FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 23, 2010

CLINTWOOD ELKHORN MINING COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant,	:	Docket No. KENT 2011-53-R
	:	Order No. 8247767;10/15/2010
v.	:	
	:	Docket No. KENT 2011-54-R
SECRETARY OF LABOR	:	Citation No. 8247767;10/15/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2011-40-R
Respondent.	:	Order No. 8247761;10/15/2010
	:	
	:	Docket No. KENT 2011-41-R
	:	Citation No. 6660595;10/15/2010
	:	
	:	Mine: Clintwood Elkhorn Mining Co.
	:	Mine ID 15-16734

DECISION

Appearances: Matt S. Shepherd, Esq., and Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Secretary of Labor; Melanie J. Kilpatrick and Marco M. Rajkovich of Rajkovich, Williams, Kilpatrick & True, PLLC of Lexington, KY, on behalf of Clintwood Elkhorn Mining Co., Inc.

Before: Judge Gill

Procedural History

This case was tried on October 19, 2010, in Pikeville, KY. The trial was expedited in response to the Respondent's request under 29 C.F.R. § 2700.52. The following cases were consolidated for expedited resolution: KENT 2011-0053-R, KENT 2011-0054-R, KENT 2011-0040-R, and KENT 2011-0041-R. The Respondents, MSHA and the Secretary of Labor, were represented by Matt S. Shepherd and Jennifer Booth of the U.S. Department of Labor, Office of the Solicitor, Nashville, TN. The Contestant, Clintwood Elkhorn Mining Co., Inc was represented by Melanie J. Kilpatrick and Marco M. Rajkovich of Rajkovich, Williams, Kilpatrick & True, PLLC of Lexington, KY. Testimonial and exhibit evidence was taken from James Holbrook, Robert H. Bellamy, and Shane Bishop.

During a pre-trial telephone conference on October 18, 2010, the parties agreed that, although the motion to expedite the case came from the Contestant, it would be best for clarity of the record and ease of presentation of the evidence if the Respondent presented its evidence first.

(Tr. 6:1-7)[1] At the conclusion of the Respondent's direct case, the Contestant moved for dismissal of the citations. Contestant's motion to dismiss was granted, obviating the need for it to present any evidence.

Rule 52(c) Motion

At the close of the Secretary's case, the Contestant moved for dismissal of the citations and orders in this case, arguing that as a matter of law and fact the Secretary had failed to produce evidence to support the issuance of the citations and orders. I granted the Contestant's motion and spoke my ruling onto the record as a bench decision.

The Commission's Rules of Procedure, the Administrative Procedure Act, and the Mine Act are silent regarding the standards that apply to motions to dismiss at the close of an opposing party's case-in-chief. It is appropriate under these circumstances to consult the Federal Rules of Civil Procedure for guidance. *Sec'y of Labor v. Basic Refractories*, 13 FMSHRC 2554, 2558 (1981). The Federal Rules of Civil Procedure allow, at the judge's discretion, the dismissal of a matter when a party fails to prove by the preponderance of the evidence a key element of their case. Fed. R. Civ. P. 52(c) ("Rule 52(c)") provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgement against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Fed. R. Civ. P. 52(c)

During a nonjury trial, Rule 52(c) authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence. In *Clifford Meek v. Essroc Corporation*, the Commission found that a ruling on a motion for involuntary dismissal under Rule 52(c) was at the judge's discretion and found "no error by the judge and affirm[ed] his procedural determinations." *Clifford Meek v. Essroc Corporation*, 15 FMSHRC 606, 614 (April 1993). In *Sec'y of Labor v. Martin County Coal Corporation and GEO / Environmental*, the Commission found that a judgment on a partial finding was appropriate because the judge had heard the Secretary's entire case. *Sec'y of Labor v. Martin County Coal Corporation and GEO / Environmental*, 28 FMSHRC 247 (May 2006). In addition, the Commission found in *Martin County Coal* that the judge does not need to address every point of evidence. *Id.* The

[1] Transcript references consist of a starting page and line number, a dash, and a closing page and line number. If the closing page is the same as the opening page, the closing page number is omitted, as in this example: (Tr. 6:1-7). If the closing page number is different, the reference looks like this example: (Tr. 6:1-8:14), which designates the passage starting at page 6, line 1 through page 8, line 14.

judge must only include findings and conclusions on "material issues of fact [and] law." *Id. citing* Fed. R. Civ. P. 52(c) .

As discussed below, the Secretary failed to put on evidence to prove the key factual elements for her case, i.e., that the truck involved in this roll-over incident was overloaded or that overloading played a significant role. MSHA's investigators chose to make overloading the focus of their enforcement action in such a way and with such unbending resolve as to make their actions arbitrary and capricious. For these reasons, the motion to dismiss granted at the close of the Secretary's case must stand.[2]

Summary of Facts and Issues

This case results from a coal truck run-away incident that happened on October 6, 2010, at the Clintwood Elkhorn prep plant dump site in Pike County, KY. The players are Clintwood Elkhorn, the contestant and operator of the prep plant, Tattoo Trucking, the employer of the driver of the truck, Hubble Mining Co., the company contracted to mine the coal hauled by the truck, and MSHA employees James Holbrook, the first-line inspector, and Robert H. "Hank" Bellamy, the investigation supervisor.

Tattoo Trucking employee, Shane Bishop, was driving a Mack 800, three axle, ten wheel coal haul truck between the Hubble No. 2 deep mine and the Clintwood Elkhorn prep plant on October 6, 2010, when the brakes failed. Bishop tried, but was unable to stop the run-away truck. It rolled approximately 100 - 150 feet down the steep haul road section it was on, jumped up the berm at the bottom of the haul road, shearing off a utility pole near the berm in the process, and rolled onto its passenger side, where it came to rest with its front axle and wheels hanging over a high wall drop-off. Bishop was not injured.

Clintwood Elkhorn notified James Holbrook of MSHA's local office of the incident. Holbrook issued a verbal 103(j) order over the phone to secure the site for investigation and evidence purposes and to ensure the safety of anyone working at the site. Holbrook then went to the site and started his investigation into what happened. He modified the verbal 103 (j) order to a 103(k) order when he arrived on the scene.

Starting that day, Clintwood Elkhorn and MSHA officials began the process of negotiating an "action plan" to address what MSHA concluded had caused the incident and to prevent a recurrence. Over the span of the next several days, Clintwood Elkhorn presented at least two proposed action plans that entailed the posting of signs cautioning drivers of the steep

[2]It is obvious that the driver here lost control of his truck. 30 C.F.R. § 77.1607(b) establishes a standard that makes it a violation if the operator of moveable equipment loses control of the equipment. Mine operators are strictly liable for violations such as this. The way in which MSHA prepared this case for immediate adjudication under the Commission's expedited hearing rule resulted in the vacation of all citations and orders relating to this incident, as is explained below. The facts and law may support further action under Sec. 105 if properly framed.

grade, providing gravel to build a run-away ramp on that section of the haul road, and the implementation of a "no shift" policy, meaning that drivers would be prohibited from shifting gears once they had started coming down the section of the haul road where the incident happened.

Clintwood Elkhorn and MSHA officials agreed on these items. They were unable to agree on an additional item that MSHA wanted in the action plan. MSHA wanted Clintwood Elkhorn to obtain the gross vehicle weight rating (GVWR) for every truck that hauled coal to the prep plant and to either put the GVWR on the weigh ticket for each load or otherwise make it available to the drivers at the prep plant scale house.[3] Clintwood Elkhorn balked at this requirement. MSHA insisted on having the GVWR data. An impasse ensued, which led MSHA to issue additional orders under the Mine Act, including a 104(b) citation which shut down the prep plant. Clintwood Elkhorn immediately asked for an expedited hearing to resolve the impasse.

Summary of Decision

The central points of contention between the parties were: (1) whether MSHA had authority to require Clintwood Elkhorn to gather and use GVWR data to address overloading of coal haul trucks; and (2) whether the Secretary proved by a preponderance of the evidence that overloading had occurred. For the reasons stated below, I find and conclude that MSHA did not have authority to regulate truck load limits in this manner and that attempting to do so in the manner reflected here was arbitrary and capricious. I further find that the Secretary failed to present evidence to prove that the alleged overloading underlying all citations and orders occurred. As a result, all orders and citations issued in this case are vacated as written.

Findings of Fact

1. On October 6, 2010, Shane Bishop, an employee of Tattoo Trucking, was driving a Mack 800 coal haul truck from the Hubble No. 2 deep mine to the Clintwood Elkhorn prep plant in Pike County, KY, when the brakes failed causing the truck to run away and roll over.

2. Bishop had hauled several loads of coal from the Hubble mine to the prep plant earlier that day using the same truck.

3. Just before Bishop lost control of the truck, he was coming down the haul road leading to the prep plant and had to stop to allow other equipment using the same road to clear the area. He applied his brakes and left the engine running as he waited at the side of the haul road.

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[3]This case is the first instance known to Holbrook or Bellamy where MSHA attempted to regulate load limits by requiring reference to and use of GVWR data. (Tr. 166:14-167:12)

4. When the other equipment cleared, Bishop continued down the haul road toward the prep plant dumping area. He tried to apply his brakes again, but they failed.

5. The truck engine was running, and the truck was in gear. As the truck accelerated, the engine revved until it stopped completely.

6. As long as the engine was running, the engine compression held the truck back somewhat, but as soon as the engine stopped, there was nothing Bishop could do or use to hold the truck speed under control. He tried to restart the engine at least once. He could not get the engine to restart.

7. Bishop testified that the transmission came out of gear at about the time the engine stopped. He tried to re-engage the transmission to no avail.

8. Bishop tried, but was unable to stop the run-away truck. It rolled approximately 100 - 150 feet down the steep haul road section it was on, jumped up the berm at the bottom of the haul road, shearing off a utility pole near the berm in the process, and rolled onto its passenger side, where it came to rest with its front axle and wheels hanging over a high wall drop-off.

9. Bishop was not injured. He was taken to a hospital emergency room as a precautionary measure where he was checked for injuries by a doctor and released without any treatment.

10. Bishop was able, wanted, and asked to return to work the same day.

11. The roll-over incident was caused by brake failure.

12. Clintwood Elkhorn is the operator of the prep plant where the roll-over occurred.

13. The prep plant comprises, among other features not relevant to this decision, a truck scale station, several coal truck dump locations, and appurtenant haul truck and end loader maneuvering areas.

14. Tattoo Trucking, Inc. is Bishop's employer. It is contracted with Hubble Mining Company, LLC., to haul coal from the Hubble No. 2 deep mine to the Clintwood Elkhorn prep plant.

15. Hubble Mining Company is contracted with Clintwood Elkhorn to mine the coal from the Hubble No. 2 deep mine.

16. James Holbrook is an employee of MSHA. He was the first-line inspector in this case.

17. Robert H. "Hank" Bellamy is an employee of MSHA. He was the investigation supervisor in this case.

18. Homer Sullivan, Mine Superintendent at Clintwood Elkhorn, informed James Holbrook about the truck runaway incident shortly after it happened on October 6, 2010. Sullivan told Holbrook that a truck had run away, run through a berm, and tipped onto its side at the Clintwood Elkhorn prep plant. Holbrook issued a verbal 103(j) order over the phone, which was later reduced to writing. (Exhibit 1)

19. Holbrook went immediately to the prep plant site where he spoke with Sullivan. At that time, Holbrook explained to Sullivan that he was converting the 103(j) citation to a 103(k) citation and why he was doing so.

20. Holbrook characterized this incident as a "non-injury" incident in the 103(k) citation. (Exhibit 1)

21. Holbrook investigated the scene and took photos of what he found. (Exhibits 2, 3, 4, 5, and 6)

22. Keith McCoy, is the director of the Clintwood Elkhorn safety department.

23. Between October 6, 2010, and October 15, 2010, Holbrook and Bellamy of the Mine Saftey and Health Administration (MSHA), who work out of MSHA's District 6 office in Pikesville, KY, conferred with each other and with Sullivan and McCoy of Clintwood Elkhorn to create an "action plan" to address what MSHA concluded had caused the incident and to prevent a recurrence.

24. Between October 6 and October 15, 2010, Clintwood Elkhorn presented at least two proposed action plans (Exhibits 13 and 14) which proposed, in pertinent part, the posting of signs cautioning drivers of the steep grade, providing gravel to build a run-away ramp on the relevant section of the haul road, and the implementation of a "no shift" policy, meaning that drivers would be prohibited from shifting gears once they had started coming down the section of the haul road where the incident happened. Clintwood Elkhorn and MSHA officials - Holbrook and/or Bellamy - agreed on these items.[4]

25. MSHA and Clintwood Elkhorn were unable to agree on an additional item that MSHA wanted in the action plan. MSHA concluded that the truck in question had been overloaded and focused on overloading as they dealt with Clintwood Elkhorn on the action plan to resolve the citations and orders issued in response to the roll-over incident.

[4] When the acronym MSHA is used, it refers to either Holbrook or Bellamy, or both.

26. MSHA wanted Clintwood Elkhorn to obtain the gross vehicle weight rating (GVWR) for every truck that hauled coal to the prep plant and to either put the GVWR on the weigh ticket for each load or otherwise make it available to the drivers at the prep plant scale house.

27. Clintwood Elkhorn balked at the GVWR requirement. MSHA insisted on having the GVWR data. An impasse ensued, which led MSHA to issue additional orders under the Mine Act, including a 104(d), a 104(a), and a 104(b) citation, which shut the prep plant down.

28. On October 14, 2010, at 11:00 AM, Bellamy issued a 104(d)(1) citation, No. 6660595, which was served on McCoy for Clintwood Elkhorn. (Exhibit 12) It alleges a safety violation and references 30 CFR § 77.1607(b). It sets a termination date and time of October 15, 2010 at 8:AM.

29. On October 15, 2010, at 9:18 AM, Holbrook issued a 104(a) citation, No. 8247768, which was served on McCoy for Clintwood Elkhorn. (Exhibit 9) It alleged that Clintwood Elkhorn had failed to provide weigh ticket records, requested by MSHA and pertinent to this investigation. It stated that failure to provide the weigh tickets would result in a daily fine of $7,500.00.

30. On October 15, 2010, at 9:15 AM, Holbrook issued a 104(b) order, No. 8247767, which was served on McCoy for Clintwood Elkhorn. (Exhibit 8) It alleged that Clintwood Elkhorn had ample time to prevent overloaded coal trucks from coming into the prep plant and that overloaded trucks were continuing to come into the facility. It ordered that all coal haulage to the prep plant cease immediately.

31. As MSHA and Clintwood Elkhorn disputed the inclusion of the GVWR data in the action plan, Clintwood challenged whether MSHA could site to any regulatory authority creating a right on the part of MSHA to regulate the load weight of trucks used to haul coal. MSHA did not cite any such authority.

32. At trial, the court asked MSHA to provide a citation to any such regulatory authority. MSHA was unable to do so.

33. Clintwood Elkhorn proposed that the issue of alleged overloading be dealt with in the action plan (Exhibit 13) by making reference to Kentucky state statutes that regulate truck loads on public roads, although the haul road where this incident occurred is not a Kentucky state public road. MSHA would not agree to this proposal.

34. Anticipating that MSHA would not relent on its requirement that the action plan include reference to GVWR data as a means to regulate the load weights, Clintwood Elkhorn verbally communicated to Bellamy, in reference to its action plan of October 13, 2010,

(Exhibit 14), that MSHA issue a "technical violation" that it could use as a basis to request an expedited hearing. (Exhibit 10)

35. Holbrook concluded that overloading was a contributing factor in this incident.

36. Holbrook interviewed Bishop and learned that the brakes had failed.

37. Bellamy's notes (Exhibit 10) are silent about brake failure being a factor in this incident.

38. Bellamy did not mention brake failure during his testimony at trial.

39. Both Bellamy and Holbrook concluded that MSHA did not have specific authority to regulate coal haul truck load limits.

40. Clintwood Elkhorn did not have the GVWR data MSHA required and would have to go to a third party to obtain it.

41. GVWR is too generic and nebulous to serve as a point of reference because the GVWR is based on model specifications rather than the individual configuration of individual and unique trucks.

42. GVWR data cannot be relied upon or even calculated when after-market alterations, as insignificant as changing tires, are made to trucks.

Discussion and Conclusions of Law

The issue of whether overloading of trucks occurred and contributed to this roll-over incident is central to this case. Holbrook and Bellamy insisted that Clintwood Elkhorn obtain and use GVWR data as a means to regulate perceived truck overloading.[5] Clintwood Elkhorn resisted being required to obtain and use GVWR data and asked the MSHA representatives to

[5] The impasse over whether MSHA could require Clintwood Elkhorn to gather and use GVWR data in order to regulate load limits arose from consultations aimed at reaching consensus about what would be necessary to lift the 104(b) closure order. This consultation process is referred to by the parties and in this decision as an "action plan." Elsewhere in the Mine Act, in a section dealing more specifically with large scale mine safety plans such as ventilation plans, there are regulations defining the actual formal action plan process. *See* 30 C.F.R. 75.372. It appears that MSHA borrowed from and adapted the formal action plan process in addressing this roll-over incident. Much of the regulatory and decisional language relating to action plans is inapposite here, however the key principle governing MSHA's ability to force an operator to accept elements of an action plan as to which there is no consensus informs this decision. Both in the formal action plan setting and in this informal instance, MSHA's actions must not be found to be arbitrary or capricious, in bad faith, or an abuse of its regulatory discretion. *See Sec'y of Labor v. Twenty Mile Coal Comp.*, 30 FMSHRC 736, (Aug. 2008) *and Sec'y of Labor v. C.W. Mining Comp.*, 18 FMSHRC 1740 (Oct. 1996).

provide authority showing that MSHA is given regulatory authority to regulate truck loading in any way. Although several citations and orders were used to get this case in a posture to be resolved with an expedited hearing, the focus of this case remains on the overarching issue of whether MSHA had authority to require Clintwood Elkhorn to obtain and use GVWR data as a condition precedent to allowing operations at the prep plant to resume and whether it was proper to shut down the prep plant to force Clintwood Elkhorn to agree to obtain and use the GVWR data. I conclude that MSHA acted arbitrarily and exceeded its authority and that it was improper for it to condition reopening the prep plant on the GVWR issue.

The Secretary failed to prove that Truck 292 was overloaded.

All citations and orders used by MSHA in this case require proof of overloading in order to be sustained. In order for the Secretary to prevail, she must satisfy her burden to prove by a preponderance of the evidence that Truck 292 was in fact overloaded and that overloading was either the cause of or a contributing factor in the roll-over incident.

The Secretary failed to prove that the truck in this case was overloaded. The evidence admitted at trail shows that Truck 292 hauled eight loads earlier in the day ranging from approximately 39 tons to approximately 47.5 tons. (Exhibit 7) However, since Truck 292 spilled its load when it rolled over, there was apparently no way to assess the weight of the load in question. (Tr. 80:3-12) The Secretary did not prove that Truck 292 was overloaded when it rolled over. The court is unwilling and unable to infer from these meager facts that overloading occurred.

The Secretary failed to prove that overloading was either the cause of or a contributing factor in the roll-over.

MSHA's actions regarding the impasse over the GVWR data were predicated on its conclusion that Truck 292 was overloaded and that overloading was at least a contributing factor in the roll-over. MSHA failed to prove that Truck 292 was, in fact, overloaded. Furthermore, in light of the strong evidence that brake failure caused the roll-over, it is surprising that Bellamy was silent about brake failure, both during his testimony and in his transaction notes. (Exhibit 10) Bellamy's silence is doubly puzzling considering that his office mate and investigating colleague, Holbrook, was aware of the brake issue from his interview with Bishop. Bishop told Holbrook what happened with the brakes and engine and that Bishop himself concluded that brake failure caused the incident. (Tr. 65:11-66:3)[6] I credit Bishop's testimony because of his involvement in the incident and the lack of any reason to question his motive. In the face of these facts, it appears that the two MSHA investigators did not communicate very well as to what caused the roll-over. Furthermore, a look at the action plans (Exhibits 13 and 14) shows that the brake

[6]Holbrook speculated at trial that overloading could be a factor in brake failure, but his speculation is far too tenuous to support a conclusion that overloading existed and played a causal role in this incident. (Tr. 65:20-66:3)

failure issue was never mentioned. Overloading was clearly the focus of the action plans to the exclusion of much more compelling evidence of the alternate cause. The citations and orders used by MSHA to carry out its purpose are all predicated on a conclusion that overloading was the cause of the incident, despite strong and convincing evidence that brake failure caused it.

Applying these findings to the sequence of citations and orders in this case results in the conclusion that the 104(a), 104(b) and 104(d) citations must fail as written. They are all premised on the conclusion that Truck 292 was overloaded.

The 104(d)(1) Citation

MSHA issued a 104(d)(1) citation. (Exhibit 12) A 104(d)(1) citation is used to charge an operator with "unwarrantable failure" to remedy an alleged violation of any mandatory health or safety standard. The 104(d)(1) citation requires the following: (1) a finding of a violation of any health or safety standard; (2) which does not cause an imminent danger; and (3) a finding that the violation is of such a nature as to significantly and substantially (S&S) contribute to the cause and effect of a mine safety or health hazard; and (4) that the 104(d)(1) violation is caused by an unwarrantable failure to comply with the underlying health and safety standard. 29 U.S.C. § 814.

In this case, the 104(d)(1) citation was used as if it were in the context of an "inspection" rather than an "investigation." The distinction is important. The legislative history of Sec. 103(a) and Sec. 103(h) is instructive. It explains that an "investigation" is an inquiry into causes, whereas an "inspection" is defined as "a close or strict examination or survey to determine compliance." Sen.Rep. No. 95–461, 95th Cong., 1st Sess. 48 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong.2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 615. (Leg. Hist., 1977 Act). There is no question that this case involves an "investigation" rather than an "inspection." The legislative history uses Sec. 104(d)(2) as an example to illustrate the intended used of a Sec. 104 citation, but the same rationale applies to a Sec. 104(d)(1) citation as well. *Id.* "Section 104(d)(1), however, is confined to violations found 'upon any inspection.'" *Mining Company v. Sec'y of Labor,* 9 FMSHRC 1541, 1564 (Sept. 1987), *quoting* Leg. Hist., 1977 Act. This provision read together with Sec. 104(d)(2) provides for immediate withdrawal authority without regard to abatement efforts for violations deemed to result from the operator's unwarrantable failure to comply. *Id.* This is a significant extension of regulatory authority and by using the term 'inspection' alone, Congress reserved and confined this authority to current existing violations which, because of their gravity or the operator's underlying failure to correct them require prophylactic mine closure. *Id.* Congress did not intend this authority to be used as a post hoc sanction for violations no longer extant or previously abated but later "found" during after-the-fact "investigations" as to their causes." *Id.*

The same distinction must be recognized in the context of this 104(d)(1) citation. First, the language of 104(d)(1) clearly restricts its application only to an "inspection."[7] 29 U.S.C. § 814. Second, since this is an investigation or an "inquiry into causes" rather than "a close or strict examination or survey to determine compliance," the extended regulatory authority reserved to inspections does not pertain, and the use of the 104(d)(1) citation in this setting is inappropriate. *Id.* This is not a situation involving current existing violations which, because of their gravity or the operator's underlying failure to correct them, require a prophylactic closure. This is an investigation into the cause of a roll-over incident. The use of the 104(d)(1) citation here is a good example of an inappropriate "post hoc sanction for violations no longer extant or previously abated but later 'found' during after-the-fact 'investigations' as to their causes," so prominently cited in the legislative history above. *Id.* Bellamy issued the 104(d)(1) order because he could not come to terms with McCoy of Clintwood Elkhorn on including GVWR data in the action plan, not because Clintwood Elkhorn had failed to abate a "current existing violation." *Id.*

Irrespective of whether the 104(d)(1) citation was the proper procedure to bring the disagreement in this case to a head, the underlying alleged violation is overloading of trucks.[8] It is clear that in the broader context of the 104(d)(1) citation it is the overloading issue that is alleged to cause and effect a mine safety hazard. The roll-over itself was a resulting incident which, absent reference to the overloading issue, has no prospect of being a future or continuing condition warranting a 104(d)(1) citation. The only way to make sense of a 104(d)(1) citation under these facts is to conclude that the alleged overloading is the condition which contributes to the cause and effect of a mine safety or health hazard, i.e., the hazard effected by the alleged overloading is the potential for a roll-over incident such as this one. It is equally clear that the reason MSHA issued the 104(d)(1) citation - as well as the 104(a) and 104(b) citations - is because Clintwood Elkhorn challenged MSHA's authority to regulate load limits by requiring reference to the GVWR data.

The 104(d)(1) citation must be vacated for three reasons: (1) the Secretary failed to prove that overloading existed, as a matter of fact; (2) the 104(d)(1) citation is predicated on the unproved allegation that overloading existed; and (3) the 104(d)(1) citation is an inappropriate post hoc sanction for violations no longer extant.

The 103(j) and (k) Orders

There was no "accident" for purposes of the 103(j) and 103(k) orders. In the Mine Act, it is clear that in order for either Section 103(j) or 103(k) to apply, an "accident" must have

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[7] "(d)(1) If, upon any *inspection* of a coal or other mine [. . .]. [Emphasis added.]

[8] MSHA refers to the loss of control described in 30 C.F.R. § 77.1607(b) in the 104(d)(1) citation (Exhibit 12), however it is clear that the gravamen of the investigation and subsequent actions is the alleged overloading of trucks.

occurred.[9] 29 U.S.C. § 813. The term "accident" has a specific technical definition under the Mine Act and its related regulations. Under 30 C.F.R. § 50.2 (h)(2) "accident" means an *injury* to an individual at a mine which has a reasonable potential to cause death. 30 C.F.R. § 50.2 (h)(2). The term "injury" has a specific technical definition under the Act as well. Under 30 C.F.R. § 50.2 (e) the definition of "injury" is satisfied only if medical treatment is administered, death or loss of consciousness occurs, or the miner is unable to perform all job duties after the event. 30 C.F.R. § 50.2 (e). Mr. Bishop was not injured. He received no medical treatment, and he remained able to perform all of his job duties on the day of the incident and beyond. (Tr. 192:10-23; 193:23-194:11; 94:12-25; 195:1-10; and 195:21-196:6) The plain meaning of these regulatory sections, applied to these facts, leads to the conclusion that there was no injury, thus no accident, thus no basis for either the 103(j) or 103(k) citations. The 103(j) and 103(k) citations must be vacated.

The 104(a) Citation

The 104(a) citation (Exhibit 9) was issued on October 15, 2010, after MSHA and Clintwood Elkhorn had discussed the action plans relating to the October 6, 2010, roll-over incident and reached an impasse on whether Clintwood Elkhorn would have to use GVWR data to limit load weight. Clintwood had, according to the testimony and evidence in Bellamy's notes (Exhibit 10), requested that MSHA proceed to issue whatever citations and orders it needed to bring the impasse to hearing under the Commission's expedited hearing authority, 29 C.F.R. § 2700.52. On its face, the 104(a) citation refers to Clintwood Elkhorn's failure to provide weigh ticket data requested by MSHA. Significantly, it is not based on any specific alleged health or safety violation, but cites only to Sec.103(a) as its authority. Sec. 103(a) establishes MSHA's general investigation and inspection authority, but does not in itself form a basis for citations or orders in this context.[10] As in the case of the related 104(d)(1) citation, the gravamen of the investigation and subsequent actions is the alleged overloading of trucks. Also, as with the 104(b)(1) citation, the Secretary has failed to prove the underlying overloading existed.

[9]The language of both Sec. 103(j) and 103(k) is identical regarding this point: "In the event of any *accident* occurring in any coal or other mine, [. . .]." [Emphasis added.]

[10]Assuming arguendo that MSHA should have cited to Sec. 103(h) instead of Sec. 103(a) in order to trigger an obligation to turn over documents, the arbitrary nature of MSHA's enforcement actions nullifies the obligation. Sec. 103(a) gives the Secretary a general right of entry for investigation purposes. Sec. 103(h), however, can require that an operator turn over documents requested during an investigation: "In addition to such records as are specifically required by the Mine Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary [. . .] may *reasonably* require from time to time to enable [her] to perform [her] functions under this act." 30 U.S.C. § 813 (*emphasis added*) As explained elsewhere in this decision, MSHA's enforcement actions were arbitrary and capricious, including conditioning the reopening of the prep plant on Clintwood Elkhorn's turning over the requested GVWR data. The document request stemming from this arbitrary enforcement action is inherently unreasonable. It deals with the same GVWR data which are the *sine qua non* for the enforcement action, and it derives from the same errors.

Accordingly, the 104(a) citation, as written, fails to cite to an alleged violation that is supported by the evidence.

The 104(b) Order

The 104(b) order (Exhibit 8) was issued on October 15, 2010, as well. It too, was prepared and served with the understanding that MSHA would issue whatever citations and orders it needed to bring the impasse to hearing as quickly as possible. The language of Sec. 104(b) makes it clear that its authority arises only in reference to a situation that has generated a prior 104(a) citation.[11] It follows then that if the underlying 104(a) citation is faulty for failure of proof, the derivative 104(b) order must fail as well. On its face, the 104(b) order speaks of Clintwood Elkhorn's failure to abate the alleged overloading issue, and nothing else. The 104(b) order must be vacated because the Secretary failed to prove that overloading occurred. The 104(b) order was issued on the basis that the overloading on which the 104(a) citation was based had not been abated. Since there was no proof of overloading to support the 104(a) citation, the 104(b) order fails because there is no valid underlying citation issue that had not been abated.

MSHA had no specific authority to regulate truck load weight limits.

The central issue in this case is whether MSHA appropriately ordered operations at the Clintwood Elkhorn prep plant to stop because Clintwood Elkhorn refused to obtain and use GVWR data to address the issue of truck overloading. I have already found that the Secretary did not prove that overloading existed or that it played a roll in this incident. It is also clear that MSHA chose to focus on the overloading issue even though brake failure was the obvious cause of the incident. Whether Clintwood Elkhorn's refusal to comply was reasonable and justified depends in large part on whether MSHA has the authority to regulate load limits in the first place. During the period between October 6, and October 15, 2010, as the parties conferred and negotiated the terms of the action plan, Clintwood Elkhorn pressed MSHA to show where the authority to regulate load limits originated. (Tr. 166:6-13) MSHA was not able to cite to any clear authority. (Tr. 85:21-86:12; 48:22-49:12; 166:6-13) At the trial on October 19, 2010, Holbrook and Bellamy testified that they were aware of no MSHA authority to regulate load limits. (Tr. 86:13-18; 158:5-23; 176:23-168:15) The evidence is clear that MSHA not only did not cite to any authority to regulate load limits, but that it acted with knowledge that it did not have authority to do so.

MSHA abused its discretion and acted arbitrarily when it conditioned the reopening of the prep plant on the use of GVWR data to regulate truck load weight limits.

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[11] Sec. 104."(b) If, upon any follow-up inspection of a coal or other mine, and authorized representative of the Secretary finds (1) that *a violation described in a citation issued pursuant to subsection (a)* has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, [. . .]." 30 U.S.C. § 814 (*emphasis added*).

The cascade of events that led to the expedited hearing in this case started with the roll-over incident and the issuance of a 103(j) and (k) order. I have elsewhere ruled that due to the peculiar and fortuitous fact that the driver of the Mack 800 truck was not injured at all, the 103 orders should not have been used as a means to attempt to regulate truck load limits. Here I address the manner in which the 103 orders were used in light of the law governing regulatory abuse of discretion and arbitrary and capricious actions.[12]

Section 103(k) of the act is to be given broad discretion. "Section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation." *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ). The Act gives MSHA plenary power to make post-accident orders for the purpose of protection and safety of all persons. *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). MSHA has broad authority to issue 103(k) orders to effectuate this purpose. *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ); *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). This broad grant of authority is recognized in the legislative history:

> [t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 617 (1978).

Given the broad discretion afforded the Secretary, her issuance of a 103(k) order, or subsequent modification, is reviewable for an abuse of discretion. The Secretary must show that "the MSHA investigation team leader did not act in an arbitrary and capricious manner in deciding to issue the 103(k) order and subject modification." *Sec'y of Labor v. Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd* 1. 111 F.3d 963 (D.C. Cir. 1997). The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of a district manager were arbitrary and capricious:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for

[12]The analysis of abuse of discretion and arbitrary and capricious action is not restricted only to citations and orders under Sec. 103. This analysis is broad enough to pertain to the other citations and orders issued by MSHA in this case.

> its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Twentymile Coal, 30 FMSHRC at 754-755, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Bellamy and Holbrook's conclusion that overloading was either the cause of or a contributing factor in the roll-over incident in this case is factually unsupportable. That in itself is not a sufficient basis to conclude that their enforcement actions were arbitrary and capricious. However, the way in which MSHA dealt with the evidence of brake failure in order to promote the theory of overloading and its acknowledgment that it lacked authority to regulate load limits do support a conclusion that their actions were arbitrary and capricious.

First, the only evidence available to the MSHA investigators about potential overloading is the weight data for Truck 292 and others at the prep plant on the day of the incident, October 6, 2010, (Exhibit 7) and Holbrook's visual observation of another truck being weighed on October 15, 2010. (Tr. 86:19-89:1)[13] These data are meaningless without some relevant point of reference from which one can determine whether overloading is happening. It is clear that MSHA wanted to use the GVWR data to establish this point of reference, but no evidence was presented showing that GVWR data do or even can serve this purpose. The evidence at trial indicated that the GVWR is too generic and nebulous to serve as a point of reference because the GVWR is based on model specifications rather than the actual configuration of individual and unique trucks. (Tr. 71:2-72:20) Also, MSHA could not show how GVWR data can be relied on or even calculated when after-market alterations as insignificant as changing tires are made to trucks. (Tr. 79:3-15) Without more evidence it is impossible to determine what relevance GVWR data have to the issue of unsafe overloading. Without a point of relevant reference, it is impossible to determine if Truck 292 - or any other truck - was overloaded, and it is impossible to make a meaningful judgment about whether overloading caused or played any role at all in this incident. It is difficult to reconcile MSHA's devotion to the importance of using GVWR data as a means of assessing overloading in light of this. Without evidence that would make the use of

[13]On cross examination, Holbrook testified that he only observed one truck being weighed on October 15, 2010, the day he enforced the 104(b) abatement order. He determined that the basis for the 104(a) citation, i.e., overloading, was still happening and that a 104(b) order for failure to abate was appropriate. (Tr. 89:2-91:20)

GVWR data meaningful as a point of reference, MSHA's choice to rely solely on the GVWR as it did is not rationally connected to the facts available to them.

Second, MSHA either ignored the clear and reliable evidence of brake failure or deemed it so unlikely as to not warrant mention in either the action plans (Exhibits 13 and 14), any of the citations and orders, or in Bellamy's transaction notes. (Exhibit 10)[14] This is clearly relevant information which requires the articulation of a satisfactory reason why it was omitted. MSHA failed entirely to consider this evidence in any way that is apparent on the record. There is no explanation why MSHA did not consider this evidence or factor it into its enforcement actions. Omission of the brake failure evidence impacts the assessment of the requirement that there be a rational connection between the facts found and the choices made. MSHA's decisions were not based on a consideration of the obvious relevant factor of brake system failure. This constitutes an unexplained and arbitrary failure to consider an important aspect of the problem.

Finally, MSHA conditioned the abatement of its orders on a single issue - the gathering and use of GVWR data to regulate load limits - knowing that there was no specific regulatory authority to regulate load limits at all. (Tr. 166:6-13)[15] In conjunction with the other factors discussed above, this fact tends to show that MSHA had a preconceived plan to use GVWR data as a means to regulate load limits and wanted to use this case to test its theory.[16] It is arbitrary to ignore facts that do not support an enforcement theory. It is arbitrary to push forward with an enforcement theory without establishing facts to support it. It is arbitrary to insist on compliance with an enforcement plan that is not supported by regulatory authority or facts.

The evidence leads to the conclusion that MSHA did not establish a "rational connection between the facts found and the choice made." MSHA's decisions and actions were not "based on a consideration of the relevant factors" in light of the evidence mentioned above. MSHA's actions and decisions were the result of a clear error of judgment. I conclude that MSHA's actions were arbitrary and capricious and an abuse of discretion. All citations and orders conditioned on use of GVWR data are invalid and must be vacated.

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[14]MSHA's failure to factor brake failure into their enforcement actions causes concern in light of the fact that Holbrook knew the details of the brake failure evidence from his interview with Bishop and then conducted a brake test on Truck 292 after it was put back on its wheels. He also testified that, irrespective of the load a truck is hauling, if the brakes fail in the manner described by Bishop, the truck will lose control. (Tr. 65:11-68:25)

[15]Clintwood Elkhorn attempted to comply with the GVWR request in a manner that could bring some clarity to the issue, i.e., by proposing to abide by the GVWR regulations created by Kentucky state statues. (Exhibit 13) MSHA would not agree to this.

[16]There were two accidents on the same day where the drivers lost control of their trucks. MSHA required the other company, Frasure Creek Mining, to put the GVWR data on the weigh tickets, and Frasure Creek agreed. This lifted the 103(k) order for that case. These cases were the first time that Bellamy required the GVWR data as part of an action plan. (Tr. 166:14-167:12)

Order

All citations and orders covered by the discussion herein are vacated and set aside.

L. Zane Gill
Administrative Law Judge

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