

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

June 27, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-14-M
Petitioner	:	A. C. No. 15-00112-05547
v.	:	
	:	
M. A. WALKER COMPANY, INC.,	:	
Respondent	:	Clover Bottom Underground

**DECISION**

Appearances: Donna Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Lyle A. Walker, President, M.A. Walker Company Inc., McKee, Kentucky, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a penalty assessment of \$987, for an alleged violation of mandatory safety standard 30 C.F.R. ' 57.4761, as stated in a section 104(a) citation served on the respondent on March 27, 1996.

The respondent filed a timely answer contesting the alleged violation, and a hearing was held in London, Kentucky. The petitioner filed posthearing arguments, but the respondent did not.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. ' 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. ' 820(i).
3. Commission Rules, 29 C.F.R. ' 2700.1 et seq.

**Issues**

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the alleged violation is ASignificant and Substantial@ (S&S), and (3) the appropriate civil penalty to be assessed for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

### Stipulations

The parties stipulated to the following (Tr. 6-8):

1. The Commission and presiding judge have jurisdiction in this matter and the inspectors were authorized to inspect the subject mine.
2. The mine is a crushed limestone operation employing approximately 25 miners, and had an annual production of 27,939 man-hours worked or production tons.
3. The size of the mine is small, and the overall size of all of the respondent's mining operations is medium.
4. The section 104(b) order issued for non-abatement of the alleged violation is still in effect, and the section 104(a) citation has not been terminated.

### Discussion

Section 104(a) AS&S@ Citation No. 4304716, March 27, 1996, cites an alleged violation of mandatory safety standard 30 C.F.R. ' 57.4761, and the cited condition or practice is described as follows:

There were no measures taken to confine or prevent the spread of toxic gases from a fire that originates in the underground shop where maintenance work is routinely done on mobile equipment.

The inspector fixed the initial abatement time as 8:00 p.m., on May 1, 1996. On May 2, 1996, he extended the abatement to July 1, 1996, and noted that Aa sprinkling system is being designed and planned for the shop. More time is needed for

installation@.

On July 22, 1996, the inspector issued a section 104(b) order, and it states as follows:

No apparent progress is being made in the underground shop to install a means to confine or prevent the spread of toxic gases from a fire that originates in the shop. The underground shop is hereby ordered withdrawn from service until the shop is equipped with a means to confine or prevent toxic gases from a fire in the shop from spreading to other working areas in the mine, and an MSHA inspector can observe the means installed to control the hazard.

#### Petitioner's Testimony and Evidence

MSHA Inspector Donald Baker, testified that he has over 25 years of mining experience, including serving as a mine superintendent, and has served as a mine inspector for five years. He was assigned to inspect the respondent's mine in September 1995, before his regular mine inspection, and while updating some information on the mine map with the respondent's safety director, he noticed an underground area marked "shop area" (Exhibit G-1). He explained the requirements of section 57.4761 to the safety director, and informed him that if in fact the area was used as a shop he needed to comply with section 57.4761 and submit a new map with proper information (Tr. 30-32, 41).

Mr. Baker stated that he went to the shop area when he issued the citation on March 27, 1996, and confirmed that it is located in the area shown on the map (Tr. 38). He identified exhibit G-2, as the mine map requirements submitted by the respondent indicating the location of the shop (Tr. 39-40).

Mr. Baker stated that after his initial contact with the safety director in September 1995, he visited the mine in December 1995, on a regular inspection, and again went to the shop area and observed a truck parked in the shop. He also observed a small air compressor, permanent lighting, electrical outlet banks in the area, oxygen and acetylene tanks, and pieces of scrap metal that appeared to have been cut off by oxygen and acetylene torches. He concluded that the area was a shop, and

informed safety director Karl Riley that he would have to comply with section 57.4761, but did not issue a citation at that time (Tr. 42). He also informed superintendent Donny Colbin later, and they discussed the installation of doors in order to comply with the regulation (Tr. 42-43).

Mr. Baker stated that he next returned to the shop area in March, 1996, for an inspection and no shop changes had been made, and he observed the same type of equipment that the found in December. He activated a smoke tube that creates a puff of smoke and found that it trailed the air from the shop area to the working face. After concluding that the area was indeed a shop, he issued the citation (Tr. 44-45, Exhibit G-3).

Mr. Baker explained that he issued the citation for the following reasons (Tr. 46):

A. Well, there were no controls. After I determined it was a shop, there were no controls put in place to control carbon monoxide or chemical smoke from materials in the shop. They were all available and present. You've got oil. You've got electricity. You've got evidence of torch work. You've got tires on equipment. You've got hydraulic hoses. You've got fabric that's in the cabs of the vehicles.

Q. So it was your opinion that these materials posed a safety hazard?

A. Yes, it was.

Q. And what type of safety hazard was posed?

A. A fire could erupt and spread carbon monoxide out into the working place, or thick heavy chemical smoke from rubber products and oil, and people could be asphyxiated by it.

Mr. Baker confirmed that he made a determination that the violation was significant and substantial because the air flow from the shop area traveled directly to the working face when he activated the smoke tube, and it was extremely likely that this would lead to an injury or illness while regular maintenance was being done with all of the materials that were available, and it could happen at anytime (Tr. 47). He further concluded that there could have been asphyxiation by smoke, or inhalation of

carbon monoxide could cause death@ (Tr. 47-48). He believed five people in the area could have been affected by the cited condition (Tr. 48).

Mr. Baker confirmed that he found moderate negligence based on his belief that the violation was not deliberate, and that the respondent may not have realized that it needed to comply after working the area for a number of years. He did not speak with Mr. Walker, the operator, at that time (Tr. 48-49). Mr. Baker further stated that Aat the time I didn't think it was high negligence@ (Tr. 50).

Mr. Baker stated that he extended the abatement time after he was told during a subsequent inspection that the respondent had requested a representative of a fire suppression company to look the area over to determine what needed to be done to achieve compliance. When he next returned for an inspection in July 1996, Mr. Baker found that nothing further had been done in the shop area, and he spoke to Mr. Walker at that time and was informed Athat the cost was absolutely too much, and he couldn't do it@ (Tr. 52). After discussing other alternative ways to comply with the regulation, Mr. Walker made no further commitment, and Mr. Baker issued the section 104(b) order (Exhibit G-4). Mr. Baker stated that the alternate compliance methods discussed with Mr. Baker included bulkhead doors, routing the shop air to direct exhaust ventilation, or fire suppression with an alternate escapeway, all of which are provided for in section 57.4761 (Tr. 52-53). The order was served on foreman Allen Rose on July 22, 1996 (Tr. 54-55).

Mr. Baker stated that the mine is Anaturally ventilated@, but there are three six-foot mine fans that Ajust circulates what air is there. It does nothing to increase the quality or quantity of natural ventilation@ (Tr. 56). The mine does not emit methane, but there is Arespirable dust or total dust@, but no quartz is involved (Tr. 57). He explained the effect of the mine ventilation as follows at (Tr. 58-59):

A. Well, it just moves from one area to another. If you're having a problem here with dust and you've got the ventilation, it will bring it out. But that's basically, you know, about all it does, just moves it around from the working personnel.

JUDGE KOUTRAS: You mean the ventilation doesn't ventilate the underground mine areas?

A. No, sir. It's like setting a fan on a stool right here in this room. It's not positive. All it's doing is just moving stuff around.

JUDGE KOUTRAS: What takes out all the airborne contaminants that contain respirable dust?

A. They generally try to keep them down with water or move them out of the way from this area they're working. They just go in the mine and work through the circled area. They can be mining in one area and the ventilation will maybe move the dust away from them if it gets too bad, or keep it down, you know, so to speak.

\* \* \* \*

A. The only requirement is, maintain 19.5 oxygen. That's the only requirement and they do this by just generally flooding the mine openings, several opening in the mine, and air just comes in naturally.

JUDGE KOUTRAS: And have they generally been in compliance with that requirement?

A. Yes.

Mr. Baker believed that the fans in question were not adequate to control a fire because they are inside and do not provide mechanically induced mine ventilation. In order to comply with the standard, the ventilation air would have to be forced in with a fan, and in the event of a fire, the ventilation could be reversed to pull the smoke to the outside. He believed the fans in question would not be strong enough to handle this situation and wouldn't do anything other than just blow it in a different direction, and the fans were not ventilated to the outside (Tr. 60).

In response to several bench questions. Mr. Baker confirmed that a fire extinguisher was probably around on vehicles and maybe the old storage area, but with the presence of electricity, welding and cutting torches and all the other stuff around could ignite and cause a fire and if a fire is burning, carbon monoxide could flow out of the area (Tr. 61). He believed that a fire could happen at any time during regular work (Tr. 62). He confirmed that he did not discuss the shop area with the inspector who conducted prior inspections, did not determine why the shop area had not been cited during prior inspections, and had no knowledge that the mine had been cited for any prior violations of section 57.4761 (Tr. 63). He also confirmed that he had never previously cited any other mines for violations of this standard (Tr. 64).

On cross-examination, Mr. Baker confirmed that the green

arrows shown on the mine map are primary and secondary escapeways that go by the shop area, and they constitute alternative routes that can be used to travel to the outside surface area. One escapeway would be construed to be a primary escape route, and the other would be an alternative route (Tr. 66-68).

Mr. Baker stated that the mine fans are marked in red on the mine map, and that he has observed them in operation. He confirmed that the fan in the lower bottom area shown on the map has a direct vent to the outside and that in a very minute fashion would help exhaust the air in that area. He explained that the red marking simply denotes where the fan is located and it's like setting a fan here and pointing it at a door 75 feet away, and is not boxed in like a bulkhead positive ventilation fan (Tr. 69). He confirmed that there is no prohibition against using a variable pitch mine fan (Tr. 69). He further explained as follows at (Tr. 69-70):

Q. And is that vent there, is that not something that mine operators put in to vent their mines other than the mine openings?

A. This is to help vent, but it's --- it's very --- it helps very minutely.

Q. What do you base that minutely on?

A. Well, it's --- again, I'd have to --- to be simplistic, I have to try ---. It's like setting a fan right here and blowing out an opening over there. You're only going to get a very small volume of air from behind you and if you'll notice where this fan is located, it's near the crusher, which leads to the outside. So in my estimation, this fan is drawing mostly fresh air from the outside and just circulating it right back around.

Q. Did you verify that?

A. With a smoke tube, yes. I smoked the area and seen where it was going. I walked up behind the fan and took the smoke out.

Mr. Baker confirmed that the fans were in operation when he was in the mine, that the air quality and oxygen content was good, and he never experienced any failed air samples (Tr. 71). He would not dispute that the mine area where work was being

performed was 27 feet high and 50 feet wide. He did not know the total air volume in the worked out areas (Tr. 75). He did not believe that a relative air volume to any potential fire hazard has any relevance to an underground shop fire emitting toxic gas. He confirmed that everyone has a self rescuer of one hour duration to wear in the event of a fire. The shop area is 1,200 feet from the outside and it would not take more than an hour to put on a self rescuer (Tr. 76). He observed people walking in and out of the mine, and he walked in (Tr. 79-80).

Mr. Baker stated that surface shops are required to have fire extinguishers around flammable materials, and he observed fire extinguishers in the underground fuel and oil tank areas as required by the regulations. He confirmed that he was not an engineer, has taken courses in mine ventilation, but has had no formal training concerning the physical properties reaction when a fire ignites (Tr. 82-83).

Mr. Baker stated that some of the unhealthy and somewhat toxic smoke from underground blasting is dissipated to the outside through the mine natural ventilation system, and if it did not escape at all, it would accumulate to intolerable levels if it took a circular motion. He confirmed that after an area is shot it is watered down and he did not believe that smoke or toxic fumes are emitted in harmful quantities and that in the natural ventilation process, some of the stuff is eventually going to get to the outside (Tr. 89-92).

On re-direct examination, Mr. Baker stated that the fans in question were not adequate to carry smoke out of the mine in the event of fire, and were not capable of mechanical ventilation reversal. He reiterated that the mine is ventilated naturally and not mechanically (Tr. 93). He confirmed that the shop area had a small ten pound hand-held fire extinguisher, and another one was at the oil drum storage area (Tr. 96).

Mr. Baker stated that gases released during blasting pose different hazards than a fire in the shop area and in the event of toxic gases released in a shop fire, some of the gas would not be visible and a miner might be overcome by the fumes before he could put on his self-rescuer. Blasting produces mostly dust that is watered down, and very little blast smoke, and a shop fire would release carbon monoxide and chemicals from burning vehicle rubber and fabrics. Further, blasting is a normal planned occurrence (Tr. 98-99).

In response to further questions, Mr. Baker stated that during his conversations with mine management prior to issuing



the citation, no one ever suggested that any existing underground fan system would comply with section 57.4761 (Tr. 100). He further explained the presence of shop area ignition sources such as hydraulic oil and greases, welding torches, and batteries, and the pieces of cut metal indicated that welding and cutting equipment had been used (Tr. 100-103).

MSHA Inspector Donald L. Walker, testified that he has 35 years of prior mining experience working in limestone, iron ore, uranium, and silica sand mines. He was assigned to inspect the respondent's mine in September 1996, and Inspector Baker advised him of the outstanding section 104(b) order affecting the shop area. When he conducted his inspection in December, 1996, the order was still in effect and nothing had been done to correct the cited shop area conditions. The mine safety person told him that the shop area would no longer be used and that a truck had been purchased to service the equipment. He observed a compressor, stored oxygen and acetylene tanks, used oil storage tanks, permanent lighting fixtures and extensions, and a truck was hooked up to a battery charger. He returned to the mine in January, 1997, and the shop had not been cleaned out, and he observed the same conditions that existed during his prior visit (Tr. 109-111).

On cross-examination, Mr. Walker confirmed that when he had occasion to take air samples, the results were good and the mine has no history of bad air. He attributed this to the natural air flow, and when he was at the mine on prior occasions, there were no fans in the shop area. He surmised that the equipment was in excellent shape, and the ventilation was adequate enough to maintain the air at an acceptable quality level. However, A dead spots@ may be found in mine headings and the shop area (Tr. 113-115). He did not sample the air quality or air flow at the time of his inspection (Tr. 117). To the best of his knowledge, the mine has never been cited for any violations of the air quality standards (Tr. 121).

In response to certain bench questions, Inspector Walker was of the opinion that the mine fan in question that was located on the floor could not control the air so that it would flow down the drifts or around the beams, and that it was A just sitting there blowing --- it's just circulating@ (Tr. 127). He confirmed that the underground mine is ventilated by a natural air flow, and that this has MSHA's approval. He stated that A the oxygen is above the standard that's safe@ (Tr. 128).

Mr. Walker suggested that the approved natural air flow method of ventilating the mine does not include the shop area because ~~At~~ most times it does not, because there's no fans in that area, and that shop is in the back over where it's deadheaded@ (Tr. 128). He further stated that section 57.4761, requires different ventilation for the shop area, and he was of the opinion that the three fans in question were not sufficient to route the shop air directly to an exhaust system. (Tr. 128). He further believed that the mine has no exhaust ventilation system, and explained further at (Tr. 129-130):

JUDGE KOUTRAS: What are these three fans considered to be? Are these ways of ventilating the mine as suggested by Mr. Walker?

A. There's no way that those three particular fans can ventilate the mine, he would have to put brattice cloth or put bulkheads in certain areas or certain drifts. That's the only way he can control it. In a natural ventilation, it takes its own course.

JUDGE KOUTRAS: You're saying they don't have that in this mine?

A. They have natural ventilation that goes whatever direction the natural ventilation allows.

JUDGE KOUTRAS: I assume reversal ventilation means or implies that there needs to be a mechanical ventilation system in place that can be reversed in case of a fire in the shop; is that what that means?

A. Yes, sir.

JUDGE KOUTRAS: And you're saying that there's no mechanical ventilation system in this mine?

A. Not a mechanical, no, sir.

Inspector Walker further explained that the three fans in question did not constitute a mechanical ventilation reversal system pursuant to section 57.4761(c), because they were not bulkheaded so that the opening was only through the fan opening, and they were not installed or equipped to operate in reverse to pull or push air in and out of the mine. He stated that although some of the natural air circulated by the fans circulated through the shop area, the mine does not have a structured ventilation exhaust system per se as provided for in section 57.4761(b), and

that any air that flows through the mine does so naturally. He did not dispute the fact that the mine has never been cited for **Abad air**@ (Tr. 136-142).

In response to mine operator Walker's assertion that the red arrows on the mine map depicting the location of the fans and the flow of air generated by those fans, indicates that the air would travel down the escapeways shown by the green and black arrows to the fan shown at the bottom of the map where it is exhausted out of the mine, Inspector Walker conceded that some of the air may possibly exhaust, but the rest of it would circulate through the area where the fan is blowing. He confirmed that the fans were intended to circulate the air in the immediate area where they are located. He believed the shop area was 150 feet long and 100 or 150 feet wide and did not believe that one fan could ventilate that area (Tr. 142-146). He did not know why the mine had not previously been cited for a violation at the shop area (Tr. 148).

In response to bench questions, mine operator Lyle Walker stated that the shop has been in existence since approximately 1972 or 1973. He further stated that the actual shop area is smaller than the area designated on the mine in blue, and he circled and marked the **Aactual shop**@ on the map@ (Tr. 151). Inspector Walker stated that he assumed that the entire area circled in blue was the shop area because of the presence of parked and junked equipment in the area. He confirmed that if the entire area was used as a **Aparking lot**@ with no maintenance work being

performed, it would not be a shop area. The **Ashop**@ that he observed was back in the area where he observed the truck with a battery charger attached to it, and not in the **Aimmediate shop area**@ (Tr. 154).

#### Respondent's Testimony and Evidence

Lyle A. Walker, respondent's president, testified that he has been in the crushed limestone business since May, 1968, and developed both of his mines (Clover Bottom and Indian Creek). He graduated in civil engineering from the University of Kentucky, and implemented the ventilation systems for his mines. Prior to serving as company president, he participated in MSHA inspections and is familiar with the process. His current safety director and superintendent have received MSHA training and schooling. Since he has been in business, he has protested approximately 10 violations, and has fully cooperated with MSHA. However, in this case he takes exception to any suggestion that he does not

adequately ventilate his mines to properly ensure the safety of his employees (Tr. 157-160).

Mr. Walker stated that mine ventilation cannot be segregated from the general mine area, and that means that you either have a ventilation system for the mine which incorporates any areas in it, or you don't have one@ (Tr. 160). He pointed out that on a day-to-day basis the mine air quality is good, and that he has always complied with MSHA's fire suppression requirements for mobile equipment and shop areas. He believed that he had adequate mine ventilation to address MSHA's risk concerns (Tr. 162).

Mr. Walker stated that there are three underground eight-foot in diameter variable pitch fans in place that are specifically designed to ventilate mines, and the fan blades can be changed for lower air volumes or air reversal and they have always been adequate to ventilate the mine. He explained that his safety director was of the opinion that the inspector wanted a bulkhead door or a fire suppression system for the shop area, and he accordingly solicited bids for a fire suppression system.

Mr. Walker disagreed with the need for a fire suppression system because he believed that the mine ventilation was adequate to ventilate a fire. He pointed out that if the air was not being exhausted to the outside by the fans he would not have been able to maintain the acceptable levels of air quality over the years (Tr. 165-166). He further explained as follows at (Tr. 165):

It was also based on the knowledge of physics that when the fire does burn, it automatically draws pressure from the outside to the inside to feed the consumption of the oxygen that's taking place with the fire. It's a proven fact that if you have an underground fire, you will draw air from whatever source you can which is normally the outside and it will create its own ventilation system, regardless of all of our fans and most mines have always been and we've found it to be most effective to exhaust to the outside.

Mr. Walker stated that the cited shop has not been dismantled, and it was his understanding that work could be performed on his equipment on a random basis, but if he designated a shop area, he was told it would have to comply with the regulation. He did not believe that parking equipment in the area, or storing parts and equipment, constituted a shop. He confirmed that he purchased a mechanic's truck and crane for \$14,000, that can be used to service and repair his equipment on

location. He also confirmed that the shop has been in existence since early 1972 (Tr. 169-173).

Mr. Walker stated that trucks are still parked in the cited shop area, but the truck that he has purchased does no maintenance work in that area, and it is used as a Amobile truck@ (Tr. 174).

He has always believed that he has been in compliance because of the A good air@ in the shop area, and that he should be able to maintain the shop (Tr. 175).

Inspector Baker was called in rebuttal by the petitioner and he testified that an approved ventilation system is not required for a limestone mine, but it must have A approved quality of air, oxygen@. He described the three mine fans in question as A a freestanding fan with no positive direction of ventilation@ (Tr. 177). He did not believe the fans were adequate to handle the ventilation in the event of a fire in the shop, but stated that A the ventilation system was adequate for normal mining conditions@ (Tr. 177). He confirmed that at the time he issued the citation, the cited area was in use as a shop, and that he A observed the normal shop stuff where routine maintenance would be taking place@ (Tr. 178).

Mr. Baker agreed that the smaller area marked on the map by Mr. Lyle Walker in the course of the hearing was the shop area, and he explained as follows at (Tr. 179-181):

A. No. I agree. But I maintain that they probably --- by this whole area that they probably have done routine maintenance work in this area because they had broke down vehicles they parked and waiting for service.

JUDGE KOUTRAS: You assume that someone had gone out to where these vehicles were parked, actually did the maintenance work there?

A. Yes. This is the shop and garage area, so I would contend that they would be brought to this area to be worked on. Now, as far as the electrical, the permanent lighting, the air compressor, the tanks, this is true. This is where they were in the actual shop area that they marked. This is true.

JUDGE KOUTRAS: So for purposes of this standard where it says, in an underground shop?

A. Yes.

JUDGE KOUTRAS: What, in your opinion, is the underground shop? Would it be the area that's circled, or the entire blue area?

A. Well, for purposes, I would say this particular area contained everything like a shop, but the area around it was for parking vehicles to be fixed or whatever **C** at a later date.

Mr. Baker stated that the three mine fans in question do not meet the mechanical ventilation reversal alternative method of compliance found in section 57.4761(c), because they provide no control for fan reversal of the natural ventilation, and the fan **A** just circulates what air is in there@ (Tr. 182). He further stated that the fans do not constitute an exhaust system for the shop air as an alternative compliance method pursuant to section 57.4761(b), because there was no way to directly blow air to an exhaust system, and in a natural ventilation system, pressure is the determining factor and the air may go in different directions (Tr. 184).

Mr. Baker confirmed that even though the natural mine ventilation has maintained the air quality in compliance with the standards, a separate system of air ventilation is required if there is a clearly defined shop area where maintenance work is taking place. He further explained as follows at (Tr. 186-187):

BY ATTORNEY SONNER:

Q. Now, to clarify, the reason you feel they need an additional system is that because the natural ventilation system that's in place would not be sufficient to move the toxic gases out quickly in the event of a fire?

A. There's no way to direct it quickly. Like I say, it just circulates, so it would blow smoke wherever the pressures sent it. There's no direct way to get it out of the mine.

Mr. Baker confirmed that when he made his smoke tube test and followed the smoke past the two fans shown at the top of the mine map, the smoke swept the faces and then circled around and went back to the face area toward the shop and it did not dissipate (Tr. 188).

Mr. Baker stated that in order for the variable pitched fans described by mine operator Walker to be reversed, someone would have to be at the controls to reverse them, and if they are to be used for that purpose they must be manned at all times, or accessible from some other location. The fans in question were not accessible from another location, and assuming they were reversed, they were not capable of moving gases rapidly out of the mine (Tr. 189-190).

### Petitioner's Arguments

The petitioner states that in September, 1995, Inspector baker was at the mine updating information on the mine map when he found an area marked Ashop@ on the map. The inspector informed the respondent's safety director at that time that if the respondent intend to use the area as a shop, it needed to comply with the requirement for controlling toxic gases in the event of a shop fire, and the inspector explained all of the alternative ways of complying with section 57.4761 to the safety director.

The petitioner states that Mr. Baker was in the mine in December 1995 on a regular inspection, and was in the designated shop area and observed a truck parked in this area, a small air compressor, and permanent lighting. He also observed banks of electrical outlets, oxygen/acetylene tanks, and various pieces of metal that Alooked like it had been cut off by oxygen/acetylene torches, scrap.@ He informed the safety director and superintendent that the evidence indicated it was a shop, and that they would have to comply with 30 C.F.R. ' 57.4761, and he explained all the alternatives. Mr. Baker did not issue a citation at that time.

The petitioner further states that Mr. Baker was again in the mine on March 27, 1996 for a regular inspection, and found no changes in the shop area. He observed the same type of equipment and same conditions, and a loader (Tr. 43). At this time, Mr. Baker used a smoke tube to test the air flow. He started the smoke trail in the shop area and it went Aright up into the face where . . . they're working@ (Tr. 44). After determining that the area was being used as a shop, Mr. Baker issued the citation, and concluded that there were no ventilation controls in place to control carbon monoxide or chemical smoke released from materials in the shop in the event of a fire.

In support of the violation, the petitioner relies on the testimony of Inspector Baker who testified that the fans utilized by the respondent were not adequate to control a shop fire because the air is not forced underground, and the existing fans would not be strong enough to do anything other than just blow smoke into a different area. The fans were not exhausted to the outside. Petitioner states that Mr. Baker confirmed that the mine is ventilated naturally and not mechanically, and the fans that were in place were not capable of mechanical ventilation reversal. There were no mine fans for mechanically ventilating the mine by bringing in air ventilation from the outside, and there was no fan capability for reversing the fans to carry smoke straight to the outside and allow people to escape any fire. Petitioner maintains that at no time during Mr. Baker's two mine visits prior to issuing the citation did the mine superintendent or safety director suggest that there was an existing underground fan system that would comply with the cited standard.

The petitioner rejects the respondent's suggestion that the three fans that were in place constituted a method of routing the mine air directly to an exhaust system or were a reversal of mechanical ventilation and were therefore in compliance in section 57.4761. The petitioner's position is that the shop area required a different kind of ventilation, and the fans in question cannot be considered an adequate ventilation system that was in place in the event of a shop fire. Although the inspector believed that the fans were adequate for normal mining conditions, they were **Afree-standing@** with no positive direction of ventilation, and there was no control over the natural ventilation.

Although the respondent was in compliance with the air quality standards through its natural ventilation system, the petitioner maintains that section 57.4761, requires a separate ventilation system if there is an underground shop where maintenance work is taking place. In support of this conclusion, the petitioner asserts that a natural ventilation system simply circulates the air and would blow smoke wherever the pressure sent it, with no direct way to get it out of the mine.

The petitioner notes that when Inspector Baker tested the air flow with a smoke tube, the smoke did not exhaust and he followed it to the working face by the two fans, and commented that **Ait has a tendency to just drift around toward the three openings to the outside@** and to **Ajust travel in a circle@**. After the smoke swept the faces, it circled back to the shop and did not dissipate. Mr. Baker concluded that the shop exhaust air was



not routed to an exhaust system.

The petitioner states that the respondent's belated contention that the free-standing fans were an alternative method of compliance with section 57.4761 is contradicted by the failure of its safety director or mine superintendent to suggest to Inspector Baker on two occasions that the fans' purpose was to comply with that standard. Further, when the section 104(b) order was issued the respondent did not raise this argument at that time and attempted to gain extra time in order to pursue a fire suppression system in order to abate the citation, and requested a cost estimate from a contractor for the installation of the system. Petitioner concludes that the respondent is now trying to rely on the use of the fans in question to justify its position after-the-fact.

The petitioner further relies on the testimony of Inspector Donald Walker, who had 35 years of mining experience, including work as a maintenance foreman and superintendent, and work in a limestone mine. Inspector Walker inspected the mine in December 1996, when the section 104(b) order issued by Inspector Baker was still in effect. Petitioner points out that Mr. Walker observed a compressor, oxygen and acetylene tanks, used oil, extension fixtures, and permanent lighting in the shop area, as well as a truck parked there with a battery charger on it, and agreed that the fans utilized by the respondent were used to circulate the air.

The petitioner cites the testimony of Inspector Walker that the ventilation requirements for underground shop areas found in section 57.4761, are separate from the required general mine ventilation scheme, and that the shop area requires different ventilation. Inspector Walker believed that the three fans that were in use were not sufficient to route the shop air directly to an exhaust system, and in his opinion, the mine had no ventilation exhaust system.

The petitioner further cites Inspector Walker's testimony that the mine openings are fifty feet, and that since the fans are approximately six feet, there was no way to control the air to travel down the drifts or around the beams, and that the air was just sitting there blowing --- it's just circulating@ and that the fans were really not strong enough@ to push the air all the way out of the mine (Tr. 126-127; 138; 156).

The petitioner acknowledges that some of the air would leave the mine through the escapeways, but that the rest of it would

circulate through the area in which the fan was blowing. The petitioner concludes that the fans are intended to circulate in the immediate area where they are located, and that in order to route the air to a natural exhaust system utilizing fans, the mine would have to have bulkheads or have the roadways blocked off to control or direct the air in one direction.

Finally, the petitioner asserts that section 57.4761 requires that one of the four alternative measures listed therein shall be taken to prevent the spread of toxic gases from a fire originating in an underground shop. Since none of these measures were in place or taken by the respondent, the petitioner concludes that it has established a violation. In support of its conclusion, the petitioner states that the free-standing fans utilized by the respondent for air circulation were inadequate to prevent the spread of gases in the event of a fire and did not comport with the requirements for mechanical ventilation reversal enumerated in the regulations. The fans were not capable of rapid air reversal as required by the regulation, and they were not provided with a second independent power cable or set of conductors from the surface. The mine shop air was not routed to an exhaust system, and Inspector Baker verified by means of a smoke tube that the air flowed from the shop directly into the working face.

#### Respondent's Arguments

As noted earlier, the respondent did not file any posthearing arguments in this matter. However, I have considered Mr. Lyle's Walker's arguments made on the record in the course of the hearing in my adjudication of this matter.

Mr. Walker was of the opinion that without the ventilation provided by the three fans that were in place the air quality in the mine would significantly deteriorate. He contended that the fans exhausted the air to the outside, and believed that they were sufficient to take care of any shop fire. He took the position that based on 30 years of experience ventilating his mines with the same type of fans, they were sufficient to maintain the air quality in compliance with MSHA's standards. If he had to depend only on natural ventilation, he would be unable to maintain the required air quality. He insisted that the fans are the mechanical means that we've always used to maintain our air quality (Tr. 130-135).

When reminded of the fact that when inspector Baker, on two occasions, discussed the matter with his safety director and superintendent, they never suggested that the fans were installed

to comply with section 57.4761, Mr. Walker stated that there was talk of bulkhead doors and other fire suppression systems that seemed to be the answer that somebody wanted to hear@ (Tr. 133).

In response to a question of why he would seek an estimate for a fire suppression system that cost \$85,000, if he believed that the three fans in question were in fact the mechanical means for ventilating the shop area in compliance with section 57.4761, Mr. Walker responded as follows at (Tr. 135):

Because my superintendent thought that's what the man wanted to hear and get. My superintendent, I'll be perfectly blunt with you. If an inspector tells him to go jump off the cliff, he'll go jump off the cliff. And sometimes I have to take exception to that.

Mr. Walker believed the fans that were in place were either substitutes for, equal to, or were in fact a method of routing the mine air directly to an exhaust system or a reversal of mechanical ventilation (Tr. 123). He stated that he has never had any trouble ventilating the mine, and in the course of questioning Inspector Baker, Mr. Walker suggested that if the existing mine ventilation was adequate to remove any smoke resulting from underground blasting from the mine, it would also be adequate to remove any toxic smoke or fumes that might result from any shop fire (Tr. 88-92).

Mr. Walker stated that except for flammable materials that might be on any mobile equipment, or flammable liquids in a shop or service area, there are few sources of ignition in a limestone mine. He stated that the variable pitched fans in question are specifically designed to ventilate the mine, and he believed they were adequate to ventilate the shop area (Tr. 163, 165). He further stated as follows at (Tr. 165-166):

It was also based on the knowledge of physics that when the fire does burn, it automatically draws pressure from the outside to the inside to feed the consumption of the oxygen that's taking place with the fire. It's a proven fact that if you have an underground fire, you withdraw air from whatever source you can which is normally the outside and it will create its own ventilation system, regardless of all of our fans and most mines have always been and we've found it to be most effective to exhaust to the outside.

Now if they did not exhaust to the outside and never did over the years, our air quality would not be acceptable. And we can turn those fans off and prove

that the natural ventilation is nowhere sufficient to ventilate either mine. \* \* \* \*

But if the ventilation system was not adequate or if it was not operating properly, we couldn't operate the mine. So based on that criteria, I felt like when they cited us and looking at the other criteria for being in compliance, that after reviewing our mine ventilation system, I felt like we were in compliance.

Finally, Mr. Walker expressed his opinion that although the inspector was well-intentioned in issuing the citation, he nevertheless based it on incorrect facts and a completely wrong set of criteria for what they've cited (Tr. 204).

### Findings and Conclusions

#### Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R.

' 57.4761, for failing to take measures to confine or prevent the spread of toxic gases in the event of a fire in the underground maintenance shop. The cited standard provides in relevant part as follows:

' 57.4761 Underground shops.

To confine or prevent the spread of toxic gases from a fire originating in an underground shop where maintenance work is routinely done on mobile equipment, one of the following measures shall be taken: use of control doors or bulkheads, routing of the mine shop air directly to an exhaust system, reversal of mechanical ventilation, or use of an automatic fire suppression system in conjunction with an alternate escape route. The alternative used shall at all times provide at least the same degree of safety as control doors or bulkheads. (Emphasis Added).

Subsections (a) through (d) of the regulation provide the specific requirements that must be followed for each of the enumerated methods that may be used as a means of confining or preventing the spread of toxic gases from an underground shop fire.

Inspector Baker identified the cited shop area as the large

area that is labeled Ashop/garage area@, and encircled in blue on a copy of a section of the mine map submitted to MSHA in 1994 by the respondent. The inspector confirmed that he made the color copy from the original map on file at his MSHA office, and he confirmed that he visited the area underground and the shop was where it is shown on the map (Tr. 33-38).

Mine operator Lyle Walker did not deny the existence of an underground shop, nor did he deny the existence of the equipment and materials that were observed and described by the inspectors when they visited the area, or the fact that maintenance and repair work was performed in the shop area. Indeed, Mr. Walker confirmed that the shop has been in use since 1972 or 1973, and he circled and labeled an area on the mine map (Exhibit G-1) where he believed the shop was located (Tr. 150-151).

Mr. Walker disputed the purported size of the shop area shown on the map, and suggested that his safety director was in error if he in fact described the entire area encircled in blue as the actual shop area. Mr. Walker stated that the actual shop area where work was performed was much smaller and that the greater area was used to park vehicles awaiting maintenance.

The cited section 57.4761, on its face, requires compliance in order to confine or prevent the spread of toxic gases from a fire originating in an underground shop where maintenance work is routinely done on mobile equipment. In the absence of any credible evidence that maintenance was actually performed in the Aparking area@, I conclude and find that the requirements of section 57.4761, apply only to the actual shop area where vehicle maintenance is routinely performed.

Inspector Baker agreed that the smaller area marked on the map by Mr. Walker was the shop area that contained the permanent electrical and lighting equipment, air compressor, and tanks, and that the remaining area was used to park vehicles awaiting maintenance. In response to a question as to whether or not the shop was in fact the entire blue area shown on the map, Mr. Baker stated AI would say this particular area contained everything like a shop, but the area around it was for parking vehicles to be fixed or whatever C at a later date@ (Tr. 180-181). Mr. Baker further agreed that the area marked by Mr. Walker on the map was the shop area containing all of the repair and maintenance equipment (Tr. 179). Mr. Baker simply assumed that

maintenance work was done on the vehicles parked in the Agarage area@ (Tr. 180).

I conclude and find that the actual Ashop@ covered by section 57.4761, was not as large as the area marked in blue, and was probably the actual size of the area marked by Mr. Walker, and confirmed by inspector Baker. In any event, regardless of the size of the shop area, I find that the credible evidence adduced by the petitioner establishes the existence of an underground shop that was subject to the requirements of section 57.4761, when the citation was issued in this case.

The record reflects that Inspector Baker issued the citation after concluding that in the event of a fire in the underground shop area, none of the means enumerated in section 57.4761, were in place or available to confine or prevent the spread of toxic gases resulting from a shop fire.

Section 57.4761, requires that one of the four enumerated measures be taken to confine or prevent the spread of toxic gases from a fire in the shop. I find no evidence that the underground shop area was provided with doors or bulkheads to confine or prevent the spread of toxic gases in the event of a shop fire.

Although the underground mine area had designated escape routes, I find that there was no automatic fire suppression system in place or available in the shop area that could be used in conjunction with an escape route. I reject the respondent's suggestion that a portable fire extinguisher constitutes an automatic fire suppression system within the meaning of the standard.

With regard to the existence of any mechanical ventilation reversal system, I find that section 57.4761(c)(1) requires the existence of a main mine fan that provides a mechanical means for ventilating the mine. If the main fan is located underground it must comply with the following:

- (i) The cable or conductors supplying power to the fan shall be routed through areas free of fire hazards; or
- (ii) The main fan shall be equipped with a second, independent power cable or set of conductors from the surface. The power cable or conductors shall be located so that an underground fire disrupting power in one cable or set of conductors will not affect the other; or
- (iii) A second fan capable of accomplishing

ventilation reversal shall be available for use in the event of failure of the main fan;

(2) Provide rapid air reversal that allows persons underground time to exit in fresh air by the second escapeway or find a place of refuge; and

(3) Be done according to predetermined conditions and procedures.

Inspector Baker, who has 25 years of mining experience, including work as a mine superintendent, testified that the mine is naturally ventilated, rather than mechanically ventilated, and that the required air quality is maintained through natural air ventilation that is induced through several mine openings that allow air to enter the mine naturally rather than through any mechanically operated main fan. He believed that the ventilating air needed to be forced into the mine with a fan capable of being reversed to pull the air and smoke out in the event of a fire.

Mr. Baker was of the opinion that the three free-standing fans that were in operation at the locations shown on the mine map were not ~~boxed in~~ or bulkheaded to provide positive ventilation, and that they simply blew the air around the general vicinity of the fan locations and did not constitute a mechanical ventilation reversal system in compliance with section 57.4761(c). He believed that section 57.4761, requires a separate and distinct ventilation system for an underground shop area where maintenance work is performed on mobile equipment in order to confine or prevent the spread of toxic gases from a shop fire.

Inspector Walker, who has 35 years of mining experience, including work experience in limestone mining, was of the opinion that the three free-standing mine fans on the floor were inadequate to control the natural air currents ventilating the mine in order to direct it down the drifts and around the beams, and that the three fans were simply blowing and circulating the air around the immediate area where they were located. Inspector Walker did not believe that the three floor fans in question constituted a mechanical ventilation reversal system in compliance with section 57.4761(c), because they were not bulkheaded or equipped and installed to operate in reverse in order to push or pull air in or out of the mine.

Respondent's representative Lyle Walker, a civil engineering college graduate, with some 30 years of mining experience, disagreed with the inspectors, and he relied on the fact that the

air quality of the mine has always been within MSHA's requirements and that he has never been cited for a violation in this regard. He was of the opinion that the three mine fans in question met the requirements for mechanical ventilation reversal. He testified that each of the fans was 8-feet in diameter with variable pitch fan blades that were capable of air reversal, and that the fans have always been adequate to ventilate the mine.

After careful consideration of all of the testimony and evidence in this case, I find the testimony of the inspectors to be credible, and supports their opinion that the three free-standing fans in question did not constitute a mechanical ventilation reversal system that was in compliance with the criteria stated in section 57.4761(c)(1). Although the inspectors were not shown to be ventilation experts, taking into account their many years of mining experience, including work as a mine superintendent (Baker), and work in a limestone mine (Walker), I find them to be credible and knowledgeable with respect to the requirements of section 57.4761.

Although respondent Lyle Walker has a civil engineering college education, he did not qualify himself as a ventilation expert. Although I find him to be an experienced and knowledgeable mine operator, I conclude and find that the evidence and testimony adduced by the petitioner through its inspectors is credible and reasonably plausible in establishing the absence of a mechanical ventilation reversal system pursuant to section 57.4761, when the citation was issued.

Finally, for these same reasons, I conclude and find that the petitioner has established the absence of an air ventilation exhaust system in place and capable of routing the air from the mine shop directly to a mine exhaust system in the event of a shop fire. Inspector Baker's credible smoke tube test of the air in the shop area established that the air ventilating that area went directly to the working face and circled back to the shop area and was not exhausted to the outside. Inspector Baker concluded that the localized fans were not ventilating the air to the outside and he found that they were inadequate to exhaust toxic gases out of the shop area in the event of fire.

Inspector Walker testified credibly that the three free-standing fans that were in place were not structured or installed so as to enable them to exhaust any toxic gases from a shop fire directly out of the mine. Although Mr. Walker indicated that some of the natural air ventilation traveled through the shop area, he indicated that the shop was located in a **Deadheaded**



area where there are no fans, and that the mine had no structured ventilation exhaust system in compliance with section 57.4761(b).

Respondent Lyle Walker's assertion that the absence of any prior air quality violations, and the fact that the air ventilating the mine has always been in compliance with MSHA's air quality standards, is proof that the mine has an exhaust system in place in compliance with section 57.4761(b), is rejected. Notwithstanding the mine's clean air history, I cannot conclude that the respondent had a distinct or separate ventilation system in place for routing any mine shop exhaust air directly and completely out of the mine through a clearly defined mine exhaust system in the event of a fire in the shop area.

Inspector Baker agreed that given the mine history of good natural air ventilation, one could conclude that the mine is adequately ventilated under normal mining conditions. However, he further testified credibly that a shop fire is not a normal mining condition, and that an additional ventilating system is required because the natural air ventilation is insufficient to quickly remove toxic gases from the mine in the event of a shop fire.

Based on the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of section 57.4761, by a preponderance of the credible evidence and testimony adduced in support of its case. Accordingly, the contested citation IS AFFIRMED.

#### Significant and Substantial Violation

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the 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 S&S "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 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

In order to establish that a violation of a mandatory

safety standard is significant and substantial under Natural 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.

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), aff-g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a

violation must be made in the context of continued normal mining operations. Natural Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986),

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), 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).

The Commission reasserted its prior determinations that as part of his AS&S@ finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the

hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

The respondent does not dispute the existence of an underground shop, nor does it dispute the fact that mobile equipment repair and maintenance work did in fact take place in the shop. Further, the respondent has not rebutted the credible testimony of Inspector Baker with respect to his observations of oil, electrical outlets, hydraulic hoses, rubber tired mobile equipment with fabric covered seats, and evidence that a torch had been used to cut metal materials, and the observations by Inspector Walker of the presence of a compressor, stored oxygen and acetylene tanks, used oil storage tanks, and lighting and extension fixtures in the shop.

Both of the inspectors expressed their concern that the maintenance and repair work taking place in the shop in the presence of flammable materials and potential ignition sources posed a safety hazard in the event a fire erupted in the shop and spread toxic gases or smoke from the shop area to the working face. Inspector Baker, whose smoke tube test established that the air in the proximity of the shop coursed the smoke directly to the working face and then simply circulated back to the shop area, was concerned that toxic gases resulting from a shop fire, which he believed could happen at any time in the normal course of mining, would follow the same route to the working face. In the absence of any existing means of exhausting such gases directly out of the mine, or the use of any of the other regulatory alternatives to confine or prevent the spread of toxic gases from a shop fire, Inspector Baker believed that the miners working at the face would be exposed to hazardous levels of carbon monoxide or other toxic chemical smoke or gases, as well as the hazard of possible asphyxiation before they were aware of the gases or before they could use their self rescuers.

Although Inspector Baker agreed that underground blasting results in smoke and toxic fumes that are dissipated through the natural air ventilation, he pointed out that they are not released in harmful quantities, and consist primarily of dust. He distinguished blasting from a shop fire which he believed would likely release carbon monoxide and harmful chemicals from burning vehicle tires and seat fabric materials. He further pointed out that blasting is a normal and planned event, and that a shop fire could occur at any time.

I have concluded that a violation of section 57.4761, has been established. I further conclude and find that the intent

of the standard is to provide a way to confine or prevent the spread of toxic gases from a fire originating in an underground shop. Accordingly, I conclude that any determination as to whether or not a violation of this standard is significant and substantial must necessarily and logically be made in the context of the existence of a shop fire, or the assumption that such a fire will occur in the normal and routine course of shop maintenance work in the presence of flammable materials and ready sources of ignition such as those described by the inspectors. To do otherwise, in my opinion, would render the regulation meaningless.

I conclude and find that the failure by the respondent to provide any of the required precautionary methods found in section 57.4761, to confine or prevent the spread of toxic gases from a shop fire presented a discrete hazard to miners at the working face areas in that such gases would likely travel directly to those locations as shown by Inspector Baker's credible and un rebutted smoke tube test, and would expose the miners to any toxic gas hazard. If this were to occur in the normal course of mining operations, I conclude and find that it would be reasonably likely that any miner exposed to such toxic gases would suffer injuries of a reasonably serious nature, including asphyxiation. Under the circumstances, the inspector's AS&S finding IS AFFIRMED.

I reject the respondent's suggestion that any affected miners could use their self rescue devices and exit the mine quickly before any toxic gases reach them. As credibly stated by Inspector Baker, toxic gases may not give advanced warnings, and miners could be overcome before they could use their self rescuers.

I have rejected the respondent's suggestion that a shop portable fire extinguisher qualifies as an automatic fire suppression system pursuant to section 57.4761. Further, although a portable fire extinguisher may be available to deal with a small localized shop fire, I accept as credible the inspector's belief that such a device is inadequate to deal with a raging shop fire that it is out of control.

#### History of Prior Violations

Petitioner's Exhibit G-6, is a computer print-out of the respondent's history of paid violations for the period March 27, 1994, to March 26, 1996. The information provided reflects that the respondent paid penalty assessments of \$1,469, for 19 of the 20 prior violations noted in section 104(a) citations. Eight of

the prior violations are listed as non-@S&S@ single penalty citations, and there are no prior violations of section 57.4761.

I conclude and find that respondent's prior compliance record does not warrant any additional increase in the penalty assessment that I have made for the violation that has been affirmed in this case.

#### Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a small-to-medium sized mine operator, and absent any evidence to the contrary, I further conclude and find that the penalty assessment that I have made for the violation will not adversely affect the respondent's ability to continue in business.

#### Gravity

Based on my AS&S@ findings, I conclude and find that the cited violation was serious.

#### Negligence

In its post hearing brief, the petitioner asserts that although Inspector Baker found that the level of negligence for the violation was moderate, he would have found that it was Ahigh@ based on information he obtained later. Included with the brief is a motion to amend the section 104(a) citation to a section 104(d) Aunwarrantable failure@ citation, and to increase the level of negligence from moderate to Ahigh@. In support of these arguments, the petitioner states as follows at pgs. 15-17, of its brief:

Inspector Baker told the superintendent and the safety director about the safety violative condition in October and December 1995, prior to issuing the citation in March 1996 (Tr. 31-33; 41-43).

The testimony at the hearing establishes that the operator, his safety director, and the mine superintendent knew of the violative condition prior to the issuance of the citation, and that the operator refused to correct it because of the expense involved (Tr. 55). The operator admitted that he looked at the regulations (Tr. 162). Based on the knowledge of the operator and the operator's representatives prior to the issuance of the citation and the operator's negative attitude

toward abatement of the violation (Tr. 50), the Secretary requests that the level of negligence be amended to Ahigh and that the citation be amended to reflect issuance pursuant to Section 104(d), in that there was an Aunwarrantable failure to comply with the regulatory requirements.

Inspector Baker testified that when he initially visited the mine in October, 1995, he spoke with the safety director about the means used to control any toxic gases in the shop area, and Athey really didn't seem to know what I was talking about (Tr. 33). Mr. Baker further explained that he advised the safety director about the requirements of section 57.4761, and the alternatives, and informed him that if the area was in fact a shop, he would have to comply. He confirmed that the safety director informed him that Athey really didn't consider it to be a shop at that time (Tr. 33).

Mr. Baker testified that he next returned to the mine in December, 1995, for a regular inspection, and after visiting the area, he concluded that it was indeed a shop. He stated that he spoke with safety director Karl Riley, and later spoke with superintendent Donny Colbin, and informed them that they needed to comply with section 57.4761. However, the inspector confirmed that he did not issue a citation at that time because A I'm thinking maybe there's still some doubt that this is a shop (Tr. 42; Emphasis added).

Mr. Baker stated that Mr. Riley and Mr. Colbin then informed him that they had discussed the installation of some control doors or bulkheads, and that they would try to see how to install them. Mr. Baker then stated A I don't care what you do, but you need to do something to comply with the standard and that's generally the way we left it (Tr. 42).

Based on all of this testimony with respect to Inspector Baker's initial visits in October and December 1995, I cannot conclude that he reached any definitive opinion or conclusion that a violative condition actually existed at that time. If he had, he should have issued a citation. He admitted that there was some doubt, and Mr. Riley apparently informed him of his opinion that the area was not a shop.

The burden of proof here is on the petitioner. I note however, that the respondent's safety director and superintendent did not testify, and they were not summoned by the petitioner to testify under oath, subject to cross-examination. Based on the inspector's testimony, I can only conclude that he spoke with

these individuals and generally discussed the requirements of section 57.4761, and he never spoke with mine operator Lyle Walker at any time during his initial visits. Under the circumstances, I find no credible evidentiary basis to support any reasonable conclusion that these initial mine visits and discussions establish any calculated or aggravated conduct by any of these mine management individuals, or credible support for the petitioner's assertion that they knew of the violative condition prior to the issuance of the citation on March 27, 1996.

Inspector Baker further testified that when he next returned to the mine for his March 27, inspection, he issued the citation after determining that no shop changes had been made, and after making a "smoke tube" test which indicated that the smoke trailed to the working face. He confirmed that he did not speak with Lyle Walker at that time. Thus, in the course of three mine visits, the inspector never spoke with Mr. Walker.

Mr. Baker further testified that when he issued his citation, he found moderate negligence based on his belief that the violation was not deliberate. Indeed, he stated that "at the time I didn't think it was high negligence" (Tr. 50). Mr. Baker further conceded that the respondent may not have realized that it needed to comply after working the area for a number of years (Tr. 48), and he specifically testified in the present tense that "I still don't think that they really thought that they should have to comply with the law", and "I don't know whether they realized it, so I just went ahead and made it moderate, because, you know, I didn't think at that time it was deliberate" (Tr. 49).

Inspector Baker confirmed that he extended the abatement time during a subsequent inspection after "they" (I assume the safety director and superintendent) informed him that a fire suppression company representative "was going to look it over and see what it would take to bring them in compliance", and they needed more time (Tr. 51).

Inspector Baker next returned to the mine on July 22, 1996, and met with Lyle Walker for the first time. He stated that Mr. Walker informed him that the fire suppression company had indeed come to the mine and that the cost for a suppression system was "absolutely too much, that he couldn't do it" (Tr. 52). They also discussed the use of bulkhead doors or exhausting or routing the shop air to direct exhaust ventilation, and the use of fire suppression in conjunction with an alternate escapeway (Tr. 52-53). Mr. Baker did not state that Lyle Walker refused to comply, but that he simply "didn't commit to either way" (Tr. 52). In

view of Mr. Walker's failure to make any commitment at that time, Mr. Baker issued the section 104(b) order (Tr. 52-55). The petitioner characterizes this as "the operator's negative attitude" toward compliance.

The petitioner further states that Lyle Walker admitted that he had looked at the regulations (Tr. 162). Mr. Walker confirmed that he reviewed the standard after the citation was issued, and he believed the mine was adequately ventilated to meet the required ventilation alternative (Tr. 162-165). He stated that he inquired about the installation of a fire suppression system because his superintendent was of the opinion that the inspector wanted it. Mr. Walker produced a copy of a July 10, 1996, proposal for the installation of a sprinkler system at a cost of \$85,432, and a June 7, 1996, letter from the sprinkler company confirming its search for a system to meet the respondent's needs (Exhibit R-1). Mr. Walker confirmed that additional people were called, and the names and phone numbers are listed on the June 7, letter (Tr. 164). He further stated that "I never did really understand why we were being cited under the circumstances as I knew them" (Tr. 125).

Mr. Walker pointed out that his safety director and superintendent have received MSHA training, and that he has always fully cooperated with MSHA and has formally protested approximately 10 violations over the many years that he has been in business. He stated that he took exception to the inspector's interpretation of section 57.4761, and considered it "a judgment call" that he disagreed with (Tr. 159). He further explained as follows at (Tr. 167).

I would like to think that I have reasonable grounds to think there might be circumstances that might prove our case. So based on that fact, that's why I protested it. And there were conversations, I don't deny them, about fire suppression systems and everything else.

The record reflects that the shop was in use since 1972, but it was never cited for a violation of section 57.4761, until Inspector Baker cited it on March 27, 1996. The inspectors, and the petitioner's counsel did to know why the shop had never previously been cited (Tr. 148-149). Although the absence of any prior violations is no excuse or defense to the citation, I can understand why mine operator Walker was somewhat agitated over a price tag of \$85,432, to install an extensive fire suppression system to abate a condition that had never before been cited by any inspector, and a



condition that I find he could have reasonably concluded was not a violation.

Based on the foregoing, and after a careful review of all of the testimony in this case, the petitioner's suggestion that the violation was the result of the respondent's unwarrantable failure to comply with the cited standard IS REJECTED. I am not persuaded that the testimony of the inspectors supports the petitioner's position, nor have I found any information later obtained, by inspector Baker to support his contention that he would have found high negligence based on this information. I conclude and find that Inspector Baker's initial moderate negligence finding was appropriately based on the respondent's failure to exercise reasonable care, and that initial finding IS AFFIRMED.

The petitioner's posthearing motion to amend the section 104(a) citation to a section 104(d)(1), unwarrantable failure violation IS DENIED as untimely and lacking in any credible or reliable evidentiary support. Further, I have serious due process and fair notice reservations in connection with the proposed posthearing amendment, particularly in light of this relatively small mine operator's pro se non-lawyer status.

#### Good Faith Compliance

The parties have not addressed the merits of the section 104(b) withdrawal order issued by Inspector Baker, and there is no evidence that the respondent timely contested the order pursuant to Commission Rule 20(a), 29 C.F.R. ' 2700.20(a). The record reflects that the proposed civil penalty assessment took into account the issuance of the order in the context of good faith abatement, one of the six statutory penalty criteria found in section 110(i) of the Act. I conclude that the validity of the uncontested order is not in issue in this case. However, in assessing a penalty in this case, I have considered the respondent's abatement efforts in the context of good faith compliance.

The respondent's assertion that it could not install a fire suppression system because the \$85,000, price tag was unreasonably high, is no defense to the violation. Although I recognize the economic impact of such an expenditure on a relatively small mine operator, the respondent has apparently opted to spend approximately \$12,000 to \$15,000 , to purchase a mobile maintenance truck for servicing its mobile equipment on location where they may be working, rather than in the shop. The respondent has at least made an effort to mitigate the hazard

of working on mobile equipment in the shop, as well at reducing its compliance costs.

I have considered the fact that the respondent initially made an effort at timely compliance when it pursued the installation of an automatic fire suppression system, only to abandon it when it learned of the high costs of such a system. However, considering the fact that a fire suppression system is only one of the regulatory alternatives, I find that the respondent was obliged to timely pursue the other alternatives, or to request additional time to do so when he discussed the matter with Inspector Baker before he issued the section 104(b) order. However, the respondent did not do so at that time, and according to the unrebutted and credible testimony of Mr. Baker, respondent Lyle Walker did not commit to taking any remedial measures. Under the circumstances, I cannot conclude that the respondent made a good faith compliance effort subsequent to the issuance of the order.

I take note of the fact that the section 104(b) order is still in effect and the citation has not been terminated. Further, according to Inspector Walker, during a mine visit in January, 1997, he found that the shop was not closed down, and he observed some of the same equipment that had previously been there (Tr. 109-111). The respondent did not believe that it was obligated to dismantle the shop and remove all of the equipment, as long as it did not use the shop for maintenance work on its mobile equipment. This is a matter that I believe is best left to the petitioner and the respondent to resolve.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$1,200 is reasonable for the violation that I have affirmed in this matter.

#### ORDER

In view of the foregoing, IT IS ORDERED as follows:

1. Section 104(a) AS&S@ citation No. 4304716, March 27, 1996, 30 C.F.R. ' 57.4761, IS AFFIRMED.
2. The petitioner's motion to amend the section 104(a) citation to a section 104(d)(1) Aunwarrantable failure@

citation IS DENIED.

3. The petitioner's request for a civil penalty assessment of \$3,000, IS DENIED.

4. The respondent shall pay a civil penalty assessment of \$1,200 for the violation. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter IS DISMISSED.

George A. Koutras  
Administrative Law Judge

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