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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 27, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-340 A.C. No. 05-02820-03621
v.	:	Docket No. WEST 92-384 A.C. No. 05-02820-03627
WYOMING FUEL COMPANY, Respondent	:	Golden Eagle Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-186 A.C. No. 05-02820-03657A
v.	:	Golden Eagle Mine
EARL WHITE, employed by BASIN RESOURCES, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Denver, Colorado, for Respondents.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent Wyoming Fuel Company with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. section 801 et seq. (the "Act"). The Secretary further charges Respondent White with violating section 110(c) of the Act.

A hearing was held on the merits in Denver, Colorado on May 26, 1993, and concluded on June 21, 1993. The parties filed post-trial briefs.

The orders/citations in Docket Nos. WEST 92-340 and

WEST 92-384 were issued to Wyoming Fuel Company as the mine operator for events that occurred on Sunday, June 23, 1991.

However, it is uncontroverted that the Golden Eagle Mine was purchased by the owner of Basin Resources, Inc. from the owner of Wyoming Fuel Company on June 1, 1991. (Tr. 205-206). No issue was raised as to this facet of the case.

In Docket No. WEST 93-186 the Secretary seeks a civil penalty, under section 110(c) of the Act, against Earl White employed by Basin Resources, Inc.

In view of the above, references in this decision may be to Wyoming Fuel Company ("WFC") or Basin Resources, Inc. ("Basin") or Earl White ("White").

DOCKET NO. WEST 92-384
CITATION NO. 3905711

This citation, issued under Section 104(d)(2) of the Act, alleges a violation of 30 C.F.R. 75.316. (Footnote 1) The citation reads as follows:

> The methane, ventilation and dust control plan, approved April 16, 1991, was not in compliance in the northwest #1 longwall, MMU 009-0, in that page 3 of this addendum shows #3 headgate entry as a return air course. The air was redirected on 6-23-91 in this entry and it is now on intake and, in turn, the air is coursed through #1 and #2 bleeder entries toward the new proposed exhaust shaft. At the shaft, the air is coursed to #58 crosscut of the tailgate return.

The regulation, Section 75.316, provides as follows:

> Section 75.316 Ventilation System and Methane and Dust Control Plan.
>
> (Statutory Provisions)
>
> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

_____

1 This section is now recodified at 30 C.F.R. 75.370-372.

DOCKET NO. WEST 93-340
CITATION NO. 3244408

This citation, issued under Section 104(a) of the Act, alleges a violation of 30 C.F.R. 75.316 (cited above). The citation reads as follows:

> Methane in excess of 4.0% and 5.0% was present out by the Kennedy stoppings in crosscuts #62 and #63 between #3 and #4 entries on the #3 side of the northwest longwall tailgate area. Also, oxygen in amounts of 17.1% was measured with hand-held detectors at least four feet out by the stopping in #62 crosscut. Bottle samples were collected to substantiate this citation and order.
>
> This was the main contributing factor to the issuance of imminent danger order #3244407. Therefore, an abatement date was not set.

Imminent Danger Order No. 3244407

This imminent danger order was issued immediately before citation No. 3244408. The order, issued under Section 107(a) of the Act, was not contested and it has become a final order of the Commission.

The order itself reads as follows:

> An imminent danger existed in the tailgate area of the northwest longwall section in that methane (CH4) in amounts exceeding 4.0% and 5.0% were detected with a permissible methane detector out by the Kennedy stoppings in crosscuts #62 and #63 between #3 and #4 entries of the tailgate. A violation of 75.329 C.F.R. 30.

DOCKET NO. WEST 93-186
Secretary v. Earl White
Employed by Basin Resources, Inc.

In this case the Secretary, pursuant to Section 110(c) of the Act, seeks civil penalties against Earl White, Respondent, for knowingly authorizing, ordering, or carrying out, as an agent of the corporate mine operator, the violations alleged herein.

CITATION NO. 3244406
DISCUSSION AND FINDINGS

The critical issue in this citation is whether Basin and its manager, Earl White, were required to obtain approval from MSHA before implementing any ventilation changes. It is uncontroverted that no prior approval was obtained.

On its face 30 C.F.R. 75.316 does not require an operator to comply with a ventilation plan nor does it require prior approval before ventilation changes are made. However, the Commission has determined that "once the plan is approved and adopted, its provisions are enforceable as mandatory standards." Jim Walter Resources, Inc. 9 FMSHRC 903, 907 (May 1987); see also Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981). In an enforcement action before the Commission, the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition violated the provision. Jim Walter, 9 FMSHRC at 907.

The pertinent portion of the ventilation plan is a letter dated November 15, 1990 addressed to Charles W. McGlothlin then Vice-President and General Manager of Wyoming Fuel Company. The letter reads, in part, as follows:

> RE: Golden Eagle Mine
> ID No. 05-02820
> Ventilation System and Methane and Dust Control Plan
>
> Dear Mr. McGlothlin:
>
> The ventilation system and methane and dust control plan, dated September 10, 1990, October 3, 1990 and November 7, 1990, consisting of three cover letters, a 48-page plan, and mine map, is approved in accordance with 30 CFR 75.316. The plan is subject to revision at any time and shall be reviewed by the operator and MSHA at least once every six months. Before any changes are made in the approved ventilation system, they shall be submitted to and approved by the District Manager prior to implementation. (Emphasis added).
>
> The following amendment to the previously approved plan is also included in the approval:
>
> > The Slope and Shaft Sinking Plan Amendment dated September 21, 1990.
>
> The map approval applies specifically to the provisions of 30 CFR Sections 75.316-1(a), 75.316-2(f)(1), 75.330, 75.1200 and 75.1200-1. Evaluation of escapeways will be accomplished by an on-site inspection of the mine by an authorized representative of the Secretary. The escapeways shall be the most direct and practical route out of the mine and shall comply with the criteria in 30 CFR 75.1704.1.
>
> This plan supersedes the previously approved plan with an approval date of May 10, 1989 and all incorporated amendments, except as noted above. This approval,

also, supersedes the conditional approval dated November 8, 1990.

It is apparent that the underlined portion requires prior approval from MSHA before implementing any changes in the ventilation system.

It is further uncontroverted that White made changes in the ventilation system without seeking prior approval.

These changes were substantiated and best illustrated by two drawings made by witness Denning, prepared as "before and after" illustrations (see Exhibits M-7 and M-8). Basically White changed a return aircourse in the No. 1 headgate to an intake aircourse. As a result of the change there was no return aircourse in the headgate.

The Judge recognizes that White stated he was accustomed in his previous work to making ventilation changes and then submitting such changes to MSHA for approval. However, although he was only at the Golden Eagle Mine a short time he should have been familiar with the ventilation plan requirements.

If the Commission accepts White's theory then the ventilation regulations would be meaningless.

The Secretary established a prima facie violation of the ventilation plan because the prior notice requirement was a part of the plan and White, Basin's Vice-President and General Manager, failed to obtain approval from MSHA before implementing such changes.

WFC argues the plan approval "cover letter" cannot be considered part of the plan for a number of reasons.

WFC initially contends the letter addressed to Mr. McGlothlin is merely a "cover letter" and not part of the actual plan.

I disagree. The letter itself identified the document as the Golden Eagle Mine ventilation plan. An amendment is specifically included in the "cover letter", "Escapeways" are also incorporated: "they shall comply with the criteria in 30 C.F.R. 75.1704.1." There appears to be no reason to conclude that "page 2 of 46" is not part of the ventilation plan for the Golden Eagle Mine. However, I recognize that MSHA's use of a cover letter to impose ventilation amendments on an operator has been criticized.

Basin further asserts that MSHA witnesses testified as to three alternatives to trigger the prior approval requirement. Some MSHA witnesses draw a distinction between "major" and "minor" changes. (Tr. 176-178, 189-190). Inspector Jordan contended that prior approval was required for "all changes." (Tr. 28, 45).

I decline to support any argument that requires prior MSHA approval only for "major", but not for minor changes.

Commission Judges have routinely ruled that any deviation from the ventilation plan, even temporary or inadvertent, is a violation of 75.316.

In Consolidation Coal Company, 3 FMSHRC 2207 (September 1981), Judge Melick affirmed a violation of 75.316, for the failure by the operator to ventilate an entry with a line curtain. Although the evidence established that the curtain had been in place 2 1/2 hours prior to the issuance of the citation, but had been taken down for some unexplained reason, the judge found that the absence of the curtain at the time the citation was issued was a violation. See also: Windsor Power House Coal Company, 2 FMSHRC 671 (March 1980), Commission review denied April 21, 1980 (Judge Melick affirmed a violation of 75.316 because of the operator's failure to maintain adequate ventilation at a working face as required by its ventilation plan); Coop Mining Company, 5 FMSHRC 2004 (November 1993) (affirmed a violation of 75.316, because of an operator's failure to install a line curtain as required by its ventilation plan. Although the judge considered the fact that the curtain may have been down for only a short time due to possible rib sloughage, he found that such an unusual occurrence was no defense); Mid-Continent Coke and Coal, 3 FMSHRC 2502 (November 1981) (a temporary halt in mining to permit other activities does not interrupt ventilation requirements) and U.S. Steel Mining Company, 12 FMSHRC 1390 (July 1990) (violation found where curtain was not required distance from face).

Basin further claims that MSHA cannot unilaterally establish plan provisions by adding requirements to transmittal letters because plans are the subject of negotiation between MSHA and the operator.

I agree that the approval and adoption process is bilateral involving consultation, discussion and negotiation between the parties mutually agreeing to ventilation plans suitable to specific conditions at particular mines. Jim Walter Resources Inc. 9 FMSHRC at 907. However, in the instant cases there is no evidence the parties ever engaged in any such negotiations. In short, evidence is necessary to support these bare allegations by Basin.

Basin also contends it had no notice of the plan requirements because it could not locate the cover letter in its file and it was not produced in discovery. (Tr. 362-363, 405-406).

The prior notice requirement was contained in MSHA's letter of November 15, 1990, addressed to Charles W. McGlothlin (Ex.

M-1, page "2 of 46"). A subsequent letter dated April 3, 1991, states in part "This amendment will be incorporated into the current ventilation plan originally approved on November 15, 1990 ... ". The subsequent letter indicates that the letter of November 15, 1990, was sent to WFC. Approvals of this type are transmitted in the regular course of business to the operator and various MSHA offices. (Tr. 130). In this situation Basin adopted the previous owner's plans. (Tr. 131).

Basin further observes that the new ventilation regulations, which were adopted after the events in this case, expressly require prior approval. (Footnote 2) As a result Basin argues the elementary rules of statutory construction compel a conclusion that the regulation as it existed did not require prior approval by MSHA.

I agree that the regulation itself, 30 C.F.R. 75.316, does not require prior approval by MSHA. However, the plan itself requires such prior approval. As a result the rules of statutory construction are not controlling.

Finally, Basin argues that MSHA's position is undercut when its other regulations provide for immediate changes especially when methane reaches certain levels e.g., see 30 C.F.R. 75.308; 309(a); 316-2(d)

Basin's arguments are rejected. MSHA may properly address particular hazards (such as methane) with specific detailed regulations. Such particularized regulations do not prevent the enforcement of ventilation plans.

SIGNIFICANT AND SUBSTANTIAL

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there

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2 The new regulation, 30 C.F.R. 75.370, provides as follows:

> (c) No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could mater- ially affect the safety and health of the miners, or any change to the information required in 75.371 shall be submitted to and approved by the district manager before implementation.

exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co. 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

MSHA's principal and most knowledgeable witnesses were Messrs. Jordan and Denning.

Mr. Jordan testified this citation was an "S&S" violation. He did so because "anything that has the potential for serious injury or bodily harm is automatically significant and substantial." (Tr. 40). Mr. Jordan further stated it had the potential ... ." and it is only a "guesstimate" of what can occur when it [air reversal] is done in this manner." (Tr. 40). It is apparent that Mr. Jordan's definition of "S&S" conflicts with the Commission's view.

Mr. Denning, MSHA's ventilation expert, testified that reversing the air without approval could cause "unknown changes" in the ventilation and cause methane to accumulate "in unknown areas." (Tr. 141).

However, Mr. Denning elaborated on this condition as follows:

> A. It's apparent that the change caused the ventilation pressures to be redistributed so that the methane accumulates at the tailgate entries and not only the change of the direction of air in the air course, but the removal of the stoppings that were cited in the imminent danger order at crosscuts 62 and 63. (Tr. 142).

As noted above the Secretary's experts failed to testify there was "a reasonable likelihood that the hazard contributed to will result in an injury." In short, the third facet of the Mathies formulation was not established.

However, it is necessary to consider imminent danger Order No. 3244407. 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 2159 (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 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). See also Wyoming Fuel Company, 14 FMSHRC 1296 (August 1992); Utah Power & Light Co., 13 FMSHRC 1617 (October 1991).

Imminent danger Order No. 3244407 was issued immediately before Citation No. 3244408 and that became a final order of the Commission. The order establishes the reasonable likelihood that the methane concentration will result in an injury.

The S&S allegations as to Citation No. 3905711 should be affirmed.

UNWARRANTABLE FAILURE

In Emery Mining Corp., 9 FMSHRC 1997, 2000-2004 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term

"unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. The Commission stated that while negligence is conduct that is "inadvertent", "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

The Commission has held that there cannot be an unwarrantable failure resulting from a good faith, although mistaken belief that its actions were in compliance with regulations. Utah Power & Light Company 12 FMSHRC 965, 972 (May 1990), aff'd 951 F.2d 292 (10th Cir, 1991), Cyprus Tonopah Mining Corporation 15 FMSHRC 367, 375-377 (March 1993).

Mr. White did not believe that 30 C.F.R. 75.316 required that he obtain prior approval from MSHA before implementing changes in the ventilation system. This belief, shared by Thompson, was based on the language in the regulations and his previous experience. (Tr. 416-417).

I conclude this evidence is credible. Mr. White and his crew changed the ventilation system on Sunday, June 23, 1991. He called Mr. Jordan the next day to advise him of the change.

Further, White felt he could have been cited for failing to correct the problems in the ventilation system. (For apparent problems in the system, see Exhibit BR-1). Several recent decisions find that insufficient air velocity violated the operator's ventilation plan support White's concerns in this regard. Bethenergy Mines, Inc., 15 FMSHRC 1200 June 23, 1993, (Weisberger, ALJ); Energy West Mining Company, 15 FMSHRC 1185 June 21, 1993 (Lasher, ALJ).

The Secretary asserts the unwarrantable failure allegations should be sustained because White ignored statements by his two deputies (Salazar and Huey) that MSHA should be notified. Further, witness Gossard advised company representatives of the necessity of prior notification as it related to an explosion in the Golden Eagle Mine in 1991.

It is true that Salazar and Huey told White prior notification was necessary. But at this point White sent Perko (Safety Department) for a copy of Part 75. White read Part 75 and stated (according to both Salazar and Huey) "Show me in the book where it says I have to notify MSHA of this change" (Salazar at 64; Huey at 81). Huey also confirmed that White read Part 316 [30 C.F.R. 75.316]. He indicated there wasn't anything there saying he couldn't make the ventilation changes (Huey at 81).

The evidence also shows that Ronald J. Gossard was assigned to head up an MSHA team to investigate the MSHA Golden Eagle mine

explosion that occurred in February 1991. At the close out conference, ventilation changes were discussed.

I give Mr. Gossard's testimony zero weight because Basin had not yet acquired the Golden Eagle Mine. Mr. Gossard's last trip to the mine was in March 1991 and he had no knowledge of the practices followed by Basin (Tr. 203). White took over his current position on June 1, 1991 when Entech (Basin) acquired the Golden Eagle Mine. (Tr. 206).

There was no unwarrantable failure because the operator through its manager had a good faith honest belief that he was complying with the regulations.

The allegations of unwarrantable failure should be stricken.

CITATION NO. 3244408
DISCUSSION AND FURTHER FINDINGS

At issue here, separate from the dispute involving Mr. White's changes in the ventilation system, is whether the methane levels that were detected by Inspectors Jordan and Phelps, when they went underground on the afternoon of Tuesday, June 25 constitute a violation.

It is uncontroverted that Inspector Jordan took his readings four feet outby the stoppings at Crosscut 62 and 63. (Tr. 47). The methane averaged 4 to 5 percent and above. (Tr. 35). The measurement location was supported by the test results which also reflect that they were taken four feet from the stoppings. (Ex. M-5). Although Jordan could not tell how far he was from the entry, White testified the stoppings are 60 feet from the entries. (Tr. 350).

Basin asserts that the mixing point where the measurement should take place is at the intersection of the bleeder taps and the return air entries, not the stoppings in the bleeder taps. As White explained, methane levels in the bleeder taps are naturally going to be higher as the methane coming off the gob is diluted on its way to the return air entries in the bleeder system. (Tr. 350). Air is traveling up the entry and the bleeder taps are at 90 degrees. As the methane comes off the gob, the air mixes with it and dilutes it below 2 percent. (Tr. 350, 351). There is no hazard in the reduction at that point and all the coal mines in the world work in that fashion. (Tr. 351).

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The ventilation plan provides as follows:

> The methane content in the air in active workings (except those active work areas specifically addressed elsewhere in the plan or in 30 CFR 75) shall be less than 1.0 volume per centum. If at any time the air in any of these active workings contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that air shall contain less than 1.0 volume per centum of methane. (Ex. M-1, page "14 of 46").
>
> The methane content in any return aircourse, other than an aircourse returning the split of air from a working section, shall not exceed 2.0 volume per centum. (Ex. M-1, page "15 of 46").

The Secretary's regulations 30 C.F.R. 75.309-2 Location of Methane Test provides as follows:

> The methane content in a split of air returning from any working section shall be measured at such point or points where methane may be present in the air current in such split between the last working place of the working section ventilated by the split and the junction of such split with another air split or the location at which such split is used to ventilate seals or abandoned areas. Tests to determine the methane content of such split shall be made at a point not less than 12 inches from the roof or ribs."
>
> Similarly, 30 C.F.R. 75.316-2, Criteria for approval of ventilation system and methane and dust control plan, states in subpart (i), "When the return aircourses from all or part of the bleeder entries of a gob area and air other than that used to ventilate the gob area is passing through the return aircourses, the bleeder connectors between the return aircourses and the gob shall be considered as bleeder entries and the concentration of methane should not exceed 2.0 volume per centum at the intersection of the bleeder connectors and the return aircourses.

The Secretary has several regulations dealing with location of methane tests.

However, the Judge believes the above provisions should be read in conjunction with 30 C.F.R. 75.310-3 which provides as follows:

75.310-3 Location of methane tests.

> The methane content in a split of air returning from any active workings of a mine shall be measured at such point or points where methane may be present in the air current in such split between the last working place ventilated by the split and the junction of such split with another air split or at a point where such split is used to ventilate seals or abandoned areas. Tests to determine the methane content of such split shall be made at a point not less than 12 inches from the roof or ribs.

Stripped of its surplusage, 30 C.F.R. 75.310-3 reads: "The methane content shall be measured ... at a point where such split is used to ventilate seals."

The cited section indicates Inspector Jordan measured the methane at the proper location and manner.

Basin's reliance on Island Creek Coal Company 15 FMSHRC 339 (March 1993) is misplaced. In Island Creek Coal Company the Commission affirmed the Judge's order vacating the citation because there was no evidence that an explosive concentration of methane was entering the mine. In the instant case a 4 to 5 percent concentration of methane existed outby the stoppings.

Citation No. 3244408 should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The S&S factors as established by the case law are set forth above.

The evidence shows that the methane was found while the mine was deenergized, no workers were present and it occurred in a non-working area of the mine. There was no evidence of any ignition sources.

In view of these facts the S&S allegations should be stricken.

UNWARRANTABLE FAILURE

The case law as to unwarrantable failure is set forth in connection with the prior citation.

The evidence does not support unwarrantable failure and said allegations are stricken.

DOCKET NO. WEST 93-186
SECRETARY V. EARL WHITE

In this case the Secretary seeks a civil penalty against Earl White, Basin Manager and Vice-President, under Section 110(c) of the Act.

Section 110(c) provides:

> (c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

In Bethenergy Mines, Inc. et al., 14 FMSHRC 1232 the Commission restated its views that a corporate agent "who knowingly authorized, ordered, or carried out ... [a] violation" committed by a corporate operator may be subject to individual liability under section 110(c) of the Mine Act. The proper legal inquiry for purposes of determining liability under section 110(c) of the Act is whether the corporate agent "knew or had reason to know" of a violative condition. Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). In Kenny Richardson, the Commission stated:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

3 FMSHRC at 16. In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted not that the individuals knowingly violated the law. Cf., e.g., United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563 (1971).

Further, the Commission reaffirmed its previous holding that a "knowing" violation under section 110(c) involves aggravated conduct, not ordinary negligence, Bethenergy, 14 FMSHRC at 1245.

The evidence as to White has been previously reviewed. His conduct was not "aggravated."

Accordingly the 110(c) is DISMISSED.

CIVIL PENALTIES

The statutory criteria to assess civil penalties is contained in section 110(i) of the Act.

The proposed assessment indicates the Golden Eagle Mine produced 591,944 tons.

Further, the penalties assessed should not affect the operator's ability to continue in business.

As to its history, the operator, Basin Resources, was assessed eight violations for the period from June 1, 1991 to June 24, 1991. (Ex. M-6).

The operator was negligent as to both citations. The company should have known prior MSHA approval was required to change ventilation. It should also have anticipated the methane concentrations would accumulate in the mine.

The gravity of the violations should be considered as high. The change in the ventilation caused the methane to locate in a different location.

The operator demonstrated good faith in promptly abating the violative condition.

The penalties set forth in this order are appropriate.

For the reasons herein I enter the following:

ORDER

1. WEST 92-384:

   Citation No. 3244406, as modified, is affirmed and a civil penalty of $300 is assessed.

2. WEST 93-340:

   Citation No. 3244408, as modified, is affirmed and a civil penalty of $400 is assessed.

3. WEST 93-186:

   The 110(c) case is dismissed.

John J. Morris
Administrative Law Judge

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