

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 23, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 97-170
Petitioner	:	A. C. No. 36-06873-03656
v.	:	
	:	Docket No. PENN 97-190
TARGET INDUSTRIES , INC.,	:	A. C. No. 36-06873-03657
Respondent	:	
	:	Docket No. PENN 97-194
	:	A. C. No. 36-06873-03658
	:	
	:	Docket No. PENN 98-8
	:	A. C. No. 36-06873-03660
	:	
	:	Target No. 1 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 98-98
Petitioner	:	A. C. No. 36-06873-03664 A
v.	:	
	:	Target No. 1 Mine
PHILLIP K. PETERSON, employed by	:	
TARGET INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MHSA)	:	Docket No. PENN 98-104
Petitioner	:	A. C. No. 36-06873-03665 A
v.	:	
	:	Target No. 1 Mine
GREGORY L. GOLDEN, employed by	:	
TARGET INDUSTRIES, INC.,	:	
Respondent	:	

DECISION

Appearances: Richard T. Buchanan, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania for Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty cases arise under sections 105(d) and 110(c) of the Federal Miner Safety and Health Act of 1977 (30 U.S.C. §§ 815(c), 820(c)) (Mine Act or Act). The Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties against Target Industries, Inc. (Target or the company), Phillip K. Peterson, and Gregory L. Golden for violations of mandatory safety standards that allegedly occurred at Target's No. 1 Mine. In addition, the Secretary alleges certain of the violations were significant and substantial contributions to mine safety hazards (S&S), were the result of the company's unwarrantable failure to comply, and were the result of "knowing" actions by the individuals.

The company and the individuals respond by challenging the legal and factual basis of the Secretary's allegations. They also argue that even if the violations occurred, the penalties proposed by the Secretary are excessive.

The matters were consolidated for hearing and decision, and the cases were tried in Morgantown, West Virginia. At the hearing, counsels advised me that three of the contested violations had been settled (see Tr. 21). The settlements were read into the record (Tr. 412-421). I will approve them at the end of the decision. Subsequent to the hearing counsels submitted very helpful briefs.

THE ISSUES

The issues are the existence of the violations, their S&S and unwarrantable natures, whether Peterson and Golden knowingly violated the cited standards, and the amounts of any civil penalties that must be assessed against the company and the individuals, taking into consideration the statutory civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. §820(i)).

STIPULATIONS

At the hearing and on brief the parties stipulated as follows:

1. The Target No. 1 Mine is owned and operated by Target Industries, Inc.
2. Target is subject to the jurisdiction of the Mine Act, and

the Commission has jurisdiction over the proceedings.

3. Target is a corporation chartered under the laws of the Commonwealth of Pennsylvania.

4. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of Target at the date, time, and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

5. The documents offered as evidence are authentic, but the parties do not agree as to their relevance, or to the truth of the matters asserted therein.

6. The applicable history of previous violations of Target is reflected in Government Exhibit 32 .

7. The allegations of Citations No. 7013512 and No. 7013513 are at issue only if the No. 2 and the No. 3 fans are found to be "main mine fans" as that term is used in 30 C.F.R. Part 75.

8. Should the Judge find either Phillip Peterson or Gregory Golden liable under section 110(c) of the Act, they will be able to pay the penalties assessed by the Secretary provided the payments are made in installments over a period of time (See Tr. 17; Sec. Br. 2-3; Additional Stipulations of the Parties 1-2).

THE CENTRAL CONTROVERSY

The central controversy involves two bleeder fans at the mine, the No. 2 fan and the No. 3 fan .¹ The fundamental question is whether the fans were "main mine fans" as that term is used in Subpart B of 30 C.F.R. Part 75 (Mandatory Safety Standards — Underground Coal Mines).

THE MINE AND ITS VENTILATION SYSTEM

¹Bleeder fans are surface fans which pull air from the bleeder entries, over the gob, and up and out of the mine. "Bleeder entries " are defined as "Panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways" (American Geological Institute Dictionary of Mining, Mineral, and Related Terms 55 (2nd ed. 1997)).

The Target No. 1 Mine is an underground bituminous coal mine, located in Greene County, Pennsylvania. At the mine, the extraction of coal is conducted using the room and pillar method. Continuous mining machines drive the entries and remove the coal. Then, the coal is transported to the surface.

The mine is ventilated by three surface fans, the largest of which is the No. 1 fan. The No. 1 fan exhausts air from the active workings via the return entries. On the mine map (Gov. Exh. 25) the No. 1 fan bears the designation "main mine fan". The No. 1 fan has the capacity to pull approximately 120,000 cubic feet of air per minute (cfm). The air travels up and through a borehole and out of the mine (Tr. 187). The diameter of the borehole is approximately 89 inches (Tr. 116).

The mine also is ventilated by the two bleeder fans. The No. 2 fan and the No. 3 fan exhaust air from the bleeder entries and the gob. On the mine map the No. 2 fan bears the designation "Ventilation Borehole #2" (Gov. Exh. 25). It ventilates the three-left gob (Tr. 32, 39). It pulls approximately 4,000 to 5,000 cfm of air. The air travels through the bleeder entries, over the gob, up a borehole, and out of the mine. The diameter of the borehole is approximately 12 inches (Tr. 111, 116).

On the mine map the No. 3 fan bears the designation "Ventilation Borehole #3" (Gov. Exh. 25). The fan ventilates the four-left gob (Tr. 32). It pulls approximately the same quantity of air as the No. 2 fan through the bleeder entries, over the gob, and up a similarly bore hole (Tr. 111, 116).²

All of the fans are equipped with pressure charts (also known as pressure gauges). The charts record the operation, or the lack of operation, of the fans over seven consecutive days by constantly recording the pressure of the air the fans are pulling (Tr. 44). If a fan ceases to function, its chart indicates that no pressure is being produced. Likewise, if a fan slows and draws less air, its chart records a diminution of pressure.

At the time the subject violations were issued, between 35 and 38 persons were employed at the mine (Tr. 387). As a general rule, they worked on three shifts — two production shifts and one maintenance shift. Thus miners usually were underground around-the-clock. The entire mine was inspected by MSHA once every three months (Tr. 104).

THE INSPECTIONS OF MARCH 3 AND MARCH 4, 1997

²The mine liberates approximately 55,000 cfm of methane every 24 hours (Tr. 133). The parties do not dispute that air in the bleeder entries and the gobs contains methane and that ventilation of the bleeder entries and gobs reduces methane in the mine.

Ronald Hixson is a MSHA inspector and ventilation specialist. He is assigned to MSHA's Rough Creek Field Office. The office is located in southwestern Pennsylvania and is responsible for the administration of the Mine Act in the region. Hixson has worked in the office since 1989. He has been a ventilation specialist since 1993. (Tr. 23-24). As a ventilation specialist, he reviews and investigates new ventilation plans, existing plans submitted for reapproval, and addendums to existing plans. The plans are submitted to MSHA by mine operators (Tr. 24).³

In early 1977, the Target No. 1 Mine was operating under a MSHA approved ventilation plan when Target proposed moving a bleeder evaluation point (BEP). (Tr. 304-305; Gov. Exh. 22)⁴ The move required Target to amend its plan, and on March 3, Hixson went to the mine to evaluate the proposal (Tr. 41).

Upon arriving at the mine, Hixson met Phillip Peterson. Peterson had worked at the mine since March 1996. Prior to that, he owned his own surveying company. Peterson was responsible for drafting the mine's ventilation plan and its addenda and for submitting the proposals to MSHA. Peterson had a thorough understanding of the mine's ventilation system (Tr. 304).

Peterson also had another responsibility. In 1996, Peterson was told to conduct daily examinations of the No. 2 and No. 3 bleeder fans (Tr. 305-307). A mine foreman told Peterson to examine the fans after the foreman spoke with a state mine inspector and after the state inspector advised the foreman the fans had to be examined daily. Because the foreman's directive followed the conversation with the state inspector, Peterson testified he understood the examinations had to be made in compliance with state, rather than with federal requirements (Tr. 306, 311-313).

After meeting Peterson, Hixson explained why he was at the mine and told Peterson that he (Hixson) needed to take air readings underground at the four-left gob and on the surface at the No. 3 fan (Tr. 41). The men decided to visit the surface installation first, and they drove Peterson's Jeep to the fan.

The fan was located in a fan house — a metal building measuring approximately 10 feet by 10 feet. The fan house was surrounded by a locked fence. As Hixson and Peterson stopped at the fan house, Hixson could not hear the fan (Tr. 42). A production crew was underground. The crew had entered the mine around 7:00 a.m. (Tr. 310).

³Mandatory safety standard 30 C.F.R. §75.370 requires a mine operator to develop and follow a ventilation plan approved by the MSHA district manager.

⁴Hixson described a BEP as a point where an operator can evaluate the direction and content of the air in a bleeder (Tr. 40).

The men got out of the Jeep, and Peterson unlocked the gate. Hixson and Peterson went into the fan house and found that the fan was not operating. Peterson restarted it by pressing the fan's restart buttons. Meanwhile, Hixson looked at the fan's pressure chart (Tr. 42-43; Gov. Exh. 26). Hixson saw that at approximately 2:00 p.m., on Thursday, February 27, the fan began to record "no pressure", and that it continued to record a lack of pressure until Peterson restarted the fan on March 3 (Tr. 41-45; Gov. Exh. 26). (An indication of "no pressure" meant that the fan was not operating.)

Hixson knew that Peterson was supposed to examine the fan on a daily basis. Therefore, Hixson asked Peterson if he had conducted an examination of the fan on February 28, the first full day the fan would have had to be examined after it shut down (Tr. 46-47). According to Hixson, Peterson replied that he did not have a key to the fan house gate on February 28, but that he had seen and heard indications from outside the gate that the fan was running (Tr. 47-48).

Hixson also knew that Target had contracted with an off-site security firm, Commonwealth Security Company (Commonwealth), to maintain an alarm system to monitor the mine's fans. When a fan's pressure gauge showed a significant drop in air pressure, the firm received a signal from the fan. Commonwealth then was supposed immediately to contact the mine, which meant that a Commonwealth representative usually called either Junior Golden, the company's president, or Gregory Golden, its maintenance foreman, to report the problem (Tr. 48-49, 76-77). This system of reporting fan slowdowns and outages was accepted by MSHA while Target was in the process of installing a direct line from the fans to the mine office in order to provide an immediate signal to the office when the fans slowed or stopped (Tr. 89-90, 189, 194, 224).⁵

Because Hixson was aware of the procedures involving Commonwealth, he asked Peterson if the company had received an indication from Commonwealth that the No. 3 fan had stopped, and Peterson told him that it had not (Tr. 49).

Hixson and Peterson then left the fan house and traveled back to the mine office, where Hixson reviewed the mine examination books (Tr. 49). In particular, Hixson looked at a book entitled Daily and Monthly Examination of Ventilation Equipment (Gov. Exh. 15; Tr. 119). Hixson noted that on February 28, at 6:40 a.m., Peterson signed the book and recorded the pressure gauge at the No. 3 fan as registering 8.6 inches (Tr. 52-53; Gov. Exh. 15 at 3). Hixson was surprised, since he had read the gauge as registering zero not 8.6 inches, and since a reading

⁵According to MSHA Inspector James Dickie, the system Target/Commonwealth was accepted even though the Secretary's regulations required a signal "at the mine when the fan slowed or stopped" (30 C.F.R. § 75.310(a)(3)). The system was allowed to continue while Target completed technological changes at activate a signal to the mine (Tr. 186-187). (As of the date of the hearing, a direct signal system was not yet in place for the No. 2 and the No. 3 fans and MSHA was still accepting the arrangement (Tr. 192-193).)

of 8.6 inches indicated the fan was in fact operating.

Hixson left the mine and returned to his office, where he discussed the situation involving Peterson and the fan with his supervisor. Hixson returned to the mine the next day, March 4, accompanied by his supervisor and by MSHA electrical inspector, Gene Kelly. The men wanted to investigate further the status of the No. 3 fan (Tr. 65). To do so, they intended to test the Target/Commonwealth signal system. They also wanted to speak again with Peterson.

Upon arriving at the mine, Hixson met Peterson and the men traveled to the No. 3 fan. They entered the fan house, and they pulled the lines from the pressure gauge to the fan chart. When the lines were pulled, the air pressure fell to zero, and a signal was sent immediately to Commonwealth. In turn, Commonwealth called the mine office and reported the No. 3 fan had sent a signal indicating it was "down" (Tr. 66).

Peterson and Hixson went back to the office, and Hixson again reviewed the ventilation equipment examination books. He repeated his questions to Peterson about whether Peterson had examined the No. 3 fan on February 28, and this time Peterson told Hixson "he did not want to lie", that actually he had not made the examination on February 28, even though he indicated in the examination book that he had (Tr. 67). He meant to do the examination, but he "just forgot" (Tr. 314). He entered 8.6 inches of pressure in the book because that was the pressure the chart usually recorded. He feared if he did not make an entry in the book, he would "get in trouble" (Tr. 313, see also Tr. 315).

Meanwhile, Kelly who also looked at the examination books, found that Peterson had not conducted an examination of the No. 2 fan on February 28, March 1, or March 2, 1997. He based his finding upon the fact the examination book for the No. 2 fan was blank for those dates (Tr. 70-71).

As a result of the inspections on March 3 and March 4, and the discussions with Peterson, Hixson and Kelly issued several citations and an order to Target, charging the company with various violations of the standards relating to main mine fans.

THE EVENTS OF APRIL 7, APRIL 8, AND APRIL 9, 1997

Due to the events in March, Target and Commonwealth agreed in writing to certain additional procedures to be followed when Commonwealth received a signal that a fan at the mine had slowed or stopped. The agreement stated that fan failure signals were not to be disregarded, that when Commonwealth received a signal it would find and notify the mine site. If it could not reach anyone at the mine, it would notify Gregory Golden. If it could not reach Gregory Golden, it would find and notify Junior Golden (Gov. Exh. 23). MSHA did not consider the agreement to be part of the mine ventilation plan, but MSHA accepted the agreement until such time as Target completed work on fully complying with section 75.310(a)(3) (Tr. 194).

In addition to the agreement, Target, through Gregory Golden, hired several new employees to monitor the fans' operations. The new miners were stationed around-the-clock at the No. 2 and No. 3 fans (Tr. 322-323). One of the employees was Donte Soucy, who described his job as "check[ing] periodically and listen[ing] consistently . . . [to] the [No. 3] fan" (Tr. 237). He worked from 3:00 p.m. to 11:00 p.m. According to Gregory Golden, if the fan ceased to operate Soucy's responsibility was to restart it. If he was unsuccessful, Soucy was to call Gregory Golden's office at the mine to tell Golden, or someone else, that the fan was not operating (Tr. 401).

On April 7, 1997, Soucy was at the No. 3 fan when he heard it slow down. Soucy tried to determine what was wrong, but the fan "picked back up" and resumed working properly (Tr. 235). Then, at 9:40 p.m., the fan completely stopped. Soucy could not restart it. Soucy claimed that he tried to call the mine office several times to report that the fan was "down", but he was unable to get through. He also claimed that while the fan was stopped no one called him (Tr. 236).

The Secretary offered into evidence the logs and a transcript of the conversations between the Commonwealth representative and the Goldenes regarding the No. 3 fan. They revealed that at 9:45 p.m., the Commonwealth representative called Gregory Golden, reported the fan was down and told Golden that she (the representative) would try to restart it (Id., Gov. Exh. 18 at 29-1, Tr. 169, 173). At 9:47 p.m., the representative called Junior Golden and notified him about the fan about the fact that she had called Gregory (Gov. Exh. 17 at 21-32, Gov. Exh. 18 at 29-2; Tr. 169-170, 172-175). The representative asked Junior Golden if he wanted to be called back when the fan was restarted, and he responded "No, call Greg" (Gov. Exh. 18 at 29-2). At 10:35 p.m. the representative again called Gregory Golden to report the fan had not been restarted. At 10:51 p.m., the representative made a final call to Gregory Golden stating that she could not restart the fan. She added, "Someone there needs to check the fan to make sure there is not some kind of equipment malfunction with the fan", and Gregory Golden replied, "Okay. I'll have somebody up there in the morning" (Gov. Exh. 18 at 29-3 - 29-4; Tr. 173-174).

Immediately after the representative first notified Gregory Golden, Gregory Golden called Junior Golden to tell him the fan was not working. Gregory Golden maintained that Junior Golden told him to "take care of it. To take care of the call" (Tr. 164). Junior Golden, claimed he told his son more, that he also told Gregory if he could not contact the mine, he should go to the mine (Tr. 295-98, 391, 394). Gregory Golden believed that it would have taken him 30 to 40 minutes to reach the mine from his home (Tr. 402).

There were three separate telephone lines into the mine office and a separate line to each of the borehole fans. Gregory Golden testified that he tried to call the mine office on all three of its telephone lines. In addition, he tried to call his cellular telephone, which he had left at the mine. One line was busy. No one answered the other lines (Tr. 399-400, 407-408). He also maintained that he tried to call the No. 3 fan, that the telephone rang, and that no one answered (Tr. 400, 405, 408).

Gregory Golden understood that if miners were working underground when a main mine fan shut down, they had to be withdrawn from the mine beginning at least 15 minutes after the fan shut down. He further understood that he was responsible for insuring the miners were withdrawn, and that he was responsible for notifying the mine if the fan shut down (Tr. 406-407). Despite this, Gregory Golden did not travel to the mine when he could not reach anyone by telephone (Tr. 408). When asked why he did not go to the mine, he testified "I hired . . . [Donte Soucy] to be there to watch the fans and report to the mine site or to call me if something happened to it " and "I assumed that the fan was running, that . . . [Soucy] was there and everything was all right" (Tr. 400-410, 409).

When the fan shut down at 9:40 p.m. on April 7, a production crew was working underground. It would have taken between 30 and 45 minutes for all of the miners to leave the mine. If the crew had left within 15 minutes of the fan ceasing to function, it would have been out of the mine before its normal quitting time. As it was, the crew left at its normal time and therefore was underground for slightly more than an hour while the fan was not running (Tr. 163-163, 177, 410). Gregory Golden knew that the crew was in the mine. He also knew that another shift was scheduled to enter the mine at 11:00 p.m. (Tr. 410).

On April 8, MSHA Inspector Dickie traveled to the mine to check on Target's progress in developing information about the mine's fans, information that would be incorporated into the mine's ventilation plan (Tr. 154, see also Tr. 155). When Dickie reached the mine office he spoke with Peterson who told him the mine telephone system was out of order due to a transformer problem (Tr. 155). State mine inspector Larry Miller also was in the office. Miller told Dickie that when he, Miller, arrived at the mine at approximately 7:30 a.m. that morning, all of the miners were above ground because the No. 3 fan was not operating (Tr. 156).

Dickie then looked at the mine fan examination book and saw a notation indicating the No. 3 fan was "down" (Tr. 158; Gov. Exh. 27 at 32). Subsequently, Dickie also looked at the fan's pressure chart (Gov. Exh. 13). The chart revealed that around 7:30 p.m. on Monday, April 7, the fan went off, then came back on. Later that evening it stopped for good (Tr. 161-162).

Dickie spoke with Carl Betchey, the foreman of the crew that was underground when the fan ceased operating (Tr. 163). Betchey told Dickie that the miners had come out of the mine at 10:50 p.m. (Tr. 163). This was the time the second shift crew normally left the mine.

Dickie also spoke with Gregory Golden. Dickie asked him what he had done as a result of the calls from Commonwealth, and Gregory Golden replied, "I didn't do anything" (Tr. 165). Dickie then asked Gregory Golden if he notified anyone at the mine that the fan was off or that the fan had a problem and needed to be checked, and Gregory Golden replied that he had not. Finally, he asked Gregory Golden if he "traveled to the mine to find out for [himself] if there was a problem with the fan", and Golden stated he did not (Id.; see also Tr. 166).

On April 9, Dickie returned to the mine where he spoke with Junior Golden about management's response to the shut down of the No. 3 fan. According to Dickie, Junior Golden

told him that he, Golden, was "tired of people not doing what they were supposed to do" (Tr. 181). Dickie asked Golden if he was referring to anyone in particular, and Golden said he was referring to Gregory Golden (Id.). No one else was present during this conversation (Tr. 182), and at the hearing Junior Golden denied he stated that he was referring to his son. Rather, he was indicating his unhappiness with the new employees whom Target hired to monitor the operating status of the borehole fans (Tr. 391-392).

WERE THE NO. 2 FAN AND THE NO. 3 FAN "MAIN MINE FANS"

A definition of the term "main mine fan" is found neither in the Act nor in the regulations, even though sections 75.310, 75.311, 75.312, and 75.313 apply only to such fans and even though the regulations repeatedly use the term. Lacking a statutory or a regulatory definition, I must consider whether the Secretary elsewhere has set forth and made available to operators what she believes the term to mean and/or whether the meaning of the term is clear from the context within which it is used.

The Secretary's Program Policy Manual (PPM) is a publication authored by the Secretary to explain to miners, operators, and the interested public the Secretary's interpretation and application of her regulations. Like the Act and the regulations, the PPM lacks a definition or explanation of the term "main mine fan" (see V PPM Part 75 at 33-34). However, the PPM is not the sole repository of the Secretary's interpretations. MSHA makes available other publications that explain how the agency views her regulations (see e.g. Department of Labor: MSHA MSHA'S Equipment Guide for Metal and Nonmetal Mining (1992)).

Denis Swentosky, an MSHA ventilation supervisor, identified a passage from a booklet entitled Ventilation [--] Questions and Answers (Tr. 266-267; Gov. Exh. 20). The booklet, in which information is presented in the form of questions and answers, was published in 1996. It states that on May 15, 1992, MSHA amended the standards for the ventilation of underground coal mines, that prior to final promulgation of the amended standards, training sessions in the standards were held for MSHA's inspectors, and that public informational meetings also were held "to introduce the new standards to the industry and labor organizations" (Gov. Exh. 20 at 2). The questions and answers in the publication are described as a compilation based on the sessions, meetings, and subsequent discussions (Id.). The publication's purpose is described as providing "guidance and assistance to the mining community applying the new standards in the specific cases represented by the questions." While the booklet states that it is "not a policy document and cannot be enforced as such," it also states that its "questions and answers should be considered an educational tool and an additional source of information" (Id. at 2). According to Swentosky the booklet was "made available to operators of coal mines" (Tr. 298).

The booklet makes clear that the Secretary considers the status of a "main mine fan" to be determined by the impact of the fan on a mine's overall ventilation system. At page 6 of the booklet, under questions regarding section 75.310, the following exchange appears:

Q. Is a small, surface bleeder fan (i.e., 50,000 cfm) considered

a "main mine fan"?

- A. The determination of what is a main fan depends on the impact a shutdown of the fan would have on the overall ventilation system. If the impact of a shutdown on mine or section ventilation is immediate and perceptible, the fan is a main mine fan (Gov. Exh. 20 at 6).

The emphasis upon an "immediate and perceptible" impact on the mine's overall ventilation system is consistent with the purpose of the regulations, as implied from the regulations themselves. The inescapable conclusion drawn from Sections 75.310, 75.311, 75.312, and 75.313 is that main mine fans serve dual and overlapping purposes. They are the primary mechanisms which ventilate a mine, and through that ventilation they eliminate explosive and toxic gases.

In her regulatory comments, the Secretary emphasized these purposes. She characterized the fans regulated by sections 75.310, 75.311, 75.312 and 75.313 as "controlling the ventilation at the [mine] and help[ing] assure that the miners have uncontaminated air at all times" (61 Fed. Reg. 9765 (1996)). The Secretary also spoke of them as "providing ventilation to prevent methane accumulations and possible explosions as well as providing miners with a healthful working environment" (Id. at 9767). In addition, she noted that a main mine fan "provides the pressure that causes air to move through the mine to dilute and carry away explosive and toxic gases, dusts and fumes" (Id. at 9769). Thus, in the Secretary's view, a main mine fan was "critical to mine ventilation and the prevention of methane accumulations and possible methane explosions" (Id. at 9770), and the hazard of such a fan stopping was that it could "result in the existence of unventilated areas and . . . highly hazardous methane accumulations" (Id. at 9773).

The testimony confirms the No. 2 and No. 3 fans in fact played an important roll in "controlling the ventilation at the [mine] and help[ed] assure that miners [had] uncontaminated air at all times" and that they "provid[ed] ventilation to prevent methane accumulations and possible explosions" (61 Fed. Reg. 9765 (1996)). In other words, the testimony confirms the No. 2 and No. 3 fans had an "immediate and perceptible" impact on the mine's overall ventilation system (Gov. Exh. 20 at 6).

Hixson emphasized that the fans pulled air and gases from the bleeder entries, across the gob, and out of the mine (Tr. 55). Without the fans, the gobs would not have been sufficiently ventilated (Tr. 112). There would not have been enough pressure to force sufficient air from the mine and prevent methane from accumulating in the gobs. As a result, the ventilation system could have reversed, and methane could have seeped into active areas where men worked (Tr. 114-115, 134-135).

Dickie's testimony mirrored Hixson's but was more detailed. Dickie essentially confirmed that Hixson's understanding of the fans' roll in the mine's overall ventilation system was correct. Dickie persuasively described the No. 3 fan as pulling air that traveled over the

four-left gob. In addition, because the three-left and four-left gobs were not totally separated, he explained how some of the air from three-left gob also was pulled over the four-left gob by the No. 3 fan (Tr. 205, 209-211). If the No. 3 fan failed there would be a "dead air space over . . . [the four-left] gob" (Tr. 211). Methane and carbon dioxide could accumulate and migrate back to the working section (Tr. 212, 215). His testimony that the four left gob was producing approximately eight cfm of methane per minute was not disputed (Tr. 212) nor was his testimony that when the fan was operating the area stayed "fairly clear" (Tr. 212). However, if the fan was not running, the gas would build until the volume got to the point where methane would migrate toward the bleeder entries and, if the stoppings had cracks, or the floor heaved, or if man doors were left open, the methane could travel to the working sections (Tr. 212, 215).

Further, John Urosek, chief of the ventilation division of MSHA's Safety and Health Technologies Center, amplified on what could happen if the fans failed in that methane which accumulated in the gob areas could be ignited by various potential ignition sources (Tr. 353-354). Any resulting explosion could damage the ventilation controls, and potentially lethal gases could endanger all of those in the active working sections (Tr. 354-355, 358-359, see also Tr. 361).⁶

Based upon this testimony, I am persuaded the No. 2 and No. 3 fans were "main mine fans". Because they had an immediate and perceptible impact on the mine's overall ventilation system they were subject to the main mine fan regulations.

NOTICE

Target contends that if this was so, the subject citations and orders nevertheless should be vacated because the company was deprived of adequate notice of the meaning of term (Tar. Br. 18-21). According to Target, it was not until March 3 and 4, 1997, the dates when the first of the subject citations and orders were issued, that MSHA viewed the fans as main mine fans. Prior to that, MSHA inspectors did not serve Target with any citations or orders for violations of the main mine fan regulations. Target especially notes that although Swentosky visited the mine on June 21, 1996, and although the No. 2 fan and the No. 3 fan then did not comply in several ways with the regulations governing main mine fans, Swentosky did not cite the fans (Tar. Br. 19-20). Target asserts that "[t]he only conclusion that can be drawn from this is that MSHA did not consider the fans to be main mine fans" and that "[a] reasonably prudent person would not have believe, after . . . Swentosky's visit[,] . . . that MSHA considered the fans as main mine fans" (Id. 20).

I disagree. In my view, a reasonably prudent person familiar with the mining industry and with the ventilation system at the mine would have known from the Secretary's regulatory comments and from the purpose of the main mine fan regulations, that the fans were subject to

⁶While Urosek's focused his testimony on the hazards of methane, he noted as well that if the fans ceased, the level of oxygen in the mine would start to decrease and carbon dioxide would increase (Tr. 366-367).

the sections 75.310 through 75.313.

Moreover, and contrary to Target's assertion, the record supports the conclusion that MSHA advised Target that MSHA considered the fans to be main mine fans. I credit Swentosky's testimony that around April 1996, he spoke over the telephone with Junior Golden about MSHA's requirements for the No. 2 and No. 3 fans and told Junior Golden that the fans would have to meet the main mine fan requirements mandating the installation of explosion and automatic closing doors and requiring a 15 feet offset (Tr. 260).⁷ Further, I credit his testimony that on June 21, 1996, he followed up on the conversations by going to the mine and by speaking with Junior Golden. The two discussed work Golden had started to install an explosion door for one of the fans and whether there was enough room to offset a fan from the mine opening by at least 15 feet (Tr.264, see also Tr. 285-286). Swentosky testified that during this visit he also told Junior Golden that the fans were main mine fans (Tr. 392). Junior Golden could not recall the latter conversation, but he did not deny that it occurred, and since the purpose of Swentosky's visit was to check on specific things that are required for main mine fans, Swentosky's recollection of what he told Golden rings true.

It is a fact that at the time of Swentosky's visit, the fans were not in compliance with many of the main mine fan requirements and that Swentosky issued no citations (See Tr. 271). When asked why, Swentosky stated that Junior Golden complained the previous owner of the mine had not been made to comply with the requirements and that Golden took exception to Target being made "suddenly" to "upgrade the fans" (Tr. 287). Swentosky candidly testified he believed Golden had a "legitimate beef" and that MSHA decided to work with Golden to, in effect, "phase in" compliance with the regulations (Tr. 287).

The problem is that the Act and the regulations do not provide for a gradual approach to compliance with regard to sections 75.310 through 75. 313. If there are violations of the regulations, either MSHA must cite the operator, or the operator must apply for a modification of the applicable standard or standards (30 U.S.C. §§814(a), 811(c)). This is not to say that MSHA's decision to "go slow" on mandating compliance was wrong. There are many considerations that come into play when administering the Act. However, the fact that MSHA decided to forego enforcement of the main mine fan regulations, while not reflecting a lack of notice, may impact on the company's negligence and hence upon any penalties assessed should I find the company failed to comply.

CONTESTED CITATIONS
DOCKET NO. PENN 97-170

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
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⁷Section 75.310(a)(5) requires main mine fans to be protected by weak walls or explosion doors, and section 75.310(a)(6) requires main mine fans to be "offset by at least 15 feet from the nearest side of the mine opening".

7013405	3/3/97	75.310(a)(3)	\$235
7013408	3/4/97	75.310(a)(3)	\$204

Citation No. 7013405 states in part:

The fan signal device installed on the No. 3 borehole fan . . . did not function as designed. [Commonwealth] either did not get the required signal that the fan was not running or failed to communicate to the person on duty at the mine that the fan was not operating. This allowed men to be working underground with the #3 borehole fan not operating. The system installed does not give an audible or visual signal at the mine (Gov. Exh. 3).

The following day, the citation was modified to allege "the system failed to give a proper signal that the fan was not operating from [2:00 p.m.] on 2/27/97 till 3/3/97 at [8:00 a.m.]. . . . The fan also does not have a signal system installed that reports to a surface location at the mine" (Gov. Exh. 3).

Citation No. 7013408 states in part:

The No. 2 borehole fan on the surface . . . is not equipped with a signaling device that will give a signal at the mine when the fan either slows or stops. The signaling device that is currently installed is monitored at a location away from the mine. Any signal is received by [Commonwealth] and they in turn phone the mine site and alert them of the problem (Gov. Exh. 4).

The citations also allege that the violations were S&S.

Section 75.310(a)(3) requires in part that each main mine fan shall be "[e]quipped with an automatic device that gives a signal at the mine when the fan either slows or stops[, and that a] responsible person designated by the operator shall always be at a surface location at the mine where the signal can be seen or heard while anyone is underground." Hixson maintained he issued the citation regarding the No. 3 fan because "the company did not get a signal" and therefore was "not alerted to the fact that the fan was down" (Tr. 76), and that he issued the citation regarding the No. 2 fan because the "fan signaling system [did] not give an alarm at the mine" (Tr. 101).

There is no dispute that each fan lacked "an automatic device that gives a signal at the mine when the fan either slows or stops" (section 75.310(a)(3)). Rather than an automatic device, Target relied on Commonwealth to act as a "middle man" by receiving the signal and by then alerting Target officials. This system did not comply with the mandate of the standard that each fan be equipped with a device that gives a signal "at the mine". Therefore, I find that in

each instance Target violated the standard.

A violation is significant and substantial, if based on 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 (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is, a measure of danger to safety contributed to by the violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

I conclude both violations posed a safety hazard that was reasonably likely to result in injuries or death. First, there are few situations in mining more potentially dangerous than those which can develop if a main mine fan slows or stops. As the Secretary's witnesses repeatedly explained, in a mine that liberates methane, the gas can begin to build as soon as the fan malfunctions and an explosion and fire can result. Indeed, the need to protect miners from the hazard is the driving force behind the main mine fan regulations. ("The main mine fans serve a vital role in providing ventilation to prevent methane accumulations and possible explosions" (61 Fed. Reg 9767 (1996).))

Without a signal to the mine, there is a greatly diminished possibility a person in authority at the mine will know if a main mine fan is defective and will take corrective action, including ordering miners to leave if the fan cannot timely be repaired. In fact, the circumstances surrounding Citation No. 7013405 exemplify the hazard inherent in these violations. The No. 3 fan was off, yet miners repeatedly were underground between February 27 and March 3, despite the fact the mine was liberating approximately 55,000 cfm of methane and was without the capacity fully to exhaust the accumulating methane (Tr. 133).⁸ Even without defective equipment underground that could serve as an ignition source, methane that has built to explosive levels still could be ignited by a roof fall or by current produced by lightning (Tr. 353-354). I therefore conclude the violations were S&S.

⁸Hixson described the miners who worked underground while the No. 3 fan was off. On Thursday, February 27, when the fan ceased to function, the day shift, a shift that mined coal from 7:00 a.m. to 3:00 p.m., was in the mine. The day shift was followed by the afternoon shift (another production shift) which worked from 3:00 p.m. to 11:00 p.m. Then, the midnight shift, a maintenance shift, entered the mine, and the midnight shift worked until 7:00 a.m. on February 28. The midnight shift was followed by the day shift and an afternoon shift on February 28. Then, on Saturday, March 1, a rock-dusting crew was in the mine. On Sunday, March 2, a midnight shift entered at 11:00 p.m. and the midnight shift stayed until the day shift entered on Monday morning, March 3 (Tr. 62-63).

In addition, because the violations created the possibility that an entire work crew would be injured or killed, the violations were very serious.

Finally, I conclude that the violations were the result of less than ordinary negligence on Target's part. The testimony of Swentosky and Dickey makes clear that MSHA was "going along" with the Target/Commonwealth system of notification until such time as a signal at the mine could be installed (Tr. 271,197). While an operator exercising reasonable care would have been in compliance or would have sought a modification of the standard, I believe that MSHA made it appear to Target that the agency -- to some extent at least -- was willing to acquiesce in the violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F. R. §</u>	<u>Proposed Penalty</u>
7013512	3/4/97	75.312(c)	\$50
7013513	3/4/97	75.312(c)	\$50

Citation No. 7013512 states "The No. 2 . . . fan was not stopped for testing of the automatic fan signal device as required by . . . [section] 75.312(c)", and Citation No. 7013513 alleges the No. 3 fan similarly was in violation (Gov. Exh. 5, Gov. Exh. 6).

The citations also allege that the violations were S&S.

The parties stipulated that the facts alleged in the violations are true and that the existence of the violations depends upon whether the fans were "main mine fans" (Stip. 4). Having found that Fan No. 2 and Fan No. 3 were "main mine fans", I further find the violations existed as charged.

I also find that the violations were S&S and very serious. The standard requires an automatic fan signal device to be tested "[a]t least every 31 days". A functioning, automatic signal device is a nearly certain way to alert an operator if a main mine fan falters or fails. Testing the device assures the operator the device is working as it should. Without a properly working device, the chance of repairing a defective or failed fan or of removing miners from the hazards attending such a fan are greatly lessened. When, as here, the mine liberates 55,000 cfm of methane a day and the cited fans are among those removing that methane from the mine, it is reasonably likely the failure to test the signal devices can lead to the serious injury or death of miners who are underground.

As with Citation No. 703450 and Citation No. 7013408, I find that the violations were due to Target's low negligence. The company could hardly test a system it did not have, and it did not have the required system because MSHA chose not to press the issue.⁹

⁹Although this finding departs from the inspector's (Gov. Exh. 6), the parties stipulated to the facts stated on the citations, not to the inspector's evaluation of the facts.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013514	3/4/97	75.312(a)	\$690

Citation No. 7013514 states:

The operator was unable to provide any evidence that the daily examination had been conducted at the No. 2 bleeder fan on [February 28, 1997, March 1, 1997, or March 2, 1997.] Miners were working underground on [February 28, 1997 and March 1, 1997]. A mine examiner entered the underground workings to conduct the preshift examination on [March 2, 1997] without the No. 2 bleeder fan having been examined prior to his entrance (Gov. Exh. 10).

The citation also alleges that the violation was S&S.

Section 75. 312(a) requires in pertinent part that "each main mine fan and its associated components. . . shall be examined for proper operation by a trained person designated by the operator[,] . . . at least once each day that the fan operates" except "when no one . . . goes underground".

Hixson, who discussed the citation with Kelly, testified that Citation No. 7013514 was based upon an inspection of the fan examination books at the mine. The inspection revealed "no entry or no record" indicating the examinations had been made (Tr. 71). Inspector Kelly inferred from this that the examinations had not been made (Id.). Target offered no evidence to counter the inference. Moreover, the record is clear that on February 28, March 1, and March 2, miners were underground (See n. 8 *infra*). I find, therefore, that the violation existed as charged.

In addition, I find that it was S&S. As Hixson explained, the reason the law requires the daily examination of main mine fans when miners are underground is "to insure that [the fans] . . are running properly" (Tr. 71). The ventilation "pulls . . . the bad air out [of] the entries to the returns and to the surface and get[s] rid of it and keeps it off the miners" (Id.). Without the examination, the safety of miners underground cannot be assured because, as the experience with the No. 3 fan revealed, the fan may slow and/or stop and miners may be left underground despite the fact that methane continues to accumulate. Serious injury or death is reasonably likely to follow.

Further, the violation was very serious. It created the potential for multiple fatalities in that it endangered up to a full production crew of miners.

I also find that Target was negligent in allowing the violation to exist because the violation was caused by the company's failure to exercise the care required to insure the examinations were made. I believe the company knew the Secretary considered the fans to be main mine fans. I have credited Swentosky's testimony concerning his April 1996 discussion

with Junior Golden and his June 21, 1996 visit to the mine. It is clear that during the discussion and visit, the men conferred about explosion door and offset requirements (Tr. 260-264). It is inconceivable to me that Junior Golden did not understand that these were regulatory requirements for main mine fans. Knowing the No. 2 fan was a main mine fan, the company should have made sure it was examined as required. Target delegated the duty of examining the fans to Peterson (Tr. 51-53), but there is nothing in the record to indicate Target took any steps to make certain Peterson fulfilled his duty.

DOCKET NO. PENN 97-194

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013407	3/3/7	75.312(a)	\$1800

Citation No. 7013407 states in part:

The No. 3 borehole fan was examined on Monday, March 3, 1997. At the time of the exam the fan was found to be not running. The pressure recording chart in the fan building indicated the fan stopped at approximately . . . [2:00 p.m.] on Thursday, February 27, 1997. The No. 3 borehole fan was not examined daily as required on February 28, March 1, and March 2, 1997. However, the men worked underground on those days. Citations No. 7013403 and 7013405 were issued in conjunction with this citation. A proper daily exam of the fan and the pressure recording chart would have shown the fan not operating and the signaling device not working (Gov. Exh. 2).

On March 4, 1997, Hixson modified the citation by adding February 27, 1997, and March 3, 1997, as days when men worked underground due to the cited condition (Gov. Exh. 2 at 2). On March 5, 1997, Hixson again modified the citation to state:

The record book located on the surface at the mine office for February 28, 1997 indicated that the fan was operating properly at 8.6 [inches] of pressure . . . The evidence indicated that the fan was not operating during that time period (Gov. Exh. 2 at 3).

The citation also alleges that the violation was S&S and the result of Target's unwarrantable failure.

Section 75.312(a) requires in part that "[E]ach main mine fan and its associated components, including devices for measuring or recording the ventilation pressure, shall be examined for proper operation by a trained person designated by the operator." Section 75.312(f)(1) requires persons making the required examinations to certify that the examinations have been made.

There is no doubt the violation occurred. The company did not challenge Hixson's assertion that the fan was not examined as required (Tr. 45; Gov. Exh. 26). I fully credit Hixson's testimony, based on his conversation with Peterson, that Peterson he did not examine the fan on February 28 and that the entry Peterson made in the examination book purposefully was misleading (Tr. 67). While Peterson may indeed have believed he would "get in trouble" if he did not indicate he examined the fan, his fear is no excuse for failing to comply with the standard (Tr. 313, see also Tr. 315). Indeed, his false certification of an examination, no matter what its motivation, was as much of a violation of section 75.312 (albeit of a different subsection of the standard) as was his failure to conduct an examination.

I also conclude the violation was S&S and extremely serious. As the standard states, the reason the law requires a main mine fan to be examined daily is to assure the electrical and mechanical reliability of the fan. Without the examination, the fan can falter or fail and the operator can be unaware of the defect. As a result, miners may continue to work underground while methane builds to a hazardous level.

When, as in the case of the Target No. 1 Mine, a mine is liberating approximately 55,000 cfm of methane every 24 hours and the No. 3 fan is one of the instruments that draw the methane from the mine, the failure to examine the fan is reasonably likely to result in the serious injury or deaths of miners who are working underground. Because proper operation of a main mine fan is critical to the effective functioning of the mine's ventilation system, the violation can be a significant factor in creating the potential for a full blown mine disaster.

The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

The Commission has identified several factors to be considered in analyzing whether a violation resulted from unwarrantable failure: among these are "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance" (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993)).

Peterson was responsible for the daily inspection of the fans. He had been assigned the task by Target. He acted for Target. Not only did he fail to inspect the fan on February 28, he purposefully falsified the examination book to indicate the examination was made. Peterson's belief that he would "get in trouble" if he did not indicate he examined the fan suggests Peterson knew full well the No. 3 fan had to be examined daily (Tr. 313, see also Tr. 315), and whether or

not he believed the examinations were required by state or federal authority is beside the point. Therefore, I find that Peterson either purposefully failed to examine the fan or was recklessly indifferent to his duty to do so, and I conclude that Peterson, and through Peterson, Target, exhibited a serious lack of reasonable care and unwarrantably failed to comply with the standard.

In making this finding, I am mindful that the Commission previously has considered a high degree of danger presented by the violation as a relevant consideration when determining the existence of unwarrantable failure (see e.g., Midwest Material Co., 19 FMSHRC 30, 34-35 (January 1997)), and in my view, the violation was a critical factor in subjecting miners underground to a situation that was potentially very hazardous.

I also believe the company was highly negligent. Peterson's lack of action in examining the fan and his action in misleading others by making it appear otherwise are attributable to Target.

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013403	3/3/7	75.311(a)	\$2000

Order No. 7013403 states in part:

The No. 3 borehole fan located on the surface of Target No. 1 Mine was not continuously operated while men were underground. When we arrived at the [No.] 3 fan[,] the fan was not running. The pressure recording chart showed the fan went down at approximately 2 PM on Thursday[,] February 27, 1997. The fan was restarted by Phil Peterson at approximately [8:00 a.m.] on March 3, 1997. The mine operator was instructed that due to the signal system's failure to signal that the fan was down a fan attendant would have to monitor the fan until the system could be checked out and verified to be working properly (Gov. Exh. 1).

The order originally was issued as a citation. The next day it was modified to an order issued pursuant to section 104(d)(1) of the Act (30 U.S.C. § 814(d)(1)). As modified, the order noted that men were working underground from the time the fan went down until it was restarted. The order also alleged that the violation was S&S and the result of Target's unwarrantable failure (Gov. Exh. 1 at 2).

Section 75.311(a) requires the continuous operation of each main mine fan, except as otherwise approved in the ventilation plan or when the fan is being tested or when it is being repaired underground. There is no dispute that the No. 3 fan was not continuously operated during the periods asserted, that its stoppage was not approved in the ventilation plan, and that it was not being tested or repaired. Therefore, the Secretary established the violation.

Because the fan was not operating, methane was not being removed from the bleeder

entries and from the gob as contemplated under the mine's ventilation plan. In addition, miners were working underground while the methane was accumulating. On February 28, at least, the methane was building while some of the miners were extracting coal, and the extraction of coal involves the use of many potential ignition sources. Moreover, even without an electrical malfunction of mining equipment to serve as an ignition source, accumulated methane could have been ignited by other sources (Tr. 353-354). Given these factors, I find the violation was reasonably likely to have result in the injury or death of those underground. Accordingly, I find that the violation was S&S.

Also, because of the gravity of the hazard engendered by the violation and the number of miners endangered, I find that the violation was very serious.

As stated, I believe Peterson understood he was supposed to examine the fan. He was the agent to whom Target assigned the task. He failed in this regard, and he purposefully falsified the examination book to indicate he acted otherwise. It is reasonable to infer that if he had made the examination, the fact that the fan was not working would have been detected and corrected. I therefore find the violation was due to Peterson's reckless indifference to the requirements of Section 75. 311(a) and to his serious lack of reasonable care. Since Peterson was acting for Target, I conclude that Target unwarrantably failed to comply as charged.

I also conclude that Target, through Peterson, was highly negligent in allowing the violation.

DOCKET NO. PENN 98-8

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/8/97	75.313(c)(1)	\$3,000

Order No. 7074002 states in part:

The No. 3 Bleeder Fan, which is a main mine fan, began to experience mechanical problems and initially shut down at approximately 7:30 p.m. on 4/7/97. Men were in the mine producing coal on the 4 left section . . . Commonwealth Security, which is contracted to monitor the fan operation, contacted the Mine Operator by phone, and informed him that they received a signal that the No. 3 fan was not operational. The operator, Junior Golden, talked to his son, Greg Golden about the signal received by Commonwealth . . . Discussion with Greg [Golden] revealed that he decided not to travel to the mine or contact anyone at the mine to inform them of these findings. No action was taken as a result (Gov. Exh. 28).^[10]

The order also alleges that the violation was S&S and the result of Target's unwarrantable failure.

Section 75. 313(c)(1) requires that miners be withdrawn from the mine "[i]f ventilation is not restored within 15 minutes after a main mine fan stops". On April 7, miners were not withdrawn within 15 minutes of 9:40 p.m. In fact, the 10 miners who were underground were not withdrawn at all in response to the fan's failure. Rather, they left the mine because their shift ended. They left almost an hour after they should have started to leave when ventilation was not restored. (Tr. 162-163, 177, 410). Therefore, I find that the violation existed as charged.

The failure to begin the withdraw the miners after 15 minutes when the No. 3 fan was not restarted, subjected the miners to those obvious hazards attending accumulating methane, hazards which can culminate in an explosion or fire. The failure to withdraw the miners meant that such consequences were reasonably likely to occur, given the propensity of the mine to liberate methane. It can not be argued seriously that this particular violation at this particular

¹⁰In further explaining the order, Dickie testified that on April 7, the No. 3 fan started to experience problems at 7:30 p.m. and "went down around 9:30, 9:45 [p.m.]". The parties stipulated that, in fact, the fan shut down at 9:40 p.m. and that at 9:45 p.m. a representative of Commonwealth spoke with Gregory Golden (Tr. 169). Because there is no disagreement about the fact that the fan shut down for good at 9:40 p.m., the Secretary's motion to amend Order No. 7074002 and Order No. 7074003 (discussed below) to reflect this fact is granted (see Sec. Br. 16 n.1)

mine was not S&S.

In addition, given the number of miners subjected to the hazard and the gravity of the hazard (serious injury or death from an explosion and/or fire) the violation was extremely serious.

The violation also was the result of the unwarrantable failure of Target to comply with the standard. Gregory Golden was a foreman and an agent of Target. He was alerted within 5 minutes after the fan ceased to function (Tr. 169). He was the person Target designated as the first to be contacted in the event the fan shut down (Gov. Exh. 23). Commonwealth understood this, Target understood this, and MSHA understood this (Tr. 194, 318-319). The arrangement was agreed to in order to prevent a repetition of the events of February 27 through March 3, when miners had been left underground after the fan failed. While Target hired employees, including Soucy, to monitor the bleeder fans around-the-clock, the Golden's, especially Gregory, bore the ultimate responsibility to insure compliance.

I believe that Junior Golden told Gregory to go to the mine if he could not reach anyone there by telephone (Tr. 295-98, 391, 394). I also believe that although Gregory Golden tried to telephone the mine about the fan's failure, he deliberately chose not to go to the mine when he could not get through by telephone. He attempted to shift the responsibility to Soucy, because Soucy was hired "to be there to watch the fans and report to the mine site or to call . . . if something happened to [the fan]", but, as stated, Golden, not Soucy, was responsible (Tr. 400-401).

As a result of Gregory Golden's decision to forego a trip to the mine, the miners remained underground after they should otherwise have started to leave. While Golden estimated it would have taken him 30 to 40 minutes to reach the mine from his home, even if it had taken him 40 minutes, he would have been at the mine before the miners left of their own accord at the end of the shift.

Given the fact Gregory Golden knew miners were underground when the fan failed and that he also knew another crew of miners would enter the mine when the present crew left, his failure to insure that miners were exiting the mine can be attributed to his, and thus to Target's, reckless indifference to the requirements of the standard.

I also conclude the company, through Golden, was highly negligent in allowing the violation to exist.

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074003	4/9/97	75.311(d)	\$3,000

Order No. 7074003 states in part:

Commonwealth Security, the company which is contracted to monitor the [b]leeder [f]ans operation of this mine, received a signal at approximately 7:30 P.M. on 4/7/97, that the No. 3 Bleeder Fan, which is a main mine fan, was not operational. At this time Commonwealth Security contracted the Mine Operator, by phone, and informed him that they received the signal of the problem with the fan.

Discussion with Greg Golden . . . revealed that he decided not to travel to the mine or contact anyone at the mine to inform them of this information received from Commonwealth Security. No action was taken as a result.

The mine operator failed to notify the [m]ine [f]oreman at the mine, of the problem with the fan. Men were working in the mine producing coal at this time (Gov. Exh. 29).

The order also alleges that the violation was S&S and the result of Target's unwarrantable failure.

Section 75.311(d), requires in part : "If an unusual variance in the mine ventilation pressure is observed, or if an electrical or mechanical deficiency of a main mine fan is detected, the mine foreman or equivalent mine official . . . shall be notified immediately, and appropriate action or repairs shall be instituted promptly."

Dickie testified without dispute that on April 7, Carl Betchey was acting as the mine foreman when the fan stopped and that Betchey was not notified immediately (Tr. 183). Further, repairs of the fan were not instituted promptly (Tr. 184). On the basis of Dickie's uncontradicted testimony, I find that the violation existed as charged.

The purpose of the notification requirement is, as the standard states, that "appropriate action or repairs . . . be instituted promptly" (30 C.F.R. §75.311(d)). The goal is to minimize to the greatest extent possible the amount of time a fan is malfunctioning. Failure to notify the foreman or others means that in all likelihood timely repairs will not be initiated. (Foremen and other mine officials are not clairvoyant and they cannot act in response to a situation of which they are ignorant.) In turn, this means that miners will be subjected to rising levels of methane and the previously discussed hazards attending such a situation.

In view of the methane liberated by this mine, in view of the fact the fan's failure diminished the capacity of the mine's ventilation system to remove the methane, in view of the fact miners were working underground when the foreman was not notified, and in view of the fact another crew shortly was scheduled to replace those underground, I find that the failure to notify the foreman or other equivalent official meant that it was reasonably likely miners would continue to work in the presence of the accumulating methane, and that the miners were

subjected to the reasonable possibility of a mine explosion or fire. The violation was S&S.

Also, and for the same reasons as stated regarding Order No. 7074002, the violation was extremely serious.

Further, the violation was the result of Target's unwarrantable failure to comply with the standard. The record does not contain the slightest indication that anyone acting on Target's behalf tried immediately to notify Betchey or an "equivalent mine official". While Gregory Golden testified he attempted to telephone Soucy, Soucy certainly did not hold a position of authority. Rather, as Dickie correctly stated, Gregory Golden "was the person that had the information to affect [the withdrawal of miners] . . . and he chose not to do anything about it" (Tr 184-185). Golden's inaction was attributable to Target. Therefore, I conclude that Target was recklessly indifferent to its notification responsibilities as well as to its concomitant responsibility to promptly institute remedial measures. In making this finding, I also have considered the high degree of danger to which Target's lack of action subjected its miners.

Finally, I conclude that Target, through Golden, was highly negligent in allowing the violation to exist.

SECTION 110(C) CASES **THE LAW**

Section 110(c) of the Act provides for the assessment of a civil penalty when an agent of a corporation "knowingly [has] authorized, ordered, or carried out" a violation of a mandatory health or safety standard (30 U.S.C. §820(c)). In order to sustained her allegations, the Secretary must prove that Target is a corporation, Peterson and Gregory Golden were Target's agents, and that they "knowingly" violated the standards.

The parties have stipulated that Target is a Pennsylvania corporation (Stip. 3), and the record supports the conclusion that Peterson and Golden were its agents. Peterson acknowledged that he was responsible for "drawing up the mine's ventilation plan and submitting . . . [the plan] to . . . [MSHA]" (Tr. 304). He also agreed that he reviewed the plan to assure it was in compliance with MSHA's requirements as he understood them (Tr. 305). Further, from the fall of 1996, he was responsible for the daily examination of the No. 2 and No. 3 fans at the mine (Tr. 306).

Target argues that Peterson could not have been its agent because he was "not directed to make fan examinations to satisfy federal requirements" (Target Br. 25). I do not agree. Rather, as the testimony shows, Peterson's function at the mine was that which "involved a level of responsibility normally delegated to management personnel" (Ambrosia Coal & Construction Co., 18 FMSHRC 1552, 1560 (September 1996) (quoting U.S. Coal, Inc. 17 FMSHRC 1684, 1688 (October 1995)) Peterson's understanding as to which authority required the examinations is irrelevant to whether he acted at such a level.

As for Gregory Golden, who was the maintenance foreman at the mine (Tr. 318), and who had authority to hire other employees (Tr. 294-295), he too was an agent.

The questions then are whether the agents knowingly ordered, authorized, or carried out violations of section 75.312(a), section 75. 313(c)(1), and section 75. 311(d).

The Commission has approved the description of "knowingly" found in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950), wherein the court stated that the word:

does not have any meaning of bad faith or evil purpose or of criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence (92 F. Supp. At 780).

The Commission has found that this interpretation "is consistent with both the statutory language and the remedial intent of the . . . Act" (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981) (aff'd on other grounds, 689 F.2d 623 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983)). The Commission has explained:

If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC at 16).

In addition, the Commission has held that to violate section 110(c), the person's conduct must be "aggravated", i.e., it must involve more than ordinary negligence (Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992)).

DOCKET NO. PENN 98-98

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>
7013407	3/3/97	75.312(a)	\$500

The Secretary alleges that Peterson knowingly violated section 75.312(a) when he failed to examine the No. 3 fan on February 28, March 1, and March 2. I have found that the violation occurred. I also find that Peterson acted knowingly. Target again argues that Peterson did not understand the examination was required by federal regulation (Target Br. 25), but even if this was so, ignorance of a standard is not a valid defense. Rather, as the Secretary correctly points out, "[T]he Secretary must prove . . . that an individual knowingly acted, not that the individual

knowingly violated the law (Warren Steen Construction, Inc., 14 FMSHRC 1125, 1131 (July 1992)).

For section 110(c) purposes a violative omission is equivalent to a violative commission. Peterson did not conduct the daily examination of the No. 3 fan as charged, and I conclude his attempt to conceal his failure of February 28 permits the inference that Peterson realized he failed to act as he should (Tr. 313, see also Tr. 315).

DOCKET NO. PENN 98-104

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/9/97	75.313(c)(1)	\$500
7074003	4/9/97	75.311(d)	\$1,000

The Secretary alleges that Gregory Golden knowingly violated section 75.313(c)(1) when he failed to go to the mine upon being notified by Commonwealth that the No. 3 fan had ceased to function and that he knowingly violated section 75.311(d) when he failed to notify Betchey (or a designated person acting for Betchey) that the No. 3 fan had ceased to function.

I have found both violations occurred, and I conclude that the Secretary has established that they were knowing. Gregory Golden was alerted within 5 minutes after the fan stopped (Tr. 169). He was the person designated the primary official to be contacted in the event a fan shut down (Gov. Exh. 23). I have credited the fact that Junior Golden told his son if a fan failed he should go to the mine provided he could not reach the mine by telephone (Tr. 295-98, 391, 394). Gregory Golden's own testimony is that he tried to call the mine and that no one answered. Gregory Golden knew miners were underground, yet when he could not reach the mine he deliberately chose to stay home. He was, to paraphrase the Commission, a person in a position to protect employee safety who failed to act on the basis of information that gave him reason to know of the existence of a violative condition (see Kenny Richardson, 3 FMSHRC 8,16 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982, cert. denied, 461 U.S. 928 (1983)).

In addition, although Gregory Golden knew the fan had stopped, he did not know if Betchey or another designated person had been notified. Just as with the violation of section 75.313(c)(1), I conclude the violation of section 75.311(d) was the result of Gregory Golden's deliberate decision to stay home. Had he gone to the mine, Betchey or someone else in authority, would have been alerted to the condition of the fan. In the face of what he knew, Gregory Golden knowingly violated section 75.311(d).

CIVIL PENALTY ASSESSMENTS

In assessing a civil penalties for the violations, the Act mandates that I consider all of the criteria enumerated in section 110(i) (30 U.S.C. §820(i)). I have made findings regarding the gravity and negligence of the violations. I also find that Target had an applicable history of 84 violations at its No. 1 Mine (Tr. 17; Gov. Exh. 32). The Secretary did not characterize this

previous history, but in proposing penalties the Secretary, through her penalty point system, indicated that she regarded the number as moderate. Further, the Secretary indicated that Target is of a medium size. For its part, Target does not maintain that the size of any penalty assessment will effect its ability to continue in business, and the parties have stipulated that Peterson and Gregory Golden will be able to pay any penalties assessed, provided such payments are made over time (Additional Stipulations 2).

DOCKET NO. PENN 97-170

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013450	3/3/97	75.310(a)(3)	\$235
7013408	3/4/97	75.310(a)(3)	\$204

I have found the violations were very serious. I also have found they were the result of less than ordinary negligence on Target's part. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I conclude an assessments of \$100 is appropriate for each violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013512	3/4/97	75.312(c)	\$50
7013513	3/4/97	75.312(c)	\$50

I have found the violations were very serious. I also have found they were the result of less than ordinary negligence on Target's part. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I conclude an assessment of \$100 is appropriate for each violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013514	3/4/97	75.312(a)	\$690

I have found the violation was very serious. I also have found it was due to Target's ordinary negligence. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violation, I find an assessment of \$200 is appropriate for the violation.

DOCKET NO. PENN 97-194

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013407	3/3/7	75.312(a)	\$1800
7013403	3/3/7	75.311(a)	\$2,000

I have found the violations were extremely serious. I also have found they were due to Target's reckless disregard of the standards. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I find an assessment of \$1,500 is appropriate for each violation.

DOCKET NO. PENN 98-8

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/8/97	75.313(c)(1)	\$3,000
7074003	4/9/97	75.311(d)	\$3,000

I have found the violations were extremely serious. I also have found they were due to Target's reckless disregard of the standard. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I find an assessment of \$1,500 is appropriate for each violation.

DOCKET NO. PENN 98-98

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013407	3/3/97	75.312(a)	\$500

I have found the violation was extremely serious violation and that Peterson exhibited more than ordinary negligence in violating the standard. The violation was abated in good faith. There is no indication that Peterson has a past history of violating the standards. Further, the parties agree Peterson is able to pay a civil penalty, provided payments are ordered on a structured basis. I find that an assessment of \$300 is appropriate for the violation.

DOCKET NO. PENN 98-104

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/9/97	75.313(c)(1)	\$500
7074003	4/9/97	75.311(d)	\$1,000

I have found that the violations were extremely serious and that Gregory Golden exhibited more than ordinary negligence in violating the standards. The violations were abated in good faith. There is no indication that Gregory Golden has a past history of violating the

standards. Further, the parties agree Golden is able to pay a civil penalty, provided payments are ordered on a structured basis. As a foreman at the mine, Gregory Golden's duty of care was more than Peterson's, and I find an assessment of \$500 is appropriate for each violation.

SETTLED VIOLATIONS

DOCKET NO. PENN 97-190

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>	<u>Settlement</u>
7013386	3/7/97	75.361(a)	\$900	\$630
7013388	3/7/97	75.370(a)(1)	\$600	\$420

DOCKET NO. PENN 97-194

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>	<u>Settlement</u>
7013384	3/7/97	75.400	\$1,000	\$700

These settlements were explained on the record and they are **APPROVED** (Tr. 412-421).

ORDER

DOCKET NO. PENN 97-170

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7013450	3/3/97	75.310(a)(3)	\$100
7013408	3/4/97	75.310(a)(3)	\$100
7013512	3/4/97	75.312(c)	\$100
7013513	3/4/97	75.312(c)	\$100
7013514	3/4/97	75.312(a)	\$200

Target **IS ORDERED** to pay a civil penalty of \$600 within 30 days of the date of this decision.

DOCKET NO. PENN 97-190

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Settlement</u>
7013386	3/7/97	75.361(a)	\$630
7013388	3/7/97	75.370(a)(1)	\$420

Target **IS ORDERED** to pay a civil penalty of \$1,050 within 30 days of the date of this decision.

DOCKET NO. PENN 97-194

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7013407	3/3/7	75.312(a)	\$1,500
7013403	3/3/7	75.311(a)	\$1,500

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Settlement</u>
7013384	3/7/97	75.400	\$700

Target **IS ORDERED** to pay a civil penalty of \$3,700 within 30 days of the date of this decision.

DOCKET NO. PENN 98-8

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7074002	4/8/97	75.313(c)(1)	\$1,500
7074003	4/9/97	75.311(d)	\$1,500

Target **IS ORDERED** to pay a civil penalty of \$3,000 within 30 days of the date of this decision.

DOCKET NO. PENN 98-98

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7013407	3/3/97	75.312(a)	\$300

Peterson **IS ORDERED** to pay a civil penalty of \$300 by paying \$75.00 on November 1, 1999; \$75.00 on December 1, 2000; \$75.00 on January 2, 2000; and \$75.00 on February 1, 2000.

DOCKET NO. PENN 98-104

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7074002	4/9/97	75.313(c)(1)	\$500
7074003	4/9/97	75.311(d)	\$500

Gregory Golden **IS ORDERED** to pay a civil penalty of \$1,000 by paying \$250 on November 1, 1999; \$250 on December 1, 1999; \$250 on January 2, 2000; and \$250 on February 1, 2000.

All payments shall be made to MSHA and upon receipt of full payment for each case, each case will be **DISMISSED**.

David Barbour
Administrative Law Judge

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