CCASE:
SOL (MSHA) V. MANALAPAN MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 93-455
	:	A. C. No. 15-16318-03572
v.	:	
	:	Docket No. KENT 93-482
MANALAPAN MINING COMPANY, INCORPORATED, Respondent	:	A. C. No. 15-16318-03570
	:	Docket No. KENT 93-599
	:	A. C. No. 15-16318-03573
	:	
	:	Docket No. KENT 93-614
	:	A. C. No. 15-16318-03576
	:	
	:	Docket No. KENT 93-615
	:	A. C. No. 15-16318-03577
	:	
	:	Docket No. KENT 93-883
	:	A. C. No. 16-16318-03581
	:	
	:	No. 6 Mine
	:	
	:	Docket No. KENT 93-486
	:	A. C. No. 15-17045-03524
	:	
	:	No. 10 Mine
	:	
	:	Docket No. KENT 93-613
	:	A.C. No. 15-05423-03733
	:	
	:	Docket No. KENT 93-645
	:	A.C. No. 15-05423-03732
	:	
	:	Docket No. KENT 93-646
	:	A.C. No. 15-05423-03734
	:	
	:	Mine No. 1
	:	
	:	Docket No. KENT 93-882
	:	A. C. No. 15-12602-03567
	:	
	:	Prep Plant

:	
:	Docket No. KENT 93-884
:	A. C. No. 15-16733-03546
:	
:	Docket No. KENT 93-918
:	A. C. No. 15-16733-03547
:	
:	Mine #7

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN for Petitioner
Susan C. Lawson, Esq., Buttermore, Turner, Lawson & Boggs, P.S.C., Harlan, KY 40831 for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Petitioner") seeking civil penalties and alleging violations by Operator ("Respondent"), of various mandatory standards setforth in Title 30 of the Code of Federal Regulations. Pursuant to notice the cases where scheduled and heard on March 1, 2, and 3, 1994, and April 26-28, 1994.

On March 1, 1994, at the commencement of the hearing, Respondent withdrew the Motions it had made to compel discovery with the exception of a motion to require production of material excised by Respondent in the notes taken by MSHA inspector James W. Poynter, that Petitioner had served in response to Respondent's request. At the hearing, I ordered Petitioner to produce the unexcised notes for an in camera examination. After such an examination, and after hearing oral arguments, I concluded that although the excise names of informants were relevant, there was no need established that out weighed the informant's privilege, especially in light of the fact that Petitioner had served Respondent with notes of the interviews of these informants. Hence, under Bright Coal Co., 6 FMSHRC 2520 (November 1984), the motion was denied.
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FOOTNOTE 1

The parties elected to file a single brief addressing all the cases that were heard on March 1-3 and April 26-28, 1994. Accordingly, all the above listed docket numbers are consolidated for purposes of issuing a decision.

At the conclusion of the hearing, counsel for both parties requested an opportunity to file post-hearing briefs, and the requests were granted. The briefs were required to be filed not later than three weeks after receipt of the transcript. The transcript was received in the Office of the Administrative Law Judges on April 4, 1994. On May 10, 1994, Respondent filed a motion requesting an extension until July 15, 1994 to file its brief. Petitioner did not file any opposition to the motion and, on May 26, the parties were advised that Respondent's Motion was granted, and the time to file briefs was extended to July 15, 1994. On July 15, 1994, in a telephone conference call convened at the initiation of Respondent, the parties were granted a further extension until July 19, 1994 to file their briefs. On July 21, 1994 the parties' briefs were received.

Findings of Fact and Discussion

I. Docket No. KENT 94-455.

A. Citation No. 3380843.

On May 22, 1992, at approximately 5:30 p.m., Steve Collins was bolting from the front of a bolter on the 002 section of the No. 6 mine. He noticed smoke coming from the bolter from the area behind him. He attempted to put the fire out. The fire appeared to go out, but started to flame again after a few minutes, and Collins called for help. Richard Daniel Cohelia, Respondent's safety director, was notified and arrived at the site at approximately 7:30 p.m. He stated that the area was smokey. Cohelia discussed with the super-intendent various means of putting the fire out. According to MSHA inspector James W. Poynter, who subsequently investigated the incident, Cohelia informed him that the fire was completely out, and the bolter was cool to the touch by 11:30 p.m. Cohelia indicated that when he exited the mine at approximately 12:30 a.m., he realized that the fire had not been reported to MSHA. At that time he determined not to call and wake up an inspector, as the fire was out and there was no longer any danger. The following morning, at approximately 9:30 a.m., Cohelia, after attempting to contact MSHA officials, Jim Ray and Elmer Smith and not being able to reach them, contacted Robert Blanton, an MSHA roof control ventilation specialist at home and reported the fire to him.

Subsequently, on May 26, 1992, MSHA Supervisory Inspector James W. Poynter, and MSHA accident investigator Daniel Lynn Johnson, were notified and directed to investigate the fire. On May 29, 1992, Poynter and Johnson issued a citation alleging a violation of 30 C.F.R. 50.10 which, as pertinent, provides that "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its

mine." (Emphasis added). 30 C.F.R. 50.9(b) defines an "accident," as pertinent, as "an unplanned fire not extinguished within 30 minutes of discovery." The undisputed evidence establishes that the fire at issue was not extinguished within 30 minutes of discovery. It also is uncontroverted that Respondent did not contact MSHA until approximately 9:30 a.m. on May 23, 1992. Since the fire started at approximately 5:30 p.m. on May 22, and was extinguished at the latest at 11:30 p.m., on May 22, and was not reported until approximately 9:30 a.m., the next morning, I find that Respondent did not immediately notify MSHA of a fire that was not extinguished within 30 minutes of discovery. Hence, I conclude that Respondent did not immediately contact MSHA upon the occurrence of an accident. I find that Respondent did violate Section 50.10, supra.

According to Poynter, the requirement of notifying MSHA of an accident allows MSHA to make a determination whether an inspector should be immediately sent to the area where an accident had occurred in order to take action to protect miners. The fire at issue did not cause any injuries to any persons. Respondent's employees were engaged in extinguishing the fire until approximately 11:30 p.m. Once the fire was extinguished there was no longer any danger, nor was there any urgency to contact MSHA. I find Respondent was only negligent to a low degree in connection with this violation. I find a penalty of $100 is appropriate for this violation.

B. Citation No. 3380844

1. Violation of 30 C.F.R. 75.400

The unreported fire on May 22, 1994 had occurred inside a metal compartment approximately 5 feet wide and 18 inches deep, that was located on a bolter. According to Poynter, when he examined the compartment on May 27, there was a significant

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FOOTNOTE 2

In evaluating the size of business of the operator, for purposes of assessing a penalty under Section 110(i) of the Act, I note that, disregarding the conglomeration of corporations relied on by Petitioner, the production figures for Manalapan alone, indicate that it is a large operation. Accordingly, I find that a penalty to be assessed for the various violations found in this decision, infra, should not be lowered based on the size of Respondent's operations.

FOOTNOTE 3

Under normal operations, the compartment is closed. There are a number of holes on the bottom of the compartment.

amount of ash and unburnt materials which appeared to be loose coal in the area of the electric motors and hydraulic pump. On other areas of the bolter, he observed loose coal, coal dust, some float coal dust, and hydraulic fluids.

Johnson, who also examined the compartment, observed a mixture of loose coal, coal dust, and rocks, which he estimated were 65 to 80 percent combustible. He said that most of the material was ash. Johnson indicated further that ash looked like pieces of burnt hose. In addition, there were burnt pieces of coal and oil that covered some rocks. Johnson said that he observed that the combustible material was packed on almost all of the visible surfaces.

Larry Bush, an MSHA inspector inspected the mine on May 26, but was not part of the investigation team. He stated that he observed oil soaked coal dust, and "cinder like material" "around the operator's deck of the drill." (Tr. 123, March 1, 1994).

Poynter and Johnson issued a citation alleging a violation of 30 C.F.R. 75.400, which provides that coal dust and other combustible materials ". . . shall not be permitted to accumulate in active workings, or on electrical equipment therein."

Steve Collins, who was a roof bolter operator/crew leader on the dates in issue, testified that some time between a month and two weeks prior to the incident at issue, he had an occasion to look inside the compartment. He indicated that he did not see any coal dust or any oil accumulation. According to Collins, after the fire was discovered on May 22, rock dust was spread into the compartment.

On May 22, 1992, after the fire had been extinguished, Michael E. Osborne, a repairman, sprayed the compartment with a pressure hose for about 30 minutes. He then opened the lid of the compartment. He noticed that everything was "completely burnt." (Tr. 163, March 1, 1994). He said that the metal components had melted. He indicated that he did not see any oil accumulation, coal dust, float coal dust, or pieces of coal.

Greg Perkins repaired the compartment subsequent to the fire. He stated that he did not know when he first observed the compartment after May 22. According to Perkins, the inside of
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FOOTNOTE 4

According to Poynter, when coal burns it becomes ash.

FOOTNOTE 5
Perkins made his observations when the bolter had been moved to the repair shop. According to Richard Daniel Cohelia, Respondent's Safety Director, the bolter was moved to the shop 3 or 4 days after May 26.

the compartment contained ashes and hoses. He did not see any dust, coal or puddles of oil. Perkins stated that a cable going to a motor inside the compartment had a hole in it. He opined that this hole was a "blowout unit" that could have caused the fire. (Tr. 177, March 1, 1994).

Richard Daniel Cohelia, Respondent's Safety Director, testified that on May 26, when he examined the compartment, its lid was off. He indicated that he observed that all the hoses were burnt, and there was a lot of soot by the motor. Cohelia said that he saw ashes from the burnt hoses, but did not see any coal dust, float coal dust, or accumulation of oil.

No witnesses observed any accumulation of combustible material prior to the fire. The testimony of eyewitness is in conflict as to whether combustible materials were observed in the compartment when the lid was removed after the fire. In resolving the conflict of the testimony, I accord more weight to the testimony of the three inspectors Poynter, Johnson, and Bush, rather than Respondent's witnesses, as the record does not contain any evidence to suggest any improper motive on the part of the inspectors. (See, Texas Industry, Inc., 12 FMSHRC 235 (February 1990), (Judge Melick)), I thus conclude that they were motivated solely by the desire to fulfill their official duties. I further do accord much weight to the responses of Respondent's witnesses in response to leading questions from Respondent's counsel. I accept the testimony of Petitioner's witnesses as to their observations. I do not consider their testimony to have been diluted by any negative inferences raised by the fact that holes in the floor of the compartment might have caused the accumulations to have fallen out as argued by Respondent. Also, due to that experience, especially Johnson's experience as an accident investigator, I accept their opinions that the materials they observed in the compartment were the residue of burnt coal and coal dust. Since the accumulations were observed by the inspectors only 4 days after the fire, and since the bolter had been removed from operation on the day of the fire, I conclude that the observed accumulations existed in the compartment prior to the fire. Although the inspectors did not test the combustibility of the accumulated materials, I accept their testimony that coal and coal dust are combustible. I thus find that Respondent did violate Section 75.400 supra.

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FOOTNOTE 6

Cohelia estimated that there were 100 hoses in the compartment. The hoses supply oil to the bolter.

2. 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." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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).

I have found as discussed above, that Respondent violated Section 75.400 supra. Also, I find that the presence of combustible material, i.e., the violation herein, contributed to the fire that occurred. Although the record does not convincingly establish the cause of the fire, I find that

presence of combustible materials did contribute to the hazard of the fire. An injury producing event, i. e., a fire did occur. Although no injuries resulted, I find that, due to the presence of smoke, reasonably serious injuries were reasonably likely to have occurred as a result of this violation. I thus conclude that the violation was significant and substantial.

The accumulated materials at issue were located in a fully enclosed compartment covered by a lid. It was not possible to have observed the accumulations without the removal of the lid. When this was last done there was no evidence of any accumulation. I thus find that Respondent's negligence herein was of a low degree. I find that a penalty of $100 is appropriate for this violation.

II. Docket No. KENT 93-599, (Citation Nos. 4241524, 4241533, 4241537 and 4241539).

A. Citation No. 4241524.

On February 10, 1993, Adron Wilson, an MSHA inspector, inspected the No. 7 belt flyte. He stated that he observed a piece of belt attached to the No. 8 head belt roller. He testified that the belt piece was not attached to the tail belt, and extended to cover only half of the diameter of the tail roller which was below the head belt roller. Wilson indicated that the bottom of the tail belt was 2 inches above the ground, and the top of the tail belt was 16 inches above the ground.

Wilson said that because the belt piece was not securely attached, a person could fall onto the belt, and could come in contact with the belt. In this connection, he indicated that two times each shift a person shoveled in the area to clean under the belt. Wilson opined that due to vibration of the belt, coal falls off the belt, and causes stumbling hazards in the area. He also noted anchor pins in the area which create stumbling hazards. Wilson said that contact with the belt roller could cause bruises, lacerations, or broken fingers. He opined that it is common to clean the belt when it is in operation, and hence an injury will occur. On cross-examination, he conceded that a person would have to stumble before there is a possibility of contact with the belt or the roller, and that if the belt is not in operation there is no danger. However, he said that belt was running when he observed it.

George Smith, a repairman who accompanied Wilson, did not contradict the latter's testimony that the piece of belt was not attached at the bottom. According to Smith, to the best of his recollection, the piece of belt material covered the entire tail roller. He described the belt as "pretty sturdy." (Tr. 14,

March 2, 1994). He said that it was more than a quarter of inch thick, and flexible. He opined that if one fell against the belt, one would not come in contact with the roller.

Cohelia testified that he is not aware of any injuries at any of Respondent's mines resulting from use of belt material as a guard. He opined that should a shovel contact a roller, the shovel would be kicked out due to the direction of the belt. This testimony was not rebutted. Cohelia stated that if one fell onto the belt, one would hit the frame of the tail piece. He said the belt was fairly stiff, and a quarter inch to a half inch thick.

Wilson issued a citation alleging a violation of 30 C.F.R. 75.1722(b) which provides, in essence, that guards at tai pulleys ". . . shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley."

Section 75.1722(b), does not specify the material of a guard, nor does it specify the specific manner in which the guards are to be installed and secured. Section 75.1722(b) is violated only when a guard does not extend a sufficient distance to prevent a person from reaching behind, and being caught between the belt and the pulley. Wilson testified that the guard extended to a point that covered only half of the diameter of the roller, leaving the bottom half exposed. Smith who accompanied Wilson testified that, to the best of his recollection, the belt material covered the tail roller. A contemporaneous drawing made by Wilson similarly indicates that the material covered the pulley. (GX 20).

The citation written by Wilson does not allege that the guard covered only half the pulley. The citation reads as follows: "A guard is not provided for the tail roller of the No. 7 belt flight. No guard is found in the area. The tail roller is self-cleaning type and rotates at a very fast RPM. This is a 15 inch tail roller fully exposed. A piece of belt is attached to the #8 head drive unit. But must be removed to clean muck out from the under the head drive unit created by the belt scraper, and tail roller leaving the person who cleans this area fully exposed to the hazard." (sic) Hence, it appears that the gravemen of the allegation in the citation, is that the belt must be removed when cleaning exposing the cleaner to the hazard of contact with the tail roller. I find that the weight of the evidence establishes that the belt material extended to the end of the roller. Since this material was at least a quarter inch thick, and extended to a point that covered roller, I find that it did extend a sufficient distance to prevent a person from reaching out behind it and being caught between the belt and the

pulley. I thus include the Respondent did not violate Section 75.1722(b), and accordingly, Citation No. 4241524 should be dismissed.

B. Citation Nos. 4241533, 4241537, and 4241539.

Wilson also observed that a guard was not provided at the tail roller for the No. 5 belt flyte. He issued a citation (No. 4241533) alleging a violation of Section 1722(b), supra. Wilson also issued another two citations for essentially the same conditions, alleging significant and substantial violations of Section 75.1722(b), supra. I accept the essentially uncontradicted testimony of Wilson that this tail roller was not guarded. Also, I accept the essentially uncontradicted testimony of Wilson that the tail roller cited in Citation No. 4241537 was partially covered by belt material, but that 6 inches on the left side of the diameter of the roller was exposed. Similarly, I accept the uncontradicted testimony of Wilson that the belt covering the roller cited in Citation No. 4241539 extended to cover only the top half of the roller and left the bottom half exposed. Essentially, the hazards associated with these conditions are the same.

George Smith, a repairman employed by Respondent, accompanied Wilson. He described the belt that covered the rollers at issue as being pretty sturdy, and more than a quarter of an inch thick. He opined that if one touched the belt, or fell against it one would not come in contact with the roller.

Smith explained that the top of the tail belt is 10 inches above the bottom of the head belt. Also, the head drive belt extends laterally 2 feet beyond the tail belts.

Osborne explained that the roller is located within a frame, and most of the frames come over the top of the roller. He estimated that the rollers were recessed approximately 8 to 10

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FOOTNOTE 7

Wilson indicated regarding the area of the tail roller cited in Citation No. 4251533 that, 4 feet from the cited area, a pin which extended approximately 2 inches off the floor was located approximately 8 to 10 inches into the walk way. He said that a chain was attached to a eyelet at the top of the pin and extended to the belt. The pin and chains constituted tripping hazards. Although Wilson did not indicate the presence of such pins in proximity to the other cited rollers, Cohelia stated that such pins which extended approximately 2 inches off the floor were located 8 to 10 inches into the walkway, in the area of the other cited rollers.

inches. Neither Smith nor Osborne noted any hazardous material in the walkway adjacent to the belts. Cohelia, who has been the safety director since 1982 when Respondent commenced its operations indicated that there have not been any accidents involving the tailpieces or rollers along the belt.

Cohelia explained that it is Respondent's policy for employees not to clean belts when the belts are in operation, and in general employees follow this guideline. According to Smith, when citation numbers 4241533, 4241537, and 4241539 were issued, the belt was not in operation.

I conclude that, although contact with the moving rollers was not likely, given the continuation of mining operations, which necessitated movement of the belt, it was possible that contact could occur with either a portion of a roller that was exposed or covered with belt material that was not secured at the bottom tail roller. Accordingly, I find Respondent did violate Section 75.1722(b), supra, as alleged in these citations.

The record establishes the following: (1) it is Respondent's policy for men to shovel under the areas in question when the belt is not in operation; (2) the rollers in question were approximately at knee height or lower; (3) the lack of significant stumbling hazards specifically in the areas at issue; (4) the available walkaway was 12 feet wide; and (5) the cited rollers were recessed beyond the vertical plane of the upper head rollers, and were recessed beyond a frame covering the portion of the top of the roller. I conclude that within this framework, it has not been established that an injury producing event was reasonably likely to have occurred. (See, U.S. Steel, supra). This is especially true regarding those rollers that were partially or fully covered by the belt material. Accordingly, I find that it has not been established that the violation was significant and substantial.

Larry Bush, an MSHA inspector who inspected the mine in question in 1991 and 1992 indicated that he had received a memorandum "from Arlington" (Tr. 148, March 2, 1994) to eliminate fence wiring and chain link guards due to their hazards. He agreed that he may have suggested to Respondent to use belt material as guards and agreed that "using a belt was a pretty good form of guarding around head pieces" (Tr. 150). Also, Cohelia's testimony was uncontradicted that he was informed by an MSHA inspector to change the guards from fences to belt material, and that four MSHA inspectors had observed belt material guarding rollers, and did not issue any citations. I thus find that Respondent was negligent to only a low degree in connection with the violations herein. I also find that there was a low likelihood of an injury producing event as a consequence of the

cited violations. Also, based on Wilson's testimony, I find that as a consequences of the cited violations possible injuries would be limited to lacerations, bruises, or possibly broken fingers. I find that these violations were of a low level of gravity. I conclude that a penalty of $20.00 is appropriate for each of these violations.

C. Citation No. 4241535.

1. Violation of 30 C.F.R. 75.400

Wilson indicated that when he made his examination on February 11, he observed an accumulation of float coal along the entire 1200 foot length of the No. 5 belt. He described this float coal dust as paper thin and black. He said it extended rib to rib in the 20 foot wide entry, and also was in the cross-cuts. He issued a citation alleging a violation of 30 C.F.R. 75.400 which, in essence, mandates that combustible materials shall not be allowed to accumulate. Respondent does not contest the fact of the violation. Based upon Wilson's testimony, I conclude that Respondent did violate Section 75.400, supra.

2. Significant and Substantial

Wilson testified that float coal dust is combustible, and can explode in the presence of methane. He also noted heat sources such as friction from a belt running across broken rollers at the 94th cross-cut, and touching the bottom of belt stands. He noted that in these circumstances a fire could have occurred. Wilson also conceded that a fire was not reasonably likely to have occurred. At the hearing, Respondent moved to vacate Wilson's finding of significant and substantial violation. In response thereto, Petitioner agreed that the violation was not significant and substantial. Based on the record before me, I conclude that an injury producing event, i.e., a fire or explosion, was not reasonably likely to have occurred. I find that the violation was not significant and substantial.

3. Penalty

According to Wilson, employees were working on the broken rollers to correct that condition. There is no evidence as to how long the accumulations had been in existence. Should the violative condition herein have resulted in coal dust being placed in suspension, and should a fire or explosion have occurred, the consequences could have been serious. I conclude that due to the extent of accumulations a penalty of $500 is appropriate for this violation.

III. Docket No. KENT 93-614

A. Violation of mandatory standards

1. Citation No. 4241527

On February 10, 1993, Wilson inspected the No. 7 belt. According to Wilson, at a point 10 crosscuts inby the No. 7 head-drive, he observed that the fire sensor cable was in two separate pieces. He indicated that an auditory and visual signal would not be emitted, and the presence of a fire would not be reported. In this connection, he issued a citation alleging a violation of 30 C.F.R. 75.1103 which provides for the installation of devices for the belts to give an automatic warning when a fire occurs on or near the belt. Based on the testimony of Wilson which was not contradicted or impeached, I find that the violation has been established.

2. Citation No. 4241525

Wilson also observed an accumulation of coal dust which he said extended the entire 1500 foot length of the No. 7 belt flyte. He said that the dust, which was paper thin, extended rib to rib, was gray to black in color, and was paper thin. Wilson said that the dust extended to the crosscut, and was dry. He said that the belt was in operation. Wilson issued a citation alleging a violation of 30 C.F.R. 75.400 which, in essence, proscribes the accumulation of combustible materials.

David Smith, a repairman, who was present at the inspection, testified that the dust was mostly gray, and only black "here and there." (Tr. 127, March 3, 1994). He also did not recall seeing any coal dust on the ribs.

I place more weight on the testimony of Wilson, based on my observation of the witnesses' demeanor. Based on the essentially uncontradicted testimony of Wilson, I find that it has been established that there was an accumulation of coal dust. Thus it has been established there was a violation of 30 C.F.R. 75.400.

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FOOTNOTE 8

Respondent argues that Section 75.1103 supra, was not violated, as it does not address or require that the fire sensor system be in a workable condition. I reject this interpretation as being unduly restrictive as it disregards, the well established principle that the mandatory standards are to be interpreted to ensure safe working conditions for miners (Westmoreland Coal Company v. FMSHRC, 606 F2d 417, 419-420 (4th Cir. 1979)). Hence, the requirement to install a sensor cable includes the requirement that the cable function properly.

3. Citation No. 4241531

Wilson stated that in the No. 7 belt he saw 20 rollers that were not rolling. He indicated that most of these were located in consecutive order, and were on the bottom of the belt. He said the belt was in operation, and he saw evidence that the belt was rubbing the vertical stands. Wilson touched these stands, and detected heat. His testimony regarding the stuck rollers was not contradicted or impeached. Based upon this testimony, I find that Respondent did violate Section 75.1725, supra.

4. Citation No. 4241528

Wilson stated that he observed black coal dust, 1/8 of inch thick, on top of the No. 7 belt starter box. This box was approximately 4 feet long, 30 inches wide, and 30 inches high. It contained various electrical components which were energized. Wilson also observed float coal dust that was at a depth of 1/8 of an inch inside the starter box. According to Wilson, the dust was on the electric circuits, and wiring. He indicated that the electrical components inside the starter box produce an electrical arc when they make and break contact in their normal operation. Wilson said that the starter box was within 6 or 7 feet of the No. 7 belt head.

Wilson issued a citation alleging a violation of Section 75.400, supra.

Smith testified that he did not see any arcing. He also indicated that there was rock dust beneath the coal dust. He opined that there was not enough of an accumulation to go into suspension, or to cause an ignition. Cohelia opined that dust in a box will not ignite until the electric coil in the box is red hot.

I find that Smith's testimony is insufficient to rebut Wilson's testimony as to his observations. I also find that the testimony of Respondent's witnesses is not sufficient to rebut Wilson's testimony concerning the presence of combustible materials i.e., materials capable of being combusted. On the basis of his testimony, I find that Respondent did violate Section 75.400 as alleged.

5. Citation No. 4238729

Wilson continued his inspection and observed that there was no guard guarding the 15 inch diameter tail roller for the No. 6 belt flyte which abuts the No. 7 belt. He stated that the belt was in operation. He issued a citation alleging a violation of Section 75.1722(a), supra. Wilson's testimony that the 15 inch

diameter roller was exposed was not contradicted or impeached. I find that Respondent did violate Section 75.1722(a) as alleged.

6. Citation No. 4241529

Wilson had the deluge spray system manually tested, and found that at the No. 7 head drive it did not operate. He issued a citation alleging a violation of 30 C.F.R. 75.1101-1. Based on the testimony of Wilson that was not contradicted or impeached, I find that a violation of Section 75.1101-1 did occur as alleged.

7. Citation No. 4241530

Wilson next observed that a wire leading to a light bulb was loosely wrapped on the 110 volt tap of the transformer located inside the starter box. He said that normally wires attached to this tap are secured by a screw. According to Wilson, loose wires generate heat and an electrical arc. He testified that he had observed an arc the size of the point of a ball-point pen. He also observed coal dust all over the inside of the box, and on the wire at issue up to the edge of its insulation. Wilson issued a citation alleging a violation of 30 C.F.R. 75.514 which provides that electrical connections shall be "mechanically and electrically efficient and suitable connectors shall be used." (Emphasis added)

Smith indicated that he did not see an arc. I find Smith's testimony insufficient to rebut the testimony of Wilson whom I find credible on this point, based on my observations of his demeanor. Also, there is no evidence that Smith and Wilson were looking at the same place at the same time Wilson observed the arc. I find, based on Wilson's testimony, that Respondent did violate Section 75.514 as alleged, as the wire connecting to the starter box was loosely wrapped, and not secured by a "suitable connector."

8. Citation No. 4241532

Lastly, Wilson observed that a shaft was protruding about 11 inches from the roller at the No. 7 head drive. He said that the circumference of the shaft had a groove cut out of it approximately one quarter of an inch, by a quarter of an inch. The groove extended back to the roller. According to Wilson, the shaft was not guarded. He was concerned that if a person's clothes contacted the rotating shaft a serious injury could result.

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Smith, who was present, indicated that a guard was approximately 12 to 14 inches away to left of the shaft, and was in place at that point. However, he did not contradict or impeach the testimony of Wilson that the shaft was not guarded. I thus find, based on Wilson's testimony, that Respondent did violate Section 75.1722(a) supra as alleged.

B. Imminent Danger Withdrawal Order (Order No. 4241526)

According to Wilson, based on all these above 8 conditions he issued a written 107(a) withdrawal order. He explained that all of the conditions were in very close proximity, and they all posed hazards. He said that the hazards were obvious, and he felt there was a lot of danger to himself and miners. He said that a lot of the hazards were inter-connected but that "all" the conditions "in general" formed the basis for the 107(a) order. (Tr. 54) He said that taken alone, the presence of dust, and the non-functioning rollers did not constitute an imminent danger.

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists.

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FOOTNOTE 9

According to Wilson, after he observed the broken sensor cable (infra, III(A)(1)), the dust accumulation in the No. 7 belt flyte, drive (infra, III (A)(2)), the dust in the starter box (infra, III(A)(4)), the broken rollers (infra, III(A)(3)), and also observed that the tail roller was not guarded, he "made the determination at that time that a lot of work needed to be done here before I could allow any coal miner to come back through that area" (Tr. 60, March 3, 1994). On that basis, at approximately 8:55 p.m., he orally issued a Section 107(a) withdrawal order.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . 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).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

As the Commission has recently stated:

> [A]n 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. 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. [Citation omitted.] Wyoming Fuel Co., 14 FMSHRC 1282, 1291.

Although, the conditions present herein did present discrete hazards, and some were inter-connected, there is a lack of evidence that these conditions, either singularly or in combination had a reasonable potential to cause death or serious injury within a short period of time. (See, Utah Power & Light, supra). Wilson testified regarding the dangers of these conditions, and their proximity to each other, but did not at all opine or setforth any observations regarding any time element. I thus find that the record presents insufficient evidence of any conditions having a reasonable potential to cause death or serious injury within a sort period of time. I thus find that Section 107(a) withdrawal order was not properly issued, and should be dismissed.

C. Whether the cited conditions were significant and substantial.

1. Citation Nos. 4238729 and 4241532.

Regarding Citation No. 4238729 (lack of guard on tail rollers), Wilson's testimony did not set forth with any degree of specificity the specific conditions which would make likely the occurrence of an injury producing event, i.e., inadvertent contact with the exposed rotating roller. Accordingly, I find this violation was not significant and substantial. For essentially the same reason, I find the violative condition cited in Citation No. 4241532 (Shaft not guarded) was not significant and substantial.

2. Citation Nos. 4241525, 4241527 4241528 , 4241531, 4241530 , 4241529

Each of these citation's taken singularly and in combination, contribute to the hazard of a fire, or the propagation of a fire. In evaluating whether a fire was reasonably likely to have occurred, I note the existence of the following conditions: (1) the extent of the accumulation of dust in the No. 7 belt flyte; (2) the accumulation of dust in the starter box in combination with the occurrence of arcing, and a loose wire which generates heat; and (3) the presence of 20 rollers that did not function, producing function and heat on the vertical stands of the belt. I conclude that with the continuation of the normal mining operations, given the presence of fuel for a fire i.e., coal dust, and numerous actual sources of ignition, a fire or explosion was a reasonably likely to have occurred. Thus, the violations cited were all significant and substantial.

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FOOTNOTE 10

Coal dust along the belt flyte.

FOOTNOTE 11

Broken fire sensor cable.

FOOTNOTE 12

Coal dust in the starter box.

FOOTNOTE 13

Belt rollers not rolling.

FOOTNOTE 14

Loosely wrapped wire in starter box.

FOOTNOTE 15

Inoperative deluge spray system.

D. Penalty

The record does establish how long the above cited conditions had been in existence. Cohelia's testimony tends to establish that Respondent's employees were in the process of cleaning another area. I find Respondent's negligence to have been moderate in connection with all these citations. I find, considering the factors set forth in Section 110(i) of the Act, that the following penalties, are appropriate for the following Citation Nos.: 4241525 - $5,000; 4241527 - $2,200; 4241528 - $2,100; 4241530 - $2,400; 4241531 $2,200; 4241529 - $2,300; 4241532 - $100; 4238729 - $100.

IV. Docket No. KENT 93-486, (Citation Nos. 3164670 and 3164679)

Elmer Thomas, an MSHA inspector, inspected Respondent's Manalapan #10 Mine on January 28, 1993. He observed that one of the permanent stoppings located at the 20th crosscut, was missing. The stoppings are designed to separate the belt entry from the adjacent return entry. He issued a citation (No. 3164670) alleging a violation of 30 C.F.R. 75.352 which provides as follows: "Entries used as return air courses shall be separated from belt haulage entries by permanent ventilation controls." Respondent has conceded the fact of the violation. Based on the testimony of Thomas, and Respondent's concession, I find that Respondent did violate Section 75.352, supra.

On February 3, 1993, Thomas observed that in the No. 1 belt line, there was another stopping that was out, and another one was partially torn at the 13 or 14th crosscut. Thomas issued another citation (No. 3164679) alleging another violation of Section 75.352, supra. Respondent has not contested the facts of this violation, and based upon the testimony of Thomas, I find that Respondent did violate Section 75.352, supra.

In essence, Thomas opined that because there was a bad roof in the section in question, especially in the No. 1 belt line, and the roof had already fallen in some parts, it was reasonably likely that, over time, a roof fall would have occurred knocking out stoppings, and separating the belt entry from the adjacent intake entry. In this event, not all the air traveling up the intake entry to ventilate the face would have reached the face, as some of it would have short circuited and entered the belt entry through the portion of the permanent stoppings that had been knocked down by a roof fall. Thomas was concerned that since testing results obtained after his inspection indicated the presence of 1/10 of 1% of methane, methane could have accumulated in the area in question, since it was more than a mile deep. Should methane had been accumulated in explosive concentrations, and not have been swept away from the face due to air having been short circuited from the intake entry to the belt entry, the

methane would had been exposed to ignition sources at the face such as the miner, bolter, scoop and charger. In addition, he indicated that the belt line contained other ignition sources such as non-permissible starters, motors, and electric cables.

In order for a violation to be significant and substantial, it must be established that there was a ". . . measure of danger to safety contributed to by the violation:" (Mathies Coal Company, 6 FMSHRC 1, at 3) (January 1984) (Emphasis added). The hazards that were the subject of the concern of Thomas are those associated with an accidental removal of a stopping between the cited belt entries and the intake entry. In contrast, the cited violative conditions were stoppings that were missing between the belt entries and the return entry. There is an absence of any nexus between the cited violations and the hazards testified to by Thomas. I conclude that Petitioner has failed to establish that there was any danger to safety that was contributed to by the violative conditions cited. Accordingly, I find that it has not been established that the violations were significant and substantial.

According to Thomas, J. D. Skidmore told him that the stopping that was missing at the 20th crosscut in the belt entry, had been taken down intentionally, in order for a scoop to pass through the area. Skidmore was not called to testify. In contrast, Johnny Helton, the assistant to the superintendent at the subject mine, testified that the first indication that he had that the stoppings at issue were missing on January 28, the date of the inspection. He also indicated that he was told that the stopping, which were cited by Thomas as having been missing on February 3, had been crushed either by a roof fall, or from a heave of the floor. There is no evidence as to how long the stoppings had been missing in the No. 1 belt line before they were observed and cited by Thomas. Within this framework, I conclude that Respondent was moderately negligent in connection with the violations cited herein. I find that a penalty of $200 is appropriate for each of the cited violations.

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FOOTNOTE 16

At the hearing, at the conclusion of petitioner's case Respondent made a motion for the entry of judgment in its favor on the issue of significant and substantial. A decision was reserved on this motion, and it is presently granted for the reasons stated above.

V. Docket No. KENT 93-613

A. Citation No. 3164651.

MSHA inspector Roger Pace, testified that while inspecting the subject mines on April 6, 1993, he noted that a fire curtain at the tail piece of the belt in the belt entry at the 006 section was lying on the ground. He cited Respondent for violating 30 C.F.R. 75.370(a)(1), which in essence requires it to comply with its ventilation system and methane and dust control plan ("ventilation plan"). The ventilation plan, as pertinent, requires the placement of a fire curtain in the belt entry 2 to 3 crosscuts out by the face. Based on the testimony of Pace, which was not contradicted or impeached, I conclude that Respondent did violate its plan, and accordingly there was a violation herein of Section 75.370(a)(1), supra.

According to Pace, if the fire curtain, which is flame retardant, is not in place, air from the belt entry would no longer be prevented from going inby to the face. He indicated that there were various ignition sources present in the belt entry such as cables, starter boxes, power units, and bottom rollers which could freeze and cause friction. In the event of a fire caused by one of these ignition sources, in the absence of the fire curtain at issue, smoke could go to the face where eight men worked, and serious fatal injuries due to smoke inhalation could result. However, the record fails to establish the existence of any specific conditions relating to the potential ignition sources that would have rendered it reasonably likely for a fire to have occurred. Accordingly, I conclude that it has not been established that, as result of the violation herein, an injury-producing event, i.e., a fire, was reasonably likely to have occurred (c.f., Mathies, supra). Accordingly, I find that the violation was not significant and substantial. There is no evidence in the record to base any finding as to what caused the fire curtain to have fallen to the floor, and when this occurred. I thus conclude that Respondent's negligence was no more than moderate. I find that a penalty of $200 is appropriate for this violation.

B. Citation No. 3164652.

Pace issued another citation alleging a violation of the ventilation plan, based upon his observation that a regulator, used to allow belt air to enter the adjacent return entry, was not in place. Respondent did not contradict or impeach this testimony, I find that the ventilation plan requires such a regulator, and since it was missing, Respondent was in violation of the ventilation plan and hence did violate Section 75.370(a)(1).

Essentially, Pace opined that the violation herein was significant and substantial. He reasoned that, in the event of a fire outby the missing regulator, smoke could travel inby to the face where eight men are located. However, due to the absence of any proof that any equipment or other potential ignition source was in such a condition as to render the event of an ignition reasonably likely to have occurred, I concluded that the violation was not significant and substantial. There is no evidence before me as to the amount of time that elapsed between the regulator not being in place, and the inspection at issue. Nor is there any evidence as to indicate why the regulator was not in place. I find that a penalty of $200 is appropriate for this violation.

C. Citation No. 3164653.

According to Pace, the water pressure on the sprays on the miner on the 006 section on April 6, 1993 was only 100 pounds per square inch, (psi) whereas the "ventilation plan" calls for 120 psi. Respondent did not contradict or impeach Pace's testimony in these regards. Hence, inasmuch as the water pressure was less than mandated by the plan, it is concluded that Respondent did violate the ventilation plan. Hence Section 75.370(a)(1) was violated.

Pace indicated that he observed dust from the miner drifting outby to the miner operator. He indicated that, with continued operation, there was a chance the operator and other persons would breathe a large amount of respirable dust, and suffer injuries to their lungs. There is no evidence that the amount of dust to which the miner operator was being exposed, was in violation of any mandatory standard. Also, it is noted that the sprays were operating with water pressure at 100 psi. There is no evidence that the 20 psi deficit in water pressure from that called for by the ventilation plan, caused any significant increase in dust exposure to the operator of the miner, or his helper. I conclude that the violation under these circumstances was not significant and substantial.

Petitioner did not contradict or impeach the testimony of Helton that it is not possible by a visual examination to detect the difference between water sprays operating with 110 psi, rather than 120 psi. As such, the violation herein cannot be found to have been easily observable. I thus find Respondent's negligence to have been only moderate. I conclude that a penalty of $150 is appropriate.

VI. Docket No. KENT 93-646

A. Citation No. 3164716

1. Violation of 30 C.F.R. 75.1101

Jim Langley, an MSHA inspector, inspected Respondent No. 1 mine on February 22, 1993. Langley issued a citation to Respondent because he had observed that the 006 section belt drive was not provided with a deluge fire suppression system in violation of 30 C.F.R. 75.1101. In essence, Section 75.1101 mandates the installation of deluge water sprays at the main, and secondary belt-conveyor drives. Respondent did not rebut or impeach Langley's testimony regarding the facts of the violation. Accordingly I find that Respondent did violate Section 75.1101, supra.

2. Unwarrantable failure.

According to Langley, Helton told him that the belt had been in operation for three weeks. Helton did not impeach or contradict this testimony. He stated that when the belt was set up, there was a notation put in the maintenance report to install the deluge system. He indicated that the maintenance foreman works for him, but that he (Helton) is not responsible for seeing that the maintenance shift installs the deluge system. He said that he had thought that the deluge system had been installed. Since the belt had been in operation for three weeks without a deluge system, and there are no facts adduced by Respondent to mitigate its conduct in not having had a system installed, I conclude that the violation herein was the result of Respondent's unwarrantable failure (See Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)).

B. Order No. 3164717.

Langley testified, in essence, that on February 22, 1993, he also observed black coal dust at the head drive of the "F" belt. He said that the dust was on the floor and both ribs, and extended for 26 crosscuts. He indicated that the accumulations extended the full width of the 18 to 20 foot wide entry, and into the crosscuts. He also indicated that there was float dust on the belt. Langley indicated that it is likely that areas of the accumulations were wet. He also noted that the area was rock dusted.

Helton, who was present, testified that the belt in section was wet, and that the coal that was being run from the face was wet. He opined that the coal that spilled off the belt would be

wet. Helton said, in essence, that the material that was "gobbed off" at the head drive "was a wet mud-like build up" (Tr. 155, April 26, 1994). He opined that the likelihood of the accumulation catching on fire when wet would be a lot less than if it was dry. However, he indicated that he agreed there was a violation.

Cohelia opined that wet coal is not combustible.

Langley, in rebuttal opined that even though coal dust is rock dusted, if there would be an explosion the coal dust would be "kicked up" in the air, (Tr. 167, April 26, 1994) and could still explode. He also indicated that wet coal dust will still ignite and burn.

Langley issued an order alleging a violation of 30 C.F.R. 75.400 which, in essence, provides that coal dust, loose coa and other combustible materials shall not be permitted to accumulate in active workings.

Based on the testimony of Langley, I conclude that Respondent did violate Section 75.400. Langley opined that the violation was the result of Respondent's unwarrantable failure, because of the amount of the accumulations. He also indicated that prior to citing the area in question, he had examined three other belts, and cited them for having accumulations of float dust. The record does not contain any evidence as to how long the accumulations at issue had existed prior to the order that was issued by Langley. In the absence of any such evidence, I find that it has not been established that there was any aggravated conduct on the part of Respondent. I thus find that it has not been established that the violation herein resulted from Respondent's unwarrantable failure.

C. Significant and Substantial (Citation No. 3164716, and Order No. 3164717).

According to Langley, the violations cited in Citation No. 3164716 and Order No. 3164717, were both significant and substantial due to the presence of possible ignition sources such as the belt drives, rollers, belt boxes, cables, drive rollers and bottom rollers. He also took cognizance of the quantity of the accumulated float dust and loose coal, the present of float dust in the starter box, the lack of the deluge system, the absence of a sensor line, and the absence of a fire hose at the belt drive. Also, he indicated that the breakers and contactors create an arc whenever the belt is turned on, an event that occurs at least twice a day. However, on cross-examination he indicated that the arc produced would not be sufficient to make a fire. Although they were potential fire sources present, there

is no evidence to predicate a conclusion that these sources were in such a physical condition as to render an ignition or explosion reasonably likely to have occurred. Hence, in the absence of evidence of a reasonably likelihood of an injury producing event, i.e., a fire or explosion, I conclude that it has not been establish that these violations are significant and substantial. I find that a penalty of $2,000 is appropriate for the violation of Section 75.1101, supra, and a penalty of $500 is appropriate for the violation of Section 75.400, supra.

VII. Docket No. KENT 93-615, (Citation No. 9885267).

On February 22, 1993, Roger Pace issued a citation alleging a violation of 30 C.F.R. 70.101 based upon the testing of respirable dust in the mechanized mining unit which indicated a concentration of 1.8 milligrams per cubic meter of air (GX 44 AP). Respondent did not rebut or impeach the testing results. Section 70.101, supra provides, in essence, that "When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10." According to Langley, applying this formula to the cited section, the percentage of quartz found divided into 10 led to a dust standard of 1.3 milligrams per cubic meter. Cohelia indicated, in essence, that the cited section had been under the reduced dust standard of Section 70.101 supra, for 3 or 4 years. Pursuant to Section 70.101, supra, as applied to the area cited, once it is revealed that the presence of quartz is more than 5 percent of the respirable dust, the operator shall continuously maintain quartz below 1.3. Since the concentration of quartz found on testing exceeded this standard, I find that Respondent violated Section 70.101 supra.

At issue is whether the violation was significant and substantial. Following the dictates of the Commission in Consolidation Coal Company, 8 FMSHRC 890, 899 (1986), I find that the violation herein, i.e., respirable dust in excess of the

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FOOTNOTE 17

The exhibits admitted in evidence at the hearing on April 26-28, 1994, will be referred to with the suffix "AP" to distinguished them from the exhibits admitted at the hearing on March 1-3, 1994.

standards setforth in Section 70.101, supra, raises a presumption that the violation was significant and substantial. Respondent did not proffer any evidence that miners in the cited section were not in fact exposed to the hazards posed by excessive concentration of respirable dust. (See, Consolidation Coal, supra, at 899). Hence, I find that the presumption that the violation was significant and substantial has not been rebutted. I find that a penalty of $5,200 is appropriate.

VIII. Docket No. KENT 93-482

A. Citation No. 2787470.

During an inspection on December 29, 1992, Langley observed that in the MMU 001 section, six doors leading to an escapeway were not marked with any sign. Respondent did not contradict or impeach the testimony of Langley. Based upon his testimony, I find that the Respondent did violate Section 75.333(c)(2) as cited by Langley in the citation that he issued.

Cohelia testified that, just prior to the effective date of Section 75.333(c)(2) he had ordered 500 signs, and installed them. He indicated that sometime subsequent to November 19, 1992, he placed another order for the signs. He indicated that, prior to the promulgation of the regulation at issue, there was some dispute as to where the signs were to be placed. He said that at one time he was told that arrows were needed along with a sign indicating "man door", but that later he was told that only arrows were needed. Nick Wright, a crew leader who was with the inspector on December 29, indicated that the doors at issue were readily observable, and that more signs had been ordered. Based on the testimony of Respondents' witnesses, I find that Respondent's negligence is mitigated somewhat. I find that a penalty of $100 is appropriate.

B. Citation No. 2787471

On December 29, 1992, Langley cited Respondent for being in violation of its ventilation plan which requires a water spray at both bridge conveyors with a minimum pressure of 50 psi. According to Langley, the MMU 001 section was producing coal at the time. A continuous miner was cutting coal, and dumping it on a bridge conveyor ("bridge"). He observed that the water spray was not operating at this bridge. Respondent has not contradicted or impeached this testimony. On the basis of Langley's testimony, I find that Respondent was in violation of its ventilation plan, and hence it did violate Section 75.370(a)(1), supra.

The continuous miner at issue was equipped with a scrubber to control dust. In addition, the miner was equipped with approximately 30 water sprays to control dust. These were operating at 140 psi which exceeds the ventilation plan requirement of 100 psi. The operator of the bridge was located in intake air approximately 5 feet outby the spray. Also, in the entry at issue, dust produced at the face from the mining process is vented down a return entry (located to the left, looking inby, of the entry in question). The velocity of the air at the face was more than required. Within this context, I conclude that the violation was not significant and substantial. (See, U.S. Steel).

The lack of functioning sprays on the bridge was apparent. However, there is no evidence as to how long this condition had been in existence before it was cited by Langley. In this connection, Nick Wright, who accompanied Langley, testified that when he and Langley first came on the section and went to the face, no coal was being produced. I find that a penalty of $300 is appropriate.

C. Citation No. 2787473

According to Langley, on December 30, 1992 in the No. 1 entry in the 002 section 9 or 10 cuts, 20 feet wide and approximately 52 to 60 feet long, had been cut into in a section that had already been pillared out. He indicated that Respondent should have had a plan showing how water was going to be pumped out of the pillared area. Also, there should have been a plan allowing for drilling into the area of the cuts. He indicated that Cohelia told him that they did not have a plan. Cohelia did not rebut or contradict Langley's testimony. Langley issued a citation alleging a violation of 30 C.F.R. 75.389(a)(1) which requires that an operator shall develop and follow a plan for mining into areas penetrated by bore holes. Based on the testimony of Langley I find that Respondent did violate Section 75.389(a)(1).

Cohelia testified that it was unclear to him what MSHA wanted an operator to place in a plan, as the mandatory standard was relatively new, having been promulgated on May 15, 1992. Cohelia testified that he attended an MSHA question and answer session on the plan. He said that the officials present did not answers questions regarding what had to be placed in the plan. They said these officials told him that they would get back to

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FOOTNOTE 18

In this connection Langley indicated that compliance with this section was extended to November 16, 1992.

him, but they did not get back to him before the citation at issue was issued. I thus find that Respondent's negligence herein was very low, and assess a penalty of $10.

D. Citation No. 3380767

On March 19, 1992, Johnnie Smith, an MSHA inspector inspected Respondent's Mine No. 6. He observed a personnel carrier. This is a self-powered vehicle that travels on rails. It is used to transport two miners under ground. The vehicle was equipped with two headlight bulbs at one end, and one bulb at the other end. None of these headlight bulbs worked. He issued a safeguard requiring as follows: "All self-propelled track-mounted personnel vehicle be equipped with headlights or its equivalent" (sic). He indicated that he issued the safeguard to provide for the observation of hazards such as the loose shale roof, and the high voltage cable that was hung approximately 6 feet from the bottom rail. He indicated that the mine had a history of the floor rolling and pitching. He was concerned that if a vehicle broke down in a dip, and did not have any headlights, another vehicle travelling on same track could hit it. He also was concerned with the need to observe the loose shale roof to determine whether it needed scaling. He indicated that the height of the mine was approximately 4 feet. I find that the safeguard was properly written, and validly issued.

On January 11, 1993, Wilson inspected the same mine. He observed a self-propelled track mounted personnel carrier that did not have any headlights on one end of the vehicle. This side of the vehicle is the front-end when the vehicle travels outby. Based on the testimony of Wilson that was not contradicted or rebutted, I conclude that Respondent did violate the safeguard, and hence Respondent did violate Section 75.1403-6(a)(2).

Wilson indicated that the shale roof was loose. In essence, he stated that he had observed it falling out between the roof bolts. He said that the mine floor was uneven and there was swags throughout. Also he noted that the tracks were slippery, and there was foot traffic in the area. He said that there was close clearance of the vehicle in the area where there was cribbing. He was concerned that, in the absence of a headlight, it would not have been possible to closely observe the roof conditions from the carrier when travelling outby. He opined that a proper determination could not have been made as to whether scaling was necessary. Langley expressed his concern

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FOOTNOTE 19

Wright indicated that the roof needs to be scaled regularly.

that in the absence of headlights, the vehicle in question could have collided with another vehicle travelling on the same track, inasmuch as operators customarily signals each other with headlights. Also, he indicated that it would be harder for pedestrians to see the vehicle, if it did not have any headlights.

Wright who was with the inspector, indicated that he did not have any problems seeing when he traveled outby in the carrier in question. Neither Wright, nor Michael E. Osborne, who have worked in the cited area for approximately 3 years, were aware of anyone being hit by roof falling on a carrier. Osborne opined that in the absence of a headlight, it is still possible to see. Cohelia indicated that in the absence of headlights, the operator of the vehicle can signal to an oncoming vehicle with bells, or with his cap light. In addition, he indicated that it is possible to hear the vehicle from a long distance. Also, Wilson indicated the area was well rock dusted which increases illumination.

I accept the testimony proffered by Wilson regarding the roof and floor conditions in the entry in question. In the context of this testimony, and considering the hazards associated with the lack of headlights, I find that the violation was significant and substantial. (See, U.S. Steel, supra). I find that a penalty of $900 is appropriate.

IX. Docket No. KENT 93-918 (Citation No. 4257585).

A. Citation No. 4257585

On June 7, 1993, inspector Roger Pace inspected Respondent's No. 7 mine. He observed a total of 13 employees travelling into the mine on two man-trips. He said that these employees were not using safety glasses. He indicated that the man-trip is open on the top. According to Pace, the slate roof continually scales and falls. He opined that it was likely for a person in the open man-trip to have been hit by falling particles from the roof. He said that some of the very thin scales that fall off the roof could cause an eye injury resulting in the loss of an eye. Pace issued a citation alleging a violation of 30 C.F.R. 75.1720(a), which in essence provides miners are required to wear face-shields or goggles ". . . when other hazards to the eyes exist from flying particles."

Allen Johnson, who has been the mine foreman at the subject mine since September 1990, indicated that he is not aware of any eye injuries caused by failure to wear safety glasses.

Based on the testimony of Pace that was not contradicted or rebutted, I find that the miners were riding in a open man-trip without wearing safety goggles. I also find that they were subjected to a hazard of being hit in the eyes by scales falling off the roof. I thus conclude that it has been established that Respondent violated Section 75.1720(a).

Pace opined that, in essence, because of the scales continually falling from the roof, a miner in the open man-trip not wearing glasses could be hit in an eye by these scales. I conclude that such an injury was reasonably likely to have occurred. I conclude that the violation was significant and substantial.

According to Pace, the fact that 13 employees were not wearing safety goggles was readily apparent. Johnson indicated that if he had observed the miners without wearing goggles, he would have been reminded them to wear glasses. In this connection, he indicated that only three of the miners in the man-trips could not produce their glasses. He said that glasses are issued to all miners, and replacements are available. At the time the citation was issued neither man-trip provided a supervisor. Cohelia indicated that in the annual training, miners are told of the importance of wearing glasses. In these circumstances, I conclude that the violation herein resulted from only a low degree of negligence on the part of Respondent. However an eye injury as a result of the violation herein, is of a high level of gravity. I find that a penalty of $350 is appropriate.

B. Citation No. 4257457

According to Langley, on June 15, 1993, he observed an exposed pinch-point on the "D" belt head drive roller. He indicated that the 2 foot diameter roller was 3 feet above the ground, and that a guard covered only part of the roller. According to Langley, the belt was in operation. He opined that due to the inadequate guard, a person's arm could get caught in the pinch-point. He indicated that the unguarded roller was on the narrow side of the belt. He opined that persons are required to work on the narrow side in order to rock dust the belt, and to service the head drive. He estimated that there was approximately 3 to 4 feet between the roller and the wall on the narrow side. He said that the roller was turning at high revolution per minute. He explained that a person could fall on the pinch point, or his clothing could get caught on the pins that stick out of the belt. He issued a citation alleging a violation of 30 C.F.R. 75.1722(a) supra.

Johnson, who was with the inspector, testified that it is normal practice for persons to walk on the wide side. He explained that normally persons toss rock dust under the roller from the wide side to the narrow side. He indicated that miners shovel from the wide side, as there is no room on the narrow side. He also indicated that the rollers on the narrow side are serviced from the wide side. He said that the mine floor in the area had only some irregularity caused by the continuous miner, and he did not recall seeing any stumbling hazards. He also indicated that he has been working in the mine since September 1990, and no one has slipped or fallen on the narrow side of the belt and gotten caught in the belt.

I find, based upon the testimony of Langley, that because the pinch point of the roller was exposed, that a person may have inadvertently contacted the pinch point, and an injury might have resulted. Thus, I find that it has been established that Respondent did violate Section 75.1722(a).

However, I find that due to the absence of any significant stumbling hazard in the area, and the relevantly low height of the exposed pinch point, it has not been established that the violation was significant and substantial. I find that a penalty of $100 is appropriate.

C. Citation No. 4257459

According to Langley, on June 15, 1993 he observed a belt starting box for the "D" belt. He indicated that a cable supplying power to the starting box entered the box through a round hole. He indicated that the box was metal, and there was nothing between the cable and the hole. He said that the outer surface of the cable was skinned back at the point where the cable entered the box. He said that the leads were resting on the metal part of the hole. Langley issued a citation alleging a violation of 30 C.F.R. 75.515 which provides as follows: "Cables shall enter metal frames of motors, slice boxes, and electric compartments only through proper fittings. When insulated wires other than cables pass through metal frames, the holes shall be substantially bushed with insulating bushings." (Emphasis added.)

Johnson, who was with the inspector testified that at the point where the cable entered the metal hole, it was completely insulated. However, there was no contradiction or impeachment of the inspector's testimony that there were not any improper fittings at the point where the cable entered the box. Accordingly, I find that Respondent did violate Section 75.515 supra.

Langley indicated that the belt drive was only 2 to 3 feet away. He opined that vibration from the belt drive could cause the thin metal of the box to cut into the leads causing the box to become energized. Should this occur, and should a person then come in contact with the box, an electrical shock, burns, or death could result. He termed the condition obvious.

According to Johnson, at the point that the cable entered the hole, it was covered with a thick rubber outer insulation which he estimated as being between a quarter and half inch thick.

Wilson opined that contactors inside the box open and close, causing vibration. However, neither Wilson nor Langley testified that they observed or felt any vibration in the starter box. Nor is there any other evidence in the record that the starter box actually vibrated. There is insufficient evidence in the record to base a finding that the box vibrated. Considering all the above, I find that the violation was not significant and substantial. I find that a penalty of $200 is appropriate.

X. Docket No. KENT 93-884

A. Citation No. 3835998

On June 28, 1993, MSHA inspector Elmer Thomas, inspected Respondent's No. 7 mine. He asked the operator of a John Deer front-end loader where the fire extinguisher was located. According to Thomas, the operator looked, "and there wasn't one." (Tr. 353, April 27, 1994). Thomas issued a citation alleging a violation of 30 C.F.R. 77.1109(c)(1) which provides that front-end loaders shall be equipped with at least one portable fire extinguisher. Respondent did not contradict or impeach the testimony of Thomas. Accordingly, based upon Thomas' testimony, I find that Respondent did violate Section 77.1109(c)(1), supra.

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FOOTNOTE 20

Langley indicated that the edge of the hole through which the cable entered the box was approximately the thickness of a dime.

FOOTNOTE 21

Since I find that there is insufficient evidence that the box vibrates, the case at bar is distinguished from U.S. Steel Mining Corporation, 7 FMSHRC 327 (1985) relied on by Petitioner. In U.S. Steel, supra, the Commission's finding of a violation therein of Section 75.515, supra, was based on the fact, inter alia, that the pump through which the cited wire passed vibrated, and the vibration was "constant" (U.S. Steel, supra, at 329).

Thomas opined that the violation was significant and substantial. He said that the front-end loader was in operation when he observed it loading a truck. He said that there were battery wires in the same area as oil hoses and the brake lines. He indicated that engine and hydraulic oil, and brake fluid, are all combustible. He concluded that in the case of a fire, considering the absence of a fire extinguisher, an accident producing injury was reasonably likely to have occurred.

I find that it has not been established that an injury producing event i.e., a fire was reasonably likely to have occurred. The record establishes the presence of only potential fire ignition sources. I thus find that it has not been established that the violation was significant and substantial. (See, U.S. Steel, supra).

According to Thomas, the operator of the front-end loader told him that he did not check to see if it contained an extinguisher. I thus find that Respondent was moderately negligent regarding this violation. I find that a penalty of $400 is appropriate.

B. Order No. 4238749

On April 20, 1993, Wilson inspected the 707 section of Respondent's No. 7 Mine. At the time, no coal was being produced. Four miners, Jim Brassfield, Greg Perkins, Ovie Penix, and Corneilus Simpson were present, repairing a bolter. Simpson and Penix were certified to perform preshift examinations, however, they did not perform any preshift examination that morning. Nor did anyone else perform a preshift examination of the area where the men were working. Wilson issued an Order alleging a violation of 30 C.F.R. 75.360(a) which provides, as pertinent, as follows: "Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, . . . enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination." The record establishes that there was no examination made prior to the time Brassfield, Perkins, Penix and Simpson went underground. Accordingly, I find Respondent violated Section 75.360(a), supra.

According to Wilson, since there was no pre-shift examination, the miners who were in the section were exposed to unknown hazards such as the possibility of the existence of methane, the possible lack of oxygen, and adverse roof conditions. In this connection, Langley testified that the roof in the mine has a tendency to fall, and several roof falls have occurred.

Right after Wilson cited Respondent, the area at issue was inspected by Allen Johnson, and no hazardous conditions were observed. No facts have been adduced to predicate a finding that an injury producing event was reasonably likely to have occurred as a result of the failure to conduct the pre-shift examination. Within the context of this record, I conclude that it has not been established that the violation was significant and substantial.

Simpson testified that he was not instructed to do any pre-shift examination. He indicated that if he enters an area of the mine by himself, he then pre-shifts that area. In this instance, he indicated that because he and the rest of the crew were late entering the mine, he thought that Allen Johnson had done the pre-shift examination. Johnson testified that since Simpson was certified to make inspections, he assumed that Simpson had done the pre-shift examination that morning. Johnson testified that had he known that the inspection was not done, he would have done it himself. Within this framework, I find that Respondent's conduct herein was more than ordinary negligence, and constituted aggravated conduct. (See, Emery, supra)). I find that a penalty of $3,000 is appropriate.

XI. Settlements

At the hearings, motions were made to approve settlements that the parties agreed to regarding the following citations/orders: 4241521, 3000263, 2787458, 4257455, 4257456, 4257922, 4257926, 9885301, 4257454, 4257938, 3835999, 4248402, 2793750, 2793751, 2793752, 4239200, 4257401, 3000239. A reduction in penalty from $19,724 to $9168 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act.

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FOOTNOTE 22

I chose not to follow Emerald Mines Corp., 7 FMSHRC 437, (March 25, 1985) (Judge Broderick), relied on by Petitioner. The key issue for resolution is whether Petitioner established that an injury producing event was reasonably likely to have occurred as a result of the failure to examine the area. There are no facts in the record to base a finding that Petitioner met this burden.

The motions for approval of the settlements are GRANTED.

ORDER

It is ordered as follows:

1. The following citations/orders are to be amended to indicated violations. They are not significant and substantial: 4241535, 4238729, 4241532, 3164651, 3164652, 3164653, 3164716, 3164717, 2787471, 4257457, 4257459, 3835998, and 4238749.

2. Order No. 3164717 be amended to indicate that the violation cited was not the result of the Operator's unwarrantable failure.

3. Citation Numbers 4241524 and 4257589 (vacated by Petitioner) are to be DISMISSED.

4. Respondent shall, within 30 days of this decision, pay a total civil penalty of $40,338.

Avram Weisberger
Administrative Law Judge
(703) 756-6215

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