, and scoops were potential sources of ignition and in the event of any methane liberation while coal was being cut at the face there was a hazard of a fire or explosion in the event the methane reached an explosive level.

Mr. Duff confirmed that the cited condition was corrected within 20 minutes and that the violation was timely abated. Although a ventilation curtain had been installed in the area, and the respondent had a waiver allowing it to maintain the curtain 20 feet from the face, no ventilation had been established for the 120 feet area which had been driven.

Mr. Duff stated that the superintendent, or foreman, Danny Osborne, was a certified foreman and that he was required to monitor the ventilation on the section and check for methane every 20 minutes. Mr. Duff stated further that given the fact the entry had been driven for 120 feet, the lack of ventilation was not created during the shift and had to exist for at least two shifts and that Mr. Osborne did not deny that he was aware of the cited condition.

Mr. Duff confirmed that he did not check the mining machine, and he conceded that in the event the methane monitor were functioning properly and there were no permissibility violations, the gravity would be less than he found (Tr. 9-26).

Section 104(a) "S&S" Citation No. 3158954, December 18, 1989, 30 C.F.R. 75.1103-4 (Exhibit P-4):

> The automatic fire sensor and warning device system was not properly installed on the No. 4 and 5 belt flight. The fire sensor line ended approximately 120 feet outby the No. 5 tail roller. The fire sensors on the No. 4 and 5 belts were installed at or below the bottom belt.

MSHA Inspector Foster I. Justice confirmed that he issued the citation and he described the cited conditions. He stated that the fire sensor devices were in fact installed along most of the belt line but that they were hung from a wire rope and were hanging below the belt rather than at an elevation above the belt. He stated that the foreman, Gary Sumpter, advised him that the fire sensors throughout the mine were installed in a similar fashion but that no one had previously cited the condition or said anything about it. Mr. Justice confirmed that because of the 11 foot coal height in the mine, the respondent had a problem installing the fire sensors at elevations above the belt because of the roof and mining height conditions.

Mr. Justice stated that no sensors were installed for the 120 feet at the area outby the tail roller, but they probably would have been when the belt was extended. He agreed that the

mining height and roof conditions did present an installation problem and he conceded that the condition was probably observed and not cited during prior inspections. He confirmed that the condition was timely abated and that the respondent repositioned the sensors above the belt lines.

Mr. Justice stated that since heat and smoke rises, the location of the sensors below the belt presented a hazard in that there would be a delay in alerting the miners on the section in the event of a mine fire and they could have been "smoked out" before the sensors detected any smoke. He confirmed that the belt drive motors, stop-start boxes, and electrical wiring on the belt line were potential sources of ignition. Any belt slippage or stuck rollers could have resulted in a belt fire and the eight miners on the section would have been exposed to smoke inhalation and carbon monoxide. The belt was running coal at the time he observed the conditions, and Mr. Sumpter acknowledged that he was aware of the fact that the sensors were installed below the elevation of the belt (Tr. 28-42).

Section 104(a) "S&S" Citation No. 3158955, December 19, 1989, 30 C.F.R. 70.501 (Exhibit P-6):

> Based on the results of a supplemental noise survey conducted by MSHA on 12/18/89, the noise standard has been exceeded in the environment of the roof drill operator, occupation code 014 on the 001-0 MMU. The results obtained from a personal noise dosimeter, Mark I, property No. 108221 showed a C/T value of 169.5%. A hearing conservation plan as required by 30 C.F.R. 70.510 shall be submitted to MSHA within 60 days from the date of this citation.

Inspector Justice confirmed that he issued the citation and he explained that he conducted a noise survey on the designated roof drill operator occupation, used an approved dosimeter, and found that the noise exposure exceeded the required level. He stated that the respondent is required to monitor the noise exposure from the equipment to insure compliance.

Mr. Justice stated that he conducted five additional noise surveys and found the noise exposure to be in compliance in those instances. He confirmed that one of the miner operators surveyed was furnished with personal hearing protection with an EAR-plug device, but that he did not determine whether the cited drill operator had such a device. He conceded that any hearing damage for excessive noise would occur over a protracted period of time. The violation was timely abated after a subsequent test determined no excessive noise level exposure for the drill operator

and the respondent timely submitted a hearing conservation plan (Tr. 42-51).

Section 104(a) "S&S" Citation No. 2982728, January 17, 1990, 30 C.F.R. 77.216-3(a) (Exhibit P-7): "The slurry impoundment has not been examined and the instrumentation monitored by a qualified person at intervals not exceeding seven days. The last examination recorded in the book was dated 1-8-90. The last piezometer readings recorded in the book were dated 12-22-89."

MSHA Inspector Robert H. Bellamy testified that he is a mining engineer, has a degree in mining engineering from the University of Kentucky, and that he is a specialist in dam impoundments which are created for disposal of mine refuse. He confirmed that he issued the citation after determining that the coal fines slurry dam impoundment constructed and maintained by the respondent was not being examined at least every 7 days and that the piezometer instrument used to monitor the water level in the impoundment was not being monitored and checked every 7 days as required by the standard.

Mr. Bellamy confirmed that an inspection book was maintained at the mine but that it did not reflect that the required inspections and monitoring of the impoundment was being conducted and recorded. He stated that plant superintendent James Chitti was one of the three individuals qualified to inspect and monitor the impoundment and that Mr. Chitti advised him that he was "caught up in other work" or was "too busy" to perform these tasks.

Mr. Bellamy stated that the purpose of the inspection and monitoring of the impoundment is to detect any hazards which may be developing and whether or not the impoundment is being properly constructed. He described the impoundment as a 130-foot high dam covering 900 acres and confirmed that the respondent was continuing to build it up by placing refuse materials on it and that a bulldozer is at the site at all times for this purpose. He confirmed that people were living below the location of the impoundment, and that in the event of a failure of the impoundment, they would be at risk.

Mr. Bellamy confirmed that at the time of the inspection the impoundment was within the established safety factor, and that the respondent had generally been in compliance in the past with the required inspections and monitoring cycles (Tr. 52-68).

Section 104(a) "S&S" Citation No. 2982729, January 17, 1990, 30 C.F.R. 77.216(d) (Exhibit P-8):

> The maintenance of the slurry impoundment is not being implemented in accordance with the plan approved by the district manager in that drainage from the right

> abutment (looking downstream) has been allowed to erode the downstream outslope of the embankment. The erosion has accumulated at the toe, partially blocking the underdrain outlet.

Inspector Bellamy confirmed that he issued the citation after observing that material at the toe of the impoundment embankment had eroded and washed down the embankment blocking the underdrain (Exhibit P-10, sketch of violative condition). The purpose of the underdrain is to relieve any excess water accumulated under the embankment, and as a result of the blockage caused by the blocking of the underdrain, the water had accumulated and was seeping from the area above the drain. If the blockage had continued, the water would not flow through the underdrain and it will accumulate in and saturate the embankment and may eventually lead to a failure of the embankment and the dam. Mr. Bellamy confirmed that the impoundment was not being maintained in accordance with the approved plan (Exhibit P-9; Tr. 68-77).

Docket No. KENT 90-162

This proceeding concerns five (5) section 104(a) citations issued on December 6, and 18, 1989, and they are as follows:

No. 3367667, 30 C.F.R. 77.216(d) (S&S) (Exhibit P-11).

> The construction of the slurry impoundment is not being implemented in accordance with the plan approved by the district manager in that the landslide debris and loose soils are not being removed from the left abutment prior to the placement of coarse refuse.

Inspector Bellamy confirmed that he issued the citation after finding that the mine refuse material deposited on the impoundment embankment was being deposited on top of other loose soils and debris which had slid down the embankment during a prior "landslide" in the area. The landslide materials were unsuitable for compaction and should have been removed from the area before the refuse materials used to construct the impoundment were deposited. Mr. Bellamy described the area as 150 by 50 feet, and he confirmed that 1 or 2 months prior to his inspection he had discussed the construction methods with Mr. Chitti and informed him that he could remove the landslide materials as the dam was being constructed but that he could not cover it with the refuse materials used to construct the dam.

Mr. Bellamy stated that some of the landslide material had been cleaned out prior to the day of his inspection, but that he could not recall what Mr. Chitti may have said about the refuse materials which had been deposited over the landslide area which he observed. Mr. Bellamy confirmed that the failure to remove

the unstable landslide materials would cause seepage in that area and would result in a "differential settlement" of the area and a failure in that relatively small area. He did not believe that any major failure of the impoundment would have occurred at the time of the inspection but that a "worst case" scenario would be a possible failure of the embankment if the condition were not corrected. He considered the cited area to be a "weak zone" in the dam embankment. He believed that construction work on the impoundment began approximately a year or so prior to the time of his inspection. He did not know when the initial landslide in question occurred, but confirmed that he saw evidence of the slide when the dam was being constructed at an earlier time. Mr. Bellamy did not believe that the landslide itself was a threat to the impoundment (Tr. 80-89).

No. 3367668, 30 C.F.R. 77.216(d) (Non S&S) (Exhibit P-12).

> The maintenance of the slurry impoundment is not being implemented in accordance with the plan approved by the district manager in that refuse has been allowed to block the main underdrain outlet. The refuse prohibits free flow from the underdrain.

The respondent withdrew its contest with respect to this citation and agreed to pay the proposed civil penalty assessment. Inspector Bellamy confirmed that the citation is distinguishable from the prior impoundment citation which he issued (Exhibit P-8), in that the water which was backed up in the blocked underdrain was seeping through the blocked drain and was not backed up and seeping through the embankment area above the underdrain.

No. 3158951, 30 C.F.R. 75.1722(b) (S&S) (Exhibit P-13). "The No. 4 conveyor head roller was not adequately guarded a distance to prevent a person from reaching over the guard and becoming caught between the belt and conveyor head roller."

Inspector Justice confirmed that he issued the citation after observing that the guard over the conveyor head roller was insufficient to prevent someone from reaching in and contacting the pinch point. He stated that the head roller was partially guarded with pieces of metal but that it did not completely cover the pinch points. He believed that the cited condition was obvious.

Mr. Justice stated that while miners are prohibited from cleaning up, greasing, or performing other work around a moving conveyor, it is common knowledge that they do. If there is any slippage of the conveyor belt roller, it is a common practice to throw rock dust on the roller to dry it out and anyone doing this would be exposed to a hazard of getting their arm or had caught in the unprotected pinch point. He was aware of an incident at

another mine where a miner had his arm torn off when it was caught in an unguarded head roller while he was throwing rock dust into it. He also believed that anyone cleaning up or shoveling in the area could readily contact the pinch point if they were to fall into it and contact the pinch point. If this were to occur, a serious injury would result.

Mr. Justice had no knowledge that the respondent required anyone to rock dust the head roller, but it was his belief that this is done anyway regardless of any instructions to the contrary. The condition was abated at the time he next returned to the mine to terminate the citation and the head roller was protected with an adequate guard (Tr. 90-100).

No. 3158952, 30 C.F.R. 75.1722(b) (S&S) (Exhibit P-14). "The No. 4 conveyor tail pulley was not adequately guarded to prevent a person from coming in contact with the conveyor tail pulley and belt. The tail roller was guarded with a piece of belt across the back of the tail roller."

Inspector Justice confirmed that he issued the citation after observing that the conveyor tail pulley was not adequately guarded to prevent a person from contacting the pinch point between the pulley and the belt. He stated that the tail pulley was guarded with a piece of belt material or a "flap" at the back of the pulley but that it did not cover the ends or sides of the pulley at the pinch points. He did not believe that the belting material, which was not rigid and could easily be pushed aside, constituted adequate guarding.

Mr. Justice confirmed that the hazards presented by the inadequate guard were the same as those which were present with respect to the previous citation which he issued for an inadequate guard on the conveyor head roller during the same inspection (Exhibit P-13; Tr. 100-105).

No. 3158953, 30 C.F.R. 75.1715 (S&S) (Exhibit P-15). "The check-in and check-out system was not established at this mine. There was no positive identification of the persons underground who portal at the 1-A portal."

Inspector Justice confirmed that he issued the citation after determining that several miners who were working underground were not identified or "tagged" on the check-in and check-out board provided at the mine. He explained that seven miners who were assigned to work at a new mine area and who were checked in at one area were in fact working at another area, and that several miners working underground were not identified on the board as being underground.

Mr. Justice explained the required check-in and check-out system and stated that the identification tag which a miner

carries on his belt must conform to the one maintained on the board. He was aware of a prior incident at another mine where a miner who had worked a double shift had not checked in and was unaccounted for after a rock fell on him and he could not move. By the time rescuers reached him, he had died after being underground for 16 hours. Mr. Bellamy stated that miners are required to check in and out at the end of their shift in order to account for everyone who may still be underground at the end of their normal work shift (Tr. 105-114).

Docket No. KENT 90-163

This case concerns ten (10) section 104(a) citations, and they are as follows:

Section 104(a) non-"S&S" Citation No. 9979793, November 13, 1989, 30 C.F.R. 70.207(a):

> The mine operator did not take five (5) valid respirable dust samples from the designated occupation 036 on MMU I.D. 003-0, for the bimonthly period of September-October as shown in the attached Advisory No. 010, dated November 7, 1989. Four (4) valid samples were received and credited to this bimonthly sampling cycle. Management shall collect and submit five (5) valid respirable dust samples from the Designated Occupation 036 on MMU I.D. 003-0. These samples shall be received by the Pittsburgh Respirable Dust Processing Laboratory on or prior to the termination due date listed on this citation.

Section 104(a) non-"S&S" Citation No. 3364696, January 5, 1990, 30 C.F.R. 77.1109(d), which states: "A fire extinguisher was not provided for the main fan installation."

The contestant withdrew its contests with respect to Citation Nos. 9979793 and 3364696, and agreed to pay the proposed civil penalty assessments for these violations (Exhibits P-16 and P-19).

Section 104(a) "S&S" Citation No. 3364694, January 3, 1990, 30 C.F.R. 75.503: "The roof bolter being used on the 002-0 section was not being maintained in a permissible condition. When checked with an approved device, the control panel cover had an opening in excess of .006 of an inch." (Exhibit P-17)

MSHA Inspector Lewis H. KlayKo confirmed that he issued the citation after conducting a permissibility inspection of the roof bolter. He used a feeler gauge and found an opening in excess of .006 of an inch in the bolter control panel cover. This was in excess of the required permissible opening of .004 of an inch.

Mr. KlayKo confirmed that he detected no methane in the cited area. However, the roof bolter was in operation and the area was dusty. Since there is always a chance of hitting a pocket of methane in a dusty environment, a spark or an arc through the control panel cover opening could ignite the methane and the dust could contribute to a methane ignition. If this were to occur, the miners working in the area would be exposed to lost work days and restricted duty injuries.

Mr. KlayKo stated that the respondent is required to conduct weekly inspections of its electrical equipment, including the roof bolter. He believed that the cited condition should have been detected during such an inspection or through the regular maintenance of the equipment. He stated that foreman Ted McGinnis informed him that he was having problems on the section and that he had a man off sick and was behind on his electrical maintenance of the equipment. Mr. KlayKo had no reason to dispute this, and he indicated that the maintenance of the equipment was "maybe not quite up to snuff."

Mr. KlayKo confirmed that the condition was abated within 15 minutes and that he had experienced no prior problems with the respondent with respect to permissibility violations other than the citations which he issued in this case. He also confirmed that the openings which he found in all of the cited equipment probably resulted from some maintenance work where the cover panels were not tightened sufficiently after they were removed and replaced (Tr. 120-125).

Section 104(a) "S&S" Citation No. 3364695, January 3, 1990, 30 C.F.R. 75.503: "The Joy miner being used on the 002-0 section was not being maintained in a permissible condition. When checked with an approved device, the master control panel cover had an opening in excess of .006 of an inch. (Exhibit P-18)."

Inspector KlayKo confirmed that he issued the citation after checking the Joy continuous-mining machine master control panel with a feeler gauge and finding an opening in excess of .006 of an inch, which was in excess of the required permissible opening. The miner was cutting coal at the face at the time of his inspection, and it was backed out so that he could check it.

Mr. KlayKo confirmed that the hazards presented by the violation were more serious than those presented by the previous citation concerning the non-permissible roof bolter because the miner was cutting coal at the face and that a sudden release of methane could result in flame coming out of the control panel cover opening and causing an ignition which would endanger the seven men working the section.

Mr. KlayKo confirmed that he detected no methane and had no knowledge of any prior methane ignitions in the mine. He also confirmed that the violation was abated in 15 minutes and that Mr. McGinnis' explanation for the existence of the condition was the same as the one for the cited roof bolter (Tr. 125-129).

Section 104(a) "S&S" Citation No. 3364697, January 5, 1990, 30 C.F.R. 77.1605(a), which states as follows: "The Caterpillar dozer S/N 92V12890, had broken windows in both doors of the cab." (Exhibit P-20).

Inspector KlayKo confirmed that he issued the citation after finding cracks in the windows of both doors of the cited bulldozer which was pushing coal on a surface storage pile. He stated that the dozer operator was not wearing any eye protection and he believed that a sliver of glass could have flaked off the cracked glass because of the vibration of the dozer while it was operating and found its way to the eyes of the operator injuring him. He believed that any sliver or flake of glass could have fallen on the gloves of the operator and that he could have inadvertently rubbed it in his eyes.

Mr. KlayKo believed that the condition existed for "a few days" and that the foreman or the equipment operator should have observed the condition and taken corrective action. He stated that foreman Chitti offered no explanation for the condition, and Mr. KlayKo indicated that the surface areas, including the equipment, was required to be preshifted. He also confirmed that the windshield was in good condition, and that the cracked door windows were safety glass. The violation was timely abated and the respondent replaced the cracked windows (Tr. 129-135).

Section 104(a) "S&S" Citation No. 3364698, January 5, 1990, 30 C.F.R. 77.1605(b): "The International end loader Model H-90, used to spread sludge on the haul road was not equipped with adequate park brake. It would not hold when set." (Exhibit P-21).

Inspector KlayKo confirmed that he issued the citation after inspecting the cited end loader and finding that the parking brake would not hold when it was engaged and tested on a 5 to 7 degree grade. The loader was loading slag, or limestone rock and gravel, on trucks which were spreading it on a haulage road and the loader was also used to spread some of this material. Mr. KlayKo stated that the foot brakes were in good condition, and that the front bucket is often lowered to the ground to serve as an additional braking device.

Mr. KlayKo stated that the haul road was approximately 50 feet wide, and while there were other steeper grades along the road, the end loader would not be operated in those areas. He believed that the inadequate parking brake presented a hazard in

the event the operator decided to stop the loader with the engine running and got out to clear some debris from the roadway. If this occurred, the loader would roll back and possibly strike some of the trucks or the drivers who were out of their trucks while working on the roadway.

Mr. KlayKo stated that the equipment operator is required to check the brakes before operating the loader and to report any inadequate brake condition to his foreman. He confirmed that the operator of the loader informed him (KlayKo) that the parking brake was not working. Mr. KlayKo also confirmed that the equipment operator is required to make a maintenance report but that he did not check any such reports.

Mr. KlayKo stated that a possibility of an accident existed, and he confirmed that a loader operator would not normally park the machine on a grade. He also indicated that the parking brake may have malfunctioned during the course of the working shift (Tr. 135-146).

Section 104(a) "S&S" Citation No. 3364699, January 5, 1990, 30 C.F.R. 77.400(c), states as follows: "The guards on the refuse conveyor belt drive had been removed and not replaced." (Exhibit P-22).

Inspector KlayKo confirmed that he issued the citation after finding that the guards on the refuse conveyor belt drive had been removed and not replaced. He observed the guards about 3 feet from the belt which was running, but he saw no one working in the area. He stated that he had walked by the belt a day or two earlier and the guards were removed, but since the belt was not running at that time he assumed that it was down for maintenance and did not issue a citation.

Mr. KlayKo conceded that subsection (d) of section 77.400, was more appropriate than subsection (c), and without objection, the petitioner was allowed to amend its pleadings to conform to its evidence and to reflect a citation of subsection (d) rather than (c).

Mr. KlayKo stated that foreman Chitti informed him that a roller had probably been changed out and that someone had neglected to replace the guards. Mr. KlayKo believed that the belt should have been preshifted, and he believed that anyone cleaning or greasing the belt while it was running could contact the unguarded pinch points and suffer serious injuries. The guards were reinstalled the same day, and Mr. KlayKo terminated the citation when he next returned to the mine on January 8, 1990 (Tr. 146-153).

Section 104(a) "S&S" Citation No. 3364700, January 8, 1990, 30 C.F.R. 75.503: "The Joy miner being used on the 001-0

section was not maintained in a permissible condition. When checked with an approved device, the trailing cable junction box cover had an opening in excess of .008 of an inch." (Exhibit P-23).

Section 104(a) "S&S" Citation No. 3515144, January 9, 1990, 30 C.F.R. 75.503: "The roof bolter being used in the 001-0 section was not being maintained in a permissible condition. When checked with an approved device, the cover for the lights junction box had an opening in excess of .009 of an inch." (Exhibit P-24).

Inspector KlayKo confirmed that he issued the permissibility violations after checking the miner machine and roof bolter with a feeler gauge and finding openings in the miner trailing cable junction box and the roof bolter lights junction box greater than permissible. The roof bolter opening was the largest that he has ever found. He confirmed that the hazards presented by the violations were the same as the previous permissibility violations which he issued, and that the miner and bolter were both operating immediately prior to his inspecting them.

Mr. KlayKo stated that foreman McGinnis "felt bad" about the violations and corrected them immediately within 15 minutes. Mr. KlayKo confirmed that his inspection was his first inspection visit at the mine and he was not aware of any prior compliance problems at the mine (Tr. 153-158).

Section 104(a) "S&S" Citation No. 3515145, January 9, 1990, 30 C.F.R. 77.205(e), states as follows: "The steps to the parts trailer on the surface area of the 001-0 section was not provided with handrails." (Exhibit P-25).

Inspector KlayKo confirmed that he issued the citation after he observed that the steps at the parts trailer were not provided with hand rails. He stated that there were four steps leading up to the trailer interior. He believed that the steps were substantially constructed wooden steps approximately 40 inches wide and 10 inches deep. The highest step leading into the trailer was approximately 48 inches above ground level.

Mr. KlayKo believed that the lack of hand rails presented a slip and fall hazard. Miners who would visit the trailer to obtain parts could possibly slip on the stairs during the winter season if they were frozen. The ground conditions near the steps were wet and muddy and the freezing and thawing of the ground would contribute to the slipping conditions since the materials would be deposited on the steps. In the event someone slipped on the steps they would have nothing to hold onto to break their fall. If they were to slip off the stairs they could suffer a possible broken leg, back, or shoulder.

Mr. KlayKo stated that foreman McGinnis advised him that the ack of handrails was an oversight and that he would install them mmediately. The condition was corrected and handrails were nstalled on both sides of the stairway (Tr. 158-166).

Findings and Conclusions

Fact of Violations

As previously noted, the respondent has stipulated that all of the conditions and practices cited by the inspectors in these proceedings constitute violations of the cited mandatory safety or health standards, and it has withdrawn its contests with respect to three of the violations (Citation Nos. 3367668, 9979793, and 3364696). Further, the respondent has presented no testimony or evidence to rebut the credible testimony of the inspectors in support of the violations which they issued in the course of their inspections. Under the circumstances, I conclude and find that the petitioner has established all of the contested violations by a preponderance of the credible and probative evidence presented in these proceedings, and all of the violations ARE 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, (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).

In United States Steel Mining Company, Inc., 7 FMSHRC 327 (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether if left uncorrected, the cited condition would reasonably likely result in an accident or injury.

The respondent presented no testimony or evidence to rebut the testimony and evidence adduced by the petitioner in support of the significant and substantial (S&S) findings made by the inspectors. Under the circumstances, and on the basis of the credible and probative testimony presented by the inspectors, I conclude and find that with the exception of Citation No. 3364697 (broken door windows on a bulldozer), and Citation No. 3364698 (inadequate parking brake on an end loader), (Docket No. KENT 90-163), all of the S&S findings made by the inspectors with respect to the remaining contested citations and order are supportable, and these findings ARE AFFIRMED.

With regard to Citation Nos. 3364697 and 3364698, the respondent's representative argued that the cited conditions did not present any hazards or a reasonable likelihood of an injury. The same argument was made with respect to Citation No. 351545 (lack of hand-rails on parts trailer steps) (Docket No. KENT 90-163).

With regard to Citation No. 3364697, concerning the "broken" windows in both doors of the cited bulldozer operator's cab, I take note of the fact that the inspector testified that the windows were "cracked" and he was concerned that a sliver of glass could have flaked off the glass and found its way to the eyes of the operator. He also believed that a flake or sliver of

glass could have fallen on the gloves of the operator and he could have inadvertently rubbed the glass in his eyes with his gloves.

The inspector confirmed that the bulldozer windshield, which is directly in front of the bulldozer operator, was in good condition, and that the cracked door windows were constructed of safety glass. Under these circumstances, and in the absence of any evidence as to the proximity of the doors to the operator's face while seated in his normal position at the controls of the machine, I find it highly unlikely that a sliver of glass from the cracked safety glass doors would contact the operator's eyes. I conclude and find that the inspector's belief that an injury was reasonably likely is unsupported speculation, and his S&S finding is vacated. The citation is modified to reflect a non-S&S violation.

With regard to Citation No. 3364698, concerning the cited end loader with an inadequate parking brake, the inspector confirmed that the service or foot brakes which are normally applied to stop the machine while it is working were in good condition.

The inspector confirmed that the loader would not be operated in roadway areas steeper than the 5 to 7 degree grade where the parking brake was tested. He believed that there was a possibility of an accident in the event the loader operator decided to stop the loader with the engine running and left his machine to clear some debris from the roadway. However, the inspector confirmed that the loader bucket is often lowered to the ground to serve as an additional braking device, and he conceded that a loader operator would not normally park the machine on a grade.

The inspector confirmed that the loader operator informed him that the parking brake was not working. However, the inspector apparently did not question the operator about his speculative conclusion that the operator would leave his machine with the engine running on a grade to clear debris from the roadway. In the absence of any evidence that this was in fact the case, I cannot conclude that the inspector's speculation concerning the possibility of an accident supports his S&S finding. Accordingly, his finding in this regard is vacated, and the citation is modified to reflect a non-S&S violation.

With regard to Citation No. 3515145, concerning the lack of protective handrails on the parts trailer steps, I conclude and find that the credible and unrebutted testimony of the inspector supports his S&S finding, and it is affirmed.

Unwarrantable Failure Violation

In Docket No. KENT 90-116, Citation No. 3369907, issued on October 4, 1989, and citing a violation of the ventilation requirements of mandatory safety standard section 75.316, was issued as a section 104(d)(1) unwarrantable failure citation.

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

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

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

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

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

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New

International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The inspector's credible testimony, which is not rebutted by the respondent, supports his conclusion that there was little or no ventilation in the cited area which had been driven for 120 feet. Given the distance driven, with no ventilation, the inspector's conclusion that the condition existed for at least two shifts, is supportable. The respondent did not dispute the inspector's testimony that the certified foreman present in the area was required to monitor the ventilation and did not deny that he was aware of the cited condition, and indeed admitted it (Tr. 17). Although the inspector confirmed that he detected no methane present, he nonetheless found that the absence of ventilation resulted in "real dusty" conditions and that the mining machine, shuttle cars, and scoops operating on the section constituted potential ignition sources which presented a fire or explosion hazard in the event of any methane liberation while coal was being cut.

The respondent presented no evidence or testimony to rebut the inspector's findings that a significant and substantial violation existed, nor did it present any reasonable explanation for the absence of ventilation in the cited area. In addition to the inspector's testimony that the section foreman, who was with him during his inspection, admitted that he was aware of the lack of ventilation, the inspector testified that the condition could not have been created on the on-going shift, and that the lack of ventilation existed for at least two, and possibly three prior shifts (Tr. 23). He also confirmed that in order to abate the condition and establish the required amount of ventilation pursuant to the ventilation plan, three breaks had to be cut through and this work was done the next day (Tr. 24-25). Under all of these circumstances, I conclude and find that the inspector's credible testimony supports a finding of aggravated conduct and his unwarrantable failure finding and citation IS AFFIRMED.

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

The parties agreed that the respondent employs approximately 100 miners, and that its annual production for 1989 was approximately two-million tons of coal. The annual production for the No. 1 Mine was one-million tons. The respondent's representative confirmed that the respondent operates eight mines and that the

No. 1 Mine consists of an underground mining operation, a surface plant, and an impoundment. The respondent stipulated that payment of the proposed civil penalty assessments in all of these proceedings will not adversely affect its ability to continue in business.

In view of the foregoing I conclude and find that the respondent is a large mine operator and that the payment of the civil penalty assessments that I have made for the violations which have been affirmed will not adversely affect its ability to continue in business.

History of Prior Violations

The MSHA computer print-out listing the respondent's compliance record for the period October 4, 1987, through October 3, 1989, reflects that the respondent paid civil penalty assessments in the amount of $18,742, for 160 violations, 44 of which were "single penalty" non-S&S violations. With the exception of one section 104(d)(1) order, one combined section 104(a) citation and 107(a) imminent danger order, and five combined section 104(a) citations and section 104(b) orders, all of the remaining violations were issued as section 104(a) S&S citations.

With regard to Docket No. KENT 90-116, I take note of the fact that the computer print-out reflects one prior violation of 30 C.F.R. 75.316, issued on March 22, 1988, as a "single penalty" citation for which the respondent paid a civil penalty assessment of $20. No prior violations of sections 75.1103-4, 70.501, 77.216-3(a), or 77.216(d) are noted.

In Docket No. KENT 90-162, the computer print-out reflects no prior citations for violations of sections 77.216(d) and 75.1722(b). Six prior violations of the check-in and check-out requirements of section 75.1715, were issued on April 6, 1988, as "single penalty" citations which were assessed and paid at $20 each. I assume that the multiple citations were issued for failure to provide proper identification for six individual miners. In the instant proceeding, the inspector issued a single violation for failure to provide proper identification for seven miners working underground.

In Docket No. KENT 90-163, the print-out reflects no prior violations of sections 70.207(a), 77.1605(a), and 77.400(c). Three prior violations of section 77.1605(b) are noted, and they were all issued on April 4, 1988.

Although I cannot conclude that the respondent's history of prior violations is particularly good, for an operation of its size where the No. 1 Mine had an annual production of one million tons, I cannot conclude that it warrants any increases in the civil penalty assessments which I have made for the violations

which have been affirmed. In this regard, I have considered the fact that the respondent's history contains only a few repetitive violations, none of which I consider particularly egregious, and this is reflected in my civil penalty assessments.

Good Faith Compliance

The record in these proceedings establishes that the respondent timely corrected and abated all of the violations in good faith. In Docket No. KENT 90-163, the four permissibility violations were all abated within 15 minutes, and the handrails were installed in the parts trailer stairway immediately and prior to the time fixed by the inspector.

In Docket No. KENT 90-116, the ventilation violation was abated and the ventilation was restored within 30 minutes of the issuance of the violation. One of the slurry impoundment violations (2982728), was abated within 2 hours, and 1-day earlier than the time fixed by the inspector.

In Docket No. KENT 90-162, the check-in and check-out violation was abated within 3 hours, 2-hours earlier than the time fixed by the inspector.

I have taken the respondent's good faith and rapid abatement actions into consideration in the civil penalty assessments which I have made for the violations in these proceedings.

Negligence

Except for Citation Nos. 3369907 and 3364696, the inspectors found that all of the remaining violations resulted from a moderate degree of negligence. The inspector who issued Citation No. 3369907 concluded that it resulted from a high degree of negligence, and the inspector who issued Citation No. 3364696 concluded that it resulted from a low degree of negligence.

The respondent presents no testimony or evidence to rebut the findings of the inspectors. Based on these findings, which I conclude and find are supported by the evidence adduced in these proceedings, I further conclude and find that all of the violations were the result of the failure by the respondent to exercise reasonable care to prevent the cited conditions or practices which it knew or should have known existed. Under the circumstances, the negligence findings made by the inspectors are all affirmed.

In Docket No. KENT 90-163, with respect to the violation for the broken windows on the cited bulldozer, and the inadequate parking brake on the cited end loader, I have considered the fact that the equipment operators apparently failed to adequately inspect the equipment and did not report the violative conditions

to their respective foremen. The inspector testified that the end loader operator acknowledged that the parking brake was inadequate, and the broken glass on the bulldozer should have been readily obvious to the operator. Although the negligence of the equipment operators does not absolve the respondent of any liability for the violations, I have considered this in mitigation of the civil penalty assessments made for these violations.

Gravity

With the exception of the three citations which were issued as "single penalty" non-S&S citations (3367668, 9979793, and 3364696), I conclude and find that on the basis of the credible testimony presented by the inspectors, all of the remaining citations affirmed as significant and substantial (S&S) violations, were serious.

With regard to Citation Nos. 3364697 and 3364698, I conclude and find that the cracked safety glass windows in the doors of the cited bulldozer and the inadequate end loader parking brake were nonserious conditions.

Civil Penalty Assessments

Although the respondent presented no testimony or evidence with respect to the fact of each violation, its representative confirmed that the respondent contested the violations because it believed that the inspectors were issuing all citations at the mine as significant and substantial (S&S) violations, and that this has resulted in civil penalty assessments which the respondent believes are "high" for the conditions cited.

The respondent also took the position that the "high" penalty assessments resulted from MSHA's inappropriate consideration of its history of prior violations. In support of this assertion, the respondent believes that any prior violations issued on any of the mine working sections should be considered and limited only to those mine sections rather than the entire mine. The respondent further believes that it is unfair to combine all of the prior violations and consider them as part of the compliance record for the entire mine, rather than the separate mine sections, and that by considering them in totality, rather than separately, "double assessments" have resulted.

It is clear that I am not bound by MSHA's civil penalty assessment procedures found in Part 100, Title 30, Code of Federal Regulations. Nor am I bound by MSHA's proposed civil penalty assessments. All civil penalty cases contested by a mine operator before the Commission, an agency which is not part of the U.S. Department of Labor, are considered de novo by the presiding judge, and any civil penalty assessments are made in accordance with the criteria found in section 110(i) of the Act.

In the instant proceedings, my findings and conclusions with regard to the violations are based on the preponderance of the credible and probative evidence adduced on the record in the course of the hearings. The civil penalty assessments which I have made for the violations which have been affirmed are likewise based on the evidentiary record and the criteria found in section 110(i) of the Act.

The respondent's assertion that its history of prior violation should be considered separately for each mine section, rather than the entire mine, is rejected. I find no support for the respondent's conclusion that MSHA's consideration of its prior history of violations resulted in any "double" proposed civil penalty assessments. The respondent's history of prior violations for the purposes of any civil penalty assessments is reflected in the computer print-out which is a part of the record in this case. I have considered this compliance record as the overall compliance record for the No. 1 Mine, and I consider the violations noted in the print-out as the total history for the mine, regardless of the particular mine sections where the violative conditions may have occurred. Further, as noted earlier, I have taken this history into account in assessing the penalties for the violations in question, and I cannot conclude that the respondent has been unreasonably penalized or treated unfairly.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed in these proceedings:

Docket No. KENT 90-116

Citation No.	Date	30 C.F.R. Section	Assessment
3369907	10/04/89	75.316	$950
3158954	12/18/89	75.1103-4	$165
3158955	12/19/89	70.501	$100
2982728	01/17/90	77.216-3(a)	$170
2982829	01/17/90	77.216(d)	$150

Docket No. KENT 90-162

Citation No.	Date	30 C.F.R. Section	Assessment
3367667	12/06/89	77.216(d)	$100
3367668	12/06/89	77.216(d)	$ 20
3158951	12/18/89	75.1722(b)	$175
3158952	12/18/89	75.1722(b)	$175
3158953	12/18/89	75.1715	$250

Citation No.	Date	30 C.F.R. Section	Assessment
9979793	11/13/89	70.207(a)	$ 20
3364694	01/03/90	75.503	$160
3364695	01/03/90	75.503	$160
3364696	01/05/90	77.1109(d)	$ 20
3364697	01/05/90	77.1605(a)	$ 20
3364698	01/05/90	77.1605(b)	$ 20
3364699	01/05/90	77.400(d)	$125
3364700	01/08/90	75.503	$160
3515144	01/09/90	75.503	$160
3515145	01/09/90	77.205(e)	$170

ORDER

The respondent IS ORDERED to pay the civil penalty assessments shown above within thirty (30) days of the date of these decisions and order. Payment is to be made to MSHA, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge