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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 94-14 A. C. No. 29-00845-03553
v.	:	
PITTSBURG & MIDWAY COAL MINING CO., YORK CNYN COMPLEX, Respondent	:	Docket No. CENT 94-48 A. C. No. 29-00845-03554 Docket No. CENT 94-65 A. C. No. 29-00845-03555 Docket No. CENT 94-66 A. C. No. 29-00845-03556 Docket No. CENT 94-67 A. C. No. 29-00845-03557 Docket No. CENT 94-68 A. C. No. 29-00845-03558 Docket No. CENT 94-70 A. C. No. 29-00845-03560 Docket No. CENT 94-71 A. C. No. 29-00845-03561 Docket No. CENT 94-77 A. C. No. 29-00845-03562 York Surface Mine Docket No. CENT 94-78 A. C. No. 29-00095-03575 York Canyon Underground Docket No. CENT 94-46 A. C. No. 29-00224-03617 Docket No. CENT 94-47 A. C. No. 29-00224-03618

: Docket No. CENT 94-64
: A. C. No. 29-00224-03620
:
: Cimarron Mine

ORDER DENYING RESPONDENT'S MOTION
TO STAY DOCKET NO. CENT 94-47
AND
DECISION

Appearances: Janice L. Holmes, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
John W. Paul, Esq., Pittsburg & Midway Coal Mining Company, Englewood, Colorado, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act). The respondent, Pittsburg & Midway Coal Mining Company is a subsidiary of the Chevron Company. These matters were heard on July 27 through July 29, 1994, in Santa Fe, New Mexico. The respondent has stipulated that it is a mine operator subject to the jurisdiction of the Act.

The parties presented a settlement motion at trial for the purpose of resolving all of the above docketed cases with the exception of Docket No. CENT 94-47. The terms of the parties' agreement were approved on the record and will be incorporated at the end of this decision.

DOCKET NO. CENT 94-47

Docket No. CENT 94-47 concerns 104(d)(1) Citation No. 3589770 and 104(d)(1) Order No. 3589771 issued on July 15, 1994, by Mine Safety and Health Administration (MSHA) Inspector Melvin Shiveley for violations of section 75.323(c)(2)(i) and (ii), 30 C.F.R. 75.323(c)(2)(i) and (ii), as a result of methane concentrations of 1.8 percent and 8.8 percent in the working section outby the face in the No. 2 return tailgate entry at the respondent's 4 left longwall in its Cimarron Mine.

Section 75.323(c) provides, in pertinent part, that when a split of air returning from any working section contains 1 percent but not more than 1.4 percent methane, adjustments in the ventilation system must be made to reduce the methane concentration in the return air to less than 1 percent. When the split of air from the working section in the return entry contains 1.5 percent methane or more, the operator must withdraw

personnel pursuant to section 75.323(c)(2)(i) and deenergize equipment at its source pursuant to section 75.323(c)(2)(ii).

The respondent has stipulated to the violative methane reading of 1.8 percent outby the face in the No. 2 return entry. FOOTNOTE (Tr. 79, 420). Although the respondent asserts that longwall foreman James Hancock was unaware of the 8.8 percent methane reading outby the face in the No. 2 entry, the respondent has admitted that it cannot refute the location and validity of this reading. (Tr. 145-146, 153-154, 195, 232, 315-317, 343, 420). In addition, the respondent repeatedly admitted that, given these high methane readings, immediate deenergizing and withdrawal of personnel should have been the respondent's response. Therefore, having recognized the exigency of the circumstances, the respondent has essentially conceded that the violations in issue were properly characterized as significant and substantial. (Tr. 117-118, 335, 339-341, 343, 351). What is contested is whether the violations are attributable to the respondent's unwarrantable failure.

At trial the respondent declined to call longwall foreman James Hancock as a witness because Hancock is the subject of an MSHA special investigation. While I indicated that I would have entertained a pretrial motion to stay this case for possible consolidation with a 110(c) proceeding pending completion of MSHA's investigation, I declined to stay this matter based on a motion made at trial without opening the record. I stated that the testimony and evidence presented by the parties would be received. If the record evidence was insufficient to dispose of the issues before me, I noted that I would entertain a motion for stay or a motion for continuance for further depositions and possible further testimony at the end of the hearing. (Tr. 56-57).

At the conclusion of the hearing, for the reasons noted below, I concluded that the evidence, including signed statements by three of the respondent's employees who took pertinent methane

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1. The 1.8 percent reading was obtained by the respondent's employee David Ortiz, who is also the safety committeeman, in return air located two cribs outby the face along the rib line in the No. 2 entry. Section 75.323(a) requires that methane air samples be taken at least 12 inches from the roof, face, ribs and floor. Mine personnel, particularly safety committeemen, are aware of this 12 inch requirement. (Tr. 97, 227). Although the respondent has stipulated to this 1.8 percent reading and has conceded that Ortiz probably took the reading "correctly", respondent's counsel indicated that he would have liked to ask Ortiz about the precise location of this methane reading. (Tr. 231, 420). The respondent, however, did not call Ortiz as a witness.

readings, as well as the testimony of respondent witnesses safety coordinator Donald Giacomo and safety manager Michael Kotrick, provided an adequate and essentially uncontroverted record that supports the actions of Inspector Shiveley. (Tr. 407-411). FOOTNOTE Consequently, I issued a tentative bench decision affirming Shiveley's citation and order. (Tr. 418-436). However, I noted that I would defer making a final written decision until I considered the respondent's proposed findings and conclusions addressing the matters raised in my tentative bench decision. (Tr. 417-418).

The respondent filed proposed findings of fact and conclusions on October 5, 1994. The proposed findings were accompanied by a motion for stay pending MSHA's investigation results and a motion to consolidate this case with two related 104(d) orders issued 6-weeks prior to trial. A similar motion to stay made by the respondent was denied at trial. (Tr. 410-411).

The MSHA investigation and the orders sought to be consolidated were known to the respondent well in advance of the hearing. I decline to delay my decision in this matter on the basis of these belated posthearing motions. Accordingly, the respondent's motions for stay and consolidation ARE DENIED.

Preliminary Findings of Fact

The subject citation and order were issued as a result of the respondent's failure to deenergize equipment at the power source and failure to withdraw personnel immediately after methane readings of 1.8 and 8.8 percent were obtained at approximately 6:00 a.m. on July 14, 1993, outby the working face

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2. At transcript page 409 I noted that Ortiz states he obtained the 8.8 percent reading in the working section. However, I erroneously stated the reading was taken one crib inby the No. 2 return entry. Ortiz states the reading was taken two cribs outby in the No. 2 entry.

3. At the conclusion of my tentative bench decision, I discouraged extensive posthearing briefs and requested the respondent to limit its proposed findings and conclusions to three issues. (Tr. 444-445). Upon further reflection, I realize parties are entitled to file proposed findings and conclusions under section 557(c) of the Administrative Procedure Act. 5 U.S.C. 557(c). Consequently,, on September 24, 1994, I had a conference call with the parties wherein, with the approval of the parties, I set October 7, 1994, as the date for the respondent's filing of unlimited proposed findings and conclusions and October 20, 1994, as the Secretary's reply date. The respondent's findings were filed on October 5, 1994, and the Secretary replied on October 17, 1994.

in the No. 2 return entry. The 1.8 and 8.8 percent methane readings were taken by David Ortiz, a repairman and United Mine Worker's Union safety committeeman employed by the respondent. After taking these high readings, Ortiz encountered longwall foreman James Hancock at the longwall face. The thrust of the respondent's defense to the unwarrantable failure charge is that Ortiz, the union safety committeeman, did not inform James Hancock, who had authority to deenergize power and withdraw personnel, that he (Ortiz) had obtained high methane readings.

Shortly before the high methane readings were obtained by Ortiz, dangerously high methane readings were also obtained by longwall foreman James Hancock and safety coordinator Daniel McClain. The high methane condition was known to Angelo Pais, Hancock's supervisor and longwall coordinator, and the respondent's Cimarron Mine Complex mine manager John Klinger.

As indicated above, the reasons for the respondent's decision not to call Hancock are clear. However, for reasons best known by the respondent, the respondent also declined to call Ortiz, McClain, Pais or Klinger. Inexplicably, citing "efficiency", the respondent relied on the testimony of safety coordinator Giacomo rather than safety coordinator Daniel McClain or safety committeeman David Ortiz although it was McClain and Ortiz rather than Giacomo who had direct knowledge of the pertinent events in this proceeding. (Tr. 72-73, 75-77). The respondent also called safety manager Kotrick who admittedly arrived at the mine site at approximately 6:00 a.m. on July 14, 1993, after the events in question had occurred. (Tr. 332). Thus, neither of the witnesses called by the respondent had direct knowledge of the facts in issue.

I have relied on signed statements by Hancock, Ortiz and McClain in my disposition of this case. These statements are essentially consistent with the testimony of Giacomo and Kotrick.

Further Findings and Conclusions

The incident in question occurred on the "graveyard" shift from 11:00 p.m. on July 13 through 7:00 a.m. on July 14, 1993, at the 4 left longwall section of the respondent's Cimarron Mine. The Cimarron Mine is ventilated by a blowing system rather than an exhausting system. Air is circulated by a fan that blows air down a 400 foot shaft for distribution throughout the mine.

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4. Although Respondent's Ex. 1 is not signed, it is a typed summary prepared by the respondent of information provided by Hancock on July 16, 1993. It was admitted in evidence without objection.

The 4 left longwall section is developed as a two entry system. The No. 2 return entry is on the tailgate side of the longwall. The No. 2 entry is approximately 17 feet wide by 7 feet high. It is supported by two rows of cribs built on 5 foot spacings with a walkway down the center between the cribs. (Tr. 302-304). Although the No. 2 entry also serves as a bleeder entry, the entry's primary purpose is as a return. Therefore, at trial I ruled that the mandatory safety standards regarding permissible methane concentrations of one percent for return entries rather than 2 percent for bleeder entries should apply. Counsel for the respondent indicated that he had no objection to my ruling. (Tr. 311-313, 322).

Shiveley's contemporaneous July 14, 1993, inspection notes reflect that James Hancock was aware of a high methane concentration problem on the tailgate side of the 4 left longwall section since returning from vacation on June 30, 1993. (P. Ex. 7). Safety Manager Kotrick testified that he had "nothing to refute" that there was a history of a methane concentration problem of at least several weeks duration prior to the July 14, 1993 incident. (Tr. 403-404). Kotrick was aware that Mike Calango, a miner's representative, had filed a 103(g) complaint with MSHA concerning high methane levels at the longwall section.

Shiveley arrived at the respondent's mine site at approximately 10:00 a.m. on July 14, 1993, after receiving Calango's complaint at 9:00 a.m. concerning continued mining operations despite high methane readings. Shiveley proceeded to the tailgate of the 4 left longwall accompanied by Kotrick and miner representative Martha Horner. Shiveley took several methane readings at various locations which were all within permissible limits. Wing brattice curtain which redirected the intake air and alleviated the methane concentration problem had been installed prior to Shiveley's arrival at the mine. (Tr. 166). Shiveley ascertained that there was a problem of high methane readings on the "graveyard" shift earlier that morning. However, personnel from that shift had departed the mine at 7:00 a.m. prior to his arrival. Shiveley gathered information about the early morning incident and left the mine at approximately 2:20 p.m.

Shiveley returned to the mine at approximately 10:15 p.m. on July 14, 1993, and stayed until 2:15 a.m. on July 15, 1993, acquiring information about the incident under investigation. Based on his investigation, Shiveley issued 104(d)(1) Citation No. 3589770 and 104(d)(1) Withdrawal Order No. 3589771 to Hancock at 12:15 a.m. on July 15, 1993. The citation and order were terminated when issued as the remedial installation of the brattice curtain had already occurred. However, Shiveley's actions were appropriate as the Commission has concluded that the Act's 104(d) withdrawal sanctions are not limited to instances

where an inspector observes an existing violation. NACCO Mining Company, 9 FMSHRC 1541, 1548 (September 1987). (Tr. 242-246). In this regard, inspectors may cite operators if they believe violations occurred based upon their investigation of past events and circumstances. Id. at 1549; see also Cyprus Plateau Mining Corporation, 16 FMSHRC 1610, 1614 (August 1994).

Shiveley's findings and subsequent MSHA investigation revealed that at 11:00 p.m., prior to the start of his July 14 "graveyard" shift, safety coordinator McClain met with swing shift longwall foreman Bob Falagrady who expressed concern about a high level of methane inby the gob at the tailgate. (Resp. Ex. 4). McClain had been hired by the respondent only 2 weeks before.

McClain went to the headgate of the 4 longwall section where he met Hancock at approximately 1:00 a.m. Hancock had been taking methane readings that were within normal limits. Sometime after 3:15 a.m. McClain went to the break line or hinge point of the tailgate shield in the No. 2 entry where he obtained a 7 percent methane reading at the break line and a 9 percent reading approximately 15 feet inby the break line. (Resp. Ex. 4; P. Ex. 8). The location of these readings are illustrated in a diagram prepared by McClain in Resp. Ex. 4 and a map drawn by Hancock in Joint Ex. 1. The parties stipulated that these readings were taken by McClain between 3:15 and 4:30 a.m. (Tr. 369-370).

Understanding the concept of the break line is crucial for a proper evaluation of the degree of the respondent's negligence in this case. The "break line", also known as the break point or hinge point, is defined as "[t]he line in which the roof of a coal mine is expected to break." Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of the Interior, Bureau of Mines, 1968. The break line is the point at which, when coal is extracted and the longwall shield is advanced, the roof crumbles and falls creating the gob. It is the point at which the roof support ends at the hinge point of the shield. (Tr. 93-94, 169-171). The parties stipulated that the break point is 12 feet inby the face. (Tr. 94). The respondent characterized the 12 foot area between the face inby to the break point as a "working area of the working section" as it is under supported roof. (Tr. 109, 174).

Although the respondent attempted to portray McClain's 7 percent reading as "behind" the break line in the gob, the preponderance of the evidence, including Kotrick's testimony, reflects the reading was taken at the break line. (Resp Ex 4, Joint Ex. 1; Tr. 351, 373-374, 425). Inspector Shiveley's uncontroverted testimony establishes that methane testing at the break line is essential to ensure that methane concentrations are vented out the bleeder system rather than migrating outby the

break line through the return air into the working section. (Tr. 132-135).

McClain's 7 percent methane concentration reading at the break line evidenced a dangerous methane buildup in the working section. This reading troubled McClain. McClain told Hancock that he was uncomfortable with the 7 percent methane concentration at the break line and the 9 percent reading inby the break line in the gob. However, Hancock told McClain that he felt the readings from the break line inby into the gob did not present a problem.

As McClain was a new employee, he asked Hancock who he should talk to regarding this apparent ventilation problem. Hancock stated no one was available on the midnight shift but recommended people he could talk to on the day and swing shifts. Sometime between 4:30 a.m. and 5:00 a.m. McClain called Hancock to determine if Hancock had taken any further methane readings in the tailgate. Hancock informed McClain that he had not taken further readings but he was about to do so. McClain told Hancock that he had spoken to Complex Manager John Klinger who told McClain that Hancock should shutdown the section if the methane concentrations had not changed in the tailgate. Hancock asked McClain to explain the situation to his (Hancock's) supervisor Angelo Pais. (Resp. Ex. 1). Hancock was waiting for further instructions from Pais.

Counsel for the respondent has conceded that Hancock's interpretation that McClain's 7 percent methane reading was not a problem was not an appropriate response. (Tr. 379). In this regard, Kotrick testified that McClain's 7 percent reading in the vicinity of the break line was cause for great concern and that he did not agree with Hancock's analysis of the situation and Hancock's decision to continue operations. (Tr. 351, 394). Although McClain's 7 percent reading was not a basis for the citation and order in issue, the testimony of Giacomo and Kotrick, as well as statements made to McClain by complex manager Klinger, reflect that consideration should have been given to withdrawing personnel as a result of this reading alone. (Tr. 339-340, 393-394).

At 5:45 a.m. Hancock obtained a 6 percent methane reading at the tailgate entry approximately 12 feet inby the break line at the back of the shield. (P. Ex. 6). Shortly thereafter, Hancock spoke to his crew consisting of headgate man Isidro Tapia, shearer operators Delbert Archuleta and Dan Renner, propmen Jim Feldman and Gerry Renner, and mechanic David Ortiz. (P. Ex. 8). Hancock told them that McClain had found 9 percent methane at the tailgate and that they had the right to refuse to work in unsafe conditions. (Resp. Ex. 1; P. Ex. 8). However, shifting the statutory burden placed on operators to withdraw personnel when methane levels are above 1.5 percent to employees to voluntarily

remove themselves from the mine is inappropriate and ineffective. (Tr. 342).

At approximately 6:00 a.m. the power to the longwall shear automatically shutdown because of a defect in the sensor of the methanometer. The shutdown that caused this malfunction was not related to high methane readings at the tailgate. The automatic shutdown of the shear was not the equivalent of shutting off power at the source as the belt conveyor continued to run. In addition, all lights and other electric equipment continued to operate in the section. Thus, the shearer shutdown did not remove other potential ignition sources. (Tr. 397-399).

Contemporaneous with the shear shutdown, David Ortiz, safety committeeman, became very concerned and decided to take methane readings of his own. Ortiz obtained an 8.8 percent methane reading in the walkway of the No. 2 return entry two cribs outby the face and a 1.8 percent methane reading two cribs outby the face along the rib line. (P. Ex. 8; Tr. 105, 145-153). These readings are depicted by an "O" and circled in red on Joint Ex. 1.

At approximately 6:10 a.m., Ortiz met Hancock carrying a roll of brattice near the headgate. Hancock told Ortiz that Pais had instructed Hancock to install brattice curtain to see if they "could get the problem solved." (P. Ex. 8). Precisely what Ortiz told Hancock is unclear. Hancock, in an exculpatory written statement provided to MSHA on May 11, 1994, states that Ortiz told him about an 8 percent methane reading in the gob at the tail of the shield rather than an 8.8 percent reading two cribs outby in the No. 2 entry in the working section. (Resp. Ex. 5). However, Hancock admits that Ortiz did inform him of the 1.8 percent reading along the rib. Id.

Hancock further stated:

> Ortiz was excited about the gas. I was too. (About [one] week later I told him it didn't dawn on me the significance of the 1.8 % reading. He said likewise it didn't on him either). (Emphasis added). (Resp. Ex. 5).

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5. Early in the trial, the respondent alleged that Ortiz' 8.8 percent reading was taken in the No. 2 entry inby the face in the gob. This allegation is illustrated on the map in Joint Ex. 1 prepared by Hancock. However, after telephoning Ortiz for clarification after the first day of trial, Ortiz informed the respondent that his 8.8 percent reading was not taken in the gob. Rather, it was obtained two cribs outby the face in the center walkaway of the No. 2 entry in the working section. (See, e.g., Joint Ex. 1; Tr. 145-150).

This statement is glaringly inconsistent. It is difficult to reconcile the admitted excitement of Ortiz and Hancock over the methane readings if they failed to recognize the significance of those readings.

Ultimate Conclusions

As discussed above, the respondent has stipulated to the 1.8 percent methane concentration detected by Ortiz along the rib line in the working section in the No. 2 return entry. Similarly, the respondent cannot refute the 8.8 percent reading taken by Ortiz near the 1.8 percent reading in the center walkway of the No. 2 entry two cribs outby the face. It is also undisputed that the respondent failed to deenergize power at the source or withdraw personnel after these readings were obtained. In this regard, the evidence reflects that the automatic shutdown of the longwall shear at 6:00 a.m. on July 14, 1993, because of a faulty sensor in the methanometer, did not constitute deenergizing at the source as the belt conveyors and lights continued to operate. Consequently, the evidence establishes the fact of the violations of sections 75.323(c)(2)(i) and (ii) cited by Shiveley in Citation No. 3589770 and Order No. 3589771, respectively.

A violation is properly characterized as significant and substantial if it is reasonably likely that the hazard contributed to by the violation will result in injuries of a reasonably serious nature if mining operations were permitted to continue without abatement of the violation. Ordinarily, the appropriate analysis for determining whether a violation is significant and substantial is set forth in the Commission's decision in Mathies Coal Company, 6 FMSHRC 1 (January 1984).

In the instant case, the respondent has stipulated to the fact that the cited violations were properly characterized as significant and substantial in view of Ortiz' statement that his 8.8 percent reading was obtained in the return entry outby the face in a working section. (Tr. 117-118). Although the respondent has stipulated to the significant and substantial question, I wish to note that applying the traditional Mathies test in this case is unnecessary. High methane concentrations in working sections, as much as nine times the permissible limit in this instance, are presumptively significant and substantial under section 303(i) of the Mine Act. 30 U.S.C. 863(i).

In section 303(i), Congress requires the immediate shutdown and withdrawal of personnel when methane concentrations are 1.5 percent or higher. High methane concentrations are so serious that Congress has removed any discretion from MSHA inspectors. In fact the statutory burden to cease operations and withdraw until methane concentrations are below 1 percent is placed directly on the operator without the necessity for

intervention by any MSHA official. Given this congressional mandate, the gravity of these violations easily satisfies the criteria for a significant and substantial designation.

Finally, we arrive at the question of unwarrantable failure. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected, or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use . . . characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991).

Resolution of the question of whether the respondent's inaction in this case constitutes unjustifiable or inexcusable conduct requires an analysis of what management personnel knew on July 14, 1993, and when they knew it. At the outset I note that management knew there was a methane concentration problem at the longwall tailgate since late June 1993. At 11:00 p.m. on July 13, 1994, at the beginning of the graveyard shift in question, swing shift longwall foreman Falagrady told safety coordinator McClain about high levels of methane inby the gob at the tailgate.

Conscious of Falagrady's concern, between 3:15 a.m. and 4:30 a.m. McClain obtained a 9 percent methane reading in the gob approximately 12 to 15 feet inby the break line and a 7 percent methane concentration in an outby direction from the gob at the break line in the direction of the return air. The 7 percent reading was cause for grave concern because, as Kotrick admitted, it was taken approximately at the break line rather than in the gob. (Tr. 351, 374, 378). As discussed earlier, the significance of this 7 percent reading is that it indicated that the methane in the gob was migrating into the working section rather than being effectively ventilated through the bleeder system.

Despite the fact that McClain told Hancock that he was concerned about these readings, mining operations continued even after McClain reported these readings to complex manager John Klinger. In this regard, at trial even the respondent did not contend that its failure to react to McClain's the 7 percent reading was appropriate. (Tr. 379). Thus, the respondent should have seriously considered withdrawing personnel as early as 3:15 a.m. to 4:30 a.m. Instead, Hancock continued mining

operations while waiting for further instructions from supervisor Angelo Pais.

At approximately 5:45 a.m. Hancock obtained a 6 percent methane concentration at the back of the tailgate shield approximately 15 feet inby the break line. Once again consideration should have been given to withdrawing personnel. Instead, Hancock informed the longwall crew that they could voluntarily leave the mine if they felt it was unsafe. Although I am certain Hancock was well intentioned, attempting to transfer the decision to withdraw from the mine operator as mandated under section 303(i) of the Mine Act to the individual miner is inexcusable. Peer pressure and the fear of retribution, whether or not such fear is warranted, could dissuade employees from evacuating. Thus, the respondent missed a second opportunity to cease operations and withdraw.

While the McClain and Hancock readings are not the basis for the citation and order in issue, the respondent clearly had ample notice of a serious methane problem in the No. 2 tailgate entry. At approximately 6:00 a.m., safety committeeman David Ortiz obtained methane concentrations of 1.8 percent along the rib line and 8.8 percent in the center walkway two cribs outby the face in the return air. It is undisputed that Ortiz met Hancock at the longwall near the headgate shortly after obtaining these readings. Hancock has admitted that Ortiz informed him of the 1.8 percent concentration.

Hancock's statement that he failed to appreciate the significance of this 1.8 percent reading given the obvious concern, if not fear, of McClain and Ortiz, as well as the concern of manager Klinger, defies belief. The respondent's failure to deenergize sources of ignition such as the belt conveyor and other electric lights and equipment and withdraw personnel on the basis of Ortiz' 1.8 reading alone constitutes inexcusable and unjustifiable conduct.

I reach this decision without addressing the respondent's vigorous assertion that Ortiz never informed Hancock of the 8.8 percent reading. While I find it difficult to imagine that safety committeeman Ortiz would have neglected to communicate this information to Hancock, there is no direct evidence or written admissions on this issue. In this regard, I find the respondent's suggestion at trial that Hancock's purported lack of knowledge of Ortiz' 8.8 percent reading is attributable to noise at the longwall which interfered with Hancock's ability to hear Ortiz as notably unconvincing. (Tr. 192-194).

It was, however, incumbent on Hancock to obtain all pertinent information from Ortiz to assist Hancock in his decision whether to withdraw personnel. Taking the respondent at its word, Hancock's failure to obtain all relevant information,

given management's notice of a significant methane condition, in and of itself manifests an unwarrantable failure by the respondent.

Accordingly, 104(d)(1) Citation No. 3589770 and 104(d)(1) Order No. 3589771 shall be affirmed. As noted in my tentative bench decision, given the respondent's size as well as the serious gravity and high degree of negligence collectively manifested by the respondent's management staff, the $17,500 total civil penalty proposed by the Secretary for the citation and order in issue shall also be affirmed. FOOTNOTE

SETTLEMENT TERMS

As indicated above, the parties reached settlement of all other matters in this consolidated docket proceeding. The settlement terms include the respondent's payment of $4,291. The settlement terms were presented by the parties and approved on the record as being consistent with the civil penalty criteria in section 110(i) of the Act. The settlement with respect to the proposed and agreed upon penalties is as follows:

Docket No. CENT 94-14

Citation No.	Proposed Penalty	Settlement
3589188	$ 2,300	$1,700

Docket No. CENT 94-48

Citation No.	Proposed Penalty	Settlement
3589587	$ 3,500	$ 617

Docket No. CENT 94-65

Citation No.	Proposed Penalty	Settlement
3589543	$ 50	$ 50
3589548	$ 50	$ 50
3589550	$ 50	Vacated
3589551	$ 431	Vacated

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6. The Secretary proposes a civil penalty of $8,000.00 for Citation No. 3589770 and $9,500.00 for Order No. 3589771.

Docket No. CENT 94-66

Citation No.	Proposed Penalty	Settlement
3589560	$ 50	$ 50
3589582	$ 50	Vacated
3589462	$ 288	$ 288

Docket No. CENT 94-67

Citation No.	Proposed Penalty	Settlement
3589594	$ 50	$ 50
3589617	$ 50	$ 50
3589618	$ 50	$ 50

Docket No. CENT 94-68

Citation No.	Proposed Penalty	Settlement
3590391	$ 50	Vacated

Docket No. CENT 94-70

Citation No.	Proposed Penalty	Settlement
3590589	$ 431	$ 200

Docket No. CENT 94-71

Citation No.	Proposed Penalty	Settlement
3590712	$ 288	$ 288
3590713	$ 288	$ 130

Docket No. CENT 94-77

Citation No.	Proposed Penalty	Settlement
3590479	$ 595	$ 50 (S&S Deleted)

Docket No. CENT 94-78

Citation No.	Proposed Penalty	Settlement
3408853	$ 178	$ 100 (S&S Deleted)

Docket No. CENT 94-46

Citation No.	Proposed Penalty	Settlement
2930235	$ 900	Vacated

Docket No. CENT 94-64

Citation No.	Proposed Penalty	Settlement
3589568	$ 50	Vacated
3589569	$ 50	Vacated
3589570	$ 50	Vacated
3589572	$ 309	$ 309
3590487	$ 309	$ 309
TOTAL	$10,417	$4,291

ORDER

Accordingly, IT IS ORDERED that 104(d)(1) Citation No. 3589770 and 104(d)(1) Order No. 3589771 in Docket No. CENT 94-47 ARE AFFIRMED. IT IS FURTHER ORDERED that the respondent shall pay a total civil of $17,500 in satisfaction of this citation and order. In addition, consistent with the approved settlement terms noted herein, the respondent IS ORDERED to pay total civil penalties of $4,291 in satisfaction of the captioned docket proceedings referenced above. The respondent has already paid the $1,700 agreed upon civil penalty in Docket No. CENT 94-14. Consequently, the respondent SHALL PAY a total civil penalty of $20,091 in these matters within 30 days of the date of this decision. Upon timely receipt of payment, these cases ARE DISMISSED.

Jerold Feldman
Administrative Law Judge

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