

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 7, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 95-75  
Petitioner : A.C. No. 36-05018-04044  
v. :  
: Cumberland Mine  
CYPRUS CUMBERLAND RESOURCES :  
CORPORATION, :  
Respondent :

**DECISION**

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,  
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (the Act). The petition seeks a civil penalty of \$2800.00 for an alleged violation of a notice to provide safeguard that had been issued pursuant to section 75.1403, 30 C.F.R. § 75.1403. The subject safeguard violation was designated as significant and substantial, and allegedly was attributable to the unwarrantable failure of Cyprus Cumberland Resources Corporation (Cumberland).

This case was heard on the merits, in a trial of one full day's duration, on February 28, 1996, in Washington, Pennsylvania. The parties' posthearing briefs are of record. For the reasons discussed below, the safeguard violation shall be affirmed. However, the Secretary has failed to carry his burden of establishing that the violation was properly characterized as significant and substantial, or, attributable to the respondent's unwarrantable failure. Consequently, a nominal civil penalty of \$100.00 shall be imposed.

**Background**

Section 75.1403 authorizes a Mine Safety and Health Administration (MSHA) Inspector to issue safeguards, that in the inspector's judgement, are necessary to "minimize hazards with

respect to transportation of men and materials..." In 1980, Cumberland voluntarily installed a signal block light system to control traffic on its track haulage at the Cumberland Mine. Under this system, a track section, of varying length, is designated as a "block" by installation of a red light at each end. The red light at both ends of the block can be turned on or off from either end. The operator of a transport vehicle turns on the block lights upon entering the block, and turns off the block lights upon leaving the block. This signals would-be operators seeking to enter a block whether the track in the block is in use.

Over the last 15 years, since the installation of Cumberland's signal block system, MSHA has issued numerous safeguards at the Cumberland Mine. These safeguards include a safeguard requiring Cumberland to maintain its signal blocks, and a safeguard requiring a distance of 300 feet between vehicles traveling in the same block.

Cumberland communicates information to personnel about its haulage system by various methods including safety messages. On September 27, 1993, Cumberland issued the following safety message concerning use of its signal block system:

1. Stop before pulling onto the main line from any switch. Make sure nothing is coming before pulling out. Remember there may be more than one piece of equipment in a block light. Just because a block light isn't on, doesn't give you the right-of-way. Don't just pull onto the haulage. It's possible the power is off, the block light doesn't work or the operator of the on-coming vehicle missed the block light. If a block light is on, wait for a reasonable length of time, then proceed with caution.

2. Block lights must be used by everyone as they travel the haulage. If a light doesn't work, you should proceed with caution. Report any lights that don't work. (Ex. R-4).

MSHA Supervisor Robert Newhouse and MSHA Inspector Robert Santee testified the safety procedures outlined above were acceptable to MSHA. Cumberland disciplines employees who fail to follow proper haulage procedures.

#### Preliminary Findings

On October 25, 1993, MSHA inspectors Frank Terrett and Robert Santee were inspecting the Cumberland facility. On that day, as Terrett was waiting to enter the mine in a mantrip, a crew exiting the mine in their mantrip was traveling too fast and bumped the vehicle in which Terrett was sitting. As a result of this incident, Terrett issued a safeguard, not in issue in this proceeding, requiring vehicles to be operated at speeds consistent with the conditions and the equipment used.

Later that day on October 25, 1993, Santee encountered a signal block light that had apparently been left on after the vehicle had left the block. Given this condition, and the previous incident involving Terrett, Santee issued Safeguard No. 3655478. This safeguard provided:

The operator has installed signal block lights along the track haulage at several different locations to be used by track haulage equipment operators to assure such operators that a clear road exists. The signal block lights installed for the 60 Mains to "0" Butt switch were left on.

This is a notice to provide safeguard requiring track haulage equip. operators to use the block lights installed along supply track haulage at the mine, to clear such lights (turn off after use) in order to assure approaching haulage equipment a clear road exists and also only 1 piece of haulage equipment shall be operated in the same block light except trailing locomotives that are an integral part of a trip may be operated the same block light. (Joint Stip. 2)

On November 1, 1993, after discussions between Cumberland and MSHA, Santee, under the direction of his supervisor, modified the safeguard as follows:

Safeguard No. 3655478 is hereby modified to delete

the wording on the last 4 lines in the body of this notice to provide safeguard beginning after the word "and" which is the 8th word on line 9, and to be replaced with the following wording to read as: haulage equipment operating in the same block light, shall maintain a safe distance which will allow them to stop within the limits of visibility, but at no time shall they be closer than 300 feet. Haulage equipment operating in the same block light shall communicate, by some means, to be assured the signal block light will be turned off after the last haulage equipment exits the last block. (Id.)

Thus, the modified safeguard removed the prohibition of more than one vehicle in the same block, and, substituted the requirement that vehicles in the same block must maintain a minimum distance of 300 feet. The modified safeguard also required operators of equipment in the same block to communicate (by hand signals) to ensure that the operator of the last vehicle turns off the block light as he exits the block<sup>1</sup>

Cumberland transports material and miners in two different varieties of battery powered mantrips called duckbills and crickets. Generally speaking, mantrips are personnel carriers with covered compartments on either end for passengers. Mantrips are operated from a position between the two passenger compartments. Duckbills are similar to mantrips except the cover for one of the compartments is removed to enable supplies to be transported in the open end. Crickets are small, slow-moving personnel carriers that hold four persons. Duckbills are faster than crickets, but travel only 5 to 8 miles per hour.

On July 14, 1994, maintenance foreman Doug Conklin and hourly mechanic Mark Zuspan were entering the mine in a duckbill operated by Zuspan. Zuspan was an experienced operator. He frequently used the haulage track, and he was familiar with the signal block system. Zuspan and Conklin traveled in the duckbill down the 57 Mains Haulage to where the 55 North haulage turns to the left. The 1A block (first block) on the 55 North haulage off the 57 Mains is 1,200 feet long. There is a curvature in the track entering the 55 North haulage that obscures visibility down the full length of the track. Conklin and Zuspan testified that,

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<sup>1</sup> Inspector Santee and MSHA Supervisory Inspector Robert Newhouse testified that Cumberland's haulage car operators relied on verbal communication or hand signals. MSHA does not require the haulage vehicles to be equipped with two-way radios. (Tr. 74-75, 86, 112, 158-59).

as they approached the signal switch for the 1A block in the 55 North haulage, they observed the 1A block lights were illuminated.

A motor attached to two rockdust tanks and a trailing motor were coming out of the 55 North haulage and about to enter the 57 Mains. Conklin exited the duckbill to throw the track switch so Zuspan could pull the duckbill past the 55 North haulage to permit the rockdust cars to turn right on the 57 Mains to continue out of the mine. As the dustcars passed the duckbill, Zuspan and the operator of the first motor signaled to each other that they could "have" each others signal block light. However, the operator of the second motor could not see Zuspan's signal to the first motor operator due to a curvature in the track. As Zuspan was moving his duckbill inby on the 57 Mains to clear the way for the outby route of the dustcars, the second motor operator apparently turned off the 1A block light. Both Zuspan and Conklin lost sight of the 1A block because of Zuspan's maneuvering of the duckbill and Conklin's switching of the track to allow the duckbill to turn onto the 55 North haulage.

During the interim period when the second motor operator turned off the signal lights and Conklin had switched the 57 Mains track back to the direction of the 55 North haulage, an inspection party in a cricket turned on the signal lights as it entered the 1A block in the North haulage 1200 feet from the intersection with the 57 Mains. The inspection party consisted of Inspector Santee, Cumberland's representative Mike Konosky, and UMW representative David Chipps. After Conklin reentered the duckbill, Zuspan entered the 55 North haulage under the mistaken belief that the lights activated by the inspection party were left on by the dustcar motorman.

As Zuspan came out of the curve at the beginning of the 1A Block, he observed the lights from the inspection party's cricket at the other end. The track was straight, visibility was good, and the cricket was slow moving. Zuspan had plenty of time and pulled into the 55 North switch and waited for the cricket to pass. While Zuspan and Conklin were waiting, Conklin exited the duckbill to check on a nearby belt drive.

The inspection party had also observed the duckbill from the other end of the block. As they traveled down the 1A Block, Santee informed Konosky that he was issuing a citation for violation of the signal block safeguard. Santee testified that the first conversation he had with Zuspan upon arriving at the 1A switch was about Zuspan's assumption that the block lights had been left on by the motor crew. (Tr. 99, 226). When Conklin returned from the belt drive, Santee learned that Conklin was a

foreman who had accompanied Zuspan in the duckbill. Consequently, Santee informed Konosky that the citation "just became an unwarrantable failure." (Tr. 238, Gov. Ex. 5, p.17-18). Santee testified Conklin "confirmed" Zuspan's statement concerning the block lights and the motor crew. (Tr. 99).

As a result of Santee's observations and discussions with Zuspan and Conklin, Santee issued 104(d)(2) Order No. 3672055 alleging the following safeguard violation:

The ML204 motor being operated by Mark Zuspan under the supervision of Doug Conklin (Maint. Foreman) entered the signal block lights off 57 Main East Supply truck haulage onto 55 Face North signal track haulage between 1A junction as such lights had been turned on by the operator of the ML408 crickets which was traveling outby towards 57 Face North area 57 Main East junction. The ML 204 motor entered such signal block light without assuring that a clear road exists and the Maint. [F]oreman is an acting agent of the operator. There were 16 violations issued during the last inspection period from 04-01-94 to 06-30-94 of 30 CFR 75.1403. (G-1).

## Further Findings and Conclusions

### a. The Validity of the Safeguard

The threshold issue in this proceeding is whether Safeguard No. 3655478 issued by Santee on October 25, 1993, as amended, is valid. The Commission has noted that section 314(b) of the Act, 30 U.S.C. § 874(b), commits to the Secretary, through his MSHA inspectors, broad discretion to issue safeguards, without operator consultation, in order "to guard against all hazards attendant upon haulage and transport[ation] in coal mining." Southern Ohio Coal Company, 14 FMSHRC 1, 8 (January 1992); Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985).

In order to issue a notice to provide safeguards, an inspector must determine: (1) determine that there exists at the mine an actual transportation hazard not covered by a mandatory standard; (2) determine that a safeguard is necessary to correct the hazardous condition; and (3) specify the corrective measures that the safeguard should require. 14 FMSHRC at 8.

In considering Cumberland's obligations to maintain and use its block light system, it is axiomatic in analyzing culpability that one who chooses to act, although there is no duty to act, must act prudently to avoid exposing others to harm. Thus, although Cumberland was not required to install its signal block system, having elected to do so, Cumberland is responsible for maintaining the system and ensuring that its personnel comply with its block light safety procedures. Cumberland recognized this responsibility in its September 27, 1993, safety message which reminded its personnel that "[b]lock lights must be used by everyone as they travel the haulage." (Ex. R-4).

Santee's testimony that he observed a block light on when he issued the subject safeguard on October 23, 1993, is uncontradicted. Although the circumstances surrounding this condition are unknown, this condition manifested a failure to adhere to Cumberland's block light procedures. Thus, it was within Santee's discretion to conclude that the failure to follow Cumberland's block light safety policy posed a transportation hazard at the Cumberland Mine, and, that a safeguard notice was necessary to ensure compliance. As noted below the safeguard, as amended, adequately set forth the corrective measures required. Consequently, I conclude that Safeguard No. 3655478 was validly issued.

### b. Fact of Violation

The subject safeguard, as amended, established four things

that operators of haulage equipment must do. They are:

1. Equipment operators are to use the signal block lights installed along supply track haulage at the mine.
2. Equipment operators are to clear such lights (turn off after use) in order to assure approaching haulage equipment a clear road exists.
3. Haulage equipment operating in the same block light, shall maintain a safe distance which will allow them to stop within the limits of visibility, but at no time shall they be closer than 300 feet.
4. Haulage equipment operating in the same block light shall communicate, by some means, to be assured the signal block light will be turned off after the last haulage equipment leaves the light block. (J-3)

In applying the safeguard requirements to the facts in this case, it is necessary to rule on the credibility of Zuspan and Conklin concerning thier testimony that they mistakenly assumed the dustcar motor operators had left the block lights on for them. While self-serving exculpatory statements must be viewed cautiously, such statements are entitled to greter weight if they were made spontaneously to the on-site inspector rather than if the explanation was first presented at trial.

In this case, Santee's testimony revealed the testimony of Zuspan and Conklin is entirely consistenet with the information provided by them to Santee when the 104(d)(2) Order was issued on July 14, 1994. Moreover, although given the opportunity at trial, Santee did not refute the story related to him by Zuspan and Conklin. In fact, Santee testified that, although he did not recall seeing any motors in the 1A block, he had no reason to doubt Zuspan's story. (Tr. 135-36). Accordingly, I conclude that Zuspan maneuvered the duckbill into the 55 North haulage under the mistaken belief that the block lights had been left on by the dustcar motorman.

Under this scenario, the first three requirements of the safeguard were not violated in that the block lights were used, they were turned off by the rear motorman, and, there was no operation of vehicles in the same block within 300 feet of each other (in the same direction). However, the Secretary has prevailed in establishing a violation of the safeguard's fourth requirement. By Zuspan and Conklin's own admissions, there was a failure of communication between them and the dustcar motormen to assure that there was no misunderstanding concerning the status



of the block lights as Zuspan's duckbill entered the 1A block of the 55 North haulage. Consequently, the record supports the fact of the violation of the safeguard in question.

c. Significant and Substantial

A violation is properly designated as significant and substantial (S&S) in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or an illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984) the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

As noted above, it is crucial that resolution of whether a particular violation is significant and substantial must be based "on the particular facts surrounding the violation...." Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). With the exception of respirable dust violations that are presumed to be S&S because of the cumulative effects of respirable dust inhalation, issues concerning S&S and unwarrantable failure must be decided on a case by case basis. See Consolidation Coal Co., 8 FMSHRC 890, 898 (June 1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987). In fact, the Commission has recently rejected the concept of relying on rebuttable preumptions to resolve questions of unwarrantable failure. Peabody Coal Company, 18 FMSHRC \_\_, slip op. at 5 (April 19, 1996).

Thus, although violations may appear to be S&S and/or unwarrantable, an examination of the particular facts surrounding the violation may preclude such characterizations. For example,

although mining a pillar in violation of a roof control plan would ordinarily manifest an unwarrantable failure, the violation is not unwarrantable where the facts of the particular violation support the operator's contention that contact with the pillar by the continuous miner operator was inadvertent. S & H Mining, Inc., 18 FMSHRC 50 (January 1996) (ALJ).

In the instant matter, this particular violation of the safeguard did not occur because of a conscious, reckless, or even careless, disregard of the operational block lights. Such conduct surrounding a violation would justify an S&S designation, particularly when viewed in the context of continued normal mining operations. Halfway Incorporated, 4 FMSHRC 8, 12-13 (January 1986).

Rather, this violation occurred because of Zuspan's mistaken belief that the block light was left on intentionally by the motorman that had just exited the block. Under such circumstances, it was highly unlikely that a haulage vehicle would be trailing closely behind the dustcars, and pose a hazard to occupants in Zuspan's duckbill. In other words, Zuspan was provided with cover by entering the 55 North haulage track immediately after the dustcars exited the track.

In the final analysis, the Secretary has the burden of proving that a violation is S&S. Union Oil of Cal., 11 FMSHRC 289, 298-99 (March 1989). Given the 1200 foot length of straight track in the 1A block immediately after the initial curve off the 55 Mains, the good visibility, the slow speed of haulage vehicles, and the protection from other vehicles provided by the exiting dustcars, the Secretary has failed to satisfy the third element of Mathies that there was a reasonable likelihood that the hazard contributed to by this violation would result in an accident causing injury. Accordingly, the significant and substantial designation shall be deleted.

#### d. Unwarrantable Failure

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company 10 FMSHRC 249 (March 1988). In distinguishing aggravated conduct from ordinary negligence, in Youghiogeny & Ohio the Commission stated:

We stated that whereas [ordinary] negligence is conduct that is 'inadvertent,' 'thoughtless,' or 'inattentive,' unwarrantable conduct is conduct that is described as 'not justifiable' or 'inexcusable.' Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.  
9 FMSHRC at 2010.

Under the Act, an operator is liable for its employees' violations of the Act and the mandatory standards. E.G., Western Fuels-Utah, Inc., 10 FMSHRC 256, 260-61 (March 1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989); Asarco, Inc., 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982) ("SOCCO"). Once liability is determined, the negligent actions of an operator's "agent"<sup>3</sup> are imputable to the operator for the purpose of assessing civil penalties. Mettiki, 13 FMSHRC at 772; R&P, 13 FMSHRC at 194-98; SOCCO, 4 FMSHRC at 1463-64.

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<sup>3</sup> Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . ." 30 U.S.C. § 802(e).

However, "[t]he conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes." Fort Scott Fertilizer-Cullor, Inc., 17 FMSHRC 1112, 1116 (July 1995) (citing SOCCO, 4 FMSHRC at 1464). "Rather, the operator's supervision, training, and disciplining of [rank-and-file] miners is relevant." Id. (citing SOCCO, 4 FMSHRC at 1464; Western Fuels, 10 FMSHRC at 261).

The evidence reflects Santee initially was inclined to issue a 104(a) citation that did not charge Cumberland with an unwarrantable failure. Significantly, Santee did not view Zuspan's conduct as aggravated conduct. (Tr. 134-35). It was only after Santee learned that Foreman Conklin accompanied Zuspan in the duckbill that Santee charged the violation was unwarrantable. (Tr. 138-40). As noted above, normally, Zuspan's negligence, as a rank-and-file employee cannot not be imputed to Cumberland even if Zuspan's conduct was aggravated conduct. Only if Conklin engaged in aggravated conduct, or, if Conklin failed to adequately supervise Zuspan, can the unwarrantable failure charge be affirmed.

In the first instance, the Secretary has failed to persuade me that either Zuspan or Conklin's conduct manifested more than ordinary negligence. As I noted at trial, it is difficult to imagine what would motivate both Zuspan and Conklin to recklessly or consciously turn on to a single track with block lights reflecting that a vehicle was proceeding down the track in the opposite direction. (See tr. 206-09).<sup>4</sup> The futility of two vehicles heading in opposite directions on a single haulage track supports Cumberland's assertion that this incident occurred because of a misunderstanding between Zuspan and Conklin, and the dustcar motormen. This misunderstanding, while unfortunate, cannot be characterized as aggravated conduct. In addition, Zuspan's failure to wait a reasonable period of time before entering the block is not indicative of high negligence given his mistaken belief that the block lights had been left on for him.

Having concluded that there was a simple miscommunication, the record does not reflect a lack of supervision, or training, on the part of Conklin with respect to his oversight of Zuspan. Santee also agreed that Zuspan's conduct was not attributable to a lack of training. (Tr. 138). Although it is true that a foreman is held to a higher standard of care given his management

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<sup>4</sup> The Secretary conceded the only reason Zuspan and Conklin would enter the block with the light on was if they believed the light was left on for them and no other traffic was coming in the opposite direction. (Tr. 208-09).

role, a violation is not unwarrantable *per se* simply because it occurred in the presence of supervisory personnel. See S&H Mining, Inc., 17 FMSHRC 1918, 1923 (November 1995), citing Youghiogheny & Ohio, 9 FMSHRC at 2011. Accordingly, Order No. 3672055 shall be modified to a 104(a) citation to reflect the cited violation of the safeguard was not attributable to Cumberland's unwarrantable failure.

#### e. Civil Penalty

Section 110(i) of the Mine Act requires the consideration of six penalty criteria in assessing the appropriate civil penalty. 30 U.S.C. § 820(i); see generally Sellersburg Stone Co., v. FMSHRC, 736 F.2d 1147, 1150-51 (7th Cir. 1984). Significant considerations among these statutory penalty criteria are the gravity of the violation and the degree of the operator's negligence.

Having determined that it was unlikely, given the circumstances of this case, that the hazard contributed to by the instant safeguard violation would result in an injury related accident, the gravity of the violation is most appropriately characterized as non-serious. Although Order No. 3672055 specified the degree of Cumberland's negligence as "high", as discussed above neither Zuspan nor Conklin's conduct was indicative of more than ordinary, moderate negligence, and, there is no basis for imputation of Zuspan's negligence to Cumberland.

The remaining criteria in section 110(i) are not particularly meaningful in assessing the appropriate civil penalty in this matter. The prior notice provided by a history of 16 safeguard violations in the two year period preceding the issuance of the subject citation is not material because this violation resulted from a misunderstanding rather than a blatant disregard of the block light procedures.

Given the reduction in gravity from serious to non-serious, and the reduction in negligence from high to no more than moderate, consistent with the 110(i) penalty criteria, I am assessing a civil penalty of \$100.00 for modified 104(a) Citation No. 3672055.

**ORDER**

Accordingly, 104(d)(2) Order No. 3672055 **IS MODIFIED** to a 104(a) citation to reflect that the cited violation was not attributable to Cypress Cumberland Resources Corporation's unwarrantable failure. In addition, 104(a) Citation No. 3672055 **IS FURTHER MODIFIED** to delete the significant and substantial designation.

**IT IS ORDERED** that Cypress Cumberland Resources Corporation pay a civil penalty of \$100.00 in satisfaction of Citation No. 3672055. Upon timely receipt of payment, this docket proceeding **IS DISMISSED**.

Jerold Feldman  
Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor,  
U.S. Department of Labor, 3535 Market Street, Room 14480,  
Philadelphia, PA 19104 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre,  
301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410  
(Certified Mail)

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