FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 22, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 93-343
	:	A.C. No. 42-01697-03648
	:	
	:	Docket No. WEST 93-344
v.	:	A.C. No. 42-01697-03649
	:	
	:	Docket No. WEST 93-399
	:	A.C. No. 42-01697-03654
C.W. MINING COMPANY, Respondent	:	
	:	Docket No. WEST 93-491
	:	A.C. No. 42-01697-03655
	:	
	:	Docket No. WEST 93-517
	:	A.C. No. 42-01697-03656
	:	
	:	Bear Canyon No. 1

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA"), charges Respondent C.W. Mining Company ("CWM") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq. (the "Act").

After a hearing on the merits was held in Salt Lake City, Utah, the parties submitted post-trial briefs.

SETTLEMENTS IN WEST 93-343

The parties reached an amicable settlement as to certain citations and a motion to approve a partial settlement and order payment was filed.

The settlement motion is formalized in this decision.

The agreement provides, in part, as follows:

Citation Nos. 3582877, 3582905, and 3582919: There is insufficient evidence to support these citations, and the Secretary moved for their dismissal.

Citation No. 3582910: The operator stipulates to this violation and agrees to pay the proposed penalty of $50.00.

Citation No. 3582904: The operator stipulates that this violation occurred and that it was "significant and substantial"; the Secretary further determined that the negligence of the operator was less than originally assessed. The amended penalty is $345.00.

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved and such approval is formalized in the Order of this decision.

Stipulation

In connection with the issues, the parties further stipulated as follows:

1. CWM is engaged in mining and selling bituminous coal in the United States and its mining operations affect interstate commerce.

2. CWM is the owner and operator of Bear Canyon No. 1 Mine, MSHA I.D. No. 42-01697.

3. CWM is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and places stated therein, and may be admitted into evidence for the purpose of establishing their

issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect CWM's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. CWM is a small mine operator with 353,377 tons of production in 1992.

FURTHER CITATIONS IN WEST 93-343

Citation No. 3582908

The above citation, issued under Section 104(a) of the Act, alleges a violation of 30 C.F.R. ' 75.316.

The citation reads as follows:

> The current approved (Oct. 18, 1990) ventilation system for methane and dust control plan was not being complied with on the north mains [MMU 002] working section.
>
> The water spray system on the continuous miner was not maintained. When tested, 10 of the 28 water sprays did not function, exceeding the approved 90 percent that must be operative. [Page 9, Item 5.]
>
> The machine was not in use but available for use.

Discussion

The requirements for ventilation, methane, and dust control plans in contest are now recodified at ' 75.370(a)(1).

CWM asserts as a preliminary matter that Citation No. 3582908 should be vacated because the cited code (' 75.316) was not in effect at the time of the inspection.

CWM states that Citation No. 3582908 alleges the company violated 30 C.F.R. ' 75.316. The citation was issued on October 29, 1992. However, the July 1, 1992, edition of 30 C.F.R. parts 1 to 199, skips from ' 75.313 to ' 75.321 (pages 517-518). There was no ' 75.316. The next edition, which was revised as of July 1, 1993, skips from ' 75.315 to ' 75.320 (pp. 541-542). There still was no ' 75.316.

CWM correctly states the changes in the Code of Federal Regulations in 1992. Section 75.316 no longer appeared as such. However, it was still a requirement as it had been recodified in Section 75.370 (pp. 531, 1992 C.F.R.). Ventilation plans were required.

CWM had a ventilation plan and was fairly apprised of the ventilation requirements imposed by ' 75.370. In sum, citing an incorrect regulation does not vitiate otherwise valid citations. Accordingly, the preliminary motion to vacate Citation No. 3582908 is again **DENIED**.

Additional Evidence as to Citation No. 3582908

Inspector Gibson testified the methane and dust control plan for the continuous miner was not maintained. Upon being tested, it was found that 10 of the 28 water sprays failed to function. This failure rate exceeded the permitted ratio. After testing the equipment, Inspector Gibson circled the plugged sprays in red on Exhibit P-7. He further explained the importance of the spray system. It serves to control respirable dust, to cool the cutting bits on the rotating drum, and to aid in preventing a coal dust or methane ignition. (Tr. 40, 41).

On the merits, CWM states there was no violation of the plan because the machine was out of service and not available for use. On this credibility issue I credit Inspector Gibson's testimony that the equipment was available for use. It is uncontroverted that the miner was parked in a crosscut on the working section and it was not tagged out.

A dispute between the witnesses exists as to whether the continuous miner's power and lights were on and whether the panel

covers were off (i.e., was the machine energized?). On this issue I credit Inspector Gibson's conclusion because it was supported by his inspection notes recorded that day.

Further, the evidence is also confirmed by the statements made to the Inspector by Mine Foreman Defa. Mr. Defa asked the Inspector to check permissibility on the miner while the roof drill was being repaired. Once the roof drill was repaired and supports installed, they could cut through the crosscuts. Obviously, the continuous miner was to be used for this effort. (Tr. 35, 36).

The Secretary's evidence establishes a violation. CWM's evidence is insufficient to support a contrary view.

Citation No. 3582908 should be affirmed and a civil penalty assessed.

Civil Penalties

Section 110(i) of the Act authorizes the Commission to assess civil penalties. The evidence relating to certain of the criteria are common to all the citations here. These include the appropriateness of the penalties to the size of the business of the operator charged. The assessed penalties in these cases are also appropriate in relation to CWM's coal production in 1991.

Further, the assessed penalties will not affect CWM's ability to continue in business.

Finally, CWM is entitled to statutory good faith for attempting to achieve rapid compliance after notification of a violation.

The remaining criteria of prior history, negligence, and gravity will be considered as they relate to the individual citations.

Concerning **Citation No. 3582908**, the operator's history indicates there were 14 prior violations under former Section 75.316 in the previous two years.

The operator's negligence is considered "moderate" because the operator did not know that certain sprays were not function-

ing. (Tr. 47). However, a routine check would have disclosed the defective sprays.

The gravity should be rated "moderate." However, the Inspector did not find this violation was "significant and substantial."

Considering all the statutory criteria, I conclude that the proposed penalty of $50.00 is appropriate.

Citation No. 3582909

The above citation, issued under Section 104(a) of the Act, alleged a violation of ' 75.1107-16(b). The Secretary moved to amend the citation to allege a violation of ' 75.1100-3. The motion to amend was granted over CWM's objection.

The citation reads as follows:

> The water-type fire suppression system being used on the Lee Norse continuous miner in the north mains working section was not being maintained. When tested, three of the fire nozzles did not function.
>
> The continuous miner was not being used but was available for use. The section was very wet.

The regulation reads as follows:

> ' **75.1100-3 Condition and examination of firefighting equipment.**
>
> All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination tag attached to the extinguisher.

Threshold Issues

CWM renews its objection to the Secretary's amendment to his citation.

Cyprus Empire, 12 FMSHRC 911, 916 (May 1990), was cited as authority for permitting such an amendment. However, CWM asserts Cyprus is not controlling because Cyprus admitted it was not prejudiced by the amendment.

In arguing its position, CWM asserts it was prejudiced because the evidence to establish a violation of ' 75.1100-16(B) was substantially different from that required under ' 75.1100-3.

CWM's arguments are without merit. The underlying facts did not change; the change was in the Secretary's legal theory of the case. No prejudice has been demonstrated by the operator.

It is well established that leave to amend "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182, 82 S.Ct. 227, 9 L.Ed. 222 (1962); Rule 15(a), FRCP.

On the merits involving Citation 3582909, CWM further argues the continuous miner had been removed from service. However, this is a renewal of the argument made in connection with Citation No. 3582908. The same continuous miner was involved and the same ruling is appropriate.

The evidence shows that when Inspector Gibson inspected the continuous miner, he also inspected the fire suppression system and observed that three fire nozzles were "either partly working or not working at all." (Tr. 53).

At the hearing, Inspector Gibson explained that the fire suppression system on the continuous miner is used "to sequester the fire or put the fire out and/or hopefully prevent it from spreading beyond the machine to the coal ribs, coal floor." (Tr. 53). Further, "[t]he nozzles are located at locations [on the miner] that would produce heat, such as the electrical control boxes, main controller." If three of the fire nozzles are plugged up, a fire hazard may result and a fire could occur on the machine. (Tr. 54)

Inspector Gibson observed accumulations on the machine around the tram motor, the cutter control box and in the front compartment. The accumulations were six inches deep in places. In addition, the inoperative nozzles were near the equipment with the accumulations covering it. Further, the tram motor and cutter control motors would also have been running hotter with accumulations of coal dust covering them. In addition, water from dust suppression system was not flowing due to the plugged nozzles. (Tr. 54-59).

On the credible evidence, Citation No. 3582909 should be affirmed and a civil penalty assessed.

Civil Penalties

The assessed violation history report indicates no prior violations of Section 75.1100-3 occurred during the two years prior to this citation. (Ex. P-1).

The operator's negligence was moderate because the miner was available for use, but it was not in use. (Tr. 61).

Concerning gravity, the MSHA Inspector did not find this violation to be of a "significant and substantial" nature. The gravity appears to be low.

Considering all of the statutory penalty criteria, a civil penalty of $50 is appropriate for Citation 3582909.

Docket No WEST 93-344

Citation No. 3852372

The above citation, issued under Section 104(a) of the Act, alleges a violation of ' 75.1702.

The regulation reads as follows:

> ' **75.1702 Smoking; prohibition.**
>
> [STATUTORY PROVISIONS]
>
> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such

The citation reads as follows:

> The weekly examination for smoker articles was made in the bleeder section kitchen on 1/03/93. The check was not made before miners entered the mine.
>
> There were no violations indicated on the report conducted in the kitchen.

Paragraph 2 of the operator's smoking prohibition program (Ex. P-14) provides:

> All persons entering the mine shall be subject to a systematic search for smoking articles. The searches shall be conducted at least weekly, at irregular intervals not to exceed seven (7) days.

Discussion

According to MSHA Inspector Marietti, the check for the smoking materials must be made at the portal or in the proximity to where the miners are "entering" the mine. (Tr. 112). This analysis is based on the Inspector's experience with smoker's checks at the mines he has worked in, his knowledge of how the checks are conducted at other mines, and MSHA's policy. (Tr. 99, 102, 110).

Mr. Defa, CWM's foreman, explained why the check is occasionally made in the kitchen area. This is the first place workers go when they enter the underground area. If a miner wanted to hide or conceal his smoker's articles and he knew that the checks were always made on the surface, he could hide them on the mantrip before the check, remove them when he exited the mantrip at the kitchen area, and have them underground without

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> practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

detection. By changing the time and location of the checks, the operator discourages such attempts and more fully conforms to the require- ment of the law, which is to make certain that no one carries such articles underground. By conducting the checks at the first point the miners reach underground, in the event a miner did take such articles underground either by mistake or design, the arti- cles could be removed before an opportunity to use them would arise.

Mr. Defa's testimony that other MSHA inspectors agreed with CWM's interpretation of the regulation and of its own plan, is supported by CWM's lack of violations. Further, no citation has ever been issued to CWM for conducting the searches at the kitchen area. (Tr. 108, 518).

CWM's reasons for conducting searches in the kitchen are commendable. However, this case requires a ruling on the issues as presented. CWM's program, as noted above, simply states that all persons entering the mine shall be subject to the search.

The regulations do not define the term "enter." However, the common meaning of "enter" is 1. "to go or come in; 2. to come or gain admission into a group; join. Webster's New Collegiate Dictionary, 1979 at 377.

This ordinary meaning of "enter" causes the Judge to con- clude that examination for smoker articles should be made where the workers "enter" the mine. Examinations for such articles at such places as the kitchen are laudable but they do not comply with the smoking prohibition program.

Citation No. 3852372 should be affirmed and a penalty assessed.

Civil Penalty

The assessed violation history report indicates there were no prior violations of the cited section in the two-year period prior to the issuance of this citation.

The operator's negligence was "low" because most of the smoker's checks were made on the surface and none of the under- ground checks produced any smoker's articles. (Tr. 106).

The Inspector did not consider this violation to be of a "significant and substantial" nature. The operator's gravity should be considered "low."

A civil penalty of $10.00 is appropriate.

Docket No. WEST 93-399

Citation Nos. 3852375, 3852376, 3852377

These citations, issued under Section 104(a) of the Act, allege violations of three separate but related regulations. All of the citations relate to a bathhouse trailer fire on December 26, 1992.

The violations are for a failure to report, failure to preserve evidence, and failure to file an MSHA form.

Citation No. 3852375

This citation alleges CWM violated 30 C.F.R. ' 50.10.

The citation reads:

> The mine experienced a reportable mine fire on 12/26/92 between 1 a.m. and 2 a.m. A bathhouse trailer on the surface burnt [sic] to the ground and partially burnt [sic] an adjacent wall and electrical system in the shop.
> The mine operator did not immediately or did they ever notify MSHA until they applied for bathhouse waiver received in District 9 on January 4, 1993.

The regulation reads as follows:

> ' **50.10 Immediate notification.**
>
> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Washington, DC, by telephone, toll-free at 202-783-5582.

Citation No. 3852376

This citation alleges a violation of 30 C.F.R. ' 50.12.

The citation reads:

> The mine experienced a mine fire on December 26, between 12:01 and 1 a.m. The fire completely destroyed a bathhouse trailer and did extensive damage to an adjacent shop wall and electrical equipment mounted on it. The trailer was scooped into a pile about 50 feet from accident site and the damaged electrical equipment was taken down and discarded.

Citation No. 3852377

This citation alleges a violation of 30 C.F.R. ' 50.20-1.

The citation reads:

The regulation reads as follows:

> ' **50.12 Preservation of evidence.**
>
> Unless granted permission by an MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

Regulation 30 C.F.R. ' 50.20-1 contains general instructions for completing and filing MSHA Form 7000-1.

There was no MSHA Accident Form 7000-1 submitted within 10 days for a trailer bathhouse fire that occurred on December 26, 1992, between 12:01 a.m. and 1 a.m.

Discussion of the Evidence

The central issue is whether a reportable fire occurred. If the fire was reportable, then the operator must immediately notify MSHA, preserve the evidence, and submit a Form 7000-1 report to MSHA.

In order to resolve the issues, it is necessary to consider the uncontroverted evidence and the definition of an "accident" as defined in 30 C.F.R. ' 50.2.

The uncontroverted evidence shows that a fire occurred on December 26, 1992. CWM did not immediately notify MSHA of the fire, did not preserve the evidence, nor did it submit a Form 7000-1 to MSHA. (Tr. 116, 117, 126).

MSHA has no policy other than the text of Section 50.10 (supra, concerning notification). (Tr. 117).

MSHA Inspector Marietti estimated the fire burned for more than 30 minutes considering the appearance and extent of the remains. He also volunteered it had been "quite a blaze." (Tr. 126).

Further Discussion

CWM contends that this was not a "mine" fire, in view of the definition of a mine as contained in 30 C.F.R. ' 50.2. Specifically, CWM states the showerhouse was used by employees to shower and change clothes. Since it was not used to extract coal from its natural deposit or used in the milling of coal, or in preparing the coal therefore the showerhouse was not a "mine."

CWM's position lacks merit; it has long been held that a "coal or other mine" is not limited to an area of land from which minerals are extracted but, as is noted, it also includes facilities, equipment, machines, tools, and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals. See, e.g., Donovan v.

Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982). In determining coverage, it is necessary to give effect to Congress's clear intention in the Mine Act, discerned from "text, structure, and legislative history." Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989). Congress determined to regulate all mining activity. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and ... doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

This broad interpretation has been adopted by the courts. See, e.g., Carolina Stalite Co., supra at 1554. The definition of "coal or other mine" has been applied to a broad variety of facilities that are not "an area of land from which minerals are extracted." See, e.g., Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981) (operator loaded previously extracted and prepared coal onto railroad cars for transportation); Stoudt's Ferry, 602 F.2d 589 (3d Cir. 1979) (operator separated sand and gravel from material that has been dredged from a river by the Commonwealth of Pennsylvania); Carolina Stalite, supra at 1547 (D.C. Cir. 1984) (operator heated previously mined slate in a rotary kiln to create a lightweight material used in making concrete blocks.

CWM also asserts the three citations should be vacated because they are all premised on the requirement of an "accident" as defined in Section 50.2. This section reads, in part, that an (h) accident means (6) an unplanned mine fire not extinguished within 30 minutes of discovery. (Tr. 118). CWM contends this fire occurred on a holiday; it was not observed until it was cold. Therefore, it fails to meet the definition contained in (h)(6).

On this issue, I credit the testimony of Inspector Marietti. He testified the bathhouse, one wall of the shop on the outside and the inside, all of the wiring on the wall, and the electrical components had burned. (Tr. 118, 119). (Exhibit P-8 contains the investigation concerning the fire.)

The electrical panel conduit and wire on the inside wall were "wiped out." (Tr. 122-124).

That portion of the definition in (h)(6) reciting the element of "not extinguished within 30 minutes" is merely a measure

of the intensity of the fire. That intensity is established by the Inspector's opinion that the fire was "quite a blaze" and his opinion that it would have burned for longer than 30 minutes. (Tr. 126). Further, the fire would have taken longer than 30 minutes to extinguish due to the operator's primitive fire-fighting equipment. In addition, the closest volunteer fire department was in Huntington, Utah, nine miles away. (Tr. 128-130, 161).

A fire that burns longer than 30 minutes is a large fire and serious enough to call for an MSHA investigation. To say that such a fire is not reportable because it was not discovered until after it had extinguished itself, is not warranted. Such an interpretation would encourage operators not to "discover" a fire at all in some circumstances if the operator does not want MSHA to investigate the causes of the fire.

This fire was also unplanned within the meaning of the regulation. The verb "plan" is defined as: 1. to arrange the parts of: DESIGN; 2. to devise or project the realization or an achievement of <~ a program; 3. to have in mind: intent. There is no evidence or inference that the fire was anything but unplanned.

Inspector Marietti could not determine the cause of the fire because the remains of the 12-foot by 60-foot aluminum type mobile home structure had been pushed into a 12-foot by 30-foot pile. (Tr. 120-122, 125, 126).

In connection with these three citations, the evidence establishes that CWM failed to immediately notify MSHA of the fire, altered the accident site, and failed to submit a Form 7000-1.

Citation Nos. 3852375, 3852376, and 3852377 should be affirmed and civil penalties assessed.

Civil Penalties

Considering the remaining statutory penalty criteria, the record establishes the operator had no violations of the regulations during the two years before these citations were issued.

Webster's New Collegiate Dictionary, 1979 at 870.

CWM was moderately negligent since it knew or should have known it was required to report the fire and preserve the scene. CWM's actions prevented MSHA from investigating the accident to determine what preventive measures should be taken to avoid a fire in the future.

Gravity should be considered "low" in connection with the citations involving a failure to report. Gravity is otherwise "moderate."

Considering the statutory criteria, I believe the following penalties are appropriate:

Citation No. 3852375: reportable fire; MSHA not notified - $200.00.

Citation No. 3852376; evidence from fire not preserved - $300.00.

Citation No. 3852377; Form 7000-1 not filed - $100.00.

Docket No. WEST 93-491

Citation No. 3583053

This citation, originally issued under Section 104(a) of the Act, was later modified to a Section 104(g) citation.

The citation alleges a violation of 30 C.F.R. ' 48.11(e).

The citation reads:

The regulation reads as follows:

> ' **48.11 Hazard training.**
>
> (e) Miners subject to hazard training shall be accompanied at all times while underground by an experienced miner, as defined in ' 48.2 (b) (Definition of miner) of this subpart A.

> The operator was not complying with the approved training plan for Hazard Training. Two vendors were observed driving their diesel truck into the mine and they were not accompanied by an experienced miner. There was no one accompanying them. The two did have the required training prior to going underground. The truck met the requirement of 30 C.F.R.

Evidence

John B. Plant of Duchesne, Utah, one of CWM's vendors is a welder and machinist for Uinta Machine and Manufacturing. The majority of Uinta's work is for coal mines. (Tr. 388, 389).

On February 3, 1993, they arrived at CWM to do some welding machine work on one of their miners. (Tr. 391).

They talked to Inspector Marietti who inquired about their mine certification, service training, and respirator training. The Inspector doubted if he (Plant) and his partner (now deceased) were properly certified to go into the mine. This resulted in some debate; some time was then spent in respirator training and surface training. Also, the Uinta vehicle was checked and cleaned several times. (Tr. 394, 395).

Subsequently, the two vendors proceeded into the portal in their vehicle. Company representative Robert Brown said they were going to the shop 500 feet underground. The Inspector indicated the company's training plan required vendors to have hazard training and they must be accompanied by an experienced miner. (Tr. 165, Ex. P-15). The Inspector then withdrew the vendors from the mine. (Tr. 165, 167; Ex. P-15). The Inspector modified the 104(a) citation to a 104(g)(1) order. (Tr. 170).

CWM contends it complied with the provisions of its plan in two respects. Specifically, when the vendors entered the mine in their vehicle, they followed the vehicle of CWM's Robert Brown. (The entryway was 20 feet wide, curved, and there were blind corners. Tr. 574, 578). Another vehicle could have pulled out between the two trucks as the lead vehicle was 50 to 100 feet in front to the vendors' vehicle. The shop itself was 500 to 800 feet underground. (Tr. 570-578). In addition, there was no way for Mr. Brown to verbally communicate from his truck to the vendors' truck following him. (Tr. 600).

In this situation, the facts establish that Mr. Brown was not "accompanying" the vendors. "Accompany" means to go with or attend as an associate or companion. Webster's New Collegiate Dictionary (1979) at 7. The vendors could hardly be said to accompany an experienced miner when they were in a different vehicle and 50 to 100 feet away.

The second argument by CWM focuses on the testimony of vendor Robert Plant. He testified that they were accompanied by an experienced miner, namely, CWM employee Israel Peterson. (Tr. 395, 396). Mr. Peterson was allegedly sitting between the two men on some hard hats and coveralls. (Tr, 414).

Inspector Marietti denies such a scenario; he testified he would certainly have seen a third person sitting in the truck. (Tr. 743). Mr. Robert Brown testified he did not recall that Mr. Peterson was in the truck. (Tr. 577).

It appears Mr. Plant was mistaken about the facts: If Mr. Peterson had been in the truck, Inspector Marietti would not have issued his order. If Mr. Marietti were mistaken, Mr. Defa would have likely raised the issue at the scene that Mr. Peterson was in the truck. However, Mr. Defa did not raise that point.

Further undermining Mr. Plant's version of this incident is the fact that if it were true, Mr. Brown would have no reason to drive his vehicle into the mine in front of the vendors to go underground. (Tr. 578).

In sum, the credible evidence establishes that the vendors were not accompanied underground by an experienced miner.

Accordingly, Citation No. 3583053 should be affirmed and a penalty assessed.

Civil Penalty Criteria

The assessed violation history report indicates no violations occurred during the two years before this citation was issued.

The operator's negligence should be considered "moderate" because CWM gave the vendors some training for underground activities.

Inspector Marietti did not find this violation to be of a "significant and substantial" nature but he considered it serious enough to immediately withdraw the vendors from the mine.

A civil penalty of $200.00 is appropriate for the violation of Citation No. 3583053.

Docket No. WEST 93-517

Citation Nos. 3583044 and 3583050

The above citations issued under ' 104(a) of the Act are factually similar and allege violations of 30 C.F.R. ' 370(a)(1).

Citation No. 3583044 reads:

> The approved ventilation plan was not being complied with in the Main North Return on the inby side of No. 27 crosscut overcast. There were three 4' x 8' x 1/2" plywood panels over the opening regulating the air from the idle Main North Entries. The Plywood was not treated to make them incombustible. The area has been idle for about one month. The area was clean and well-rock dusted. There were no ignition sources.

Citation No. 3583050 reads:

> The approved ventilation plan was not being complied with. The lower seam regulator doors were 5/8" x 4' x 7' plywood. They were not constructed or coated with incombustible material. The area was well rock-dusted and there were no ignition sources in the area.

The relevant portion of the ventilation plan adopted by CMW reads:

> All exposed wood in the construction of any ventilation control shall be coated with an

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This regulation deals with ventilation, methane, and dust control plans. See Citation No. 3582908, supra, p. 3, this decision.

MSHA-accepted fire retardant sealant. (Ex. P-9, p. 6, **&** 5).

Inspector Marietti observed two wooden panels. One was in the main north return and another was in the return from the lower seam mine to the upper seam return. The wooden panels were partly covered with a silver-looking paint. (Tr. 203, 220).

CWM's evidence shows the doors had been coated with accepted MSHA coating in 1985 and 1986. Mr. Defa was the one who coated the doors when they were originally installed. (Tr. 646). Although Mr. Defa no longer had the container or specifications from the material used seven or eight years previously at the mine so that he could "prove" to Mr. Marietti that the material was MSHA-accepted, he was able to subsequently obtain that information from his supplier. The specifications were introduced at the hearing. (Ex. R-4). The doors were "coated with an MSHA-accepted fire retardant sealant."

As Mr. Defa further explained, the sealant soaks into the wood and if subjected to heat, it would expand to fill any chips or small areas not covered. (Tr. 654).

I find Mr. Defa's testimony on this point to be credible. His testimony is essentially uncontroverted.

The Judge is aware of the uncontroverted observation by Inspector Marietti that "the boards were water-soaked for some reason or another; they weren't completely covered with this silver looking paint." (Tr. 203). Further, "there was exposed wood where the coating had worn away." (Tr. 225).

In weighing the total evidence, I conclude that Inspector Marietti's observation establishes more of a situation where CWM failed to fully maintain its ventilation control. This citation does not deal with maintenance.

In sum, the Secretary failed to prove that CWM violated its ventilation plan.

Accordingly, Citation Nos. 3583044 and 3583050 should be vacated.

Citation No. 3851921

The above citation alleges a violation of 30 C.F.R.

' 75.1403-10(l).

The citation reads:

> The audible alarm did not operate on the John Deere No. 1 tractor that is used in the east bleeder section, MMU006.

On February 10, 1993, Inspector Marietti inspected the John Deere No. 12 tractor in the east bleeder section. He and Mr. Defa found the horn did not work. Mr. Defa told the Inspector that the tractor was out of commission because its tie rods were broken; the rods were lying on the ground. The Inspector did not issue a citation that day.

The following day, February 11, 1993, Inspector Marietti returned to the area and determined the vehicle's tie rods had been repaired. He determined the rods had been repaired by climbing on the tractor and testing the steering wheel. (Tr. 235). When Mr. Defa could not get the horn to operate (Tr. 227), Inspector Marietti issued Citation No. 3851921 on February 11, 1993.

The citation was abated on February 24, 1993, when the horn button was pushed; at that time the horn did sound. (Tr. 229).

Inspector Marietti explained that the instant citation was issued pursuant to a safeguard dated April 23, 1982. The safeguard was written under section 75.1403-10(1) which provides that, "all self-propelled rubber-tired haulage equipment should be equipped with well-maintained brakes, lights, and a warning device." The safeguard states in pertinent part,

> This is a notice to provide safeguard requiring all self-propelled rubber-tired haulage equipment to be equipped with well-maintained brakes, lights, on one or both ends if equipment is capable of being operated in either direction, and a warning device (audible)." (Emphasis added). (Ex. P-10).

The cited regulation reads:

> (l) All self-propelled rubber-tired haulage equipment should be equipped with well-maintained brakes, lights, and a warning device.

As Inspector Marietti further explained, once a safeguard is issued, it is recorded on a list which the inspectors review prior to every inspection. It constitutes the law until the mine closes or is abandoned. (Tr. 239).

As a threshold matter, it is apparent that a horn is a warning device within the meaning of the safeguard and the citation.

CWM contends its John Deere haulage equipment was out of service and did not work. Therefore, the operator did not violate the regulation.

I am not persuaded by CWM's views. Mr. Marietti stated he would not have issued the citation if he believed the vehicle was out of service. On February 10, 1993, the vehicle was out of service because its tie rods were broken and lying on the ground. No citation was issued at this time. The following day the Inspector tested the steering wheel and found the tie rods had been repaired. However, at this time the horn did not function and he properly issued his citation. The equipment was not tagged nor marked as being out of service.

Citation 3851921 should be affirmed and a penalty assessed.

Civil Penalty

CWM has no adverse prior history for violations of the cited section during the two years prior to the issuance of the citation. (Ex. P-5B).

The operator's negligence is "moderate." The operator repaired the tie rods but not the horn.

Gravity should be considered "low." Further, Inspector Marietti did not conclude that the violation was "S&S."

The proposed penalty of $50 is appropriate.

Citation No. 3851922

The above citation alleges a violation of 30 C.F.R. ' 75.400.

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[1] The regulation reads:

' **75.400 Accumulation of combustible materials.**

The citation reads:

> The air compressor in the east bleeder section, MMU006, was observed with accumulations of combustible material. The accumulations were on the lower part of the cylinders and the crank case. They were heavy on the crank case and the base and on the tank under the compressor. The accumulations were oil mixed with coal dust. It appeared that they had been there for a considerable period of time. The compressor was mounted in a trailer with the welder.

Inspector Marietti described an air compressor as a device that pressurizes air. The air in turn is used to operate air tools and drills. The compressor was located on a trailer with a welding machine parked in a crosscut. (Tr. 319, 320).

The compressor was a piece of electrical equipment in active workings. It measured approximately 18 inches wide by 2 feet high. (Tr. 315, 316, 322). Attached to it was an electric motor with a power cable and a receptacle. (Tr. 316, 320).

The lower part of the cylinders, the crank case, and the section underneath the compressor on the air tank were covered with a heavy coating of oil and coal dust. Inspector Marietti concluded that, due to their thickness, the accumulations had been there for quite some time. (Tr. 316).

CWM contends the issue here is whether or not the electrical air compressor was in use or available for use.

It is apparent the compressor was not in use at the time of the inspection but was it available for use? I conclude that the total record establishes that the compressor could not be used.

[Statutory Provision]

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Inspector Marietti agreed that Mr. Defa told him that the compressor had not been used for some time and was not being used in the mine. (Tr. 321). He also admitted that he did not test it to see if it worked. Moreover, he did not remember if he checked the electrical book to see if it was in service. (Tr. 330, 338). Further, he did not see any air hose that could be used to make the compressor operable. (Tr. 344).

Mr. Nathan Atwood, who installed the compressor and welder on the trailer, testified that the compressor had not been used for at least two years and the cable inside the electrical box for the compressor had been removed so it could not be energized. (Tr. 636-639). Both Messrs. Atwood and Defa testified that the compressor was among the abandoned equipment that was being pulled back as they retreated from the pillar section, and that it could not be operated. It was effectively taken out of service by making it impossible to energize it in its present condition.

I am persuaded by the testimony of Messrs. Atwood and Defa that the abandoned equipment was not operable.

The Secretary attacks CWM's evidence because there was fresh oil around the motor and the compressor. (Tr. 322).

I am not persuaded. The fresh oil around the motor could have come from the motor itself or sources other than the air compressor.

Citation No. 3851922 should be vacated.

Citation No. 3851927

This citation alleges a violation of 30 C.F.R. ' 75.1100-3.

The cited regulation reads:

> ' **75.1100-3 Condition and examination of firefighting equipment.**
>
> All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

The citation reads as follows:

> The fire hose at the No. 46 crosscut Main North No. 4 Belt Entry was not being maintained fully usable and operative. There was no nozzle with the hose. The hydrant was 30 feet outby. The belt has been idle since Nov. '92. The belt serves the Main North idle section and the 3d West idle entries.

The Secretary's evidence shows that on February 24, 1993, Inspector Marietti observed a fire hose. The hose was missing its nozzle. (Tr. 348, 350).

Inspector Marietti explained that a nozzle is essential if a miner is going to use the hose to fight a fire because it allows the miner to direct a steady stream towards the fire from a safe distance of approximately 60 feet. (Tr. 348-349). Without the nozzle, the miner would be forced to come much closer to the fire and it would place the miner in a greater danger of being injured. (Tr. 349, 353). It also allows the miner to more effectively combat the fire since the concentrated stream from the nozzle can be used to break up the materials of the fire, such as coal or wood, which will remove heat from the fire and put the fire out. (Tr. 348).

CWM argues no violation occurred since its equipment was in a non-working section, the power was locked out, and there was no water in the hose line.

I disagree. This equipment was obviously for firefighting. It may be called into use in a nonworking section. Power and water are only required when there is a need for the firefighting capabilities.

Citation No. 3851927 should be affirmed.

Civil Penalty

The assessed violation history (P-5) indicates 12 violations of ' 75.1100-3 during the two-year period prior to this citation.

The operator's negligence was moderate because Mr. Defa did not know the nozzle was missing. (Tr. 356).

Inspector Marietti did not find this violation "significant and substantial".

The proposed civil penalty of $50.00 is appropriate for Citation No. 3851927.

Citation Nos. 3851928 and 3851939

These related citations allege a violation of 30 C.F.R. ' 75.1100-2 (cited in a previous citation).

The conditions cited in Citation No. 3851928 are as follows:

> The fire extinguisher hanging in [the] 46 crosscut in the Main North No. 4 belt entry had not been examined since February 1992. The belt is idle and there was no electrical equipment in the vicinity. The operator did not check it.

The conditions cited in Citation No. 3851939 are as follows:

> The fire extinguisher provided for the pump in the Main North Return No. 72 crosscut did not have an examination since June of '92 indicated by the tag attached. The pump was connected to an energized transformer in the idle Main North Section.

The evidence is uncontroverted. There were two fire extinguishers without tags to show they had been examined every six months.

CWM agrees the extinguishers had not been checked and dated (as required by the regulation). However, they believed there was no violation because they were fully charged and operational and not even required at that location.

CWM's views are without merit. The only way to insure that the fire extinguisher is operative is to check it. The operator failed to follow this procedure and it is not the function of the Commission to rewrite the regulation.

Civil Penalty

History: The assessed violation history (P-5) shows 12 violations of ' 75.1100-3 in the two-year period prior to these citations.

Negligence: The operator's negligence was designated "moderate." (Tr. 365, 444-445).

Gravity: The Inspector did not designate these violations as "significant and substantial."

The proposed civil penalty of $50.00 is appropriate for each citation.

Citation No. 3851938

This citation alleges a violation of 30 C.F.R. ' 75.1100-2(e)(2).

The citation reads:

> There was not 240 pounds of rock dust provided at the temporary electrical installation in the idle Main North Section's transformer. The transformer was energized and supplying power to pump circuits. There was a fire extinguisher provided and rock dust about 300 feet outby.

On February 24, 1993, Inspector Marietti observed an energized transformer supplying power to two pumps. (Tr. 375). The transformer itself advanced (and retreated) with the working section. (Tr. 375-376).

The Inspector issued MSHA's citation because there was no rock dust provided at the transformer.

CWM contends it has always interpreted ' 75.1100-2(e) as applying to electrical installations that are not part of a working section. Other inspectors who have inspected CMW's mine have interpreted the regulation in that manner. (Tr. 680-685).

' **75.1100-2(a)** provides

The cited section reads:

> One portable fire extinguisher and 240 pounds of rock dust shall be provided at each temporary electrical installation.

> (1) Each working section of coal mines producing 300 tons or more per shift shall be provided with two portable fire extinguishers and 240 pounds of rock dust in bags ... .

Mr. Defa testified that all of the equipment required by ' 75.1100-2(a) was provided in the working section, therefore CMW argues there was no violation. (Tr. 680-681),

I am not persuaded by CWM's argument. A critical difference exists between the two regulations. Section 75.1100-2(e)(2) requires a fire extinguisher and rock dust at each temporary electrical installation. Since this installation advanced and retreated with the working section, it was necessarily of a temporary nature.

On the other hand, the term "temporary" does not appear in ' 75.1100-2(a).

If the construction of the regulation as urged by CWM is followed, the protection afforded miners at temporary electrical installations would be essentially negated.

MSHA's policy manual (Ex. P-25) further supports Inspector Marietti's views.

Citation No. 3851938 should be affirmed.

CIVIL PENALTIES

CWM was assessed a single penalty of $50.00 for the violation of ' 75.1100-2(e)(2).

Prior history: There have been no violations of ' 75.1100-2(e)(2) during the two years prior to this citation. (Ex. P-5).

Negligence: The operator's negligence was moderate because the weekly examiner should have been checking for rock dust at these temporary locations. (Tr. 380).

If this had been a permanent electrical installation, the operator would have been required to install it in a fireproof en- closure, isolated from the designated escapeway. (Tr. 376).

Gravity: The Inspector did not find this violation "significant and substantial."

The penalty of $50.00 is appropriate for the violation of Citation No. 3851938.

Citation Nos. 3851935 and 3851936

On February 25, 1993, Inspector Marietti issued the above citations alleging violations of 30 C.F.R. ' 75.1101-23(a).

The cited section requires each operator of an underground mine to adopt a program to instruct all miners in the proper evacuation procedures in the event of an emergency. The evacuation plan in effect at the Bear Canyon #1 Mine was admitted in evidence as Exhibit P-12. It states in pertinent part as follows:

> **Location of SCSR units**
>
> **Mantrips** Each mantrip carries enough units for number of men on trip. Units are stored in a metal container on "Mantrips to protect SCSR's. Units are checked at least every 24 hours by operator, trained to inspect units, before entering mine.

Inspector Marietti observed a Duetz-Allis tractor getting ready to go underground with two miners on board. He asked them about their SCSR units and they indicated that they did not have any. He observed that the SCSR unit storage box had a broken lid and was being used to store tools. He then issued Citation No. 3851935 in which he described the condition as follows:

> The approved self-contained self-rescue storage plan was not being complied with. The Duetz-Allis mantrip tractor was observed getting ready to go underground. There were two miners on the tractor. There were no SCSR's on the tractor. The tractor operator indi- cated that they never had any SCSR's. I tried to question, but the miners spoke no or very little English, and could not determine the knowledge of the SCSR storage plan.

Shortly thereafter, Inspector Marietti went underground and observed an Allis-Chalmers tractor with one person driving, going from underground in the mine to the outside. (Tr. 492). Again he questioned the driver about whether he had an SCSR unit. The driver indicated that he did not have an SCSR unit and Inspector Marietti observed that there was no SCSR storage box. (Tr. 494). Inspector Marietti then issued Citation No. 3851936 in which he described the condition as follows:

> The approved self-contained self-rescue storage plan was not being complied with. The Allis-Chalmers mantrip was observed operating in the main west designated intake escapeway. When the machine was checked outside, there was no SCSR for the miner operating it. He said or indicated he could speak no English so I could not determine his knowledge of the SCSR storage plan. I tried to tell him he needed one and he appeared to understand I am not sure. Refer to Citation Nos. 3851935 and 3851936.

The Code of Federal Regulations does not define "mantrip," however, Inspector Marietti's understanding of the meaning of "mantrip" is supported by the definition of "Mantrip" contained in A Dictionary of Mining, Mineral, and Related Terms, at 679. It defines "mantrip" as:

> a. A trip made by mine cars and locomotives to take men rather than coal, to and from the working places. B.C.I. b. Trip made by a man cage in a shaft to take men rather than ore, to and from a working place in a mine.

Although this definition does not refer to what types of vehicles are considered mantrips, it specifies trips containing men, instead of mineral, going in and out of the mine.

Mr. Defa, on behalf of CWM, testified that the vehicles cited by Mr. Marietti were not mantrips but were non-face mobile equipment used to transport supplies, not men. (Tr. 700-702).

I am not inclined to follow CWM's views. The common issue is whether miners were being transported. For example, in connection with Citation No. 3851935, two miners were observed in a Duetz-Allis tractor ready to go underground. This constituted a mantrip.

In connection with Citation No. 3851936 the Inspector observed two miners on an Allis-Chalmers tractor getting ready to go underground. This was also a mantrip.

It matters not at all that some vehicles were non-face mobile equipment because when cited they were being used to transport men, thus they were "mantrips."

Citation Nos. 3851935 and 3851936 should be affirmed.

Civil Penalties

CWM was assessed a total penalty of $697.00 for the violations alleged in Citation Nos. 3851935 and 3851936.

Prior History: There have been no prior violations of ' 75.1100-2(e)(2) during the two years prior to this citation. (Ex. P-5).

Negligence: The operator's negligence was moderate because CWM's equipment lacked SCSR units.

Gravity: The Inspector did not find the violation to be "significant and "substantial."

A penalty of $100.00 is appropriate for each violation.

For the foregoing reasons, I enter the following:

ORDER

1. The following citations are **VACATED**: Nos. 3582877, 3582905, 3582919, 3583044, 3583050, 3851922.

2. The following citations are **AFFIRMED** and penalties as indicated are **ASSESSED**:

Citation No.	Penalty
3583053	$200.00

3852372	$ 10.00
3852375	$200.00
3852376	$300.00
3852377	$100.00
3582904	$345.00
3582908	$ 50.00
3582909	$ 50.00
3582910	$ 50.00
3851921	$ 50.00
3851925	$ 50.00
3851927	$ 50.00
3851928	$ 50.00
3851935	$100.00
3851936	$100.00
3851938	$ 50.00
3851939	$ 50.00

John J. Morris
Administrative Law Judge

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