# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 23, 2000

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| RAG CUMBERLAND RESOURCES LP, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. PENN 99-195-R |
| | : | Order No. 7075043; 4/9/99 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH, | : | Docket No. PENN 99-196-R |
| ADMINISTRATION (MSHA), | : | Citation No. 7075044; 4/9/99 |
| Respondent | : | |
| | : | Cumberland Mine |
| | : | Mine ID 36-05018 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 2000-134 |
| Petitioner | : | A. C. No. 36-05018-04187 |
| v. | : | |
| | : | Cumberland Mine |
| RAG CUMBERLAND RESOURCES | : | |
| CORPORATION, | : | |
| Respondent | : | |

## DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant;
Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Respondent.

Before: Judge Feldman

This contest proceeding, heard on April 25 through April 26, 2000, in Fairmont, West Virginia, arose as a consequence of an April 9, 1999, incident that occurred at RAG Cumberland Resources LP's (RAG's) Cumberland Mine.[1] The incident concerned a collision

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[1] The contestant has filed an unopposed motion to change the captioned contestant from RAG Cumberland Resources Corporation, formerly Cyprus Cumberland Resources, to RAG Cumberland Resources LP. The contestant's motion is granted. Reference herein to RAG Cumberland Resources LP (RAG) includes reference to all of the predecessor corporate entities.

at a mantrip station involving two incoming mantrips that were coupled together, with a cricket that was about to depart the station to travel into the mine. The mantrips were operated by Paul Taylor, an hourly employee, who, at the time of this incident, was completing his shift and exiting the mine. The incident was observed by Mine Safety and Health Administration (MSHA) Inspector James Conrad.

Upon witnessing this incident, Conrad issued 104(a) Citation No. 7075044 alleging a significant and substantial (S&S) violation of a safeguard that requires mantrips to be controlled within the limits of visibility. Conrad also issued 107(a) imminent danger Order No. 7075043 based on his belief that Paul Taylor had "a practice" of operating mantrips at unsafe speeds.

Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated . . . ." 30 U.S.C. § 802(j). Thus, a central issue in this proceeding is whether a miner's negligent act, once completed, can provide a basis for the issuance of an imminent danger order under section 107(a) of the Mine Act based on an MSHA inspector's belief that the miner's negligence will reoccur.

On July 7, 2000, the civil penalty proceeding concerning 104(a) Citation No. 7075044 docketed as PENN 2000-134 was assigned to me for disposition. The Secretary seeks to impose a civil penalty of $5,000 for Taylor's alleged failure to adequately control the mantrip. RAG has filed a motion to consolidate PENN 2000-134 with the contest proceeding in PENN 99-196-R challenging Citation No. 7075044. The Secretary does not oppose RAG's motion.
Good cause having been shown, the civil penalty matter in PENN 2000-134 **IS HEREBY CONSOLIDATED** with the related contest matter in PENN 99-196-R, and a decision on the merits of the Secretary's civil penalty proposal is contained herein.

The parties' proposed findings and conclusions have been considered in the disposition of this matter. For the reasons discussed below, 107(a) imminent danger Order No. 7075043 shall be vacated, and a reduced $2,400 civil penalty shall be imposed for 104(a) Citation No. 7075044.

## I. **Findings of Fact**

On October 25, 1993, MSHA Inspector Frank Terrett, who is now retired, witnessed a collision of haulage vehicles at the Cumberland Mine that was similar to the subject incident witnessed by Conrad on April 9, 1999. At the time of the October 25, 1993, incident, Terrett was sitting underground in a mantrip at the No. 3 Portal waiting to enter the mine to perform a routine inspection. The No. 3 Portal was a heavily traveled area where mantrips entered and exited the

mine. The maximum speed of a mantrip traveling on level ground is approximately 15 miles per hour. (Tr. 207).[2] While waiting to enter the mine, Terrett's mantrip was struck by an incoming mantrip that was traveling at an excessive speed. Terrett sustained a neck injury as a result of the collision that required him to "wear a neck brace for a week." (Tr. 48).

As a result of the October 25, 1993, incident, Terrett issued Notice to Provide Safeguard No. 3655679 for the Cumberland Mine. The safeguard stated that all mantrips shall be operated at speeds consistent with the conditions and the equipment used, and that mantrips shall be controlled so that they can be stopped within the limits of visibility. (Gov. Ex. 5).

These matters concern a similar mantrip incident that occurred at the Cumberland Mine at the beginning of the day shift on April 9, 1999, approximately 5½ years after the incident involving inspector Terrett. On the morning of April 9, 1999, an inspection party consisting of MSHA Inspector James Conrad, Michael Konosky, the company safety representative, and Lloyd Blair, the union safety representative, entered the mine using the elevator at the No. 6 Portal. (Tr. 78-80). They proceeded a short distance along the manway to the haulage track where they intended to obtain transportation into the mine. (Tr. 78; Joint Ex. 2). A second inspection party, consisting of MSHA Inspector Joe Hardy, company representative Pat Maher, and miner representative Randy Bedilion, followed behind Conrad's party. (Tr. 261, 265).

Both the No. 3 and No. 6 Portals are used to provide access into the mine. However, since 1966 the No. 6 Portal area, a relatively new area, has been the main portal where the majority of the miners enter the mine. (Tr. 146-7). The No. 6 Portal was designed so that mine vehicles would travel a loop off the main haulage in order to load and unload passengers. (Tr. 146-7, 403-4). The area around the No. 6 mantrip portal station where miners enter and exit track vehicles is relatively flat. (K. 9). To arrive at the station, vehicles traveled up a hill from the main haulage. (K. 9, 14). Unlike the No. 6 Portal, the No. 3 Portal, which was previously used as the primary entry to the mine, had no such loop, and mine vehicles loaded and unloaded right on the main haulage. (Tr. 147).

On April 9, 1999, a portion of the loop off the main haulage was closed in order to install additional support to the ribs (Tr. 215, 360; Joint Ex. 2). For that reason, mine vehicles traveled the short distance to and from the main haulage using track that approached the station as both incoming and outgoing track. *Id.*

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[2] References to the hearing transcript are designated by "Tr." followed by the page number. Michael Konosky was unable to attend the hearing due to a death in the family. The record was kept open so that Konosky could be deposed. Konosky was deposed on June 14, 2000. References to the Konosky deposition transcript are designated by "K." followed by the page number.

The No. 6 Portal is an area of high congestion during shift changes. For example, 100 miners work the midnight shift, and 125 miners are assigned to the day shift. (Tr. 235). Between 7:30 a.m. and 9:30 a.m., the crews on the departing midnight shift and the arriving day shift arrive at the station at staggered intervals to reduce the traffic in the No. 6 bottom area. (Tr. 104, 147, 271, 288). Thus, the Cumberland Mine uses a "hot seat" changeout system for its production crews, *i.e.*, the crew going off shift does not leave the producing section until the oncoming crew arrives at the section. (Tr. 104 107). The crews coming out of the mine arrive at the No. 6 bottom at different times depending on the length of time it takes to travel from their work areas. (Tr. 107; K. 10).

Mine inspectors generally wait until after 9:00 a.m. in the morning to enter the mine when congestion eases at the No. 6 Portal. (Tr. 109, 421). When Conrad, Konosky and Blair arrived at the No. 6 Portal at approximately 9:00 a.m. on April 9, 1999, there was no mine vehicle parked at the mantrip station. Konosky went to get a mine jeep or "cricket" from a battery charging station. (Tr. 78-9). Konosky returned with a cricket and pulled into the curve where mantrips load and unload. (K.10; Joint Ex. 2). He observed two mantrips coupled together coming up from the main haulage. (K. 10). He thought the mantrips might be traveling too fast so he flagged them with his light. (K. 11). When he did not get an immediate response, Konosky quickly exited from the cricket in case the mantrip collided with the cricket. (K. 11). Konosky first sought safety in a manhole before going to an area behind a set of concrete block piers at the entrance to the portal entry where Conrad and others were waiting. (Tr. 276; K. 11). The cricket was capable of rolling if bumped because Konosky had not set the brakes on the cricket. (K. 11).

The approaching mantrips were coupled together because the battery in the second mantrip was low. (Tr. 357). The front mantrip was operated by Paul Taylor, an hourly employee (Tr. 83-4, 209, 271). The other miners on the crew were in the front mantrip. (Tr. 358). A foreman, Joe Kushner, was in the operator's seat of the second mantrip. (Tr. 83-4, 209, 271). Although Kushner could apply the brakes on the second mantrip to slow the coupled vehicles, Kushner's vision was obscured by the front mantrip. Thus, the cricket could not be seen from the second mantrip. (Tr. 277, 364). In this regard, Conrad testified Kushner was not aware that Taylor had hit the jeep although Kushner apparently was aware that something had happened. (Tr. 160). Consequently, Kushner relied on Taylor to avoid colliding with other vehicles as their mantrips approached the station.

Konosky and union representatives Blair and Bedilion observed the mantrips as they entered the station. They all agreed the mantrips were going "too fast." (Tr. 263, 265, 276; K. 21; Gov. Ex. 12). For example, Konosky stated the mantrips were traveling "a little bit too fast," and, ". . . they were coming fast enough . . . . I flagged him and he kept on coming, so I got off the motor and got in the clear." (K. 11, 21). Blair testified Konosky told him that he knew the mantrips were not going to stop so he "bailed off" the jeep. (Tr. 205-06). Safety manager Robert Bohach also stated that Konosky told him he "bailed out" of the jeep. (Tr. 414). Bohach admitted Konosky probably did so to avoid injury. (Tr. 414-15).

As the mantrips reached the unloading point they contacted the cricket causing it to roll down the track. The cricket is approximately 10 feet long. Konosky estimated the cricket rolled one length, or approximately 10 feet. (K. 11). Blair and Bedilion's contemporaneous notes reflect the jeep traveled approximately 3 lengths, or 30 feet after being struck. (Tr. 178, 265, 292-93, 360-61, 405; Gov. Ex. 12). Conrad testified that the mantrip had ". . . struck [the jeep] violently . . . and Mr. Konosky had exited the jeep at a faster than normal speed in order to get off the jeep so he would not be in the vehicle whenever it was struck." (Tr. 80-81).

No one was injured as a result of the collision, and neither the cricket nor the mantrips sustained any damage. (Tr. 174, 209, 219, 405). The cricket is rated as a one ton vehicle. The coupled mantrips are considerably larger and are each rated as five ton vehicles. (Tr. 208-09). Given the disparity in the vehicles' size, apparently the miners riding with Taylor in the first mantrip, and Kushner riding in the second mantrip, were not immediately aware that the cricket had been struck until it was brought to their attention. (Tr. 161, 209-10, 363-4; Gov. Ex. 18, pp. 7-8).

As Taylor exited the mantrip, Conrad observed Konosky approach Taylor to admonish him about the collision. Conrad and Konosky are related by marriage. Their wives are sisters. Thus, Conrad and Konosky are brother-in-laws. (Tr. 200). Taylor responded to Konosky with profanity and said he was going home. (Tr. 81, 159, 219, 271; K. 14-15). Conrad, having observed this incident from behind the piers in the manway, was upset by Taylor's attitude towards his brother-in-law. (Tr. 82). Conrad testified:

> The men that were in the mantrip that was coming into the bottom that stuck the cricket, especially the operator, he jumped off the motor and proceeded [from] the mantrip. Mr. Konosky questioned [Taylor] as to what he was doing. And [Taylor], the operator, came back with obscenities and continued on towards the mine bottom.
>
> There was nobody that asked any questions as to whether anybody was hurt. Everybody piled out and continued on over to the elevator. Nobody was concerned with whether or not people were injured or whether or not anybody was involved or what condition they were in. There seemed to be no remorse at all as far as the actions they took or what had transpired, and they proceeded out. Because of the fact that I was very, very upset with the situation as far as the way the people responded, we traveled up the elevator to the surface and proceeded to go to the mine office.

(Tr. 81).

Conrad accompanied Konosky on the elevator to the surface and he asked Konosky if he would "take care of" the situation. (Tr. 81, K. 15). Conrad went to the mine foreman's office where he issued to Konosky an imminent danger order and an accompanying citation.

Imminent danger Order No. 7075043, was issued pursuant to Section 107(a) of the Act, 30 U.S.C. § 817(a). Under the heading "Condition or Practice" the Order alleged as follows:

> The following practice constitutes an imminent danger.
>
> Two man trip motors coupled together and being approached by the midnight crews off of the midnight shift approached the No. 6 shaft man trip station at an unusual high rate of speed where [people] regularly load and unload man trips. Several persons where standing around in the area at the time the man trip started around the corner where the cement piers are located and struck a jeep that was parked there. The two man-trip motors had approximately 10 people in them when they struck the jeep. (75.1403-7(f) citation issued) The two man-trip motors were not being operated at a safe speed when approaching the No. 6 man-trip station or were not being controlled so as to stop the motors within the limits of viability [sic] before striking another vehicle.

(Gov. Ex. 6).

The only basis for Conrad's issuance of imminent danger Order No. 7075043 was Taylor's operation of the mantrip on the morning of April 9, 1999. (Tr. 164-6, 184; Gov. Ex. 6). Conrad did not interview Taylor or Kushner, or obtain any information from mine management prior to issuing the 107(a) imminent danger order. (Tr. 159). In addition, Conrad had never seen Taylor operate a mantrip before. *Id.* Despite Conrad's lack of knowledge about Taylor's past behavior, Conrad concluded Taylor's failure to control the mantrip was representative of Taylor's normal manner of operation "because of the way [Taylor] responded in this situation." (Tr. 159, 165-6). Thus, Conrad's belief that Taylor had a practice of operating mantrips at excessive speeds was based on Taylor's lack of contrition and remorse. (81-85; 166).

On April 9, 1999, Conrad also issued Citation No. 7075044, pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a). It alleged an S&S violation of the provisions of 30 C.F.R. § 75.1403-7(f) concerning safeguards that was attributable to moderate negligence. Citation No. 7075044 stated:

> The following condition was a contributing factor to immanent (sic) danger Order No. 7075043 issued on April 9, 1999. Two man-trip motors that were coupled together approached the No. 6 air shaft man-trip station. They approached at a rate of speed that could not be controlled and/or stopped within the limits of viability (sic). The man-trips, with approximately 10 people in them from the midnight shift, stuck (sic) a jeep that was

> parked on the corner.
> There is no abetment (sic) time fixed to this citation since
> it is part of the order.

(Gov. Ex. 7).

Initially, Citation No. 7075044 did not cite the safeguard on which it was based. Conrad modified Citation No. 7075044 on April 22, 1999, to reflect the citation was based on a violation of safeguard No. 3655679 issued as a result of the October 25, 1993, incident involving MSHA Inspector Frank Terrett discussed above. (Gov. Ex. 7). Safeguard No. 3655679 states:

> The #112 Track mounted self-propelled personnel carrier was not being operated at a safe speed. The #112 personnel carrier was enroute to the bottom at the end of [the] shift with 10 persons aboard when it hit into mantrip parked at bottom for men to enter mine.
>
> This is a notice to provide safeguard that all trips including trailers and sleds shall be operated at speeds consistent with conditions and the equipment used, and shall be so controlled that they can be stopped within the limits of visibility.

(Gov. Ex. 5).

RAG filed its Notice of Contest for Citation No. 7075044 on May 10, 1999. Following RAG's contest, after consultation with the Secretary's counsel, on August 19, 1999, Conrad again modified Citation No. 7075044 to increase RAG's degree of negligence from moderate to high. (Tr. 169; Gov. Ex. 7). Conrad based the increase in culpability "upon further review of previous haulage incidents and accidents that have occurred at this mine and within the industry" (Gov. Ex. 7). Conrad testified he believed the history of haulage incidents at the Cumberland Mine appeared to be "a little bit higher than normal." (Tr. 110, 168). However, Conrad admitted he did not compare the history of haulage incidents at the Cumberland Mine with other mines. (Tr. 168). Notwithstanding the October 1993 incident involving Terrett, there is no evidence of a reportable injury from a haulage collision at the Cumberland Mine since Terrett's safeguard was issued in 1993. (Tr. 171-72; Gov. Ex. 9).

Despite MSHA's assertion that there was a continuing condition or practice of unsafe operation of mantrips, RAG was not cited for any violation of the subject safeguard during the intervening 5½ year period beginning with its issuance by Terrett on October 23, 1993, until the Taylor incident on April 9, 1999. (Joint Stip., Nos. 17-18). The absence of a relevant history of violations is particularly significant in view of MSHA's admitted continuing presence at the

Cumberland Mine during regular triple A quarterly inspections during which time inspectors would regularly ride track vehicles departing from portal stations.

Finally, three day disciplinary suspensions were imposed on Taylor and Kushner for their roles in the April 9, 1999, incident. (Tr. 364). Similarly, the miners responsible for the October 1993 incident involving Terrett were also suspended for three days shortly after the collision described in Terrett's safeguard. (Gov. Ex. 3). In the past, RAG has disciplined other miners for violation of its haulage safety policies, and it has posted safety messages on haulage practices for personnel training. (Tr. 398-401; Gov. Exs. 2, 3).

## II. **Further Findings and Conclusions**

### A. Imminent Danger Order No. Order No. 7075043

Imminent danger Order No. 7075043 was issued pursuant to section 107(a) of the Mine Act. Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area *until* an authorized representative of the Secretary determines that *such an imminent danger and the conditions or practices which caused such imminent danger no longer exist*. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under section 110. (Emphasis added).

As a threshold matter, neither the Secretary, nor the evidence, suggests RAG had a policy or practice of reckless mantrip operation, or otherwise encouraged or condoned such operation. In this regard, union representatives Blair, Riggi and Bedilion all testified they were regular operators of mantrips, and that they operated mantrips safely. (Tr. 221, 223 237, 247, 274, 297-98). Although Blair, Riggi and Bedilion opined some miners operate mantrips too fast, Conrad's testimony reflects the imminent danger order was directed exclusively at Taylor.

Assuming, solely for the sake of argument, that the aftermath of Taylor's mantrip operation, *i.e.*, a person's completed negligent act, can constitute an imminent danger, the plain statutory language requires the continued exposure of miners to a hazardous "condition or practice" in order to warrant the issuance of an imminent danger order. In this regard, section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a

coal or other mine which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated* . . . ." 30 U.S.C. § 802(j) (emphasis added).

In *Wyoming Fuel Company* , 14 FMSHRC 1282 (August 1992), the Commission stated the appropriate analysis for determining the validity of an imminent danger order is whether the preponderance of the evidence shows ". . . that the condition or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated." 14 FMSHRC at 1291. In *Wyoming Fuel*, the Commission noted that there must be a degree of imminence to support a 107(a) order noting that the word "imminent" is defined as "ready to take place: near at hand: impending . . .: hanging threateningly over one's head: menacingly near." *Id.* at 1290 *citing Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (October 1991).

In view of the potential imminence of danger, the Commission has repeatedly recognized that an inspector must be accorded considerable discretion in determining whether to issue a 107(a) withdrawal order because "an inspector must act with dispatch to eliminate conditions that create an imminent danger." 14 FMSHRC at 1291 (citations omitted). However, although far reaching, an inspector's discretion to issue 107(a) orders is not unfettered. Rather, the apparent imminence of danger is a prerequisite to empowering the inspector with the broad discretion to issue 107(a) withdrawal orders.

Here, even if we assume Taylor was inclined to strike other vehicles, the inescapable fact is that, at the time of the alleged imminent danger, Taylor had exited the mantrip to depart from the mine at the end of his shift. Taylor was not scheduled to return to the Cumberland Mine for at least 16 hours. Thus, at the time Conrad issued the imminent danger order at 8:40 a.m. on April 9, 1999, Taylor's alleged "practice" of recklessly operating mantrips posed a hazard to no one because Taylor had already exited the mine for the surface. The imminent danger was abated 50 minutes later at 9:30 a.m. after Taylor and Kushner were instructed about the safe operation of mantrips. (Gov. Ex. 6). However, there was no continuing threat to miners during the interim 50 minute period from 8:40 a.m. through 9:30 a.m. given Taylor's departure from the mine. Thus, Conrad's issuance of 107(a) Order No. 7075043 constituted an abuse of discretion.

The above discussion assumed, for the sake of argument, that Taylor's conduct was properly characterized as a "condition or practice." However, if a miner's negligent act, once completed, could provide the basis for an imminent danger solely on the assumption that his negligence will reoccur, virtually any violation of the Secretary's mandatory safety standards could be characterized as an imminent danger. Like the boy who cried wolf, such an approach trivializes the rationale for section 107(a), and, in so doing, undermines the Secretary's authority to issue imminent danger orders.

Finally, I do not question inspector Conrad's sincerity. In the heat of the moment, Conrad understandably was upset over Taylor's apparent lack of contrition, particularly in view of his brother-in-law's exposure to potential injury. However, it is difficult to understand why the Secretary, despite the benefit of hindsight, continues to adhere to her assertion that the circumstances in this case constitute a violation of section 107(a).[3] Accordingly, 107(a) imminent danger Order No. 7075043 shall be vacated.

B. 104(a) Citation No. 7075044

a. Fact of Violation

In *Southern Ohio Coal Company*, 14 FMSHRC 1 (January 1992), the Commission addressed the statutory and regulatory basis for the Secretary's general authority to issue safeguards pursuant to the criteria governing safeguards in sections 75.1403-2 through 751403-11. The Commission stated:

> A safeguard may be issued to minimize transportation hazards only in underground coal mines. An inspector's decision to issue a notice to provide safeguards must be based on his consideration of the specific conditions at the particular mine. The requirement that the inspector identify a specific transportation hazard at a mine before issuing a safeguard flows from the language of section 314(b), authorizing the issuance of a safeguard that is "adequate, in the judgment of an authorized representative of the Secretary," to minimize a transportation hazard. (Emphasis in original). Section 75.1403-1(a) further clarifies that consideration of the specific conditions giving rise to a hazard requires inspectors to issue safeguards on a mine-by-mine basis. Further, safeguards may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required as of a specified date. Section 75.1403-1(b). MSHA's current *Program Policy Manual* ("Manual") states that the criteria of sections 75.1403-2 through -11 are not mandatory standards:
>
>> It must be remembered that these criteria are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not covered by a

[3] The Secretary does not assert that RAG had "a practice" of operating mantrips at unsafe speeds. Rather, the thrust of the Secretary's case is that Taylor was the imminent danger. While the Secretary could have argued that Taylor's conduct constituted an unwarrantable failure warranting a 104(d) withdrawal order, there is no statutory authority under section 107(a) for designating an individual as an imminent danger.

> mandatory regulation, the authorized representative must issue a safeguard notice, allowing time to comply before a 104(a) citation can be issued. . . .

*Manual*, Volume 5, Part 75, pp. 125-26.

14 FMSHRC at 7 (footnote omitted).

An inspector's use of the safeguard provision is not limited by the statute, the regulations, or the *Policy Manual* to hazards that are "unique" or "peculiar" to a mine. *Id.* Rather, a safeguard is valid so long as it addresses specific conditions at a particular mine, regardless of whether similar safeguards are issued at other mines. *Id.* at 14.

104(a) Citation No. 7075044 alleges an S&S violation of the provisions of 30 C.F.R. § 75.1403-7(f) concerning safeguards. Citation No. 7075044 states:

> The following condition was a contributing factor to an immanent (sic) danger Order No. 7075043 issued on April 9, 1999. Two man trip motors that were coupled together approached the No. 6 air shaft man trip station. They approached *at a rate of speed that could not be controlled and/or stopped within the limits of viability* (sic). The man trips, with approximately 10 people in them from the midnight shift, stuck (sic) a jeep that was parked on the corner.
>
> There is no abetment (sic) time fixed to this citation since it is part of the order.

(Gov. Ex. 7) (emphasis added).

Initially, Citation No. 7075044 did not cite the safeguard on which it was based. As previously noted, Citation No. 7075044 was modified on April 22, 1999, to reflect the citation was based on a violation of safeguard No. 3655679 issued as a result of the October 25, 1993, incident involving inspector Terrett. (Gov. Ex. 7). Safeguard No. 3655679 states:

> The #112 Track mounted self propelled personnel carrier was not being operated at a safe speed. The #112 personnel carrier was enroute to the bottom at the end of [the] shift with 10 persons aboard when it hit into mantrip parked at bottom for men to enter mine.
>
> This is a notice to provide safeguard that all trips including trailers and sleds *shall be operated at speeds*

> *consistent with conditions and the equipment used, and shall be so controlled that they can be stopped within the limits of visibility.*

(Gov. Ex. 5) (emphasis added).

The thrust of the cited safeguard is that mine vehicles should be operated at speeds commensurate with the limits of visibility. Terrett's safeguard was issued as a consequence of the October 25, 1993, incident that occurred in the No. 3 Portal where the same haulage track was used for both incoming and outgoing mine vehicles. Similarly, the April 9, 1999, incident observed by Conrad occurred when the No. 6 Portal track temporarily was used for both incoming and outgoing traffic because incoming traffic was diverted as a consequence of rib maintenance in the incoming track entry. Obviously, an incoming vehicle approaching a station containing a parked vehicle must be operated in a controlled manner to avoid the hazards associated with a head-on collision. Taylor's failure to avoid contact by his two 5 ton rated mantrips with the considerably lighter cricket clearly constitutes a violation of the cited October 25, 1993, safeguard. Thus, the Secretary has prevailed on the issue of the fact of the violation cited in 104(a) Citation No. 7075044.

b. Significant and Substantial

A violation is properly designated as 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).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.,* 6 FMSHRC 1866, 1868 (August 1984).

Resolution of whether a particular violation of a mandatory safety standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Thus, consideration must be given to, both the time frame that a violative condition existed prior to the issuance of citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc*, 8 FMSHRC 8, 12 (January 1986).

Turning to the S&S *Mathies* criteria, the first element of Mathies is satisfied since, as noted above, Taylor's failure to control his mantrip constituted a violation of the cited safeguard. Furthermore, the collision of two five-ton vehicles with a stationary one ton-vehicle clearly exposes occupants of both vehicles, particulary occupants of the stationary lighter vehicle, to a measure of danger. Thus, the second element of *Mathies* is also met.

The remaining Mathies criteria require the Secretary to demonstrate, by a preponderance of the evidence, that there is a reasonable likelihood of serious injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.,* 18 FMSHRC 508 (April 1996). Common sense suggests that it is reasonably likely that the transfer of energy from moving, coupled, ten-ton rated mantrips to a stationary one-ton cricket, even at a relatively slow speed, will result in serious musculoskeletal injury to the neck, back or limbs of occupants in the lighter, stationary vehicle. Konosky's own testimony reflects he "bailed out" of the cricket in fear for his safety.

The likelihood of serious injury is further reflected by the approximate 30 feet distance the cricket traveled after it was struck by the mantrip. Finally, the neck injuries sustained by Terrett as a result of the October 25, 1993, incident demonstrate the likelihood that serious injury will result from the collision hazard contributed to by the subject safeguard violation. Accordingly, the Secretary's S&S designation in 104(a) Citation No. 7075044 shall be affirmed.

## III. **Civil Penalty**

It is well settled that the Commission assesses civil penalties *de novo* and is not bound by the Secretary's proposed assessments. *Topper Coal Co.,* 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291, (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). In determining the appropriate civil penalty to be assessed, Commission Rule 30,

29 C.F.R. § 2700.30, requires the Judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

a. Size of Operator and Ability to Remain in Business

The parties have stipulated that RAG and its affiliated companies produced over 78.9 million tons of bituminous coal, 6.3 million tons of which was produced at the Cumberland Mine. (Joint Stip.). Thus, RAG is a large mine operator and the imposition of a civil penalty in this matter will not affect RAG's ability to remain in business.

b. Negligence

With respect to negligence, it is noteworthy that the safeguard violation cited in 104(a) Citation No. 7075044 was initially attributed to RAG's moderate negligence. The citation was modified to reflect culpability of high negligence in contemplation of litigation after RAG contested the Citation. While the Secretary may modify a citation after it is contested, the Secretary bears the burden of demonstrating the modification is supported by the evidence. Here Conrad testified the increase in the degree of the operator's negligence was based on the history of haulage accidents at the Cumberland Mine that appeared to be "a little bit higher than normal." However, Conrad conceded he did not compare the history of haulage accidents at the Cumberland Mine with other mines. Moreover, the history of haulage incidents at the Cumberland mine does not reflect a significant history of accidents attributable to excessive speed.

The Mine Act is a strict liability statute. Thus, operators are strictly liable for their employees' violative conduct. *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"*). Thus, while it is true that hourly employee Taylor's conduct, for which a three day suspension was imposed, evidenced a significant degree of negligence given the two-way nature of the track, and the high traffic in the vicinity of the No. 6 Portal, it does not necessarily follow that Taylor's negligence must be imputed to RAG.

Once liability is determined, the negligent actions of an operator's "agent"[5] are imputable to the operator for the purpose of assessing civil penalties. *Mettiki Coal Corporation*, 13 FMSHRC 760, 772 (May 1991); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98; (February 1991); *SOCCO*, 4 FMSHRC at 1463-64. 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). "Rather, the operator's supervision, training, and disciplining of [rank-and-file] miners is relevant." *Id. citing SOCCO*, 4 FMSHRC at 1464; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988).

There is no evidence that Taylor was serving in a management capacity at the time of the April 9, 1999, incident. Moreover, although foreman Kushner was operating the second mantrip that was coupled with Taylor's mantrip, Conrad admitted that Kushner could not see the cricket as the mantirps approached the station because Kushner's vision was obscured. In fact, Conrad concluded Kushner was not even aware of the collision although he knew "something" had happened. Since Kushner could not have anticipated the collision, or known that Taylor was not in control of the mantrip, there is no basis for imputing Taylor's negligence based on inadequate supervision.

Moreover, there is no evidence of inadequate training or discipline of RAG's miners in view of Taylor's three day suspension, and RAG's history of posting safety notices on the proper methods of operating haulage vehicles. Although the Secretary presented testimony by safety committeemen that Taylor purportedly had a tendency of operating mantrips, that have a maximum speed of approximately 15 miles an hour on level ground, "too fast," there is no evidence of any history of haulage accidents or relevant citations involving Taylor. Accordingly, there is no basis for imputing Taylor's negligence to RAG. Consequently, a low degree of negligence is the appropriate degree of negligence that should be attributable to RAG for the cited safeguard violation.

c. Gravity

The gravity penalty criteria contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) *citing Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, it is reasonably likely that serious injury will occur to the occupants of haulage vehicles if incoming mantrips collide with stationary vehicles waiting to depart portal stations. Consequently, the cited violation is serious in gravity.

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[5] 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).

d. History of Previous Violations

During the two year period preceding the subject violation from April 9, 1997, through April 8, 1999, approximately 600 violations were cited at the Cumberland Mine. Of these 600 violations, approximately 60 violations were for safeguard infractions of section 75.1403. The majority of these safeguard violations were designated as non-S&S. In applying the history of prior violations penalty criterion, the Commission has noted that it is the operator's general history of violations, not just its history of similar violations, that should be considered. *Cantera Green*, 22 FMSHRC 616, 623 (May 2000) (citations omitted). The history of approximately 600 violations cited at the Cumberland Mine during the approximate 24 month period preceding the issuance of the subject 104(a) citation on April 9, 1999, constitutes an extensive violative history.

e. Good Faith Efforts at Abatement

There is no evidence to suggest that RAG did not timely abate the cited safeguard violation.

In summary, invalidating the alleged imminent danger condition, and lowering the degree of negligence attributable to RAG, are factors that justify a reduction in civil penalty. However, the history of excessive violations at the Cumberland Mine is an aggravating factor. Thus, on balance, the Secretary's proposed $5,000 civil penalty shall be reduced to $2,400.

## ORDER

Accordingly, **IT IS ORDERED** that 107(a) imminent danger Order No. 7075043 **IS VACATED**. Consequently, the contest in Docket No. PENN 99-195-R **IS GRANTED**.

**IT IS FURTHER ORDERED** 104(a) Citation No. 7075044 **IS MODIFIED** to reflect the degree of negligence associated with the cited violation is low. **IT IS FURTHER ORDERED** that 104(a) Citation No. 7075044, as modified, **IS AFFIRMED**. Consequently, the contest in Docket No. PENN 99-196-R **IS DENIED**.

**IT IS FURTHER ORDERED** that RAG Cumberland Resources LP **SHALL PAY** a civil penalty of $2,400 in satisfaction of 104(a) Citation No. 7075044. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the $2,400 civil penalty, **IT IS ORDERED** that the contest proceedings in Docket Nos. PENN 99-195-R and PENN 99-196-R, and the civil penalty matter in Docket No. PENN 2000-134, **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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