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WYOMING FUEL COMPANY V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268
June 16, 1993

WYOMING FUEL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 90-112-R
	:	Order No. 2930784; 2/13/90
	:	
v.	:	Docket No. WEST 90-113-R
	:	Citation No. 2930785; 2/13/90
	:	
	:	Docket No. WEST 90-114-R
SECRETARY OF LABOR,	:	Order No. 3241331; 2/15/90
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-115-R
Respondent	:	Citation No. 3241332; 2/16/90
	:	
	:	Docket No. WEST 90-116-R
	:	Citation No. 3241333; 2/16/90
	:	
	:	Golden Eagle Mine
	:	MSHA Mine I.D. No. 05-02820
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-290
Petitioner	:	A.C. No. 05-02820-03569
	:	
v.	:	Golden Eagle
	:	
WYOMING FUEL COMPANY,	:	
Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

The Commission remanded the above contest cases to the Judge for reconsideration consistent with the principles set forth in the order of remand, 14 FMSHRC 1282 (1992).

DID WFC SUFFER LEGALLY RECOGNIZABLE PREJUDICE?

A threshold matter is whether WFC would suffer legally recognizable prejudice if Citations Nos. 2930785 and 3241332 were modified as proposed by the Secretary. If the Judge finds prejudice the citations shall remain unmodified and his decision vacating them, on the basis of the inapplicability of 75.329-1, shall stand. If the Judge does not find legally recognizable prejudice the citations shall be modified to allege violations of

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75.316 and the Judge shall conduct such further proceedings as he deems necessary, 14 FMSHRC at 1290.

In a post-remand order, WFC was directed to state facts in detail as to the manner in which it suffered legally recognizable prejudice. (Order, September 4, 1992). WFC's statement filed September 18, 1992, is attached to this decision. The Secretary responded to WFC's statement.

RULING ON LEGALLY RECOGNIZABLE PREJUDICE

On October 16, 1992, the Judge denied the claim of legally recognizable prejudice and held, in part, as follows:

The original Citations (Nos. 2930785 and 3241332) are set forth, respectively, at 12 FMSHRC 2005 and 12 FMSHRC 2007-2008. The proposed amendments were received in evidence as Exhibits S-1 and S-2. The exhibits were ruled inadmissible at the commencement of the hearing. (Tr. 9-20).

DISCUSSION

The parties agree on the applicable law:

The grant or denial of a motion for leave to amend is within the sound discretion of the Judge and will be reversed only for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 28 L.Ed.2d 77 (1971); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Rule 15(a), Fed. R. Civ. P., mandates that leave to amend "shall be freely given when justice so required."

In *Foman v. Davis*, supra, the Supreme Court set forth the guidelines governing motions to amend under Rule 15(a). They are as follows:

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, *Federal Practice* (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on

the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be freely given. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 371 U.S. at 182, 83 S.Ct. at 230.

See also 3 J. Moore, R. Freer, Moore's Federal Practice, par. 15.08(2), 15-47 to 15-49 (2d Ed. 1991); Cyprus Empire, 12 FMSHRC 911, 916 (May 1990).

In *Forman v. Davis* the Supreme Court recited several factors to be considered in the denial of an amendment. The citations here only involve the test of whether there was undue prejudice to the opposing party by virtue of allowance of the amendment.

The hearing in these cases commenced on March 13, 1990. On March 9, 1990, Contestant was served, by mail, with the Secretary's modification of the above citations. The modifications sought to change the citations to allege violations of 30 C.F.R. 75.316 instead of 30 C.F.R. 75.329-1(a).

FURTHER DISCUSSION

WFC's post-remand statement failed to set forth facts that are persuasive that the operator incurred legally recognizable prejudice if the citations were modified. WFC's statement generally contains conclusions of law.

The mandate of Rule 15(a) is that leave to amend "shall be freely given when justice so requires." Conversely, facts to show recognizable prejudice are required if an amendment is to be denied.

Illustrative of this point is the Third Circuit decision *Cornell and Company, Inc., v. Occupational Safety and Health Review Commission*, 573 F.2d 820 (1978). In *Cornell*, nine days before the ALJ hearing and more than four months after the inspection, the Secretary moved to amend the citation and complaint by alleging violations of different regulations. The hearing proceeded as scheduled.

At the conclusion of the hearing on the merits, *Cornell* was granted additional time to gather evidence but it concluded that the additional time would not remedy the prejudice it suffered in preparing its defense. Therefore it presented no additional evidence.

Specifically, *Cornell's* factual claim of prejudice was that the testimony of the company's workers was necessary as such testimony related to the stability of the beams where they were working at the precise time of the inspection. The danger of using the belts in accordance with the safety belt standard at that exact time was vital to *Cornell's* defense.

The Court regarded the workers' testimony as indispensable. The record showed that the modification of the final amendment, more than four months after the inspection, made it impossible for *Cornell* to locate its witnesses. The workers were transients hired from union halls and *Cornell* had long since lost contact with them.

On this basis, the Court concluded that: "[t]his inability to secure necessary witnesses caused solely by the delay of the Secretary in seeking the amendment, vitiated *Cornell's* ability to present its sole affirmative defense." 573 F.2d at 824.

In the case at bar, WFC failed to offer any facts to support its claim of recognizable prejudice, nor was there a claim of prejudice made at the hearing. (Tr. 3-27).

WFC claims the Secretary's amendment modified the facts as well as the regulation

allegedly violated. I disagree. No change of facts occurred. The Secretary alleged that 75.316 was violated, rather than 75.329-1(a). (Compare the citations and Exhibits S-1 and S-2).

In support of its position, WFC also relied on Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 971 (6th Cir. 1973) and Conray Datsun, Ltd. v. Nissan Motor Corporation, 506 F. Supp. 1051, 1054 (N.D. Ill. 1980).

The cited cases are not persuasive since the Secretary here did not change her theory of the case but only the regulation allegedly violated.

WFC further contends it is further prejudiced because the mine has been sold and, since considerable time has lapsed, any of its witnesses are no longer available. This point fails since WFC has failed to assert any facts of legally recognizable prejudice that such witnesses might reveal if they testified.

WFC further asserts it would be necessary to engage in significant new preparation based on the modifications. This is not the case since, under either standard, the facts appear to be the same. The primary issues involved the validity of the 107(a) orders and whether WFC was required to use seals or Kennedy stoppings.

WFC can hardly claim surprise since the ventilation plan was received in evidence at the hearing. (See Exhibit S-8). Mr. Mitchell, WFC's witness, was also an expert in ventilation.

I agree with WFC there are a "host of potential issues" in a ventilation plan case that would not be involved in a violation of 75.329. However, the operator fails to point out any of the "hosts" that were not addressed at the hearing or not prepared to be addressed at the hearing.

In sum, WFC's argument that it was prejudiced is general in nature and gives no specific instance in which it may incur legally recognizable prejudice by having to defend the citations as a violation of the ventilation plan.

I conclude there was no legally recognizable prejudice caused by the proposed modifications.

The parties should be given the opportunity to offer additional evidence in view of the Judge's ruling modifying Citation Nos. 2930785 and 3241332 to an alleged violation of 75.316.

The Judge's ruling concluded with an order granting the Secretary's motion to modify Citation Nos. 2930785 and 3241332 to allege violations of 30 C.F.R. 75.316. (Footnote 1)

Further, the parties were granted 15 days to state whether they desired to present any further evidence to the citations, as modified. Both parties declined to present any further evidence.

CONSOLIDATION WITH WEST 90-290

Subsequently the Secretary moved to consolidate WEST 90-290 (Penalty Proceeding) with WEST 90-112 et al. WFC had no objection and all pending cases were consolidated on November 5, 1992.

Further, post remand briefs were filed by the parties.

VALIDITY OF IMMINENT DANGER ORDERS

In its order of remand the Commission noted that Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated...." 30 U.S.C.

802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 215 (November 1989)("R&P"), the Commission reviewed the precedent analyzing this definition and noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." 11 FMSHRC at 2163 (citations omitted). It

1 75.316 is entitled "Ventilation system and methane and dust control plan."

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noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Id.*, quoting *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974).

In *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (October 1991), the Commission held that there must be some degree of imminence to support a section 107(a) order and noted that the word "imminent" is defined as "ready to take place: near at hand: impending...: hanging threateningly over one's head: menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." *Id.* Finally, the Commission stated that the inspector must determine whether an imminent danger exists without considering the "percentage of probability that an accident will happen." *Id.*, quoting S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 626 (1978) ("Mine Act Legis. Hist.").

In both R&P and UP&L, the Commission concluded that an inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger. R&P, 11 FMSHRC at 2164; UP&L, 13 FMSHRC at 1627. As the U.S. Court of Appeals for the Seventh Circuit recognized:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975) (emphasis added); compare *Gland Creek Coal Company Va 91-47-R* (March 3, 1993).

In applying the imminent danger test, the Commission noted that the appropriate focus is whether the inspector abused his discretion when he issued the imminent danger order.

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It is appropriate to consider separately the areas of the mine that were involved in these cases.

Order No. 2930784 alleged an imminent danger existed. The order further closed the Golden Eagle Mine and ordered all personnel underground withdrawn. The order issued by MSHA Inspector D.L. Jordan, reads as follows:

Methane in excess of 9.9% as approved by a handheld detector at a point at least 12" from the roof face and ribs was present behind a line of 6 Kennedy stoppings that have been constructed across the second south entry at the intersection of the number 14 west main return. This encompass area behind the stoppings six (6) entries wide and 25 crosscuts deep. Bottle samples were collected to substantiate the order. Citation No. 2930785 for a violation of 30 C.F.R. 75.329(a)(1) accompanies this order at section 8, "Condition or Practice".

Citation No. 2930785, issued under section 104(a) of the Act, followed the order.

A preponderance of the substantial, reliable and probative evidence establishes the following findings of fact and the additional findings set forth in the discussion below.

FINDINGS OF FACT

1. Donald L. Jordan has been an MSHA coal mine inspector for 19 years. (Tr. 37-39). He has 42 years experience in the mining industry. (Tr. 78).
2. His training includes courses in "Methane Detection and Use of Permissible Methane Detector." He also holds mine foreman, assistant mine foreman, fire boss and shot fire certificates for the State of Colorado. (Tr. 39).
3. Mr. Jordan spends about eight weeks a year at the Golden Eagle Mine. (Tr. 40).
4. On February 13, 1990, accompanied by Mark Bayes, an assistant mine foreman, he inspected the west slope area of the underground coal mine. This was an abandoned area of the mine. (Tr. 40).
5. Mr. Jordan identified Order No. 2930784, an imminent danger order issued on the Second South Area of the west slopes. The area, in excess of 2,000 feet, comprises six entries, approximately 25 crosscuts deep. (Tr. 41).

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6. After making their initial approach the inspection team found Kennedy stoppings at all six entries. (Tr. 42). [A Kennedy stoppings is shown on Exhibit S-5.]

7. The stoppings are made out of galvanized sheet iron and they direct the ventilation in the mine. Kennedy stoppings are not seals. (Tr. 43).

8. An attempt had been made to seal the stoppings from the outside by applying a limited amount of styrofoam around the roof and ribs. (Tr. 43).

9. Mr. Jordan had studied the ventilation plan and he was aware the stoppings were not on the map. (Tr. 44).

10. The stoppings were an attempt to deflect the air current and seal the area behind them. (Tr. 44).

11. The Kennedy seals could not be accepted because MSHA has no way of knowing what air mixtures are behind the seals. (Tr. 45).

12. At the Golden Eagle Mine there has been a history of unintentional roof falls, numerous ignition sources and rock dust surveys have been way below normal. Also there was excessive liberation of methane gas in the mine. Considering these factors Kennedy stoppings were unacceptable. (Tr. 45).

13. Initially the only methane readings Mr. Jordan was able to take were outside of the stoppings. (Tr. 45). The readings were high enough that he was alarmed because the area was not sealed. There was every possibility that there was an explosive mixture behind the stoppings. (Tr. 46).

14. Mr. Jordan took methane samples at all six entries. (Tr. 46).

15. The methane readings were as follows:

No. 1 entry:	.8 percent
No. 2 entry:	.6 percent
No. 3 entry:	1.5 percent
No. 4 entry:	.7 percent
No. 5 entry:	.6 percent
No. 6 entry:	.8 percent

16. To measure the methane concentration Mr. Jordan used a CSE 102 hand-held digital methane detector. (Tr. 48).

17. These methane levels on the ventilation side created a huge doubt as to what concentrations were behind the stoppings. (Tr. 48).

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18. Mr. Jordan then went outby and by telephone contacted Mr. Joe Paplovich, his immediate supervisor. (Tr. 49).

19. Mr. Jordan informed Mr. Paplovich of the discovery and he further sought sampling equipment to determine what was behind the stoppings. (Tr. 50).

20. Mr. Jordan feared there was an explosive mixture behind the seals. (Tr. 50).

21. When he met Messrs. Paplovich, Duran and Feltheiger they discovered Mr. Duran had one vacuum bottle suitable for sampling behind the stoppings. (Tr. 50).

22. Mr. Jordan had ordered all power withdrawn from the area before he met Mr. Paplovich. The power source was an energized trolley line. (Tr. 51).

23. The group then returned to the area and Mr. Jordan found a 2.2 methane level. This indicated there was fluctuation and the area was "breathing." (Tr. 52).

24. They then went to the No. 1 entry and withdrew several samples by using an aspirator pump and a bottle. (Tr. 54).

25. The sample, then in a 50 milliliter bottle was later evacuated at the MSHA laboratory located in Mount Hope, West Virginia. (Tr. 55).

26. An analysis report was submitted by the lab. (Tr. 56, Ex. S-6).

27. The numbers of the samples collected were duly recorded. (Tr. 57).

28. After proceeding to the No. 1 entry the group with their three or four methane detectors took samples from the tube during aspiration. There were readings in excess of 9 percent from the tube. (Tr. 62).

29. The readings from all of the hand-held methane monitors were almost the same. (Tr. 62).

30. The subdistrict manager, Mr. Paplovich, and Mr. Jordan concluded the situation was much more serious than they had initially suspected. They jointly agreed to conduct an orderly withdrawal from the mine. Mr. Jordan then orally issued an imminent danger order. (Tr. 62-68).

31. Mr. Jordan believed there was danger in the area at that time. He considered the danger to be imminent because of the history of roof falls and ignition sources in the area which com-

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bined with the methane levels discovered behind the stoppings. He also considered the size of the area. It exceeded a depth of 2,000 feet. (Tr. 63, 64).

32. The second south area was immediately off of the No. 14 return entry. The entry leads directly to the mine fan. (Tr. 64).

33. Behind the stoppings are interrupted tracks and trolley lines. Additional matters contributing to an ignition are a belt structure, roof bolts securing roof plates and mats. Also there were mandooors. These are a source of ignition due to roof falls. (Tr. 65).

34. A roof fall can be a source of ignition by striking steel against steel depending on where it falls, and depending on the structure of the roof and its strata. They all enter into a combination of effects. (Tr. 66).

35. In Mr. Jordan's mind there was a definite potential for explosion behind the Kennedy stoppings. (Tr. 66).

36. Given the conditions he described Mr. Jordan had a reasonable belief that an explosion could occur in that area. (Tr. 67).

37. After a certain number of years in a coal mine, seeing the aftermath of what can occur Mr. Jordan stated [the condition] "scares the pants off of you." (Tr. 67).

38. An explosion would propagate beyond the Kennedy stoppings. (Tr. 67).

39. Mr. Jordan was afraid for himself but he was not absolutely certain there was going to be an explosion. (Tr. 69).

40. After they went to the surface they proceeded to the New Elk Mine in order to discuss the course of action to be taken. (Tr. 69).

41. The order remained in effect to evaluate the atmosphere immediately behind the stoppings.

42. The area behind the stoppings was not ventilated nor sealed in any manner at the time of the issuance of the order. (Tr. 70).

43. In an abandoned area not ventilated you expect to see seals or ventilation required by the ventilation plan or by law. (Tr. 70).

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44. If there is no ventilation in the area you expect the seals to be constructed as explosion-proof bulkheads. (Tr. 71).

45. Mr. Jordan saw no evidence of ventilation in by the stoppings nor did he see evidence of seals nor any intention of building any seals. (Tr. 72).

46. In Mr. Jordan's opinion the violation was of a significant and substantial nature. The hazard would be the explosion. (Tr. 73).

47. Seals create an atmosphere behind them but normally the atmosphere is above the explosion range for methane. (Tr. 73).

48. At the meeting at the New Elk Mine the subdistrict manager requested a proposal from management but no one wanted to volunteer to attempt to remove any part of the Kennedy stoppings. The slightest spark and the explosive mixture could create an explosion. (Tr. 75).

49. The 107(a) imminent danger order withdrew miners from the entire mine. (Tr. 76).

50. The order was modified to allow construction of the seals in the Second South section of the mine. (Tr. 76).

51. A CSE methane detector is accurate within .1. (Tr. 82).

52. A detector is thrown out of calibration when methane exceeds 9 percent. (Tr. 83, 84).

53. The explosive range of methane is five to fifteen percent. (Tr. 84).

54. Mr. Jordan had not seen a Kennedy stopping installed in Two South or One Right before February 13, 1990. (Tr. 85, 86).

55. On February 13, 1990, in the MSHA office before the inspection, Kennedy stoppings were discussed. (Tr. 86, 87).

56. Mr. Jordan was surprised someone would install Kennedy stoppings in a coal mine. (Tr. 87).

57. Kennedy stoppings could not be allowed because they do not suffice as an explosion-proof bulkhead. (Tr. 88). However, use of such a stopping is not a violation of any regulation but they cannot be used as a seal. (Tr. 92, 93).

58. The area behind the Kennedys could not be ventilated because the mine could not afford the additional ventilation. Also the area was too hazardous to travel. (Tr. 90).

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59. It was the presence of the methane behind the stoppings plus the existence of an ignition source behind the stoppings that led Mr. Jordan to his imminent danger finding. (Tr. 97).

60. You would expect to find some methane on the outby side and it wouldn't be a basis to conclude the area was imminently dangerous. (Tr. 98).

61. The track that goes into Two South is continuous up to the stopping. It runs a good distance behind the stopping. (Tr. 101, 102).

62. The sampling tube extends 40 feet inside the Kennedy stopping. When aspirating the tube the methane detector readings were as much as 9 percent. (Tr. 102).

63. The methane concentration could differ at different points away from the end of the sampling tube. (Tr. 104).

64. The span of the entries across Two South is about 600 feet. (Tr. 105).

65. Sample bottle number A-2109 shows a methane concentration of 6.09. This was the only concentration in the explosive range. (Tr. 106-108).

66. Sample No. A-2107 taken at the same location and time shows 1.32 percent methane. (Tr. 106, 107).

67. Sample A-2108 shows methane of 1.67 percent.

68. The bottle sample results were not available the day Mr. Jordan issued the imminent danger order. (Tr. 108).

69. In Mr. Jordan's opinion the results of bottle samples justify the action taken that day. (Tr. 108).

70. In Two South there has been as many as six roof falls. (Tr. 110).

71. Mr. Jordan remembered seeing ignition sources behind the stoppings in Two South. Those were steel three by three man-doors, the belt and track trolleys, trolley hangers, trolley wire, roof bolts and roof plates. (Tr. 110, 111).

72. A roof fall can strike a rail. The roof is made of unconsolidated soapstone and sandstone. (Tr. 112).

73. The ventilation plan says nothing about when seals have to be installed. (Tr. 115).

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74. It is an accepted practice to issue a verbal imminent danger order. (Tr. 118).

75. MSHA requested WFC furnish a plan to correct the condition. (Tr. 119).

76. Removing the stoppings might cause an ignition. (Tr. 121). The stoppings would have to be removed to ventilate the area. (Tr. 121).

77. Seals are constructed with tubes so the atmosphere can be sampled behind them. The area behind the seals might contain a higher or lower level of methane. (Tr. 123).

78. In Exhibit S-6, except for sample A-2109, the samples were taken on the exterior side of the seals. (Tr. 124).

79. When Mr. Jordan issued the imminent danger order he believed the area was explosive. He also believed the stoppings were being used as seals. (Tr. 126).

80. The company had made various attempts to ventilate this area but with so many roof falls and obstructions the area became untravelable. (Tr. 126).

81. For an explosion to occur it is necessary to have the explosive mixture as well as an ignition at the same location. (Tr. 130).

82. The Kennedy stoppings were being swept by 37,632 cubic feet of air a minute. (Tr. 133). Mr. Jordan didn't find any appreciable methane outby the Kennedy stoppings. (Tr. 133).

83. In the meeting before the inspection Mr. Jordan believed he was going to take enforcement action of some kind if he found a Kennedy stopping. (Tr. 134).

DISCUSSION

The credible facts establish the expertise of Donald Jordan, an individual with 42 years experience in the mining industry and 19 years as a coal mine inspector. As noted above Mr. Jordan who spends eight weeks a year at the Golden Eagle Mine became alarmed when he found high methane concentrations outside the stoppings in the air course. These methane readings were taken at each of the six entries. (Fact 15).

Mr. Jordan contacted his supervisor and obtained sampling equipment to test behind the Kennedy stoppings. With three or four detectors the members of the group observed methane concentrations in excess of nine percent.

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These actions constitute a reasonable investigation. In issuing his order Mr. Jordan basically relied on the methane levels behind the stoppings and his knowledge of ignition sources behind the Kennedy stoppings. These facts are further detailed above in paragraphs 12, 31 and 33. The facts establish Mr. Jordan made a reasonable investigation of the circumstances at hand and the facts support his issuance of the imminent danger order. There is no evidence in this record that Mr. Jordan abused his discretion or authority.

WFC in its supplemental brief contends the Secretary has failed to establish a violation of 75.316, that is, the Secretary has failed to establish which provision was allegedly violated and that the provision was part of the plan. In the alternative WFC states that if the Secretary clarifies the provision allegedly violated the record demonstrates WFC was complying.

On its face 30 C.F.R. 75.316 does not require an operator to comply with a ventilation plan. But the Commission has held that "[O]nce the plan is approved and adopted, these provisions are enforceable as mandatory safety standards Jack Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987).

The ventilation plan contains a page entitled "Concrete block explosion proof seals". (Ex. S-8, page 13). Further, MSHA's expert witness William Reitze expressed the view that for areas not being ventilated he would expect to see permanently constructed seals. (Tr. 236-239).

WFC apparently had no difficulty realizing seals had to be installed in Second South in accordance with its plan. Exhibit S-9 shows six triple lines which indicate a seal. Written on the map is the notation "Seals to be constructed when approved. SM 12-29-88." "SM" is WFC representative Steve Matson. It was he who drew the seals on the Company map and initiated it. The map is part of the ventilation plan.

The revised plan was apparently approved on May 10, 1989 (Letter to Rick Callor, Safety Superintendent from MSHA).

WFC contends the plan did not prescribe the timing or steps to be followed in sealing an area nor did any other plan provision. (Tr. 115, 122, 262-263, 272-273, 486). In addition, the plan did not prohibit the use of Kennedy Stoppings as an initial step in the sealing process. (Tr. 321, 386). Therefore, the Secretary has failed to establish which provisions of the plan WFC allegedly violated.

When a regulation is silent as to the period of time required for compliance the Commission has imparted a reasonable

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time. Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981), Monterey Coal Co., 5 FMSHRC 1010, 1019 (June 1983).

In this case WFC had at least 10 months to begin sealing the six entries with concrete block explosion proof seals. No such sealing occurred and 10 months is a reasonable time to comply with the ventilation plan.

According to David Huey, WFC's Manager, the company did not have a definite date to install explosion proof seals.

WFC further states that the Kennedy stoppings were in place temporarily as the mine prepared to construct the seals as required by the ventilation plan. (Tr. 652-654, 662-663).

The record is clear that the Kennedy stoppings can be used as a ventilation device but not as a substitute for explosion proof seals. Accordingly, the Secretary is not unilaterally imposing a sealing regime on WFC. Rather, it is requiring the use of Mitchell-Barrett seals as permanent seals. (Tr 298-299, 370, 583-584, Ex. C-6, S-8 at 13-14). There was a reasonable time allowed for installation of the seals and WFC failed to act in that time.

DID SECRETARY PROVE IMMINENT DANGER?

WFC claims Mr. Jordan failed to prove an imminent danger in Second South because his measurements were inadequate. Specifically he "assumed there was an explosive mixture of methane throughout an area 600 feet wide and 2,500 long." (Tr. 105). WFC relies on the testimony of its expert witness Donald Mitchell.

As previously stated I credit the testimony of Mr. Jordan and I find no evidence that he abused his discretion or authority. In particular, Mr. Jordan after eight years inspecting the mine was familiar with it. He found methane concentrations outside the Kennedy stoppings. (See Facts, 15). He contacted his superior and upon returning he detected a 2.2 methane level. There were readings in excess of 9 percent when the tube was aspirated. Behind the stoppings are numerous ignition sources and Mr. Jordan was afraid for himself. The area of the concentrated methane leads directly to the mine fan.

Given these factors I conclude the inspector properly issued his imminent danger order.

I am not persuaded by Mr. Mitchell's testimony that the inspector's methane measurements were inconclusive. In short, on the conditions Mr. Jordan found, he believed there were explosive mixtures of methane behind the stoppings. Mr. Jordan's testimony

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in this respect was supported by Charles W. McGlothlin, Jr., Vice-President and General Manager of the Golden Eagle Mine. Mr. McGlothlin, an experienced miner, testified he personally investigated the facts. (Tr. 533). While he believed there was no ignition source at the Second South he admitted that "if there had been an ignition source at the Second South" then he "would have agreed that there was an imminent danger." (Tr. 551).

IGNITION SOURCES IN SECOND SOUTH

The issues framed by the record relate to the likelihood of a roof fall and whether such a roof fall in Second South would cause an incendive spark.

The Commission has previously declined to rule whether the Secretary may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source, Island Creek Coal Company, FMSHRC, VA 91-47-R slip op. 10 (March 3, 1993).

The Commission has continued to follow its ruling in Rochester & Pittsburgh, supra, namely: an inspector must have considerable discretion in issuing imminent danger orders. If R&P is to have any meaning the Secretary need not prove that a specific ignition source existed. Rather, the Secretary need only prove a reasonable likelihood that the source is present. The explosive mixture of methane has been discussed.

In addition, the prime mover of any ignition can be a roof fall. In this case David Huey, WFC's Manager of Operations, located six roof falls on Exhibit C-4. The roof falls were all in Second South inby crosscut 20, and behind the seals. (Tr. 445).

Mr. Jordan further testified that behind the Kennedy stoppings were interrupted tracks and trolley lines. (See portion of Ex. C-4 marked "track end"). In addition, behind the stoppings there were a belt structure, mandooors and roof plates.

The record further evolves into issues of whether the rock in the roof would cause an incendive spark. Some rock, under certain conditions, will cause an incendive spark. Others will not.

Mr. Huey indicated the roof in Second South contained only shale which would not cause an incendive spark. Mr. Huey based his opinion on a lithology. WFC's expert witness Mr. Mitchell also relied on the core samples. Three different lithologies were submitted by WFC. (Ex. C-2, C-10 and C-11).

I am not persuaded by the lithologies. They show an obvious mix of rock of various thickness. Exhibit C-2 (from roof

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upwards) shows 10' siltstone; 2.8' carbon shale; 8.9' Maxwell seam; 13.3 shale and 10' of siltstone sandstone.

Exhibit C-10 shows 54' shale, 3' of carbonaceous shale, 5' Maxwell seam, 1' shale and 23' of sandy shale.

Exhibit C-11 shows on drill hole 234 siltstone (unstated amount); 3' shale; 10.5 of Maxwell seam; .5' carbonaceous shale; 2' carbonaceous siltstone and 4' shale. The GE service hole on Exhibit C-11 shows 8' Maxwell seam, 33' mudstone and 10' sandstone.

I am further unpersuaded by Mr. Huey's testimony. He initially identified the lithographic description in C-2 as accurate. (Tr. 283). But he then repudiated the exhibit stating there was not "ten foot of sandstone." (Tr. 284).

Mr. Mitchell, WFC's expert, also testified that based on the lithology provided by WFC there was no sandstone or other material in the roof that could cause an incendive spark. Both witnesses Huey and Mitchell were contradicted by Exhibit C-2.

I agree with the testimony of MSHA representative Joseph Pavlovich. In reviewing Exhibits C-2, C-10 and C-11 he indicated he would probably have been more afraid than he was [if he had seen the lithologies]. (Tr. 887). He went on to explain that with the varying roof types throughout the mine, there was no way to tell what may have been in the areas behind the stoppings. With the lithologies so different "you could have anything in there." (Tr. 888).

Mr. Jordan recalled seeing ignition sources in Second South. Such sources consisted of 3 by 3 manddoors, belt and track trolleys, trolley hangers and hanging trolley wires, roof bolts, roof plates and mats. Mr. Jordan didn't know of any occasion when they had been removed. An ignition source would be an interaction of a roof fall or roof support fall striking a rail. (Tr. 110).

Mr. Mitchell's testimony sought to rebut the Secretary's evidence. However, I am not persuaded. To a degree his evidence supports Mr. Jordan. For example "we heard testimony regarding mats and steel bolts." (Tr. 618). But according to Mr. Mitchell these have not been demonstrated to present a frictional ignition hazard except under three circumstances. One when the bolt is torn apart ... at the point of breakage you might form incendive sparks. (Tr. 619). Further, if any portion of the bolt is silicized steel or coated with aluminum and it strikes sandstone on the floor there is a potential for the formation of incendive sparks. (Tr. 619, 620). The latter two circumstances involve aluminum which is not shown to be present in Second South but the initial scenario could occur with a roof fall.

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A further source of frictional ignition (and a concern to Mr. Mitchell) was aluminum pop cans. If a can slid across dry rusty steel, the result could be the "possible formation of incendive sparks." (Tr. 624). However, Mr. Mitchell regarded this as highly improbable (due to the accumulation of water).

While Mr. Mitchell's testimony concerned First Right it is relevant to Second South. In sum, the Judge concludes WFC's expert supports the Secretary's position relating to ignition sources.

Mr. Huey marked on Exhibit C-4 the "track end." WFC's manager was in a position to know that the trolley wire was in place and that there was "metal track actually going from the track end to the stopping." (Tr. 403). In sum, there was considerable metal in Second South behind the stoppings.

In his testimony Mr. Mitchell further rejected the potential for friction ignition from sandstone rubbing against sandstone. He based his opinion on the insufficient presence of piezoelectric quartz. (Tr. 926-927, 616, 666, 827, 924, 926). Further, there was an unlikely occurrence of a roof fall past the breakage point. (Tr. 617, 669-670, 771-772, 833, 926-928, 751-752, 966). Finally, there was an absence of high strain on sandstone. (Tr. 934).

The inspector did not rely on a sandstone against sandstone friction ignition. But in any event I credit the contrary testimony of William A. Bruce as well as the Nagy and Kawenski report. (Ex. C-12). The report, a scientific approach deals with "Frictional Ignition of Gas During a Roof Fall." The report states in part that ignition by sandstone on sandstone with a pressure of 50 pounds could easily produce an incendive spark.

Mr. Mitchell, WFC's expert states he initiated the Nagy and Kawenski report but after returning from Indonesia there "were quite a number of problems that we had with this report that we needed to discuss." (Tr. 964). Mr. Mitchell does not agree with the conclusions in the Nagy/Kawenski report. (Tr. 964-965).

I credit the report, supported by Mr. Bruce's testimony, as it is a scientific approach to the frictional ignition of gas. A portion of the report (Ex. C-12) reads as follows:

SUMMARY

Limited experiments in the laboratory with specimens of mine rock from a Virginia bituminous coal mine indicate that natural gas-air mixtures can be ignited by sparks generated by rubbing friction of sandstone against sandstone, shale against sandstone,

sandstone against (roof-bolt) steel, and shale against steel. Such sparks, generated during a roof fall, may have initiated a recent gas explosion in this Virginia mine, although this cannot be stated with certainty.

No ignitions of gas were produced by sparks or heat generated by impact friction between mine rocks or steel, during tension breaks of roof bolts, or by pull tests of roof bolts through their washers and roof plate. However, this negative result of limited experiments does not preclude the possibility of gas being ignited by these conditions.

The exact mechanism of ignition of gas by frictional sparks is unknown; it has been shown by other investigators that:

1. The visibility of sparks is not a criterion for ignition, as many highly luminous sparks are nonincendive.
2. The ignition frequency increases with impact energy and material hardness.
3. The impinging of sparks on an obstruction increases their incendivity.
4. The gas concentration is a parameter; for methane, a concentration of 6 to 7 percent gas appears to be most easily ignited by frictional sparks.
5. In impact friction (aluminum striking steel) the rustiness of the steel (thermit reaction) and angle of impact are factors. The ignition frequency increases with relative humidity.
6. Among rocks, the quartz-bearing sandstones present the greatest frictional ignition hazard; shale is less dangerous than sandstone; and pyrite inclusions generally increase incendivity.
7. Metal-to-metal contacts generally produce less incendive sparks than metal-to-rock contacts. The reportedly "nonsparking" metals produce incendive sparks under some conditions.

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Table 2 of the report involved contact surfaces that produced gas ignition by rubbing friction. This involved a stationary specimen and a rotating specimen at minimum load and minimum speed.

Some of the conclusions stated in the report follow:

According to these experiments, rubbing friction sparks from the sandstone-sandstone contact were the most incendive. Ignition was obtained with a load as light as 12 pounds (at a velocity of 34 f.p.s.) and at a speed of 12 f.p.s. (at a 50-pound load). A rock would attain a velocity of 12 f.p.s. during a free fall of 2.2 feet. Ignitions were obtained readily by sparks from the shale-sandstone contact and somewhat less easily from sandstone and shale in contact with roof-bolt steel. An overall ignition frequency of 19/119 was obtained for the sandstone-sandstone contact. This is numerically less than the frequencies obtained for the shale-sandstone (21/66) and sandstone-steel (70/315) contacts; however, both the load and speeds were varied, and a greater number of experiments were made with the two sandstones in contact at limiting conditions required for ignition than with the other materials. The overall ignition frequency for the shale-roof bolt contact was 5/35. In these experiments a shower of sparks was visible whether ignition occurred or not. Gas ignition occurred 1 to 30 seconds after contact between the specimens.

One of the conclusions reached in the report was:

Because of incendive sparks can be produced so readily and with so little expenditure of energy, it is virtually impossible to eliminate them in coal mining. Gas ignitions by this source must be prevented by other measures. One of the most effective measures is adequate ventilation to prevent an accumulation of gas.

WFC further argues that MSHA's actions were inconsistent with a belief in the existence of an imminent danger in Second South.

The Judge originally vacated the Second South Order because of the inspector's actions in permitting 113 miners to construct

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permanent seals in close proximity to the Kennedy stoppings and not requiring that the atmosphere to be stabilized.

The Commission in remanding the case ruled the method of abatement is left to the informed discretion of the designated representative of the Secretary. Further some imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to the miners, 14 FMSHRC at 1291.

WFC finally claims that MSHA abused its discretion by leaving the order in effect for 15 days when an imminent danger no longer existed.

As stated above the method of abatement is left to the informed discretion of the designated representative of the Secretary.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated as being of an S&S nature "if, based on the particular facts surrounding that 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 (January 1984), the Commission further explained.

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary 861 F.2d 99, 104-05 (5th Cir. 1988) aff'g 9 FMSHRC 2015, 2021 (December 1987) (Approving Mathies criteria).

On the basis of the Mathies formulation the record establishes an underlying violation of 30 C.F.R. 75.316, the ventilation regulation. WFC failed to erect explosion proof seals. A measure of danger, i.e. the possibility of an explosion was contributed to by the violation. There was a reasonable likelihood that the hazard would result in an injury. Finally, an explosion would cause a fatality or a reasonably serious injury.

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For the foregoing reasons the S&S allegations should be affirmed.

CIVIL PENALTY

Section 110(i) of the Mine Act mandates consideration of six criteria in assessing appropriate civil penalties.

The record establishes that the Golden Eagle Mine had 132 hourly employees and 26 salaried employees. It mines approximately 900,000 tons of coal annually. It should be considered a medium size operator.

There is no evidence as to WFC's financial condition. Therefore, in the absence of facts to the contrary I find the payment of penalties will not cause WFC to discontinue its business. Buffalo Mining Co., 21BMA 226 (1973) and Associated Drilling Inc., 31BMA 164 (1974).

There is no evidence of WFC's history of previous violations.

The operator was negligent since it had ten months to erect the explosion proof seals.

The gravity of the violation is high since an explosion could propagate through the mine since Kennedy stoppings are not explosion proof.

WFC demonstrated statutory good faith since it abated the violative condition.

The penalty of \$1,000.00 set forth in the order of this decision is appropriate in consideration of the penalty criteria.

ORDER NO. 3241331

This order was issued on February 16, 1990, three days after Mr. Jordan's order in Second South.

The order alleged a condition of imminent danger existed. The order was accompanied by Citation No. 3241332 issued under section 104(a) of the Act.

Order No. 3241331 reads as follows:

An unknown mixture of methane/air could not be determined at the Kennedy stopping constructed at #1, #2, and #3 entries of 1 - Right due to [sic. the condition] that there was no means of testing or detecting what mixture was behind the stoppings. #1, #2,

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and #3 were being ventilated with the use of a line curtain from #7 right return entry of 3d North. When No. 2 entry stopping was not ventilated methane of 10% plus volume percentum was detected 12 inches from the roof and face of the stopping with the use of a permissible hand held methane detector. Bottle samples were collected at leakage areas of the stopping to substantiate the order.

SUMMARY OF SECRETARY'S EVIDENCE
FINDINGS OF FACT

1. Anthony Duran, an MSHA surface inspector, has been employed by MSHA for 13 years. (Tr. 136, 137).
2. He has received training as a coal mine inspector. He is experienced in coal mining. (Tr. 137-139).
3. He spends two quarters of the year at the Golden Eagle Mine. (Tr. 139).
4. On February 13 he was part of the inspection team with Mr. Jordan. (Tr. 140).
5. On February 13 he was called to Second South but took no methane readings. However, he was involved in discussions with regard to the withdrawal order issued on Second South. (Tr. 141).
6. He agreed with Mr. Jordan's opinion that there was an imminent danger in Second South. (Tr. 141).
7. On February 16 he was monitoring the seals being put up in Second South. He went to First Right because he was told they were installing seals at that location. (Tr. 141).
8. At the time Mr. Jordan's order was in effect for the entire mine. (Tr. 141, 142).
9. Mr. Duran was accompanied by Mr. Perko, WFC's safety foreman, Mr. Perko, confirmed that they were erecting the seals in First Right. (Tr. 142).
10. Six men and a foreman were installing seals. (Tr. 143).
11. Mr. Duran initially checked for methane at the Kennedy stoppings. (Tr. 143).
12. The methane was measured with an MX-240 hand-held methane detector. (Tr. 143, Ex. C-1).

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13. When measuring for methane inspectors try not to let the monitor exceed 10 percent because such a level can burn it out or knock it out of calibration. (Tr. 144).

14. The Kennedy stoppings were in place at First Right when Mr. Duran arrived. (Tr. 144).

15. The methane readings varied at different locations. (Tr. 145).

16. In Mr. Duran's opinion the methane readings indicated there was an unknown mixture of methane and air behind the stoppings. (Tr. 145).

17. A five percent methane concentration indicated you're getting to the point of an explosive range. He considered there was a possibility of an explosion. (Tr. 146).

18. He thought an explosion was a possibility because a roof fall could have ignited whatever methane was behind the Kennedy stoppings. (Tr. 146, 147).

19. An explosion behind the Kennedy stoppings would propagate into the working area. (Tr. 147).

20. Mr. Duran was unsuccessful in taking an air bottle sample in the No. 3 stoppings.

21. Mr. Perko went in and checked the tubing which was backed up against the Kennedy. Mr. Perko noted a reading of 1.92 percent methane from one corner to the other. This measurement was in an area between the Kennedy and the seal that was being constructed. (Tr. 148).

22. A copper tube was inserted but they could not get an air reading. (Tr. 149).

23. They then went to the No. 2 Kennedy stopping and "popped the bottle" with two samples.

24. He then measured methane at the No. 1 stopping. (Tr. 149, 150).

25. When you pop it the bottle soaks in the methane (or whatever is there), then you cap it with a small plastic wax cap. (Tr. 150).

26. They then went back to No. 3 with two big air bottles and two little ones. (Tr. 150).

27. After the bottle samples were taken Mr. Duran informed Mr. Perko there was an unknown mixture of methane. (Tr. 150).

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28. Mr. Duran then issued a 107(a) order because there was a possibility of an imminent danger behind the Kennedys. (Tr. 151).

29. In addition to methane there must also be an ignition source. (Tr. 151, 152).

30. In Mr. Duran's opinion a roof fall could be an ignition source. Some of the roof bolts go through the plate and it causes a spark prior to falling or even when it falls. Steel against steel can cause a spark. (Tr. 152).

31. The First Right is a gassy section. The hazard would be an explosion due to methane. (Tr. 153).

32. First Right was not similar to Second South because in Second South they were able to sample with air bottles; also there was a surveillance tube and a vent pipe was available for samples. (Tr. 154).

33. When Mr. Duran was at First Right there was no means to ascertain what mixture was behind the seals, other than what was leaking from the Kennedys. (Tr. 154).

34. However, he took it for an imminent danger because he didn't know what was behind the Kennedys other than what was on the outby end. (Tr. 154).

35. Mr. Duran was afraid for the safety of all in the area. (Tr. 155).

36. There were defective curtains in front of the stoppings. They allow the return air to sweep the face of the Kennedys.

37. To Mr. Duran's knowledge the area behind the Kennedys was not ventilated. In addition, the erection of the explosion proof seals had not been completed. (Tr. 156).

38. If an imminent danger exists it could cause death or physical harm if mining proceeds and the hazardous condition is not eliminated.

39. Someone could have been seriously injured or killed as the result of an explosion. (Tr. 157).

40. Mr. Duran indicated an explosion was a possibility. (Tr. 157, 158).

41. The imminence of the situation was because Mr. Duran didn't know what the methane mixture was behind the stoppings. (Tr. 158).

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42. Mr. Duran then went to surface and he called his supervisor, Rick Phelps. He was then told to write the 107(a) imminent danger order. (Tr. 160). The miners came out from underground.

43. The 107(a) order was terminated after the explosion proof seals were completed. (Tr. 161).

44. After the seals were erected a sample taken with a Rilken. It indicated the methane concentration was 80 percent; this was behind the No. 3 shield. (Tr. 161).

45. Mr. Duran identified the instruction manual for the Model MX-240, Combination Methane and Oxygen Monitor. (Tr. 164, Ex. C-1).

46. Mr. Duran has been trained in the methanometer and it requires calibration. (Tr. 166).

47. When the MX-240 detects methane in the excess of 4 percent it has to be recalibrated. (Tr. 167).

48. Mr. Duran recalibrated his instrument before he went underground on the 16th; he again recalibrated it when he came out. (Tr. 168).

DISCUSSION AND FURTHER FINDINGS OF FACT

The methane readings in connection with Order No. 3241331 are inadequate because the ventilation was disturbed; further, the hand-held methane monitor was not properly recalibrated.

Mr. Duran testified he found methane concentrations of 1.9 to 2 percent at the Kennedy stoppings. At one stopping in close proximity to a small hole, he found an 8 percent concentration. (Tr. 143, 145). He also took six bottle samples. (Ex. S-7).

The uncontradicted testimony of witness Frank Perko, WFC's safety inspector, indicated that Mr. Duran disturbed the ventilation along the Kennedy stoppings then he measured for methane.

The record indicates Mr. Duran knowingly made the disruption. (Tr. 505-509, 515-518).

Specifically, there was line brattice in the First Right area. Each entry had brattice up to the seal. The purpose of the brattice was to ventilate the stoppings. (Tr. 504). Mr. Duran took readings around the partially construed seal. (Tr. 504). After Mr. Duran left the No. 3 entry he went to the No. 2 entry. Mr. Perko followed in two to five minutes. In the No. 2 entry he noticed the brattice had been brought back to the rib line in the main No. 7 entry. (Tr. 505-506). Mr. Duran made

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several checks. Mr. Perko mentioned that the brattice should be brought in to continue the ventilation along the stopping. At that time Mr. Duran said "Wait a minute. I want to take some checks without any ventilation in here." The miner holding the brattice said: "One of you is telling me to take it out; one is telling me to bring it back; the other one is telling me to take it back out. I wish someone would make up their mind." Mr. Perko thought it should be ventilated "so we don't create a condition." (Tr. 506, 507).

Mr. Perko also thought Mr. Duran was taking his readings too close to the face. (Tr. 507). [Compare the requirements of 30 C.F.R. 75.309-2.]

In the No. 1 entry Mr. Duran pulled back the curtain enough to disrupt the ventilation. After taking his readings he put the curtain back up. (Tr. 508, 509).

When he was in the No. 1 entry he said "We'll do it as we did in No. 2." (Tr. 515). When Mr. Perko said we'd better bring the brattice in, Mr. Duran said "No, no, wait a minute. I want to take the readings -- take readings along this stopping without any ventilation." (Tr. 515, 516). He [Mr. Duran] did not explain why he wanted to take readings without ventilation. (Tr. 516).

I find Mr. Perko's testimony to be credible. A company safety foreman accompanying a federal inspector would particularly observe the inspector's activities. Further, Mr. Perko's evidence is uncontroverted.

In support of an explosive mixture the Secretary also offered a laboratory analysis of the air bottles taken by Mr. Duran.

At the hearing the Judge questioned the proof adduced by Exhibit S-7. (Tr. 183). However, Mr. Duran identified sample A5500 as well as Column 6 as "no sample" number. Sample A5500 shows a concentration of 13.76 percent methane and the "no sample" shows a concentration of 1.35 percent.

These readings may be correct but on the present state of the record it is not possible to know how the samples may have been skewed by any disturbed ventilation.

The Commission has previously invalidated a citation because the inspector intentionally skewed the air readings, Freeman United Coal Co., 11 FMSHRC 161, 166 (1989).

Mr. Duran's methane measurements with the hand-held monitor are further suspect. It is uncontroverted that Mr. Duran cali-

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brated his monitor when he went into the mine and again when he came out.

On the other hand, the manufacturer's specifications provide for more frequent calibration. The manual states:

Methane Measuring Range: 0 to 4% methane per Code of Federal Regulations. Title 30, Part 22.7. The instrument must be recalibrated after displaying a methane concentration above 4%. (Ex. C-1 at 4).

There was no expert testimony offered by either party concerning the effect of a failure to recalibrate. However, on the state of the record I give zero weight to any methane concentrations measured by the MX 240 Combination Methane/Oxygen monitor.

The crucial question in connection with Order No. 3241331 is whether the inspector abused his discretion or authority. An abuse of discretion may be broadly defined to include errors of law. See generally *Butz v. Glover Livestock Commission Co.* 411 U.S. 182, 185-186 (1973); *NL Industries, Inc. v. Department of Transportation* 901 F.2d 141, 144 (D.C. Cir. 1990). *U.S. v. U.S. Currency*, in the amount of \$103,387.27, 863 F.2d 555, 561 (7th Cir. 1988).

I conclude the disturbance of the ventilation in the mine constituted such an abuse. Further, the inspector's investigation did not sufficiently support the imminent danger order or the citation. The order and the citation should be vacated.

Accordingly, for the reasons stated herein I enter the following:

ORDER

1. Order No. 2930784 is AFFIRMED and the contest of the order is DISMISSED.

2. Citation No. 2930785 is AFFIRMED and the contest of the citation is DISMISSED and a civil penalty of \$1,000.00 is ASSESSED.

3. Order No. 3241331 is VACATED and the contest of the Order is SUSTAINED.

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4. Citation No. 3241332 is VACATED and the contest of the citation is SUSTAINED.

John J. Morris
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., CROWELL & MORING, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004 (Certified Mail)

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

shMargaret A Miller Esq
Office of the Solicitor
US Department of Labor
1585 Federal Building
1961 Stout Street
Denver CO 80294
Timothy M Biddle Esq
CROWELL & MORING
1001 Pennsylvania Avenue NW
Washington DC 20004