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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. CENT 90-110 A.C. No. 29-01168-03532
v.	Docket No. CENT 90-143 A.C. No. 29-01168-03533
SAN JUAN COAL COMPANY, RESPONDENT	Docket No. CENT 90-144 A.C. No. 29-01168-03534 San Juan Mine & Plant Docket No. CENT 90-166 A.C. No. 29-01825-03513 La Plata Mine

DECISION

Appearances: Michael H. Olvera, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Donald L. Jumphreys, Esq., San Juan Coal Company, San Francisco, California, for Respondent.

Before: Judge Lasher

In these four proceedings the Secretary of Labor (MSHA) seeks assessment of penalties for a total of 26 alleged violations (described in 26 Citations) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977).

After the commencement of hearing in Durango, Colorado, on May 13, 1991, the parties concluded settlements of 22 of the 26 enforcement documents, which accord as reflected below was approved from the bench and is here affirmed. The remaining four Citations (three involving so-called "grounding" charges and one "highwall" matter involving an alleged infraction of Respondent's Ground Control Plan) were fully litigated. As result of the settlement, the only Citation involved in Docket No. CENT 90-110 was fully disposed of.

As to the four Citations litigated, Respondent challenges the occurrence of violation on all and the "Significant and Substantial" designations in two of the three "grounding" Citations (Nos. 3414864 and 3413540) and the highwall Citation, and as to the grounding Citations makes a serious challenge to the standard involved on the basis that it is unconstitutionally vague with respect to its application to the three electrical appliances cited, pointing out that MSHA's Program Policy Manual (Ex. P-7, II-T. 27-28, 40-42) and personnel have apparently exempted the type of appliances involved here from coverage.

DOCKET NO. CENT 90-110

This docket contains one Citation, No. 9996512, which was settled at the hearing. Pursuant to their agreement, the parties concur that this Citation should be modified

(1) to change paragraph 10 A thereof to reduce the "Gravity" of the violation from "Reasonably Likely" to "No Likelihood";

(2) to change paragraph 10 B thereof from "Lost Workdays or Restricted Duty" to "No Lost Workdays";

(3) to delete the "Significant and Substantial" designation contained in paragraph 10 C thereof; and

(4) to change the "Negligence" designation in paragraph 11 A from "Moderate" to "Low."

As modified, the parties stipulated that $147 is an appropriate penalty for this violation. Such penalty is here assessed and the settlement reached, having been approved from the bench, such is here AFFIRMED.

ORDER (CENT 90-110)

Citation No. 9996512 is MODIFIED as agreed to by the parties as set forth above. Respondent, if it has not previously done so, SHALL PAY to the Secretary of Labor within 30 days from the date of this decision the sum of $147 as stipulated.

DOCKET NO. CENT 90-166

This docket contains one Citation, No. 5414864, a so-called "grounding" allegation which was not settled. Discussion and decision thereof appears below under the heading "Three Grounding Citations."

This docket contains 20 Citations, 18 of which were settled at hearing. Of the remaining two Citations, No. 3413540 involves an alleged infraction of 30 C.F.R. 77.701 and is discussed in the subsequent section "Three Grounding Citations." The last Citation, No. 3414683, referred to in the transcript as the "highwall" Citation, is likewise discussed and decided subsequently.

THE PARTIAL SETTLEMENT

As noted, 18 of the Citations were settled at the hearing. (I-T. 98-104). Respondent agreed to pay in full MSHA's initially proposed penalties as to 11 of these 18, 6 were modified, and as to one, Citation No. 3413538, the "excessive history" upgrading was waived by Petitioner and the proposed penalty reduced from $649 to $413. The agreement reached as set forth below was approved from the bench at hearing and that approval is here AFFIRMED.

Citation Number	Agreed Penalty	Modification
3413538	$ 413	None
3413539	350	None
3414668	350	None
3414669	350	None
3414670	350	None
3414671	350	None
3414672	350	None
3414673	350	None
3414674	264	See "Order" below
3414675	350	None
3414676	350	None
3414677	350	None
3414686	264	See "Order"
3414687	214	See "Order"
3414688	264	See "Order"
3414689	264	See "Order"
3414690	350	None
3414691	357	See "Order"
TOTAL	$5,890	

Citation No. 3414674 is modified to change paragraph 11 thereof pertainng to "Negligence" from "Moderate" to "None." Citation No. 3414686 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None." Citation No. 3414687 is modified to change paragraph 10 A thereof pertaining to "Gravity" from "Reasonably Likely" to "Unlikely"; to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None"; and to delete the "Significant and Substantial" designation contained in paragraph 10 C thereof.

Citation No. 3414688 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None."

Citation No. 3414689 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None."

Citation No. 3414691 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "Low."

Respondent, if it has not previously done so, within 30 days from the date hereof, SHALL PAY to the Secretary of Labor the total sum of $5,890.00 as and for the civil penalties above assessed in this docket pursuant to their settlement agreement. Penalties for the two remaining Citations in this docket, Nos. 3413540 and 3414683 will be determined separately and subsequently herein.

DOCKET NO. CENT 90-144

This docket contains four Citations, three of which were settled at the hearing as reflected below. The remaining Citation, No. 3414692, involves an alleged infraction of 30 C.F.R. 77.701 and is discussed in the subsequent section entitled "Three Grounding Citations."

The Partial Settlement

As noted, three of the four Citations in this docket were settled at hearing. (I-T. 105). Pursuant thereto, Citation No. 3414693 and Citation No. 3414694 are both to be modified to change paragraph 11 to show the degree of negligence involved in the violation to be "Low" rather than "Moderate" and the penalty for each is to be reduced from $350 to $192. As to Citation No. 3414698, there are no modifications and the penalty concurred in by both parties is $259. This agreement was approved from the bench and such approval is here AFFIRMED.

Citations numbered 3414693 and 3414694 are modified as agreed to by the parties and reflected above, and Respondent SHALL PAY to the Secretary of Labor within 30 days from the date of this decision the total sum of $643.00 as and for the civil penalties agreed to. The penalty for Citation No. 3414692 will be assessed separately subsequently herein.

THREE "GROUNDING" CITATIONS

These three Citations, each in a different docket as noted above, all originally involved alleged "Significant and Substantial" infractions of the standard contained in 30 C.F.R. 77.701 pertaining to "Grounding" which provides:

> Grounding metallic frames, casings, and other enclosures of electric equipment.
> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

Evidence for these three Citations was received separately and appears in different parts of the transcript. The parties stipulated that the evidence introduced with respect to the Citation in Docket No. CENT 90-166 (which was tried first), insofar as relevant, is to be incorporated by reference into the record for the other two Citations in dockets numbered CENT 90-143 and CENT 90-144, respectively, and vice versa. (I-T. 107-108; II-T.29).1

Citation No. 3414864 (Docket No. CENT 90-166)

This Citation, issued by MSHA Inspector Larry W. Ramey during an AAA (regular) inspection on May 16, 1990, charges Respondent as follows:

> A ground was not provided for the energized General Electric Toast-Oven located in the warehouse. This toaster was 110 AC. The outer housing of the toaster was constructed of Metallic. There was no external ground observed for the toaster. This toaster was equipped with a 16/2 cable.

This appliance (I-T. 33) was located on a formica-topped metal table sitting in an eating area in a warehouse with a concrete floor. As charged in the Citation, it had no external ground, had a metal housing, and was equipped with a size 16 cord (four feet long) with two conductors. (I-T. 24-26, 33, 46).

Inspector Ramey felt that, in terms of the "hazard" involved, the warehouse was unlike a residential dwelling since it was constructed of steel and had concrete floors, which he said was "a good conductor of electricity." (I-T. 28). The Inspector believed that the toaster would have been used on every shift, five to seven days a week, by miners wearing steel-toed shoes. He felt that people could become the "ground" themselves, if "something happened to the internal wiring" and the insulation failed and a person walked up and touched it. He knew of no specific instance where such toasters were involved in such an occurrence. (I-T. 28-29). In his opinion, a shock injury occurring from such event could reasonably be expected to result in lost work days, and he pointed out that electrical shock could cause even electrocution and heart attacks. (I-T. 29, 30). He was of the opinion that Respondent was "moderately negligent" since the foreman should have been aware of the toaster and because he felt the toaster was "electrical equipment" which was subject to a monthly "electrical equipment" check. He believed the area in question would not have been "hosed down" for cleaning purposes, but would have been mopped. He also speculated that the toaster would have been used more frequently than one in the average household." (I-T. 38).

Like the other two appliances (Proctor-Silex Toaster and portable heater) involved in the related grounding Citations, this G.E. toaster was U.L. approved. It was not in any way damaged. (I-T. 45). According to Terrance D. Dinkel, an electrical engineer with MSHA's Safety and Health Technology Center

in Denver, Colorado, in order for a toaster to become hazardous it would "have to develop a fault in it." (I-T. 55). He was unable to express an opinion as to the likelihood of an accident occurring. (I-T. 58, 61). He knew of one fatality from a miner using a power tool, but none involving a toaster. (I-T. 64-65).

The National Electrical Code (NEC) provides that such a toaster can be used in areas which are not damp or wet. (I-T. 54-55).

Contrary to the somewhat speculative tenor of Petitioner's witnesses, Respondent established that only three warehousemen used the toaster. (I-T. 70). Respondent also established that (1) from its inquiry to Black & Decker, G.E.'s small appliance division, there had been no instances of product liability for toaster ovens (I-T. 70-71) and (2) it had not had, in the prior 13 years, any employee injuries from an appliance.

Respondent's expert witness, Lynn Byers, a master electrician, testified that the fact of U.L. approval indicates an appliance complies with the N.E.C. (I-T. 73-77). He also indicated, contrary to Mr. Dinkel, that there is a significant difference between a power tool, which is motor driven and can be overloaded, and kitchen "fixed resistance" appliances which are not subject to overload abuse. (I-T. 77). Also, contrary to Petitioner's witnesses, he convincingly testified concerning the significance of any differences between residential environments and the warehouse environment:

> Q. Much was made of the differences between the residential environment and warehouse environment in a surface coal mine. Do you see any basis for such a distinction?
>
> A. I think two of them are alike in some respects and different in others. As far as National Electric Code is concerned, indoor locations are the same whether they're in a coal mine or residence. They're not damp or wet locations.
>
> Further, I believe at the strip mine, you know, we're talking about certified electricians under direct supervision of management performing the different tasks and work. We're talking about adults in the mine rather than kids and elderly people, and maybe people that are incapacitated using these appliances. The people at the mine are also trained in electrical hazards and avoidance as well. We're not--I think it's

> unfair to compare general public with qualified trained miners who are in good health, and so forth. (I-T. 77-78). (Emphasis supplied).

Respondent also established that the G.E. toaster oven in question sits on a credenza on the exterior portion of a small office (of drywall construction) in the southeast corner of the two 50- by 100-foot warehouse. (I-T. 69-70).

In response to an inquiry from Respondent (Ex. p-3; II-T. 405), concerning grounding of the toasters, Paul Duke, Assistant to the Vice President, Electrical Division, Underwriters Laboratories, Inc., gave an incisive and probative analysis of the situation (Ex. R-5; I-T. 80-82), which is in part quoted here:

> Underwriters Laboratories Listed electrical equipment for ordinary locations has been evaluated for use in accordance with the National Electrical Code and to determine that the design of such equipment provides for the reduction of the risk of injury to life and property.
>
> Grounding of equipment connected by cord-and-plug is covered in Section 250-45 of the NEC and is reflected in our Standards.
>
> Electric toasters are not among the appliances in residential occupancies required to be grounded by Section 250-45(c). Additionally, in other than residential occupancies, cord-and-plug connected appliances not used in damp or wet locations or by persons standing on the ground or on metal floors or working inside metal tanks are not required to be grounded. Please refer to Section 250-45(d), item (5). UL considers Listed electric toasters, although not grounded, to comply with the NEC whether used in residential occupancy or the type of premises you described which I understand is a dry location. Modifications to toasters to replace the power cord with a grounding type cord, which you indicate is required by the inspector, can introduce risks of electric shock or fire . . . .

* * * * *

> All of the foregoing and possibly other concerns, depending on the toaster construction, lead to the conclusion that risks of fire or electric shock may be introduced when field modifications are made to a Listed product.
>
> UL cannot comment on MSHA regulations other than it appears subparagraph 77.701 is intended to apply to mining equipment, tools, and appliances used in the mining operation and not to appliances used in an office-type dry location. (Emphasis added).

Citation No. 3413540 (Docket No. CENT 90-143)

This Citation, issued on April 2, 1990, by Inspector Ramey, charges the following violative condition:

> The 110 AC electrical wall heater located in the Radio Repair shop was not provided with a ground. The heater was equipped with a 16/2 electrical cable. No external ground was provided. This heater was energized when this condition was observed. The outer frame was metal.

Petitioner points out with respect to this Citation2 that the fact situation and expert testimony is essentially the same as that in Docket CENT 90-166, with the exception that this Citation refers to a 110 A.C. electrical wall heater located in the radio repair shop (a small room) in close proximity to one radio repairman (I-T. 109). Petitioner's evidence indicates that the repairman works at a metal desk and the 8 x 10 room has a concrete floor. The ungrounded heater was about one foot by four feet in size and the inspector thought it was mounted on a wall. (I-T. 113-114). Inspector Ramey thought that electrical shock would result in a "lost work days" type of injury. (I-T. 115). The general conclusion of Mr. Dinkel was that if the heater was used in an area with a "conductive" concrete floor, it was required to be grounded. (I-T. 116, 119).

Respondent's evidence differed from Petitioner's--and is credited--in that it was shown that the repairman sat at a workbench with a formica top and that the U.L. approved heater sat on a stool about three feet high and was not mounted on the wall.

Merrit D. Redick, Chief Electrical Engineer for BHP-Utah International, testifying for Respondent, gave the following testimony which was convincing and also is credited:

> Q. Mr. Redick . . . is there any reason to draw a distinction between this portable heater and the toaster oven . . . ?
>
> A. I think it would be similar in the sense as long as it was a U.L. approved appliance. There's now been a lot of research done before it was given approval, and I think very minimal chance of picking up a shock off of it. We all have the same type heaters around our kids at home.
>
> * * * * *
>
> A. . . . I think U.L. agrees that U.L. approved equipment loses its approval when you tear into it and modify it. Unless you're very careful and knowledgeable about what you're doing, you can increase the risk of being shocked off that piece of equipment.
>
> Q. . . . How would you characterize the chances of getting seriously injured by shock from . . . this . . . portable heater . . . ?
>
> A. It's very remote, in my opinion. Anything that's been researched by U.L. and put out to the general public in the United States, is really no risk at all. (I-T. 123-124).

Citation No. 3414692 (Docket No. CENT 90-144)

Inspector Ramey issued this citation on April 16, 1990, charging as follows:

> The energized 110-volt AC Proctor-Silex toaster oven located in the control room of the new plant was not provided with a ground. This toaster was equipped with a 16/2 electical cable. There was no external ground wire provided. The outer housing of the toaster was constructed of metallic.

It is noted that Petitioner MSHA has modified this citation to delete the "Significant and Substantial" designation thereon, and also that Petitioner agrees that the fact situation and expert testimony with respect to this Citation is essentially the same as that in Docket No. CENT 90-166 except that a "Proctor-Silex toaster resting on a formica table on a tiled floor" is involved in this Citation.3

Petitioner's evidence (which is not entirely accurate) was to the effect that this undamaged (II-T. 7) toaster oven was sitting on a metal table in an 8- x 24-foot control room having a concrete floor near a metal refrigerator.4 The floor, according to Inspector Ramey, would not have been cleaned by washing down with a hose, but rather it would have been "dry" mopped. (II-T. 7-8, 16). The inspector again "speculated" that the toaster oven would have been used on every shift to warm food. (II-T. 8-9). The area the toaster oven was in was essentially a dry environment. (II-T. 16)5

Respondent established--in some contradiction to Petitioner's showing--that the table in question had a formica top and that the floor of the control room was overlaid with green asphalt commercial tile.6

DISCUSSION, ADDITIONAL FINDINGS, AND CONCLUSIONS
THREE GROUNDING CITATIONS

Respondent's fundamental position with respect to these three Citations is found meritorious.

A safety standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it "cannot be so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." (Emphasis added).7

30 C.F.R. 77.701, as Respondent contends, is sufficiently indefinite and unclear in its application here as to cause disagreement among Petitioner's own hierarchy (I-T. 82-83; Exs. R-1A, R-7), as well as failing to communicate that it could be intended to apply to small toaster-ovens and a small portable heater manufactured for use without a grounding conductor in the cord and plug.8

MSHA's own Program Policy Manual, at Section 77.702 thereof (Ex. R-7), appears to exempt U.L. approved cord-and-plug appliances such as the toaster ovens and heater involved here. It states:

> Portable tools and appliances that are protected by approved systems of double insulation9, or its equivalent,10 need not be grounded. (Emphasis supplied).

As argued by Respondent, I conclude from reliable evidence of record that the U.L. listing is in effect a certificate that the three listed appliances have means of shock protection equivalent to double insulation. (I-T. 90-92, 96; II-T. 27-28, 42, 44; Ex. R-5).

Further, MSHA's Program Policy Manual (at Section 701 thereof, Ex. R-1A) appears to give some idea of the type of "electric equipment" 30 C.F.R. 77.701 is intended to encompass, i.e., "Certain movable electrical equipment, e.g., rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, etc." The types of clear-cut mining equipment mentioned as examples by MSHA as a minimum delivers considerable weight to Respondent's contention that the subject standard is unenforceably vague when applied to the three appliances in question.

Conclusions

1. The safety standard, 30 C.F.R. 77.701, in its application to the three subject appliances, is unenforceably vague in that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific prohibition or requirement of the standard.11

2. Applying the "reasonably prudent person" test to the subject standard, such a person would not consider the term "electric equipment" used in 30 C.F.R. 77.701 to apply to the three U.L. approved appliances in question and have recognized a requirement to modify each appliance by grounding it externally.

3. The three appliances involved--the two toasters and the portable heater--are not "electric equipment" as that term is used in 30 C.F.R. 77.701.

ORDER

Citations numbered 3414864, 3413540, and 3414692 are VACATED.

THE "HIGHWALL" CITATION (DOCKET NO. CENT 90-143;0
CITATION NO. 3414683

This Citation, issued by MSHA Inspector Larry W. Ramey at 9:10 a.m. on April 11, 1990, charges Respondent with a violation of 30 C.F.R. 77.1000 as follows:

> The operator was not complying with the approved ground control plan. Loose hazardous material was observed, loose and hanging over the top of the highwall. This condition was located at North Pi%25non Marker 600 East of Pi%25non 3. The loose overhanging material revealed large cracks on both sides of the material. The cracks appeared to be from 1 to 1 1/2 feet in width. The loose overhanging mass appeared to be 20 feet in height by 18 feet in width. Void could be observed behind the overhanging material. The roadway leading to the DRE 82 dragline was located under this overhanging material. Tire marks showed that traffic vehicles traveled to within 10 feet of the highwall. This overhanging material appeared to hang out from the highwall bank-slope approximately 4 to 6 feet thick.

The Citation (paragraphs 16, 17, and 18) indicates that the condition was timely abated by 10:20 a.m. by the following action: "The operator installed a 32-inch high dirt barrier in the travel road to prevent traffic from driving through this area."

30 C.F.R. 77.1000 pertaining to "Ground Control" provides:

> Each operator shall establish and follow a ground plan for the safe control of all highwalls, pits, and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

Petitioner contends that Respondent did not comply with paragraph 6 b of its Ground Control Plan (Ex. P-4) which requires that "Unstable highwall and banks shall be taken down and other recognized unsafe ground conditions shall be corrected promptly, or such area shall be posted."

In his testimony, after confirming the description of the violative conditions contained in the Citation, Inspector Ramey described such as "overhanging rock" (II-T. 51) "rock that was leaning out" (II-T. 49) and "outcropping" (II-T. 53) separated from the highwall by a void (II-T. 49). He said there were large cracks around this rock, which he estimated to be 20 feet in height and 18 feet in width (II-T. 52-53, 61). He also described the instability thereof:

> . . . when you look at the other section, the highwall, then it's stable. It's all bonded together. This one section here has pulled loose from the main highwall and my opinion of it, it was ready to fall. (II-T. 54).

The loose overhanging material, i.e., rock outcropping, was created after blasting a month before the Citation was issued. (II-T. 66-67, 68). The area was not posted. Below the loose rock material was a bench approximately 120 feet wide. Tire marks on the roadway below the unstable outcropping indicated that vehicles had been traveling in the exposed area and several miners were exposed to the hazard that the rock would fall. (II-T. 54-55). The tire marks were within 10 feet of the highwall. (II-T. 54). The outcropping (depicted in Exs. P-5 and P-6) was approximately 50 feet high (II-T. 55) and it was vividly described by the Inspector as having "pulled loose from the main highwall" and as being "a large chunk of rock . . . that is cracked on both sides, behind even the bottom." (II-T. 58-59).

Respondent's stripping foreman, George Francis, was of the opinion that the condition was not a hazard since (a) it had been there a month and had not fallen or crumbled, (b) the material was "laid back"--not at a vertical angle--and (c) it was sitting on solid rock. (II-T. 67, 68, 69-71). However, there had previously been a failure at a San Juan mine of a highwall which Respondent also considered stable. (II-T. 72, 75-76).

The Inspector's description of the violative condition, and his opinion that the outcropping was unstable and ready to fall because of the cracks and void, are corroborated by photographic evidence submitted by Petitioner in Exhibits P-5 and P-6. There is no reason to discount his testimony and opinion in this matter. It is concluded that the infraction of Respondent's ground control plan did occur in that an unstable area of highwall did exist and had not been taken down for one month and the area was not posted. Infraction of such a plan is enforceable as a safety standard. Jim Walters Resources, Inc., 9 FMSHRC 903 (May 1987).

Since the violative condition existed for a month in an area where the foreman would have traveled and been aware of such (II-T. 55), it is concluded that the violation resulted from Respondent's negligence.

The issuing inspector's opinion that this was a "Significant and Substantial" violation is borne out by the reliable evidence of record. A violation is properly designated "Significant and Substantial" ("S&S") "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 (1984), the Commission listed four elements of proof for S&S violations:

> In order to establish that a violation of a mandatory standard is significant and substantial under Nationl 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 (1985), the Commission expounded thereon 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 1573, 1574-1575 (July 1984).

It has been previously found that a violation occurred. On the basis of prior findings, I also conclude that a measure of danger to safety was contributed to by the violation and there existed a reasonable likelihood that the hazard contributed to would result in a serious injury or fatality. Thus, not only was the Inspector's opinion as to the "significant and substantial" nature of the violation (T. 54-55) left largely unrebutted, but the evidence demonstrates that there was exposure of several miners to the hazardous conditions present which would have resulted in serious injury. (II-T. 54-55).

Thus, the Inspector testified:

> I felt if the rock did fall that there's definitely going to be an injury because of that mass of rock falling on a vehicle. And if you--in the body of the Citation, now, I estimate the rock to be 20 feet in length, so if it's driving within ten foot of the highwall. If the rock fell, it's going to come in contact with the vehicle, and/or person, or persons, that could be working in the highwall area. (II-T. 55).12

The Inspector's opinion that the relatively large rock out-cropping could fall "at any time" (II-T. 62); coupled with the visible cracks and looseness of the rock and the height it would fall are all factors which confirm that the element of reasonable likelihood of such events occurring was established by MSHA. This combined with the exposure of miners (not denied by Respondent) and the seriousness of injuries which reasonably would ensue from such occurrence is sufficient to establish Petitioner's burden of proof as to the four prerequisite elements of the Mathies formula, supra. Consequently, it is concluded that the violation in question was "significant and substantial," as well as otherwise serious in nature. Citation No. 3414683 is AFFIRMED in all respects.

Penalty Assessment for Citation No. 3414683

Respondent San Juan Coal Company is a Delaware corporation and is the owner-operator of the San Juan Mine and Pit (60 employees) and the La Plata mine (18 employees) which respectively mine 2 million tons and between 1.1 million and 2 million tons annually. (I-T. 5). The controlling entity produces over 10 million tons of coal annually and is found to be a large mine operator. During the 24-month period preceding the occurrence of the violation, 68 prior violations occurred at the San Juan Mine and Pit and 20 occurred at the La Plata mine. (See I-T. 5-6; Exs. P-1 and P-2).13 Assessment of penalties will not adversely affect Respondent's ability to continue in business. Upon notification of the violation, Respondent proceeded in good faith to achieve rapid compliance with the standards cited. The remaining statutory penalty assessment criteria of negligence and gravity have been previously determined. A penalty of $600 is found appropriate and is here ASSESSED.

ORDER (Citation No. 3414683)

Respondent SHALL PAY to the Secretary of Labor the sum of $600 within 30 days from the date of this decision.

FINAL ORDER

The modifications of various Citations are reflected in the separate sections for each docket herein. In the section of this decision entitled "Three Grounding Citations," Citations numbered 3414864, 3413540, and 3414692 have been VACATED. Citation No. 3414683 has been AFFIRMED.

Likewise, all penalties assessed for Citations involved in the four subject dockets are directed for payment at the end of each of the various sections. The total amount for all penalties in these four dockets is $7,280.00, and Respondent should make payment as indicated.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE

1. The hearing was held on two days, May 13 and May 14, 1991. For each of the two days of hearing there is a separate transcript beginning with page 1. Accordingly, transcript citations will be prefaced with "I" and "II" for May 13 and 14, respectively.

2. Petitioner's Brief, page 3.

3. Petitioner's Brief, page 3.

4. According to MSHA's expert, Mr. Dinkel, the presence of the refrigerator would "probably" not add to the situation. There was no sink, and attendant water, in the area. (II-T. 8).

5. MSHA did not establish that any of the three areas involved in the three Citations were "damp" or "wet."

6. At this juncture in evidence-taking, Petitioner modified the Citation on the record to delete the "Significant and Substantial" designation. (II-T. 22-23).

7. Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982).

8. Petitioner did not establish that the toaster-ovens and the heater were used for any mining-related purpose, or for any purpose other than what one might expect them to be used for in the domestic market and, as noted elsewhere in this decision, while showing the three appliances were in areas with concrete floors, Petitioner did not establish that such areas were damp or wet or that there was really much of a difference between these areas and places in homes where such appliances would be used to prepare food or to heat a room.

9. Although a portion of the record (II-T. 27-29, 39-41) was devoted to discussion of this subject, Respondent does not contend that any of the three subject appliances are covered by this "double insulation" exemption. (II-T. 41).

10. Respondent does however contend and I conclude that U.L. approval is tantamount to "equivalent" protection. (II-T. 41-42).

11. See Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Lanham Coal Company, Inc., 13 FMSHRC _____ (September 3, 1991).

12. See also II-T. 62-63.

13. The transcript incorrectly shows the figures for number of employees as being the number of previous violations. The "employee" numbers indicated were taken from my notes taken at hearing. The figures for history of previous violations were taken from Exhibits P-1 and P-2. The figures for the two categories are similar and the changes have no bearing on penalty assessment.