

CCASE:
SOL (MSHA) V. PEABODY COAL
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-713
Petitioner	:	A.C. No. 15-08357-03740
v.	:	
	:	Camp No. 11
	:	
	:	Docket No. KENT 93-714
	:	A.C. No. 15-08357-03741
PEABODY COAL COMPANY,	:	
Respondent	:	Camp No. 11

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Carl B. Boyd, Jr., Henderson, Kentucky, for Respondent.

Before: Judge Amchan

These cases arise out of several different inspections of Respondent's Camp No. 11 underground mine in Union county, Kentucky. At the outset of the hearing three citations were settled. With regard to citation Nos. 3547717 and 3547573, Respondent agreed to withdraw its contests of the proposed \$50 penalties. Petitioner modified citation 3547578 to "non significant and substantial" and reduced the proposed penalty from \$309 to \$50. I find that the settlement of these penalties is consistent with section 110(i) of the Act and, therefore, grant the parties' motion for approval of this partial settlement.

Contested Penalties

Citation 3860644: Rock Dust

On January 25, 1993, MSHA Inspector Harold Gamblin took band samples of the rock dust on the mine floor, roof and ribs, in an area leading to the working face of respondent's mechanized

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mining unit #5 (Tr. 17-20, 26, 44). Gamblin began taking samples at a point 2,300 - 2,500 feet from the working face and stopped taking them about 300 to 500 feet from the working face (Tr. 46 - 247, 68). In some of the areas sampled, the rock dust appeared to be inadequate in that the surface sampled was black in color, while adequate rock dusting normally gives the surface a white or grayish appearance (Tr. 21).

Inspector Gamblin's rock dust samples were sent to the MSHA laboratory which analyzed them and reported the results to his office in Madisonville, Kentucky (Exh. G-1, pp. 3 - 6). All 10 samples taken in the return aircourse complied with MSHA standards, but 5 of 25 taken in the intake aircourse did not (Exh. G-1, pp. 3-6).

MSHA regulations, at 30 C.F.R. 75.403, require that the incombustible content of the combined coal dust, rock dust and other dust shall not be less than 65 percent, but not less than 80 percent in return aircourses. Where methane is present in any ventilating current the incombustible content of the combined dust must be increased by 1 percent in those areas where the 65 percent standard would otherwise be in effect, and must be increased by 0.4 percent in return aircourses.

As rock dust is 100% finely ground limestone and coal dust is combustible, a sample which contains an insufficient percentage of incombustible material indicates that an insufficient amount of rock dust has been applied to the surfaces in the mine (Tr. 23). Inadequate rock dusting may increase the severity of a fire or explosion if one should occur (Tr. 22-23, 36-37, 58, 73-74). Increased combustibility of the dust in the mine would propagate a fire or explosion (Tr. 73-74).

Analysis of Mr. Gamblin's samples revealed that sample 375937, taken 1500 feet inby from the point where the sampling started had an incombustible content of 59.7%. Sample 375940 taken 500 feet inby the starting point was 64% incombustible. Sample 375950 taken 500 feet inby the starting point was 56.9% incombustible. Sample 375952, taken 1500 feet inby was 51% incombustible. Sample 375953, taken 2,000 feet inby, and 300 - 500 feet from the working face was 64.3% incombustible (Exh. G-1 pp. 4-5, Tr. 68).

After receiving the laboratory results, Inspector Gamblin issued Respondent citation No. 3860644 on March 18, 1993. He characterized the violation as "significant and substantial" and Peabody's negligence as "moderate." A \$1,019 penalty was proposed for the violation.

The "S&S" characterization was predicated in large part on the fact that after taking the rock dust samples Inspector Gamblin found methane concentrations in excess of 2.5 percent

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inby the site of the samples, 34 feet from the working face for mechanized mining unit # 5 (Tr. 36 - 37, 51). As the result of his methane readings, Inspector Gamblin issued Respondent an imminent danger order pursuant to section 107(a) of the Act (Tr. 65). Inspector Gamblin also found loose coal or coal dust accumulations in the same areas in which the rock dust violations were discovered (Tr. 33-34, 312). He cited Respondent for a violation of 30 C.F.R. 75.400 on account of these accumulations (Tr. 33-34, 312).

Citation 3860644: Analysis

Respondent does not dispute the fact that a violation occurred with respect to citation No. 3860644; it contests the characterization of the citation as "S&S" and the assessment of the gravity for penalty calculation purposes (Respondent's Answer).

The Commission formula for a "significant and substantial" violation was set forth in Mathies Coal Co. 6 FMSHRC 1 (January 1984):

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.

The central issue in this case concerns the application of step 3 of the Mathies test. The Commission's decisions in Shamrock Coal Company, 14 FMSHRC 1306 (August 1992), cited in Respondent's post-hearing brief, and Texasgulf, 10 FMSHRC 498 (April 1988) support the proposition that a rock dust violation is "S & S" only if other conditions that make an accident reasonable likely exist at the same time, or are reasonably likely to occur in the future. In Texasgulf permissibility violations were found non "S&S" because there was no evidence that ignitable or explosive concentrations of methane were likely to occur in Texasgulf's mine. The Commission relied on low methane readings the day of the violation, the absence of any methane explosions or ignitions at the mine in the past, and the geological characteristics of the mine.

In Shamrock 31 of 38 rock dust samples in the return aircourse were violative, some as low as 56% instead of the required 80%. The Commission affirmed the judge's finding that this violation was non "significant and substantial" and

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implicitly rejected the Secretary's argument that the judge failed to give proper consideration to "normal mining practices" 14 FM7SHRC 1310.

The Commission concluded that the judge did not err in finding these violations to be non "significant and substantial" because of the absence of a "confluence of factors" which would make an explosion or ignition reasonably likely to occur, 14 FMSHRC 1311. It noted that there was no indication that the mine had experienced methane ignitions in the past or that it liberated excessive quantities of methane. The Commission also relied on the lack of evidence regarding impermissible equipment or violative coal dust accumulations on the day of the rock dust violation.

The question then becomes whether respondent's violation of 30 C.F.R. 75.403 is "significant and substantial" because MSHA, on January 25, 1993, also detected in excess of 2.5% methane at the working face, about 800 to 1,000 feet from several obviously violative rock dust samples, and discovered loose coal accumulations near areas that were inadequately rock dusted.(Footnote 1) Respondent's compliance manager, Mitchell David Fuson disagreed with MSHA that conditions on January 25, 1993, were such that an explosion or fire were reasonably likely (Tr. 304-313, 317-318, 319-320). His testimony in this regard is predicated on the fact that the rock dust violations were in the intake aircourse and that coal dust accumulations were not sufficient to cause an explosion.

Despite Mr. Fuson's opinion, I conclude that there was a reasonable likelihood of an ignition or explosion when inspector Gamblin detected methane concentrations of 2.5%.(Footnote 2) At the time mining operations were ongoing (Tr. 304, 312-313). MSHA regulations at 30 C.F.R. 75.323 require the withdrawal of miners from intake air courses when methane levels reach 1.5%. From this I conclude that at such concentrations an explosion or ignition is reasonably likely. Indeed, the Commission has recognized that methane is ignitable at a 1.0 to 2.0 percent concentration Texasgulf, 10 FMSHRC at 501.

Although this record indicates that an explosion is far more likely to travel out the return aircourse than the intake

1I exclude consideration of the two samples that were barely under the required 65 percent.

2Inspector Gamblin's testimony indicates methane concentrations may have been even higher, possibly in the explosive range, at the working face. He was unable to take samples any closer to the face because the roof was not supported (Tr. 61).

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aircourse, it does establish that they may travel through the intake side (Tr. 58, 65). Moreover, I infer from the requirement for rock dusting in the intake air courses that the danger of an explosion traveling through that aircourse is sufficiently likely to meet the requirements of the Mathies test. As I find no serious issue with regard to the other criteria set forth in Mathies, I find this violation to be "significant and substantial."

I find further that an \$800 civil penalty is appropriate for this violation considering the factors set forth in section 110(i) of the Act. The gravity of the violation warrants such a penalty because the increased danger to employees caused by inadequate rock dusting might have caused injury to miners who otherwise would not have been hurt, or resulted in more severe injuries than would otherwise have occurred.

I concur with inspector Gamblin's characterization of Respondent's negligence as moderate. He based this in part on the fact that the areas in which the violations occurred would not have been subjected to a pre-shift examination. I also take into consideration the fact the return areas were adequately rock dusted and most of the intake areas sampled were in compliance as well.

Peabody is large operator and an \$800 penalty will have no adverse impact on its ability to stay in business. Respondent demonstrated good faith in abating the violation. I see no reason to either raise or lower the penalty on the basis on Peabody's history of prior violations of the Act.

Citation 3547572: Airflow in the Belt Entry

On April 3, 1993, MSHA ventilation specialist, Troy Davis, conducted an inspection accompanied by Peabody representative, Clifford Alexander. At about 8:00 or 8:30 a.m. the inspection party passed an overcast on the belt line leading to mechanized mining unit #2, which was damaged later in the morning. When the inspection party passed by, there was nothing wrong with the overcast (Tr. 336).

The inspection party proceeded to the working face of unit #2 and performed a thorough ventilation inspection (Tr. 328). On the way back, Inspector Davis took some airflow readings in the neutral entries occupied by the conveyor belt (Tr. 99). At crosscut 31, one crosscut outby the beltline's tailpiece, Davis took two airflow readings that averaged 16 fpm (feet per minute)(Tr. 100). Peabody's ventilation plan required an airflow of 50 fpm.

The reason for the 50 fpm requirement in Respondent's ventilation plan is that Peabody had installed a low-level carbon

monoxide detection system in some of its conveyor belt entries (Exh. G-3, pp. 18 - 21). To insure that fires are detected promptly, Respondent's amended approved ventilation plan requires that air velocity of 50 feet per minute be maintained in the conveyor belt entries relying on the carbon monoxide detection system (Exh. G-3, pg. 18, paragraphs 3 and 4). The detectors are spaced 2,000 feet apart and, thus, an air velocity of 50 fpm will insure that any rise in carbon monoxide levels due to fire will be detected in 40 minutes or less (Tr. 138).

When Mr. Davis obtained the 16 fpm air velocity readings, Mr. Alexander attempted to get in touch by telephone with Terry Hall, the mine foreman. After one or two unsuccessful attempts to reach Mr. Hall, Alexander was able to reach him in approximately twenty minutes (Tr. 333). Alexander told Hall about Mr. Davis' air velocity readings. Mr. Hall informed Alexander that somebody had run into the overcast, which separates intake air and return air (Tr. 103-104). The overcast was being repaired while they spoke (Tr. 136-137, 145). While Mr. Alexander was talking to Mr. Hall, Inspector Davis took another sample of the air velocity and found that it was back up to 86 fpm (Tr. 102, 334).

As a result of the 16 fpm readings, inspector Davis issued Respondent citation No. 3547572 which alleged a "significant and substantial" violation of 30 C.F.R. 75.370(a)(1). That regulation requires the operator to follow its approved ventilation plan. A \$1,610 penalty was proposed.

Analysis

I find that Respondent did violate the regulation as alleged but that the violation was not "significant and substantial" and that a penalty of \$50 is appropriate pursuant to the criteria set forth in section 110(i) of the Act. The record establishes that the violation was inadvertent in that airflow was reduced due to the accident involving the overcast. Moreover, there is nothing in the record indicating the degree of negligence responsible for this accident.

More importantly, the record establishes that the violation was abated almost as soon as Respondent became aware of the damage to the overcast. Indeed, Mr. Hall had the overcast repaired before he was made aware of the resulting drop in airflow. In applying the third element of the Mathies test to this violation, I conclude that given the prompt abatement of the violation by Respondent, in it unlikely that miners would be injured in this or similar situations occurring in the normal course of mining operations. Therefore, I find the violation to be non "significant and substantial."

Mr. Davis opined that Mr. Hall should have notified the supervisory personnel inby the damaged overcast. Further, Davis believes that Hall should have had the miners working inby this point removed to a point outby the damaged overcast until he established that air velocity had been restored to levels required by the ventilation plan (Tr. 120, 148-151)(Footnote 3). However, I find it difficult to fault Mr. Hall for not taking such steps even if he realized that airflow inby the damaged overcast could not have been in compliance with the ventilation plan.

I find that Mr. Hall responded reasonably in correcting the problem at its source rather than taking the time consuming steps of removing employees. It might be otherwise if Mr. Hall was aware of the reduced airflow but not what was causing it. However, since Mr. Hall could reasonably assume that fixing the overcast would restore the necessary airflow in very short time, I do not consider him negligent for failing to pull his employees outby the damaged overcast.

The violation may have lasted for only about 20 to 25 minutes (Tr. 137). Respondent's ventilation plan allows for a lapse of up to 40 minutes for the carbon monoxide monitors to detect a fire (Tr. 138). Considering all the facts surrounding this violation I deem the gravity of the violation and Respondent's negligence to be very low. Adding to that, Respondent's almost immediate abatement of the problem--without prodding from MSHA, I conclude that a \$50 penalty is appropriate.

Citation 3860363 and 3860368: Roof Dust in the Haulage Roads

On April 5, 1993, MSHA Inspector Robert Meadows observed 2 piles of roof dust 8 feet apart sitting in a haulage road leading to mechanized mining unit 001-0 (Tr. 170 - 171). Roof dust consists of rock, shale and, in some instances, a significant amount of quartz (Tr. 258). The piles of roof dust were about a foot high and 2 1/2 feet wide. There were tire tracks running through the piles (Tr. 173).

As a result of these observations, Meadows issued Respondent citation No. 3860363 alleging a "significant and substantial" violation of 30 C.F.R. 75.370(a)(1). A \$506 penalty was proposed for the violation. A factor in assessing the gravity of the violation is that mechanized mining unit 001-0 was operating

3The Secretary contends that Respondent violated 30 C.F.R. 75.324 in proceeding as it did (Tr. 149, Petitioner' brief a page 11). Section 75.324 pertains to intentional changes in the ventilation system and is not applicable to the circumstances of this citation.

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pursuant to a requirement that miner exposure to respirable dust not exceed 1.7 mg/m³ due to the elevated quartz content of the dust in that area of the mine (Tr. 169).

The cited regulation requires compliance with the operator's approved methane and dust control plan (Exh. G-6). That plan requires that roof dust be deposited against the rib of the last open crosscut or in any entry or room near the rib outby the last open crosscut (Exh G-3, page 3 of plan).

The danger created by deposited roof dust in haulage roads is that when vehicles travel through such deposits, they increase the amount of dust in the air which can be inhaled. This can contribute to the development of pneumoconiosis or silicosis (Exh. G-8).

Respondent takes issue with the characterization of this violation as "significant and substantial." The appropriate criteria for "S&S" with regard to respirable dust is set forth in Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom. Consolidation Coal v. FMSHRC, 824 F. 2d 1071 (D.C. Cir. 1987).

As formulated in Consolidation Coal, supra, the question at step 3 of the Mathies test for respirable dust is whether there is a reasonable likelihood that the health hazard contributed to will result in an illness. Piles of roof dust in travelways are reasonably likely to contribute to the hazard that miners may develop pneumoconiosis or silicosis. While two piles of roof dust observed on one day may not be reasonably likely to lead to occupational illness, if such conditions continue to exist in the normal course of mining operations, it is likely that they will contribute to the likelihood that serious respiratory disease will result.

The fact that no samples were taken of the roof dust piles in this case has no bearing on whether this violation was significant and substantial. If roof dust is deposited in travelways, in the normal course of mining operations, it is likely that there will be an increase in the amount of respirable dust and quartz that is inhaled by miners.

Prevention of respiratory disease requires not only compliance with the exposure limit in section 70.100(a) but also with specific work practice requirements, such as depositing roof dust outside of travelways. If these requirements are not strictly adhered to, overexposure may occur which may not be reflected in bi-monthly sampling(Footnote 4). I regard any violation that

⁴If the sampling is done on days on which such violative conditions do not exist, or are conditions to which the designated miner sampled is not exposed, the sampling results may

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may in the normal course of mining operations unnecessarily expose miners to additional amounts of respirable dust or quartz to be "significant and substantial." The rebuttable presumption that violative sampling results are "S&S" is applicable to this citation by way of analogy.

Citation No. 3860368 was issued for conditions very similar to those relating to citation No. 3860363. On April 5, Inspector Meadows discussed the roof dust citation with Respondent's walkaround representative, Mitchell David Fuson, who assured him that the violation would not recur (Tr. 183). Three days later, near the 005 working section, Meadows came upon two more roof dust piles sitting in the middle of a travelway (Tr. 183). As in the prior instance, equipment tracks ran through the dust piles.

The gravity of the violation on April 8 was somewhat less than that of April 5, in that the dust in the 005 section did not have an elevated quartz content. On the other hand, Respondent's negligence was greater in that it had been specifically told of the need for greater attention for proper disposal of roof dust and the deposits in this instance should have been discovered by pre-shift and on-shift examiners (Tr. 188-189).

I assess a \$506 penalty for each of these citations. The gravity of the first violation--given the quartz content of the dust, warrants such a penalty. Although the gravity of the April 8 violation was less, the higher degree of negligence warrants a \$506 penalty in consideration with the other statutory factors.(Footnote 5)

Citation 3860369: Trailing Cable Exposed to Damage

In the course of his inspection of the 005 mechanized mining unit on April 8, 1993, MSHA Inspector Meadows came across a 990 volt trailing cable, part of which had come out into a roadway. This cable was coiled up behind a power transmission center and was providing power to a continuous mining machine approximately 200 feet away. The exposed portion of the cable had tire tracks over it and was being mashed into the ground (Tr. 193 - 194).

On the basis of his observations, Meadows issued Respondent citation No. 3860369 alleging a "significant and substantial"

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Footnote 4 continued.

be misleadingly low.

5 Despite the fact that the 005 section did not have an elevated quartz content in its dust, I have applied the same rationale in concluding citation No. 3860368 to be "significant and substantial" as I applied with regard to citation No. 3860363.

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violation of 30 C.F.R. 75.606. That regulation requires that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment." A \$288 penalty was proposed for this alleged violation.

Respondent concedes that the condition violated the cited standard but takes issue with the gravity assigned to the violation (Respondent's Answer). The thrust of Respondent's argument is that a 990 volt cable has safety features that make injury fairly remote if the cable is damaged by mobile equipment.

The dangers of explosion and electrical shock mentioned and experienced by Inspector Meadows (Tr. 195 - 197) are substantially reduced because the live electrical wires inside a 990 volt cable are wrapped in a metal shield that is grounded (Tr. 276). If the cable is damaged and the wires touch the metal shield, power to the cable will be cut off at the circuit breaker (Tr. 276, 289 - 292). Lower voltage cables, such as the 440 volt cables which injured Inspector Meadows, do not have such protective features (Tr. 277). Sam Sears, the chief electrician for Peabody at Camp 11, characterizes the potential for explosion of a damaged 990 volt cable as "minimal." (Tr. 278)

Analysis

I presume from the regulation that MSHA deemed it reasonably likely that injury would result in the normal course of mining operations if trailing cables are not protected from damage. However, this citation presents the complicating factor that there have apparently been technological changes since the standard was promulgated. The 990 volt cables, with the internal protection devices described by Mr. Sears, have apparently been in use only since the 1980s, while the standard was promulgated in 1969 (Tr. 296).

It is quite clear that injury is far less likely to occur due to mobile equipment running over a 990 volt trailing cable than it is from similar damage to a lower voltage cable. On the other hand, the record indicates that injury is possible if there are failures elsewhere in the system which would prevent the circuit breaker from cutting off power to the cable (Tr. 295). Obviously, if there is an injury it is likely to be more serious the higher the voltage of the trailing cable.

The question then becomes whether the remote possibility that a number of factors coming together may cause injury meets the criteria for a significant and substantial violation under the Mathies and U. S. Steel Mining tests. To find that such a possibility does not meet this criteria would mandate a finding of non "significant and substantial" and indicate that noncompliance with this requirement will normally bring only a \$50 penalty from MSHA pursuant to 30 C.F.R. 100.4.

In Peabody Coal Company, 15 FMSHRC 2578, I concluded that I would presume that MSHA deemed injury reasonably likely unless the operator established that the cited condition was distinguishable from those addressed by the regulation. In this case, since the 990 volt cable with its internal protective devices was not in use when the standard was promulgated, I find that Respondent has met that burden. Given this fact and my conclusion that the degree of negligence, Respondent's history of violations, good faith etc., do not warrant a higher figure, I conclude that this violation is non "significant and substantial" and assess a \$50 penalty.

Citation 9898030: Respirable Dust

On March 23 and 24, 1993, Respondent conducted its bi-monthly respirable dust sampling as required by 30 C.F.R.

70.207 on the continuous miner operator of mechanized minin unit 005-0 (Exh. G-11). The samples taken by Respondent were analyzed by MSHA's Pittsburgh laboratory and were reported to average 2.5 mg of respirable dust per cubic meter of air, a level that exceeds the 2.0 mg/m³ limit set by MSHA's regulations at 30 C.F.R. 70.100(a) (Exh G-11, page 2).

On the basis of these results, MSHA inspector issued Respondent citation No. 9898030 on April 2, 1993, alleging a significant and substantial violation of section 70.100(a). The company sampled again between April 13 and 15, 1993 and obtained an average respirable dust concentration of 0.8 mg/m³ (Exh. G-11, page 4).

Respondent in its post-hearing brief indicates an intention to withdraw its contest to the \$1,019 penalty proposed for this citation. Therefore, I assess a civil penalty in this amount. There is a rebuttable presumption that respirable dust violations are presumed to be significant and substantial Consolidation Coal Co. v. FMSHRC, 824 F. 2d 1071 (D. C. Cir. 1987). That presumption has not been rebutted in this case.

The April sampling results suggest that compliance with the standard is achievable if proper attention is given to work practices and dust control measures. Given the importance of controlling respiratory dust exposures in the statutory scheme, I consider any violation of 70.100a to very grave and any violation to be evidence of a considerable degree of negligence. The fact that the March samples were above the permissible limit suggests that during this time period employees were regularly overexposed to excessive concentrations of respirable dust.

Given the gravity of the violation and Respondent's negligence, I conclude that the \$1,019 penalty proposed is appropriate even after considering Peabody's good faith in

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abating the violation. Such a penalty is also appropriate considering the company's size and prior history of violations. The penalties in this case obviously do not compromise Peabody's ability to stay in business.

ORDER

The citations at issue in this case are affirmed and Respondent is ordered to pay the penalties set forth below within 30 days of this decision:

Citation	Standard	Assessed Penalty
3547578	75.370(a)(1)	\$ 50*
3547717	75.360(c)(1)	\$ 50
3547573	75.370(a)(1)	\$ 50
3860644	75.403	\$ 800
3547572	75.370(a)(1)	\$ 50*
3860363	75.370(a)(1)	\$ 506
3860368	75.370(a)(1)	\$ 506
3860369	75.606	\$ 50*
9898030	70.100(a)	\$1,019

Total: \$3,081

* Citation modified to non "significant and substantial" violation.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

W. F. Taylor, Esq., Office of the Solicitor, U. S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Carl B. Boyd, Jr., Esq., Suite A, 120 N. Ingram St., Henderson, KY 42420 (Certified Mail)

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