

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-169
Petitioner	:	A.C. No. 46-07166-03536
v.	:	
	:	No. 1 Surface
ANCHOR MINING INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 96-74
Petitioner	:	A.C. No. 46-07166-03539 A
v.	:	
	:	No. 1 Surface
JAMES SIMPKINS, Employed by	:	
ANCHOR MINING INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 96-75
Petitioner	:	A.C. No. 46-07166-03540 A
v.	:	
	:	No. 1 Surface
JAMES TACKETT, Employed by	:	
ANCHOR MINING INCORPORATED,	:	
Respondent	:	

DECISIONS

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, for the Petitioner;
David J. Hardy, Esq., John T. Bonham, Esq., Jackson and Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondents pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Docket No. WEVA 95-169, concerns civil penalty proposals filed by the petitioner against the respondent Anchor Mining Inc., for alleged violations of mandatory safety standards 30 C.F.R. ' 77.1006(a) and 77.1006(b). The petitioner seeks civil penalty assessments of \$8,500, for the alleged violations.

Docket Nos. WEVA 96-74 and WEVA 96-75, concern civil penalty proposals filed by the petitioner against the named individual respondents pursuant to section 110(c) of the Act for allegedly knowingly authorizing, ordering, or carrying out an alleged violation of 30 C.F.R. 77.1607(g). The petitioner seeks civil penalty assessments of \$2,000 against Mr. Simpkins, and \$2,500 against Mr. Tackett for the alleged violations.

The respondents filed timely answers denying the alleged violations, and a consolidated hearing was held in Charleston, West Virginia. The parties filed posthearing briefs and I have considered their arguments in the course of my adjudication of these matters.

Issues

In Docket No. WEVA 95-169, the issues include (1) whether the corporate operator violated the cited mandatory safety standards; (2) whether the violations were significant and substantial (S&S), (3) whether the violations were the result of unwarrantable failures to comply with the cited standards; and (4) the appropriate civil penalties to be assessed, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

In the two individual section 110(c) cases, the principal issue is whether or not the named respondents knowingly authorized, ordered, or carried out the alleged violation, and if so, the appropriate civil penalties that should be assessed for the violation taking into account the relevant criteria found in section 110(i) of the Act. Also in issue is whether or not the violation was S&S and the result of an unwarrantable failure to comply with the requirements of the cited standard.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq.
2. Commission Rules, 20 C.F.R. ' 2700.1 et seq.

3. Sections 110(a) and 110(c) of the Act. Section 110(a) provides for assessment of civil penalties against mine operators for violations of any mandatory safety or health standards, and section 110(c) provides as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) (emphasis added).

An Agent⁸ is defined in Section 3(e) of the Act (30 U.S.C.

⁸ 802(e)) to mean Any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine.⁹

Stipulations

The parties stipulated in relevant part to the following (Tr. 8-12):

1. The respondent is the operator of the subject mine and the operations of the mine are subject to the jurisdiction of the Mine Act.
2. The Commission and the presiding Judge have jurisdiction to hear and decide these matters.
3. The information contained in the proposed assessments (MSHA FORM 1000-179) is accurate.
4. MSHA's computer print-out concerning Anchor Mining's listing of prior violations (Exhibit G-1) is authentic and admissible, except that the proposed penalty assessments associated with the two instant section 110(c) cases should be excluded as part of the history.
5. Respondent James Simpkins served as an officer of Anchor Mining and as an Agent⁸ as defined in section 3(e) of the Mine Act.
6. Respondent James Simpkins has the financial ability to pay the assessed penalty in this matter.
7. Respondent James Tackett served as an Agent⁸ of Anchor Mining as that term is defined in Section 3(e) of the Mine Act, and, was employed as

mine superintendent at the time of the violations.

8. The section 104(d)(1) and (d)(2) Achain@ was procedurally correct and followed the sequence pursuant to the Act.

Docket No. WEVA 95-169

Section 104(d)(1) AS&S@ Order No. 4001122, October 12, 1994, cites an alleged violation of 30 C.F.R. 77.1006(a), and the cited condition or practice is described as follows:

It was revealed during an investigation of a non-fatal machinery accident that James G. Tackett, superintendent, performed work in a underdrain at the Dorothy Pit on September 15, 1994. Tackett exposed himself to the hazards of the unstable spoil on the sides of the underdrain. James Simpkins, President/Owner, was directing the construction of the underdrain.

Section 104(d)(1) AS&S@ Order No. 4001124, October 12, 1994, cites an alleged violation of 30 C.F.R. 77.1006(b), and the cited condition or practice is described as follows:

It was revealed during an investigation of a non-fatal machinery accident that James G. Tackett, superintendent, performed work in an underdrain at the Dorothy Pit on September 15, 1994, while an Hitachi Model EX 1000 excavator was positioned at the top of the underdrain which blocked Tackett's egress. The spoil on both sides of the underdrain was unstable. James Simpkins, President/Owner, was operating the excavator and directing the construction of the underdrain.

Docket Nos. WEVA 96-74 and WEVA 96-75

Respondents James Simpkins and James Tackett are both charged with a Aknowing@ violation of mandatory safety standard 30 C.F.R. 77.1607(g), as stated in a section 104(d)(1) AS&S@ Citation No. 3745835, issued on September 19, 1994. The cited condition or practice states as follows:

It was revealed during a non-fatal accident investigation that James Simpkins, mine operator, failed to insure that all persons were in the clear before moving a Hitachi EX 1000 excavator at

the Dorothy Pit on September 15, 1994. Simpkins was placing rock into an underdrain when Dempy Cline, Dozer operator, stepped between the excavator and a spoil pile. Cline sustained serious injuries to his right leg which became pinned between the excavator and spoil. Simpkins knew that 3 persons were standing in close proximity to the excavator and said that he should have instructed them to move to a safe location.

MSHA's Testimony and Evidence

Ricky D. Adams, Environmental Engineer, employed by Cumberland River Coal Company, testified that his company holds the coal mine leases and that the respondent was mining coal as a contractor. Since Cumberland River was responsible for surface environmental compliance, Mr. Adams was at the mine on September 15, 1994, to observe the construction of a French drain. He confirmed that he took photographs to document that the drain was constructed properly to drain the water from the underground mine, and he explained what was taking place when the photographs were taken (Exhibits G-2 through G-11; Tr. 22-51).

Mr. Adams stated that the excavator was digging at the base of the highwall creating a drainage ditch running away from the highwall. The highwall was approximately 80 feet high above the edge of the ditch nearest the highwall, and the loose spoil materials excavated from the ditch were placed on either side of the ditch (Tr. 28). He confirmed that Mr. Tackett went into the ditch to spread a Typar covering material that had fallen off the excavator teeth over the rocks that were placed in the ditch (Tr. 33, 35).

Mr. Adams stated that the ditch was approximately six-foot deep near the edge of the excavator and at least six-foot deep or more at the end of the ditch near the spoil bank at the base of the highwall. After the initial layers of rock and Typar were placed in the ditch, there was still depth to the ditch and spoil was piled on each side when he observed Mr. Tackett in the ditch (Tr. 39-40).

Mr. Adams stated that the Typar material had to be stretched from end-to-end in the drain. However, Mr. Tackett did not go further into the ditch than the location shown in photographic exhibits G-8 and G-9-A and ~~he~~ just reached over and brought the Typar back to completely cover the section of ditch that they had constructed@ (Tr. 42). He confirmed that Mr. Tackett was below the height of the spoil material that was on each side of the ditch (Tr. 45).

Mr. Adams marked a red circle on exhibit G-11, to show the vicinity of the area where he was standing for a good view of the drain. He stated that it was a flat area composed of the spoil material that was dug out of the ditch (Tr. 51). He confirmed that at one time he, Troy Perry, Demy Cline, Mr. Simpkins, and Mr. Tackett were all standing at that location before the accident (Tr. 52-53).

Mr. Adams stated that Mr. Cline was standing to his left within a step and a reach, and that they were 16 to 18 feet from the rear machine counterweight before it turned and swiveled. When the machine swiveled, he estimated that they were 5 or 6 feet from the rear counterweight. After standing with the group looking at the ditch, Mr. Simpkins commented "let's finish the job," and he and Mr. Tackett walked around the other side of the machine. The machine then started to turn and he noticed that Mr. Cline was in its path. He did not notice that Mr. Cline had moved from his prior position. Mr. Cline was looking toward the ditch and did not see the machine. Mr. Adams yelled at Mr. Cline and reached to grab him, but the machine trapped his leg and dragged him into the spoil pile under the machine (Tr. 54-59).

Mr. Adams stated that before Mr. Cline was struck, he (Adams) knew that Mr. Simpkins was going to get on the machine, but did not know the instant he was going to swivel the machine. Mr. Adams noticed no signal from Mr. Simpkins and Mr. Simpkins did not tell him that he was going to move the machine. Mr. Adams stated that Mr. Tackett gave no warning to him, and he noticed no warning to anyone else (Tr. 60).

Mr. Adams confirmed that when the accident occurred preparations were being made to construct and extend the next section of the ditch. He identified exhibit G-12 as a photograph of the counterweight that struck Mr. Cline (Tr. 63).

Mr. Adams stated that his safety training included spoil bank loose and unconsolidated materials. He saw nothing about Mr. Tackett's location in the drain ditch that would cause him any safety concern, and saw no dangerous situation involving Mr. Tackett (Tr. 69-70).

Mr. Adams was of the opinion that the accident was preventable if the drain had been constructed two or three weeks earlier before pushing any spoil off the highwall because little excavation work would have been required, and if Mr. Cline had been standing somewhere else behind him. However, he conceded that the state regulations did not prohibit constructing the drain the way the respondent was doing it, and he felt reasonably

safe where he was standing, and Mr. Cline was near him (Tr. 72-76).

On cross-examination, Mr. Adams confirmed that he holds a mining engineering degree from West Virginia Tech and has had daily experiences with spoil banks and highwalls (Tr. 80). He stated that the drain design called for a six-foot deep ditch with rock in it four-feet high and four-feet wide. The drain area was five or six feet wide (Tr. 81-82).

Mr. Adams confirmed that photographic exhibit G-9-A shows where Mr. Tackett was standing in the ditch and he did not see him go further into the ditch when he was stretching the Typar over the rock. He stated that in the photograph the rock appears to be directly over Mr. Tackett, but that is not the way he recalled the situation when he took the picture. At that time he had no safety concerns that Mr. Tackett was in danger of being covered up, and the spoil banks on either side of Mr. Tackett were not in danger of giving way (Tr. 83). He characterized those spoil banks as tapered out to zero, and the ditch where Mr. Tackett was standing was probably six feet deep and four to six feet wide (Tr. 84). Mr. Adams stated that Mr. Tackett was in the ditch less than a minute and he did not recall that he had any difficulty in leaving (Tr. 85). He confirmed that he would have spoken out if he believed Mr. Tackett was in an unsafe position (Tr. 88).

Mr. Adams stated that the area in which he was standing prior to the accident was loose, unconsolidated spoil material near the toe of the spoil bank, and it consisted of ninety percent sandstone rock. The material never slipped while he was standing on it, and it showed no indication that it would slip (Tr. 89). The area was level and it was approximately five-by-six, four-by-six, twenty-four feet square (Tr. 90). The area was close to the elevation of the counterweight, and he observed that the counterweight had made a clear indentation in the spoil bank between the level area where he was standing and the excavator (Tr. 90-91).

Mr. Adams believed that everyone was in the clear while standing on the level area in question, including himself and Mr. Cline, and he perceived no hazard from that position. If he had, he would have relocated and informed the others to do so. He confirmed that Mr. Cline moved from the position that he had originally observed him in, and it was not clear when he was struck, but he did not observe him move (Tr. 93).

Mr. Adams stated that Mr. Tackett had to come back behind, back toward the excavator to get out of the ditch and he was sure that he could get out on either side of the excavator (Tr. 97). He observed no problem, did not believe that the excavator was blocking Mr. Tackett's egress, and saw nothing that prevented

him from leaving the ditch area from where he was standing.

In response to further questions, Mr. Adams stated that although the rock shown in exhibit G-9-A was away from Mr. Tackett towards the highwall, it was part of the loose, unconsolidated spoil bank material above the spoil bank in front of Mr. Tackett, and if the spoil bank gave way, it could have affected him (Tr. 108). He further confirmed that anyone going further into the ditch to stretch the Typar all the way to the back of the ditch would be exposed to 20 feet of spoil bank on either side of the ditch (Tr. 119).

Mr. Adams stated that the Typar was spread by the bucket teeth of the excavator and that Mr. Tackett did not go into the ditch to spread it out against the farthest end of the ditch (Exhibit G-4, G-5). He characterized the installation of the Typar as a sloppy job, and to spread the Typar nice and tidy would require someone to do it by hand (Tr. 127-130). However, he saw no one do this while he was there (Tr. 131).

With regard to the accident involving Mr. Cline, Mr. Adams stated that he knew the machine was going to move and was not surprised by the swinging of the counterweight, and he expected it (Tr. 133-134). Mr. Simpkins was operating the machine the entire time, and before it swiveled striking Mr. Cline he did not hear or see Mr. Simpkins give an audible signal or eyeball anyone standing at the rear (Tr. 137). He did not believe the machine had an alarm that sounded when the counterweight swiveled, and the area to the rear of the machine was not posted, flagged, or barricaded. He was not aware that industry practice or the regulations required an alarm or posting and he believed that he and the other individuals were at a safe distance where they were standing (Tr. 139).

Roy T. Perry, employed by the respondent as a security guard, testified that he was present at the time of the accident on September 15, 1994, and was taken to the site by Mr. Tackett

to help cut the Typar material that was installed in the drainage ditch. The Typar was placed on the bucket teeth of the excavator to be placed into the ditch, and Mr. Tackett, assisted by Mr. Cline, were hanging the Typar on the excavator. The fabric fell off, and he saw Mr. Tackett go into the ditch and hang the Typar up again. After this was done, he stood to the rear left side of the machine with Mr. Cline and Mr. Adams (Exhibit G-11; Tr. 147-148). Mr. Cline was looking into the ditch when the machine swung and struck him (Tr. 150). Mr. Perry further explained as follows at (Tr. 151-152):

17. And before the machine moved, did you have any signal or any type of warning from anyone that it was going to move?

1. I wasn't C myself, I wasn't expecting it. I don't know whether there was any indication of it, you know, to let me know or somebody else know. I was interested in watching him work the material in the hole.
17. Do you recall anyone signaling you or notifying you at all that it was going to move?
1. I didn't see no one. Like I said, I wasn't paying no attention. You know, I was just looking over in the hole.
17. How close were you to the counterweight, the rear part of the machine, as it went by you?
1. Well, I thought I was far enough away, but after it went by me there, if I would have made one step, I would have probably been under it. I could have reached up and probably tipped it. That is why I looked off. When it went by me, I felt the wind of it and I jumped and looked back.
17. How many feet would you estimate that you were close to it?
1. It's like I told the others, an arm's length. I could have reached out and tipped (sic) it.

Mr. Perry stated that Mr. Tackett explained the possible dangers to him before he started the work and told him to watch the machine. Be careful, and warned him not to get too close.

When he observed Mr. Tackett in the ditch, Mr. Tackett was on the right side of the bucket hanging up the Tyvar (Tr. 153).

On cross-examination, Mr. Perry stated that Mr. Simpkins was operating the excavator when Mr. Cline was struck, and he described what occurred as follows at (Tr. 156):

1. Like I said, he was standing out in front of me. I was looking at the hole and I could see him. He moved his foot like he was going to turn. And when he done that, that is when everything went into motion and I looked off. I never did see him put down his foot. The next time I looked back around, he was under the machine and Rick was trying to get him out.

Mr. Perry stated that he did not realize that he and Mr. Cline were close to the counterweight or in danger. He confirmed that he observed Mr. Tackett hook the Tyvar on the teeth of the excavator but saw no one in the ditch laying it out, and he did not observe Mr.

Tackett straightening out the Typar (Tr. 159).

In response to bench questions, Mr. Perry viewed Exhibit G-9-A, and confirmed that it shows Mr. Tackett in the ditch next to the excavator bucket straightening out the Typar. However, he indicated that he only observed Mr. Tackett hang the Typar on the excavator teeth (Tr. 161).

Dempy Cline, testified that he was unemployed, and that he worked for the respondent for eight years as an equipment

operator. He confirmed that he was working on September 15, 1994, helping Mr. Simpkins in the construction of the ditch.

Mr. Cline operated a D-9 dozer pushing dirt out of the way while Mr. Simpkins excavated dirt out of the ditch (Tr. 163-168).

Mr. Simpkins was operating the excavator, and after holes were cut into the end of the Typar material, it was placed on the excavator teeth and Mr. Simpkins dropped it in the ditch and stretched it out with the machine (Tr. 168).

Mr. Cline stated that when the second piece of Typar was dropped in the ditch it didn't go in there good, and Mr. Tackett went into the ditch to move and stretch the material. He stated that Mr. Tackett stretched the material toward the back of the ditch to the farthest distance from the edge of the excavator (Tr. 170).

Mr. Cline stated that he and Mr. Simpkins, Mr. Perry, and Mr. Adams were standing at the left rear of the excavator talking, and Mr. Tackett was in the ditch. Mr. Cline then moved to the area circled in red on exhibit G-11, with Mr. Perry and

Mr. Adams, and they were talking and looking up the hill where a strip job was working. Mr. Cline stated that he was looking up and to the left, with his back turned toward the excavator when Rick Adams grabbed me by the shoulder and I sort of turned around. About that time, the machine hit me and knocked me down, cut my leg off (Tr. 173).

Mr. Cline stated that he had no warning that the excavator was going to move and he believed that Mr. Simpkins should have known where he was positioned because he got on the machine on the left side where the cab ladder was located, and that was the same side where he (Cline) and the others were standing at the left rear of the machine. Mr. Cline stated that Mr. Tackett was not aware where he was standing (Tr. 174). He confirmed that he was standing on recently placed spoil (Tr. 175). Mr. Cline stated that he had no indication by the sound of the machine that it was going to turn in the direction where he was standing, and he did not expect that the counterweight would turn to the left before it hit him (Tr. 176, 179)).

Mr. Cline estimated that the height of the spoil bank on each side of the ditch was 10 to 15 feet at the excavator end of the ditch, and 40 feet at the end toward the highwall (Tr. 179). Based on his experience, Mr. Cline believed that a prudent distance for anyone to be close to the machine would be 50 feet away from the back of the machine. He was not 50 feet back because the excavator was idling, and he was not present when the counterweight was previously moving from right to left because he was operating the bulldozer (Tr. 183-184).

On cross-examination, Mr. Cline confirmed that he previously

gave a taped interview to MSHA immediately following the accident, has given at least one deposition, and has filed a civil lawsuit against the respondent as a result of his injuries (Tr. 187-188).

Mr. Cline agreed that people around machinery have a responsibility to look out for its movements. He confirmed that he was at the work location for three and one-half hours prior to the accident and observed Mr. Simpkins swing the machine more than once (Tr. 190).

Mr. Cline stated that he heard no loud machine noises and observed no diesel smoke immediately prior to the accident and that he had his back to the machine. He did not believe that it was idle with no one in it (Tr. 197). He did not notice Mr. Simpkins leave the group when they were standing at the rear of the machine talking and Mr. Simpkins said nothing to him that he heard. He thought Mr. Simpkins was still there hanging around (Tr. 198). Conceding that it was possible that he took a step

into the path of the counterweight, Mr. Cline did not recall ever moving. He also stated that it was possible that he told MSHA that this is what occurred (Tr. 199).

Respondent's counsel stated that he was prepared to play the tape of Mr. Cline's MSHA interview statement that it was possible that he took a step to the side or forward at the same time the machine started to turn. MSHA's counsel stipulated that the tape would reflect that Mr. Cline did make the proffered statement (Tr. 200). Mr. Cline confirmed that he stated "it was possible," but he did not recall moving (Tr. 203).

Mr. Cline confirmed that he was standing when he was struck and that he did not slip or fall, and the area where he was standing did not give way (Tr. 205). He confirmed that he did not actually see Mr. Tackett positioning the Typar at the point farthest away from the excavator, and stated "that is what he was supposed to have done" (Tr. 206). Mr. Cline read a portion of his prior deposition on October 31, 1995, at page 73, stating that he did not know where he was standing prior to the time he was struck. He could not recall making the statement, but confirmed that he didn't know exactly where he was standing (Tr. 207-209).

Mr. Cline confirmed his prior deposition statement that since the excavator was not operating he didn't believe he had anything to worry about, and had he known it was operating he would have been back out of the way (Tr. 213). Further, since Mr. Simpkins was near him immediately before he was struck, Mr. Cline had no concern about the rotation of the machine because there was no operator on it (Tr. 215-216). The second phase of the operation would entail Mr. Simpkins tramping the machine back to continue placing rock and Typar in the ditch (Tr. 219). Mr. Cline confirmed that Mr. Tackett was on the right side of the machine prior to the accident and would not have known where he was positioned before he was struck (Tr. 222).

Roderick R. Wallace, West Virginia state surface mine inspector, testified that he has inspected the respondent's mining operation and investigated the accident that occurred on

September 15, 1994. The investigation took place the following day and Mr. Simpkins and Mr. Tackett were present and he spoke with them. He explained what he covered and observed during his investigation, including the dimensions of the French drain and how it was constructed (Tr. 223-236).

Mr. Wallace stated that the loose unconsolidated soil material that was excavated out of the drain ditch constituted a very high potential of this stuff slipping and sliding off of there, and he believed it would be foolish to go into that hole

for any reason (Tr. 236). He further stated that the spoil in and around the ditch was all near vertical. It was all loose, unconsolidated material (Tr. 236). Based on his interviews, he determined that the people who were present at the time of the accident were standing on loose, unconsolidated material that was on a slope, and they were in very close proximity to the swinging arc of the excavator. He confirmed that he interviewed Mr. Simpkins, Mr. Tackett, Mr. Adams, and Mr. Perry (Tr. 243). In his opinion, any location within the swinging radius of the excavator is a hazardous position, and standing on unconsolidated spoil will increase the potential for personal injury (Tr. 245, 248).

Mr. Wallace stated that no one told him that they were standing on unconsolidated material or were unsure of their footing. Nor did they tell him that they were slipping or sliding or thought that they were in a hazardous position (Tr. 245). He stated that Mr. Perry told him he was within an arm's length of the excavator (Tr. 246). Mr. Wallace stated that anyone within the swinging radius of the excavator boom could come in contact with the machine (Tr. 251).

Mr. Wallace stated that in an interview with Mr. Cline after his initial investigation Mr. Cline told him that Mr. Tackett went into the drain to spread the Typar, and Mr. Tackett later confirmed that he was in the ditch (Tr. 255). Mr. Wallace was of the opinion that it was not safe for anyone to be anywhere in the ditch because of the surrounding unconsolidated material (Tr. 256).

Mr. Wallace stated that in the event of a spoil bank collapse, anyone in the ditch would have to come out the front, and the excavator would partially block that area and make it a little more difficult to get out (Tr. 258). He confirmed that Mr. Simpkins indicated to him that if he had made sure everyone was in a safer location the accident would not have occurred (Tr. 260). Mr. Wallace stated that if he had observed the individuals standing in the location indicated, he would have cited them for being in close proximity to the moving machine (Tr. 260).

On cross-examination, Mr. Wallace confirmed that he has no mining engineering degrees, has no experience operating an excavator, and took no measurements concerning the width or depth of the ditch. He also confirmed that his accident report reflects that there is conflicting evidence concerning

Mr. Cline's position in that Mr. Adams and Mr. Perry indicated that Mr. Cline stepped down into the excavator, and Mr. Cline did not recall that he had done so (Tr. 268). His report also reflects that as the excavator began to move, Demy Cline appeared

to step onto a flat area where the counterweight had scuffed off on the spoil bank (Tr. 269).

Mr. Wallace stated that no state personal action was taken against Mr. Tackett, Mr. Adams, Mr. Cline, or Mr. Perry, but charges were recommended against Mr. Simpkins for a knowing violation (Tr. 280-281). He confirmed that his report contains no statement that anyone was within the zone of danger on the swing of the excavator boom (Tr. 284). He further confirmed that he did not personally know whether Mr. Tackett had a means of egress and ingress to the left of the excavator, and it was possible that he could have exited on the right side or under the tracks of the machine (Tr. 285).

Mr. Wallace confirmed that he cited Mr. Simpkins for operating a piece of equipment with people in such proximity as to be injured (Tr. 287). He also cited the company for the same violation and for operating an excavator within four feet of a spoil pile, and the citations were issued as unknowing violations (Tr. 290).

William A. Blevins, MSHA supervisory mine inspector, testified that he went to the mine on September 16, 1994, in response to a notification by the respondent that a serious accident occurred the prior evening, and he discussed his investigation and what he observed, including a sketch of the accident scene, his accident report, and several photographs (Exhibits G-12, G-13, G-18; Tr. 291-311).

Mr. Blevins confirmed that he issued all of the citations in question. He issued section 104(d)(1) Citation No. 3745835, for a violation of section 77.1607(g), because of the respondent's failure to assure that everyone was clear of the excavator at the time of the accident (Exhibit G-14, Tr. 315). He based his safety conclusions on the fact that an accident occurred and Mr. Cline lost part of his leg. He based his high negligence finding on the fact that Mr. Simpkins was directing the work being performed and Mr. Tackett was in the area helping with the work (Tr. 317-318).

Mr. Blevins stated that he based his unwarrantable failure findings on the fact that Mr. Simpkins and Mr. Tackett were in the area directing the work force, had direct knowledge of the position of Mr. Adams, Mr. Perry, and Mr. Cline, and failed to exercise reasonable care to assure that they were in a safe location before moving the machine. He believed that this constituted aggravated conduct (Tr. 319). He further explained that he was told that before getting back on the machine, Mr. Simpkins glanced to the left to see where the three people were located and Mr. Tackett was to the right side of the machine. Mr. Simpkins signaled Mr. Tackett that he was getting back on the machine, but did not signal the other individuals (Tr. 320).

Mr. Blevins stated that the cited regulation requires the equipment operator to check around the machine to be sure that everyone is in the clear, or give a signal or use other means to assure that everyone is in the clear before moving the machine (Tr. 322). Mr. Blevins stated that during his interview, Mr. Simpkins told him that he saw the three individuals standing in close proximity to the excavator. He further stated that he asked Mr. Simpkins what he could have done to prevent the accident, and Mr. Simpkins stated to have the people move to a safe location (Tr. 327).

With regard to section 104(d)(1) Order No. 4001122, citing a violation of section 77.1006(a) because Mr. Tackett entered the drain ditch and exposed himself to loose and unstable spoil,

Mr. Blevins stated that he based it on statements made by Mr. Cline, Mr. Adams, and Mr. Tackett that Mr. Tackett had indeed entered the ditch (Exhibit G-15; Tr. 331-332). He based his AS&S@ and gravity findings on the fact that the unstable materials would cover up a person in the ditch if work were to continue. He based his high negligence finding on superintendent Tackett's admission that he entered the ditch and exposed himself to a hazard. His unwarrantable failure finding was based on the following (Tr. 334):

1. Well, when I went back to the mines and talked to Mr. Tackett about it, he then admitted that he had gone into the ditch and realized that it was unsafe for him to do so and said that he shouldn't have done it. And I don't remember his exact remarks, but he wouldn't ask anybody else to go in and do it, but he would do it himself, something of that nature.

Mr. Blevins confirmed that he issued section 104(d)(1) Order No. 4001124, citing a violation of section 77.1006(b), after concluding that Mr. Tackett's egress from the ditch where he had worked would be blocked by the manner in which the excavator was positioned (Exhibit G-16; Tr. 334). He believed the only access out of the ditch was up by the excavator tracks, but that mode of access was just about blocked, although not completely. While it is possible that Mr. Tackett could have escaped under the machine and between the tracks, Mr. Blevins believed this would be unsafe (Tr. 336).

Mr. Blevins explained his gravity findings, and he stated that Mr. Tackett had a small area on each side of the machine that would possibly have allowed him through depending on where unstable spoil fell, but in the event of a spoil failure, it would probably have been fatal, and he would have been covered up (Tr. 337). He based his unwarrantable failure finding

basically on the fact that Mr. Tackett was the superintendent and agent of the operator and placed himself in a dangerous position by getting in the ditch (Tr. 339).

On cross-examination, Mr. Blevins confirmed that he has worked at a surface strip mine but has never operated an excavator. He further confirmed that he made no measurements during his investigation, and that all of the distances he mentioned were estimates (Tr. 344). He stated that Mr. Tackett admitted that he was in the ditch but that the boom was not extended out over him (Tr. 346-347).

Mr. Blevins agreed that nothing in his investigation led him to believe that any of the witnesses thought they were in a dangerous situation prior to the accident. He confirmed that his accident report does not address the swing of the excavator boom in the zone of danger associated with the range of the boom (Tr. 349-350).

Mr. Blevins confirmed that his report reflects that Mr. Cline positioned himself in a location where he would be struck by the counterweight, and Mr. Blevins could not recall that Mr. Adams believed that the material he was standing on was loose and unconsolidated. Mr. Blevins could not recall whether he asked Mr. Tackett or Mr. Simpkins whether they recognized the area where they were standing as hazardous, and he confirmed that Mr. Simpkins believed they were in a safe location (Tr. 352).

Mr. Blevins confirmed that the statement attributed to Mr. Simpkins as reflected on the face of the citation was made in response to "What could we do to prevent a recurrence," and that it was made after the accident (Tr. 354-355).

Mr. Blevins confirmed that Mr. Simpkins told him that he looked back to see the location of the three miners. Mr. Blevins stated that this was an unobstructed view to the left of the machine and he found no evidence to refute Mr. Simpkins' statement, or to refute his statement that he looked and made visual contact with Mr. Tackett on the right side of the machine (Tr. 357).

Mr. Blevins confirmed that Mr. Adams and Mr. Perry stated that Mr. Cline took a step in towards the machine, and these statements were made a day after the accident. Mr. Cline's interview was conducted approximately three weeks later after Mr. Cline's attorney contacted him and advised him that Mr. Cline was available at his home for an interview (Tr. 357-359).

Mr. Blevins was of the opinion that the men were in an unsafe location even before the counterweight swung around, and

the fact that the miners did not recognize the hazard would not mitigate the respondent's negligence (Tr. 360). He believed that the hazard should have been obvious to the miners, but he did not consider Mr. Cline's movement as part of his unwarrantable failure finding, and he based his determination on their position prior to the accident (Tr. 361).

Mr. Blevins did not know whether or not Mr. Tackett could have gone around the right or left side of the machine when he was in the ditch, but stated it was possible. He also did not know if Mr. Tackett could have exited the ditch under the machine and between the tracks because the machine had been moved. The question of Mr. Tackett's ability to get himself in and out of the area was not addressed during his initial investigation interviews, but he obtained the information weeks later. He spoke to no eyewitnesses and issued the citation based on his judgment alone (Tr. 375-376).

Mr. Blevins stated that during his interviews of Mr. Perry, Mr. Adams, and Mr. Cline, they gave no indication that Mr. Simpkins warned or informed them that he was going to move the machine, and they stated that they did not know that Mr. Simpkins had gotten back into the machine (Tr. 380). Mr. Blevins observed that there was an indentation in the spoil where the accident occurred, and according to the statements of the miners they were standing within a few feet of the indentation. He concluded from this that they were too close to the machine (Tr. 382).

Dr. Kelvin K. Wu, PH.D., Chief, Mining Engineering Division, MSHA Pittsburgh Safety and Health Technology Center, was accepted as an expert in geotechnical matters, including ground control (Exhibit G-19; Tr. 12-21). He testified that he reviewed the accident report and gained further information concerning the respondent's mining operation through discussions with MSHA's counsel and Inspector Blevins, and also reviewed the photographic exhibits and equipment specifications for the Hitachi Model 1000 excavator. He also gave a deposition attended by respondent's counsel and has been present during the testimony in these proceedings (Tr. 30). Based on his review of the photographs and witness testimony, Dr. Wu was of the opinion that the ditch was not very wide and that the sloped sides of the ditch consisted of loose materials that can fall in unpredictably anytime (Tr. 37). He also believed that anyone standing at the end of the ditch closest to the excavator would be in a hazardous location because the sloped materials can slide and cover him up (Tr. 41).

Dr. Wu described the working parameters of the machine that was used in excavating and constructing the ditch (Tr. 48-53). He confirmed that the machine boom can make a complete 360 degree turn, with a resulting 45 foot radius. He agreed that the boom

may not swing completely around in a circle while excavating, but since it is capable of doing so, he was of the opinion that a location outside of the 45 foot boom swing would be a safe location for people to be in. He further believed that only those people necessary to the work being performed be allowed around the machine, and that in order to avoid an accident it was critical for the machine operator to make acknowledged eye contact with persons near the machine (Tr. 57-60).

Dr. Wu stated that depending on the prevailing conditions, and in an emergency, Mr. Tackett could have crawled out of the ditch under and through the openings of the undercarriage of the machine (Tr. 62-66). However, given the fact that the ditch area is sloped, a sudden slide of materials would make it very difficult to get out of the ditch (Tr. 66-67). Reviewing photographic exhibits G-9(a) and G-11, Dr. Wu believed that Mr. Tackett would be exposed to a hazard if he were positioned between the machine shovel bucket and the front of the machine, and in the event of a massive slide of loose material, the machine boom area would be covered up (Tr. 68-70). Dr. Wu believed that providing clearance on either side of the machine, or providing a wider area on either side of the ditch slopes, could have provided a means of egress for Mr. Tackett (Tr. 84-86).

Dr. Wu believed that the area outside the farthest reach of the machine would be a safe zone. Although Mr. Simpkins may have made visual contact with the people standing behind the machine, he did not receive any acknowledgment (Tr. 72). Dr. Wu believed that the people standing behind the machine on loose materials as shown by the red circle on photographic exhibits G-2 and G-11, could have lost their footing while the machine was turning, and he was of the opinion that these hazardous conditions would be obvious to the equipment operator, and precautions should have been taken (Tr. 78, 81-82). He further stated as follows at (Tr. 90):

Q. Would a reasonably prudent equipment operator, first of all,

under these circumstances, have been aware that these miners, as testified to were in the counterweight area, were in an unsafe area?

A. As I stated before, based on this specification, I can comfortably say there is a blind area or spot behind this piece of equipment the operator wouldn't see. So if he knows there is a certain blind spot and very close if he knows people are there, then special precaution should be taken.

Q. And from testimony as was stated earlier, there was testimony that Mr. Simpkins looked toward these people. And would a reasonably prudent equipment operator do that? Was that enough under the circumstances to - -

A. Under this circumstances, I would say no, because when the machine was faced to the highwall, the operator sitting in the cab, when he turns left, he can see those people. As I stated, you might misjudge the distance. And the major things happening here is miscommunication. Seems to me that testimony is no acknowledgment of those people receive his visual contact. When the machine swing to the right, then those people behind the counterweight is in the blind spot. He no longer can see them.

And at (Tr. 92):

Q. And in terms of the spoil bank conditions surrounding the ditch, would a reasonably prudent superintendent or someone in charge of the health and safety of the area of the mine permit someone to go into that ditch to work under those conditions?

A. If those people responsible for the operation have a knowledge of the hazardous conditions, then they probably would recognize it. If they do not, then probably not.

On cross examination, Dr. Wu acknowledged that he has never worked as a miner or operated an excavator (Tr. 97). He confirmed that his involvement in this case began in July 1996, and he has never visited the accident scene (Tr. 100). He agreed that no exact measurements were made with respect to the areas in and around the excavator, and after reviewing photographic exhibits G-2, G-9(A), G-10 and G-11, he agreed that they do not show a lack of clearance on the left or right of the machine tracks (Tr. 104-106). He confirmed that he was aware of no definite or clear testimony indicating the clearance between the left and right tracks where Mr. Tackett was moving the Typar material (Tr. 107-108). Dr. Wu was of the opinion that a minimum of 2 2 feet of clearance on each side of the tracks would be sufficient clearances to meet the requirements of the regulation. In addition, a further safe practice would be to stabilize the side slopes in order to maintain the clearances, even though this is not required by the cited regulation (Tr. 116-118).

Reviewing photographic exhibit G-9(A), Dr. Wu described what he believed were loose materials around the area where Mr.

Tackett is standing. He estimated that the machine boom is extended 25 feet from the front of the excavator track, and that Mr. Tackett is approximately 5 to 10 feet from the boom bucket teeth (Tr. 122-124). Dr. Wu could not speculate or predict where the rock that is circled in the photograph would go if it fell and rolled down the slope (Tr. 124-125).

Dr. Wu estimated from the photographs and testimony that the ditch was approximately 30 to 40 feet long, and from 0 to 30 feet deep. He further estimated that the ditch was 10 to 15 deep where Mr. Tackett was standing, and that he was standing within 25 feet of the end of the ditch (Tr. 131-135). He believed that a safe depth for Mr. Tackett to stand with loose material around him would be 4 **2** feet (Tr. 136).

Dr. Wu stated that an equipment operator has a duty to make sure he makes eye contact with a person in a hazardous area before he moves the equipment, and the person needs to acknowledge that he received the signal and must also be alert that he is in a hazardous area (Tr. 138-139). He agreed that when Mr. Simpkins looked left before swinging the machine, he could see the people and they were not in his blind spot. It could take two seconds for the machine to swing in the other direction, and someone could move to his blind spot and he would not have time to do anything once he starts the turn. Under this scenario, it is extremely important that the person acknowledge the operator's signal (Tr. 141). The operator sits on the left side of the machine and has a blind spot on the right side for anything below his visual line of sight (Tr. 142).

Dr. Wu was not aware of any MSHA policy guidelines or bulletins regarding an equipment operator's duty pursuant to sections 77.1006(a) and (b) (Tr. 143-144). Although he believed that Mr. Adams honestly believed he was standing on stable material when the accident occurred, Dr. Wu believed that Mr. Adams' belief was based on a lack of training. He would have expected Mr. Adams to understand that loose materials are unstable and that any disturbance can cause the materials to flow (Tr. 147). Dr. Wu acknowledged that there is no evidence that the area where Mr. Adams and the others were standing moved an inch or caused the accident, and the accident report reflects that Mr. Cline, for whatever reason, **A**got himself down in that indentation (Tr. 148). Dr. Wu was unaware of any MSHA regulation that would have prevented the way the drain was constructed (Tr. 153).

Dr. Wu confirmed his deposition testimony that a slope such as the one at the ditch would generally be hazardous if it was

over six feet, or at the height of the individual standing in the ditch (Tr. 153-157). He also confirmed that he performed no calculations in formulating his opinion (Tr. 163).

In response to further questions, Dr. Wu stated that there would be no serious safety concern if Mr. Tackett were standing in the five or ten foot area at the end of the ditch coming out, but there would be a hazard if he were beyond that point in the ditch towards the highwall.

However, if he were standing in the ditch where it was four feet deep, and the ditch slope bank was an additional four feet, this would be hazardous because of the presence of the loose materials (Tr. 165-166). He also believed that the individuals who were behind the excavator when it swung around were too close to the machine, and they were standing on loose, unconsolidated materials. Under these conditions, they were exposed to a hazard of slipping or losing their footing while in close proximity to the machine (Tr. 167-168).

Respondent's Testimony and Evidence

James G. Tackett, mine superintendent, testified that he was serving in that capacity on the day of the accident, but he did not observe it take place, and did not observe Mr. Cline's actions immediately prior to the accident because the excavating machine was between them and blocked his view (Tr. 180).

Mr. Tackett stated that Mr. Simpkins called him and asked him to come to the area where the ditch was being constructed and he explained the work that was being performed, including preparing and installing the first layer of Typar material in the ditch. He stated that he never entered the ditch during the installation of the first layer because Mr. Simpkins used the excavator bucket to spread the Typar (Tr. 181-185). He stated that he and Mr. Cline and Mr. Perry then stood to the left side of the rear of the machine in a flat area approximately 10 feet wide and watched Mr. Simpkins loading rock into the ditch over the Typar. Everyone was standing 8 to 10 feet away from the machine at that time, and he confirmed that the counterweight of the machine was swinging around and digging into the soil bank (Exhibit G-11; Tr. 185-188).

Mr. Tackett believed that everyone was in the clear and in no danger while Mr. Simpkins was loading the rock into the ditch over the first layer of Typar. He also believed that the rock and dirt spoil materials in the area where they were standing was good and stable there, because it was solid and there was no loose rock, everything was compact and I wasn't walking on no loose rock, and no one had any trouble with their footing (Tr. 191).

Mr. Tackett confirmed that he went into the ditch when the second layer of Typar was being spread over the rocks and it overlapped itself close to the front of the machine, and he looked to both sides and under the machine, checked the spoil on both sides, and determined that it would be safe to step onto the rock and spread the Typar. He believed he had at least three feet on each side of the machine as an escapeway in the event spoil materials came into the ditch (Tr. 195).

Mr. Tackett stated that the ditch was approximately two to three feet deep at the end closest to the excavator where he was standing in front of the machine bucket on the other side of the track. He was able to see around and out of the area while he was in that position (Tr. 196-197, Exhibit G-11). He believed he had access in and out of the ditch to the right and left, and could have gone out under the machine, and he estimated the tracks to be three to four feet high (Tr. 199).

Mr. Tackett stated that he was never in front of the machine bucket toward the highwall side of the ditch area and from what he observed he believed he was safe and would not have gone into the ditch if he thought he would be hit by a rock. He confirmed that he did not initially inform Inspector Blevins that he was in the ditch because AI didn't even think nothing about it two or three weeks later. He denied telling Mr. Blevins that he should have known better or should not have done it. He did not believe that it was unsafe for anyone else to go into the ditch, but stated AI wouldn't care to put either one of them men in there (Tr. 201-203).

Mr. Tackett stated that Anchor Mining is presently doing reclamation work and is not mining coal, and when the reclamation is completed the company has no further contractual obligations to mine coal. He expects that Anchor Mining will close its operation and be out of business by October 1996, and he will probably be laid off and will have to look for a job. He expects to earn \$50,000 in 1996, has savings accounts and a car payment of \$520 a month. His wife is unemployed, and if he is laid off, he expects to receive \$1,000 a month in unemployment. He owes \$10,000 for his wife's 1994 automobile. He stated that if he were required to pay the proposed \$2,000 assessment it would create a hardship for him and he would have to use some of the \$1,900, he has saved for his 13 year old daughter's college fund (Tr. 206).

Mr. Tackett stated that he was approximately five feet ten inches tall and at the location where he was standing, he estimated that the ditch was three to four feet high, or waist high on each side of him (Tr. 207).

On cross-examination, Mr. Tackett could not recall stating in his deposition of July 16, 1996, that the ditch was between five and ten feet or something like that where he was standing (Tr. 209). He explained further that this statement referred to the height of the spoil bank on the side of the machine where he had been walking and standing and where the machine counterweight was rubbing the spoil (Tr. 214; Exhibit G-9-A).

Mr. Tackett estimated that there was three feet of spoil material on the edge of the ditch where he was standing and plenty of spoil, approximately 30 to 40 feet, toward the highwall. However, he was not in that area (Tr. 215). When he stretched out the Tyvar at the point where it was overlapping he pulled it toward the back of the machine, and at no time did he stretch it back in the direction of the highwall (Tr. 216-218).

Mr. Tackett stated that he was never instructed to stretch the Tyvar along the entire length of the ditch as shown in Exhibit R-12, nor was he instructed to go into the ditch, and stated AI took that on myself to do that (Tr. 221). He confirmed that he was aware of the spoil bank material on each side of the ditch as shown in exhibit G-9-A. He was also aware of the spoil bank at the highwall area, and knew that the spoil bank materials were loose and unconsolidated materials that were dug out from the ditch. He also knew that none of these materials were supported by any shoring, posts, or timbers

(Tr. 224). Referring to exhibits G-7 and G-8, he stated that Mr. Simpkins stretched out the rest of the Typar with the machine bucket as shown in exhibit R-12 (Tr. 228-230). He confirmed that he was between the machine bucket and the machine when he stretched out the Typar (Tr. 235-236).

Mr. Tackett reiterated that he never stated to Mr. Blevins that he knew it was unsafe to go into the ditch, and he explained further as follows at (Tr. 238):

I just got in the ditch. I observed both sides, looked carefully, seen if there was a way to get in and out of that ditch. I could have walked to either side of the machine, went under the machine. I chose to just step off the rock, onto the flat area.

Mr. Tackett stated that just before the accident he was standing to the left side of the machine with Mr. Perry, Mr. Cline, and Mr. Adams, and with the machine counterweight swinging, they were in the danger zone. He stated that he observed that everybody was safe and away from the machine. He did not recall if Mr. Simpkins was there at that time, but he was not in the machine and was probably off, on the ground (Tr.

239-240). He received no communication from Mr. Simpkins at that time that he was going to move the machine, nor could he recall Mr. Simpkins tell him that he was going to do so (Tr. 241-242).

Mr. Tackett stated that after he left the area where the three individuals were standing he went to the right side of the machine and saw Mr. Simpkins in the operator's seat. Mr. Simpkins did not give him any signal. However, he signaled to Mr. Simpkins with his arm that he was in the clear and he knew that after spreading the Typar, Mr. Simpkins would move the machine (Tr. 247-248).

Mr. Tackett stated that he did not signal the people standing to the left side of the machine or try to warn Mr. Simpkins that they were there because he was on the right side of the machine and Mr. Simpkins was aware and was over there with the people on the left side of the machine (Tr. 250). He stated that Mr. Simpkins made eye contact with him, but he did not signal Mr. Simpkins to stop the machine to check the other side because the last time I was on the other side of the machine, all the men were in the clear when I was over there with them (Tr. 252).

In response to further questions, Mr. Tackett stated that the excavator dual diesel engines are noisy, and when the machine throttles up to swing around, it was very loud and everyone in the area could hear it. Mr. Tackett stated that he never had any concern that the three people standing to the left of the machine were not in the clear. While he was in that area everyone was safe and out of the swing of the machine. He stated that Mr. Cline was an experienced miner and had operated the excavator ninety percent of the time. Mr. Tackett stated that he advised Mr. Perry to stay away from the swing of the machine because he was inexperienced. Mr. Tackett reiterated that it would be difficult for him to live on his unemployment if he were laid off and that it would be tough for him to make ends meet if he had to pay the proposed penalty assessment

(Tr. 263).

James Simpkins, testified that he is one of the mine owners and has been in business for 8 to 10 years. He confirmed that he was operating the excavator constructing the ditch in question on the day of the accident, and has operated excavators for 20 years. He considered himself to be an excellent operator and explained how the ditch was excavated and how he spread the Typar with the machine. (Tr. 265-274).

Mr. Simpkins stated that the rock shown in Exhibit G-9-A, that appears to be above Mr. Tackett's head was secure and nearly halfway up into the ditch and he tried to dig it out but could not move it (Tr. 277). He attempted to remove it because he was

concerned that materials might flow from under the rock into the ditch while he was digging at the bottom. He speculated that the rock was 5 to 10 feet in front of Mr. Tackett (Tr. 178).

Mr. Simpkins stated that he tested and checked the rocks and the sides of the ditch, and did not believe that there was a potential for Mr. Tackett to be covered up by any loose spoil where he was located. If Mr. Tackett had gone in by that area he would have exposed himself to some danger, but he did not do so (Tr. 279). Mr. Simpkins stated that the company has no assets, no prospects for future coal production, and has been in the red for the last four years, and has no way of paying any assessments (Tr. 281).

Mr. Simpkins described what occurred prior to the accident. After Mr. Tackett stretched the Typar, he came out of the ditch and went to the right side of the machine and Mr. Adams, Mr. Cline, and Mr. Perry were in the area where they had been standing all day (Exhibits G-11). He estimated that they were 15 to 20 feet from where he was located and clearly out of the way of the swing of the machine counterweight (Tr. 283-285). He further explained at (Tr. 285-286):

A. At that point in time, Tackett had flipped the Typar back over. The bucket was already turned down into the hole with the teeth down in the right direction. I simply made a couple of quick, short passes to stretch the Typar, looked to the left and right, revved the machine up and proceeded to swing the machine to the right, but could not, since I had raised the boom up, see Jim Tackett and I had to lean up and look forward to locate him.

Having spotted Jim, knowing he was now in the clear, I proceeded to swing, and at that point, made a swing out of the hole with the machine, turned it around almost a ninety degree turn. And at that point in time, Troy Perry came running around the side of the machine, waving me down, and I knew something had happened.

Mr. Simpkins stated that after the last swing of the machine his work was finished and he planned to tram the machine out of

the ditch. He stated that AI told the men that I was finished and I was going to tram the machine out of the hole,@but up to that point, he gave Mr. Cline no indication that he would turn the machine around and tram out. Although he could not state for certain whether Mr. Cline heard him state that the work was finished, Mr. Simpkins stated AIif he didn't, he should have@(Tr. 288).

Mr. Simpkins stated he Afelt perfectly comfortable@with the three individuals standing on the left side of the machine, and he further explained at (Tr. 289-290):

Q. Would you rather have had them in a different position?

A. I liked having them where I could see them.

Q. Why?

A. Because I knew where they were. Had they been to my rear, all the time, then I would have had to swing around completely to have located them. And when they were standing off to my left - - that is why Rick had chosen that spot to take the pictures, so I could see him, and not gotten off on right side or behind me. He got on my left where there was clear visible contact between the two of us and I could always see where he was.

Q. Did you have any reason - - did you have any indication at all that anyone was going to step into the path of the counterweight?

A. No, I had no idea that Dempsey was going to do that.

Q. Did you have any reason to believe that Mr. Cline or anyone else out there was going to move - - that any one of those people on the left-hand side of your machine was going to move from the position that you last saw them in?

A. No. They had been there for two or three hours in that position and they seemed to be quite content there.

Q. Had they all been in that position?

A. At times. Troy and Rick had been there most of the time and even, I think, at times, Tackett was there with them, and Dempsey at different times.

Mr. Simpkins stated that the company paid the assessment for the violation that was issued for failure to make certain that people were in the clear because he had instructed his controller to promptly pay for all violations. He did not have time to stop the payment, and he would not have paid it (Tr. 291).

Mr. Simpkins confirmed that he made a statement to the MSHA inspectors during the accident investigation, but he could not recall the exact words, and indicated that Athe only thing that could have been done was just not to have those people there, period.@ He stated that he had

no control over what any of the people would do because they could have walked up to the machine while I was busy with the equipment and had my back to it (Tr. 292). He further stated that he may have acknowledged to the inspector that the people were not in the clear when he began to move the machine (Tr. 293). Mr. Simpkins stated that Mr. Cline was a close friend of his and worked for him for 8 years, and he was heartbroken and grief stricken over the accident, the first such incident at the mine (Tr. 293-294).

On cross-examination, Mr. Simpkins stated as follows at (Tr. 294-295).

Q. All right, Mr. Simpkins, according to our transcription from the tape recording interview of you by Mr. Blevins, you were asked by him, as indicated by Mr. Bonham, what could be done to prevent this accident from happening. And the answer from the tape transcription is, **A**lf I had, before I moved the machine, if I had moved everybody from the area and made sure they were back away completely, this accident would not have happened. Does that refresh your memory as to what you said?

A. Yes. If you're reading from the transcript, then that is what I said, yes.

* * * *

Q. And you made mention to them that you were going to tram the machine out of there?

A. Yes.

Q. And you didn't mention to them, did you, that you were going to swing the counterweight to the left and swing the boom to the right, did you?

A. It would have been necessary to have done that to have trammed the machine.

Mr. Simpkins confirmed that he did not exchange any signals with the people standing on the left side of the machine because they were already in the clear and I could plainly see them (Tr. 299). He believed they should have known he was going to

move the machine when he throttled it up because it would have been impossible for them not to hear the engines, and he acknowledged that the machine responds quickly and the counterweight turns in seconds (Tr. 302-303).

With regard to the rock near Mr. Tackett as shown in Exhibit G-9-A, Mr. Simpkins confirmed that it was secure, but that it was located in loose, unconsolidated material, and even at

8 feet away, it could have caved in and effected Mr. Tackett. However, he tried to move the rock and found it very secure (Tr. 310). He stated that the machine bucket is five feet wide and that the ditch was approximately ten feet wide and the reach of the bucket boom is 47 feet (Tr. 311).

Mr. Simpkins confirmed that the mine produced 1,000 tons of coal per day until mid-July 1996, and he sold it for \$10 or \$15 a ton. He stated that the company is owned by Pehem Industries, Inc., a parent company, and it has mined coal in 1995 and 1996 (Tr. 317-318). He confirmed that he also owns the cattle that are at the mine and is co-owner of Pehem Industries, the owner of Anchor Mining's stock (Tr. 319).

Dr. Wu was recalled, and stated as follows at (Tr. 323-324):

A. I do believe as what Mr. Simpkins stated, that he did try to loosing the material and the rock is his concern. It should be a simple thing to do with this particular piece of equipment. And my concern is for loose materials, we're not only talking one piece of rock or one particular piece of rock when you try to move it and you're sure the thing will not come down.

Basically, when we're talking dealing with loose material, he is talking overall the spoil bank. So there could be this piece of rock at the time was firm, but as time goes and the bottom, the material, starts getting loose and a big piece can come down anytime. So it's always important to slope back those banks, the spoil banks, to provide a safe working environment.

Findings and Conclusions

Docket No. WEVA 95-169. Fact of Violations.

Section 104(d)(1) AS&S@Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a)

Inspector Blevins cited Anchor Mining Company with a violation of mandatory safety standard 30 C.F.R. 77.1006(a) after making a determination that Mr. Tackett went into the ditch that was under construction at the base of the highwall to smooth out a part of the Typar covering material that was over the rock that had been placed in the ditch. The cited section 77.1006(a), provides as follows:

- ' 77.1006 Highwalls; men working.
 - (a) Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks.

Based on the evidence adduced with respect to this violation, I conclude and find that the construction of the drainage ditch in question was taking place near or under a dangerous highwall and spoil banks

that were located on either side of the ditch and formed by the materials that either came off the highwall or were excavated from the ditch during construction and placed on either side of the ditch. Accordingly, the cited safety standard clearly applied to the work that was being performed on September 15, 1994, the day of the accident in question.

Mr. Tackett admitted that he went into the ditch to pull back and straighten out a piece of the Tyvar material, and this act on his part was confirmed by eye witnesses Adams, Cline, and Simpkins. I conclude and find that Mr. Tackett was in the ditch near and under the dangerous ditch spoil banks performing work and that his presence there was a clear violation of section 77.1006(a). Under the circumstances, the violation IS AFFIRMED.

Section 104(d)(1) AS&S@Order No. 4001124, October 12, 1994, 30 C.F.R. 77.1006(b).

Inspector Blevins cited Anchor Mining Company with a violation of 30 C.F.R. 77.1006(b), after concluding that the excavator being used to construct the drainage ditch on September 15, 1994, was positioned in such a way as to block Mr. Tackett's egress from the ditch which he had entered to perform the work that resulted in the issuance of the prior section 104(d)(1) AS&S@Order No. 4001122. Section 77.1006(b), provides as follows:

' 77.1006 Highwalls; men working.

* * * *

(b) Except as provided in paragraph (c) of this section, men shall not work between equipment and the highwall or spoil bank where the equipment may hinder escape from falls or slides.

Photographic exhibits G-8 and G-9-A, clearly depict Mr. Tackett in the ditch pulling on the Tyvar material, and he is positioned between the excavator and the highwall and adjacent ditch spoil banks that were on either side of him. Further, his location in the ditch was observed by several of the witnesses, and I conclude and find that Mr. Tackett presented no credible evidence to rebut the fact that he was in the ditch between the excavator and the highwall and spoil banks. The critical issue however, is whether or not the excavator would have hindered Mr. Tackett's escape from his location in the ditch in the event of a fall or slide of the spoil materials. Webster's New Collegiate Dictionary, defines hinder as follows at pgs. 536-537:

to make slow or difficult the progress of; to delay, impede, or prevent action.

The burden of proof is on the petitioner to establish the violation by a preponderance of all of the credible and probative evidence presented in support of the charge described in the citation. I take note of the fact that although section 77.1006(b), prohibits an individual from working between equipment and a highwall or spoil bank where the equipment may hinder his escape from falls or slides, the citation issued by Inspector Blevins states that the excavator blocked Mr. Tackett's egress from the ditch. The word block is defined by Webster's New Collegiate Dictionary, as to make unsuitable for passage by obstruction; to hinder the passage of; I

conclude and find that both words have essentially the same meaning and the fact that the citation states Ablocked rather than Ahindered is not critical to the charge.

Eyewitness mining engineer Adams, testified credibly that Mr. Tackett was in the ditch for less than a minute and he did not recall that Mr. Tackett experienced any difficulty in leaving after he pulled back the Typar (Tr. 85). Mr. Adams further believed that the excavator did not block Mr. Tackett's egress and he was certain that he could have exited the ditch on either side of the excavator (Tr. 97).

State mine inspector Wallace, who investigated the accident the following day, confirmed that he made no measurements of the width or depth of the ditch, and he was of the opinion that in the event of a collapse of the spoil bank anyone in the ditch would have to exit out of the front of the ditch and that the excavator would partially block the area and make it Aa little more difficult to get out (Tr. 258, 268). Mr. Wallace conceded that he had no personal knowledge as to whether Mr. Tackett had a means of egress or ingress to the left side of the excavator, and that it was possible that Mr. Tackett could have exited the ditch on the right side of the excavator or under the tracks (Tr. 285).

MSHA Inspector Blevins confirmed that he too made no measurements during the course of his accident investigation and his report is confined to the accident itself and contains no information concerning this alleged violation. Indeed, Mr. Blevins admitted that Mr. Tackett's ability to get in and out of the ditch was not included as part of his accident investigation and that he spoke to none of the eyewitnesses about this violation at that time. He confirmed that he obtained information about this event Aweeks later and that the citation was based on his judgement alone (Tr. 375-376).

Mr. Blevins believed that the only access out of the ditch was by the excavator tracks that Aw was just about blocked, but not completely (Tr. 336). However, he also believed that assuming there was no spoil failure, there was an area on each side of the machine that would possibly have allowed Mr. Tackett to pass through (Tr. 337). He later testified that he had no knowledge as to whether or not Mr. Tackett could have exited the ditch around the right or left side of the excavator, but nonetheless believed this was possible (Tr. 367-368). I find Mr. Blevins's testimony in support of this particular violation to be rather equivocal, contradictory, and less than credible.

Mr. Tackett's credible and un rebutted testimony is that he had access in and out of the ditch to the left and right side of the excavator, as well as under the machine tracks, and that before going into the ditch he looked carefully to both sides and determined that there was a way to get in and out by walking to either side of the excavator or under the tracks (Tr. 199-238). His testimony is essentially corroborated by Dr. Wu, who, after viewing several photographic exhibits, agreed that they do not show a lack of clearance on the right and left sides of the excavator, and that Mr. Tackett could have crawled out of the ditch and through the undercarriage of the machine in an emergency (Tr. 66, 104-106).

Although Dr. Wu believed than a minimum of 2 **2** feet of clearance on each side of the

machine would provide sufficient clearance to meet the requirements of section 77.1006(b), he agreed that no measurements were taken by anyone in connection with this violation, and as noted above, his own testimony lends support to Mr. Tackett's belief that he had sufficient clearance on either side of the machine, as well as under it, to leave the ditch unimpeded by the position of the machine.

After careful review and consideration of the evidence and testimony adduced with respect to this alleged violation, I conclude and find that the petitioner has not established a violation of section 77.1006(b), by a preponderance of the credible and probative evidence presented in this case. Under the circumstances, the violation and contested order ARE VACATED.

Docket Nos. WEVA 96-74 and WEVA 96-75

Fact of violation, Section 104(d)(1) AS&S@Citation No. 3745835, September 19, 1994, 30 C.F.R. 77.1607(g).

Mr. Tackett and Mr. Simpkins are charged individually pursuant to section 110(c) of the Act as agents of Anchor Mining Company with knowingly authorizing, ordering, or carrying out a violation of mandatory safety standard 30 C.F.R. 77.1607(g), which states as follows:

- ' 77.1607 Loading and haulage equipment; operation.
 - (g) Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.

Respondent Anchor Mining Company did not contest section 104(d)(1) Citation No. 3745835, issued on September 19, 1994, for a violation of section 77.1607(g), and pursuant to section 105(a) of the Act, the uncontested violation and proposed civil penalty assessment became a final order of the Commission. Pursuant to the Commission's decision in Old Ben Coal Company, 7 FMSHRC 205, 209 (February 1985), such final orders reflect violations of the Act and the asserted violation contained in the citation is regarded as true.

Although Mr. Simpkins and his counsel stated that the \$4,000 civil penalty assessed against Anchor Mining was paid (Tr. 291, 320), an MSHA computer print-out of the respondent's history of prior violations prepared on July 8, 1996, reflects that the penalty was not paid and that a delinquency letter was issued (Exhibit G-1). Further, at page 4 of his post-hearing brief, MSHA's counsel states that as of the filing of the brief on October 28, 1996, the penalty assessment of \$4,000 has not been paid.

The respondent's suggestion that Mr. Cline caused the accident and violation by stepping in front of the excavator counterweight, thereby absolving Anchor Mining and its management from any responsibility or liability for the violation is rejected. It is well settled that mine operators are liable without regard to fault for violations of the Act. See: Secretary v. Fort Scott Fertilizer-Cullor, Inc., 17 FMSHRC 1112, 1115 (July 1995); Secretary v. Western, Fuels-Utah, Inc., 10 FMSHRC 256 (March 1988). However, the absence of fault by the mine operator may mitigate its

negligence and any civil penalty assessment for the violation.

In Austin Power, Inc., 9 FMSHRC 2015, 2018-2019 (December 1987), the Commission stated as follows:

We hold that section 77.1607(g) requires the operator of equipment subject to the standard to be certain that all persons within the potential zone of danger are clear from reasonably foreseeable hazards resulting from the starting or moving of the equipment. * * *

As contrasted with more detailed regulations, the requirement of section 77.1607(g) that A[e]quipment operators be certain . . . that all persons are clear before starting or moving equipment@is the kind of regulation made A simple and brief in order to be broadly adaptable to myriad circumstances.@ Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Generally, the adequacy of an equipment operator=s efforts to comply with section 77.1607(g) is evaluated in each case with reference to an objective test of what actions would have been taken by a reasonably prudent person familiar with the mining industry, relevant facts, and the protective purpose of the standard. See, e.g., United States Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); United States Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982).

The critical issue here is whether or not Mr. Simpkins, who was operating the excavator, acted reasonably and prudently in making certain that Mr. Cline was clear of the machine when he put it in motion by swinging the boom to the right, causing the rear counterweight to swing to the left into Mr. Cline, causing serious injuries to his leg.

Mr. Adams, Mr. Perry, and Mr. Cline were standing together to the left rear of the machine shortly before Mr. Simpkins put it in motion. Mr. Adams testified that they were standing in a level area close to the elevation of the machine and he saw that the machine counterweight had made an indentation in the spoil bank between the area where they were standing and the excavator as it swung around in the course of the work that was taking place (Tr. 90-91).

Mr. Adams testified that he perceived no hazard to Mr. Cline where he was standing, and he felt A reasonably safe@ where he (Adams) was standing, and that Mr. Cline was near him. However, he nonetheless believed that the accident was preventable, in part, if Mr. Cline had been standing somewhere else behind him (Tr. 72-76). Mr. Adams also indicated that he and Mr. Cline were 5 or 6 feet, or A a step and a reach@ from the counterweight when it swiveled (Tr. 54-57).

Although Mr. Adams stated that he was not surprised by the swinging counterweight and expected it, he confirmed that he did not hear Mr. Simpkins give any audible signal or see him A eyeball@ anyone before putting the machine in motion (Tr. 133, 137).

Mr. Perry and Mr. Cline testified credibly that they had no advance warning that Mr.

Simpkins would put the machine in motion, and Mr. Perry observed no signal from Mr. Simpkins (Tr. 151-152). Mr. Perry further testified that he was one step and an arm's length away from the counterweight as it swung by him, and that he felt the wind as it passed him (Tr. 151-152).

Mr. Tackett testified that Mr. Cline, Mr. Perry, and Mr. Adams were standing 8 to 10 feet from the excavator on the level area to the rear left of the machine while Mr. Simpkins loaded rock into the ditch. Although they were in the danger zone, Mr. Tackett believed the men were clear and in no danger at that time (Tr. 188, 190). He could not recall that Mr. Simpkins ever told him that he was going to move the machine and he received no communication from Mr. Simpkins that he was going to do so (Tr. 241-242).

Contrary to the testimony of Mr. Perry, Mr. Cline, and Mr. Tackett, Mr. Simpkins testified that he told them that he was going to tram the machine out of the area. With respect to Mr. Cline, Mr. Simpkins did not know if Mr. Cline heard him, and stated, if he didn't, he should have (Tr. 288). I find the testimony of Mr. Simpkins to be less than credible, and conclude that he did not inform Mr. Cline that he was going to move the machine before he put it in motion.

Mr. Simpkins' assertion that the machine was loud enough for Mr. Cline to hear it and realize that it was going to move is rejected. The cited standard requires the equipment operator to be certain by signal or other means that all persons are clear before moving the equipment. I reject as unreasonable any notion that revving up the engine is an acceptable means of warning anyone to stand clear of the machine, particularly since the machine boom can swing around in a matter of seconds (Tr. 302-303).

Mr. Simpkins acknowledged his prior statements to MSHA's inspector that the accident would not have happened if he had moved Mr. Cline and the other individuals from where they were standing to the rear left of the machine and made sure they were completely clear of the machine (Tr. 295). Mr. Simpkins also admitted that he did not exchange any signals with these individuals, and claimed he did not do so because he believed they were clear of the machine and he could see them (Tr. 299).

Mr. Simpkins' assertion that he was in complete compliance with section 77.1607(g), because he made certain that all men in the vicinity of the excavator were in the clear before he moved is rejected. The evidence establishes that Mr. Simpkins did not signal the men standing to the rear of the machine that he was going to move it and swing the counterweight around in their direction. He clearly violated that part of section 77.1607(g) that requires a signal by the equipment operator. The other means of compliance argued by Mr. Simpkins is that he visually observed the men standing to the rear of the machine, and based on his experience and judgment, concluded that they were clear of the machine counterweight (Tr. 284-285).

I conclude and find that the credible testimony of Mr. Cline, Mr. Perry, and Mr. Tackett establishes that they were not completely clear of the swing of the counterweight and were in the danger zone when Mr. Simpkins put the machine in motion. While it may be true that Mr. Cline may have stepped into the counterweight when it swung in his direction, the evidence strongly suggests that he did not step far before the machine contacted his leg, and reasonably

supports a conclusion that he was not completely clear of the counterweight. The same can be said of Mr. Perry who was standing near Mr. Cline and testified that he could have reached out and touched the counterweight and heard the rush of air as it passed him.

I conclude and find that Mr. Simpkins acted less than a reasonably prudent mine operator when he failed to make sure that the three individuals who he observed standing to the rear of the excavator acknowledged the fact that he saw them and clearly understood that he was about to put the machine in motion and swing the counterweight in their direction. In the absence of a clearly communicated and acknowledged signal by Mr. Simpkins indicating that he was going to put the machine in motion, I conclude and find that his unilateral observation of the three men standing to the rear of the machine was an inadequate and unreasonable means of making certain that the men were in fact clear of the counterweight before putting the machine in motion. This is particularly true in this case where Mr. Simpkins claimed that his work with the machine was finished and that he intended to tram the machine out of the area. If this were the case, I can only conclude that the three individuals had no particular reason for being so close to the machine, and that it would have been a rather simple matter for Mr. Simpkins to make sure that the men were completely removed from the area before moving the machine. I believe that a reasonably prudent mine operator would have done so in these circumstances. I further believe that Mr. Simpkins's tacit admission that he should have removed all of the individuals from the area and made sure they were completely away from the machine supports these conclusions.

Based on the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of section 77.1607(g), by a preponderance of all of the credible evidence adduced in these proceedings.

The alleged **Aknowing@violation.**

The Commission has defined the term **Aknowingly@** as used in the statutory predecessor to section 110(c), in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (January 1981), aff'd 669 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983), as follows:

Aknowingly,@ as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

In Secretary of Labor (MSHA) Bethenergy Mines, Inc., et al., 14 FMSHRC 1232 (August 1991), the Commission reaffirmed its prior holding in Kenny Richardson, supra, and stated that **A**the proper legal inquiry for purposes of determining liability under section 110(c) of the Act is

whether the corporate agent knew or had reason to know of a violative condition, and that the Secretary must prove only that the cited individual knowingly acted and not that he knowingly violated the law, 14 FMSHRC 1245. The Commission has also stated that a corporate agent in a position to protect employee safety acts knowingly when, based on the facts available to him, he knew or had reason to know that a violation would occur, but failed to take preventive steps. Roy Glenn, 6 FMSHRC 1583 (July 1984). Further, a knowing violation requires proof of aggravated conduct exceeding ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 15 FMSHRC 1232, 1245 (August 1992).

WEVA 96-75, James Tackett.

The evidence establishes that as the mine superintendent, Mr. Tackett was an agent of Anchor Mining Company on the day of the violation, and he has stipulated that this was the case. The petitioner argues that Mr. Tackett and Mr. Simpkins were both supervisory personnel with a heightened standard of responsibility for the safety of the miners at the work site, and its theory of section 110(c) liability on the part of Mr. Tackett for the violation seems to be based on the fact that Mr. Tackett occupied a supervisory position and was present at the area where the violative conduct took place.

The evidence in this case establishes that Mr. Simpkins, and not Mr. Tackett, was supervising and directing the drain construction work on the day in question. Indeed, at page 19 of its post-hearing brief, the petitioner recognizes that this was the case. The evidence further establishes that Mr. Simpkins summoned Mr. Tackett to the ditch area to explain the work that was to be performed, and although Mr. Tackett was the mine superintendent, Mr. Simpkins was in charge and directed the work force which I find included Mr. Tackett. Under the circumstances, I conclude and find that Mr. Tackett had little, if any, supervisory authority or responsibility for the ditch construction work that was taking place on September 15, 1994, when the violation occurred.

The evidence further establishes that Mr. Simpkins was operating the excavator when the violation occurred and was aware of the fact that Mr. Adams, Mr. Cline, and Mr. Perry were standing to the rear of the machine. As the operator of the equipment, Mr. Simpkins was directly obligated under section 77.1607(g), to make sure that the individuals were clear of the machine, and I conclude and find that he, rather than Mr. Tackett, was in the best position to make sure that this was done.

Mr. Tackett testified credibly that before leaving the area where the three individuals were standing, he was satisfied that they were clear of the machine. Mr. Tackett then went to the other side of the machine, and he had no further visual contact with the individuals because the excavator blocked his view and he assumed that Mr. Simpkins had them in view because his operator's compartment was on the left side of the machine. Mr.

Tackett's credible testimony that his view was blocked is corroborated by Mr. Cline, the injured miner, who was an experienced excavator operator who often operated the machine. Mr. Cline testified credibly that Mr. Tackett was not aware where he (Cline) was standing when Mr. Simpkins put the machine in motion. Further, Mr. Perry, who was inexperienced and normally

worked as a security guard, testified credibly that before the work was started, Mr. Tackett explained the hazards associated with the ditch work to him and warned him to be careful and not to get too close to the machine (Tr. 153).

In view of the foregoing, and in particular the fact that Mr. Tackett was not supervising the ditch work that was taking place and was located in an area where he could not see the three individuals standing behind the machine before Mr. Simpkins put it in motion, I cannot conclude that Mr. Tackett acted in a knowing and intentional manner, or engaged in any aggravated conduct. In short, I cannot conclude that the credible evidence adduced with respect to Mr. Tackett establishes that he knowingly authorized, ordered, or carried out a violation of section 77.1607(g), within the meaning of section 110(c) of the Act, and the applicable case law. Accordingly, the alleged violation charged to Mr. Tackett is VACATED, and the proposed civil penalty assessment filed against him IS DENIED and DISMISSED.

WEVA 96-74, James Simpkins

I agree with the petitioner's assertion that in his supervisory capacity as the part mine owner, Mr. Simpkins had a heightened duty and standard of care to insure compliance with the cited standard. As I found earlier, Mr. Simpkins was supervising the work, while at the same time operating the excavator, and he clearly gave no signal to the individuals behind the machine before placing it in motion. I have also concluded that Mr. Simpkins acted less than a reasonably prudent operator when he failed to make sure that the individuals who he observed to the rear of the machine either acknowledged the fact that he had seen them, or to remove them completely from the area near the machine.

As the supervisor in charge of the ditch construction, Mr. Simpkins was in the best position to provide protection for Mr. Cline and the other individuals standing to the rear of the excavator, and by failing to take reasonable steps to insure that they were not in close proximity to the machine when he put it in motion, causing the counterweight to swivel around and strike Mr. Cline, I conclude that he acted knowingly within the meaning of section 110(c) of the Act. Under the circumstances, I conclude and find that the petitioner has carried its burden of proving by a preponderance of the evidence that Mr. Simpkins knowingly carried out the cited violation. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violations

A significant and substantial (S&S) violation is described in section 104(d)(1) of the Act as a violation of such nature as could significantly and substantially contribute to the cause

and effect of a coal or other mine safety or health hazard@ 30 C.F.R. ' 814(d)(1). A violation is properly designated S&S Aif, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonable serious nature.@ Cement Division, National Gypsum Co. 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term AS&S@ as follows:

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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984).

The Commission reasserted its prior determinations that as part of his AS&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

Section 104(d)(1) AS&S Citation No. 3745835, September 19, 1994, C.F.R. 77.1607(g)

After careful consideration of all of the evidence and arguments presented with respect to this citation, I conclude and find that the petitioner has established by a preponderance of the credible evidence that this violation was significant and substantial (S&S).

I have concluded that a violation of section 77.1607(g) has been established. I further conclude and find that the failure of Mr. Simpkins to signal or take other reasonable precautions to insure that the three individuals who were located behind and close to the excavator when he put the machine in motion were clear of the machine, or to remove them from the area where they were standing, presented a discrete hazard of the machine counterweight striking one of the individuals when it was placed in motion and turned to the right by Mr. Simpkins.

I further conclude and find the failure to signal the individuals or otherwise insure that they were clear of the machine, or moved away from the area, presented a reasonable likelihood that the machine would come in contact with any individual in close proximity to the swinging machine counterweight. If this were to occur, I further conclude and find that the individual contacting the counterweight as it turned would reasonably likely suffer injuries of a reasonably serious nature. Indeed, in this case, that is precisely what happened, and Mr. Cline lost a leg as a result of the accident. Under the circumstances, the inspectors AS&S finding IS AFFIRMED.

Section 104(d)(1) AS&S Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a)

After careful consideration of all of the evidence and arguments presented with respect to this violation, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the violation was significant and substantial (S&S).

The respondent's assertion that Mr. Tackett went no further than the outside edge of the drain area to grasp and pull taut the Typar fabric is not well taken. While there is no evidence

to establish that Mr. Tackett ventured beyond the excavator bucket in the direction of the highwall while he was in the ditch, the fact remains that the testimony and evidence presented, including the photographs, establishes that he was in the ditch, and not simply at the outside edge. Mr. Adams testified that the location where Mr. Tackett was standing was approximately 6 feet deep and 4 to 6 feet wide, and that Mr. Tackett was below the spoil bank material that was on each side of the ditch (Tr. 45, 84).

Mr. Tackett estimated that the height of the ditch where he was standing was 3 to 4 or 5 feet or waist high on each side of him, and he estimated that there was 3 feet of spoil material on the edge of the ditch where he was standing (Tr. 207, 215). Mr. Tackett confirmed that he was 5 feet, 10 inches tall, and I conclude and find that if the spoil bank where Mr. Tackett was standing in the ditch had given away, he could have been covered up by the materials.

The fact that Mr. Tackett may have been in the ditch for less than a minute, as testified to by Mr. Adams (Tr. 85), is not particularly relevant in my view. Accidents involving roof falls, falling rocks, and sliding loose unconsolidated spoils materials have been known to occur instantaneously and in less than a minute.

Although Mr. Simpkins indicated that the rock shown in photographic exhibit G-9-A, was secure, and that he also tested and checked the sides of the ditch and did not believe that Mr. Tackett could potentially be covered up by any loose spoil where he was located in the ditch, Mr. Simpkins further testified that the secured rock was located in loose, unconsolidated material, and even though it was 8 feet away from Mr. Tackett, if these materials caved in, it would have affected Mr. Tackett (Tr. 279-310). He also testified that he attempted to remove the rock because he was concerned that loose materials might flow from under the rock and into the ditch that was being constructed (Tr. 178).

Mr. Adams did not believe that the spoil banks on either side of the ditch at the location where Mr. Tackett was standing were in danger of giving way. However, he stated that the rock that Mr. Simpkins found to be secure was part of the loose, unconsolidated spoil bank material in front of where Mr. Tackett was located, and if it were to give way, the rock may have affected Mr. Tackett (Tr. 83, 108).

State mine inspector Wallace viewed the scene of the accident the next day and testified credibly that the spoil banks around the ditch consisted of loose, unconsolidated materials and were nearly vertical. He believed that these materials had a very high potential of slipping or sliding and that that it would be foolish for anyone to go into the ditch for any reason (Tr. 236).

MSHA inspector Blevins, who also viewed the scene the day following the accident, testified credibly that he based his AS&S finding on the fact that the unstable spoil materials would cover up anyone in the ditch if work were to continue (Tr. 216).

Dr. Wu, who did not view the scene, but was nonetheless competent to express his expert opinion, stated that standing in a 4 foot deep ditch adjacent to an additional 4 foot sloped spoil bank, would be hazardous to Mr. Tackett because of the presence of the loose spoil materials (Tr. 165-166).

I have concluded that a violation of section 77.1006(a), has been established. I further conclude and find that working near or under spoil banks consisting of loose unconsolidated soil and rock materials presents a discrete hazard of anyone working in such a location to be covered up or being hit in the event of a slide or fall of the materials into the ditch. If this were to occur in the normal course of mining activities, I find that it would be reasonably likely that the person in the ditch would suffer injuries of a reasonably serious nature. In this case, I conclude and find that Mr. Tackett placed himself in just such a position when he went into the ditch in close proximity to a slide or fall of materials hazard. Accordingly, I conclude and find that the violation was significant and substantial (S&S), and the inspectors finding in this regard IS AFFIRMED.

Unwarrantable Failure Violations

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held, in pertinent part, as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of

reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghioghney & Ohio, at 9 FMSHRC 2010:

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

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase unwarrantable failure. Unwarrantable is defined as not justifiable or inexcusable. Failure is defined as neglect or an assigned, expected, or appropriate action@ Webster's Third New International Dictionary (Unabridged), 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by inadvertence, thoughtless, and inattention.@ Black's Law Dictionary 930-931 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Section 104(d)(1) AS&S@ Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a).

As noted earlier, Mr. Tackett did not deny that he went into the ditch, and he did so with the full knowledge of the presence of loose and unconsolidated materials on both sides of the spoil

banks where he was standing. I conclude and find that he failed to exercise such care as a reasonable and prudent person would be expected to use, particularly someone in a responsible position like Mr. Tackett, who in his capacity as the mine superintendent, should set an example. I conclude and find that Mr. Tackett's conduct was aggravated and inexcusable, exceeded ordinary negligence, and constituted an unwarrantable failure on his part to comply with the requirements of the cited standard. Accordingly, the inspectors' finding in this regard IS AFFIRMED.

Although Mr. Tackett asserted that he was not instructed to go into the ditch, and took it upon himself to do so, and exposed no one other than himself to a hazard, I nonetheless conclude and find that his conduct and negligence may be imputed to Anchor Mining Company, particularly in light of the fact that a high level agent of Anchor Mining (part-owner and officer), in the person of Mr. Simpkins, was supervising the work and obviously observed Mr. Tackett go into the ditch and did nothing to prevent him from doing so. See: NACCO Mining Co., 3 FMSHRC 848 (April 1981); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 197 (February 1991).

Section 104(d)(1) AS&S@ Citation No. 3745835, September 19, 1994, 30 C.F.R. 77.1607(g).

After careful review and consideration of all of the testimony and evidence presented with respect to this violation, and based on my findings and conclusions with respect to Mr. Simpkins' knowing violation of section 77.1607(g), which I incorporate herein by reference, and where I found that Mr. Simpkins acted in a knowing and intentional manner because he knew or had reason to know that Mr. Cline and the other individuals with him were standing dangerously close to the rear area of the excavator when he was about to put the machine in motion causing the counterweight to swing around and contact Mr. Cline's leg, I conclude and find that Mr. Simpkins' conduct was aggravated, exceeded ordinary negligence, and resulted in an unwarrantable failure to comply with the cited standard. Accordingly, the inspectors' finding in this regard IS AFFIRMED.

I further conclude and find that the negligence of Mr. Simpkins, including his unwarrantable failure conduct in his supervisory capacity, is imputable to Anchor Mining Company, NACCO Mining Co., 3 FMSHRC 848, 849-850 (April 1981).

History of Prior Violations

With respect to Anchor Mining Company, a computer print-out for the period beginning on October 12, 1992, and ending October 11, 1994, reflects that it paid penalty assessments for 41 prior section 104(a) citations, none of which are for violations of the

same standards at issue in these proceedings. Further, there is no evidence that Mr. Tackett or Mr. Simpkins have ever been previously charged pursuant to section 110(c) of the Act.

I have considered the compliance record of the respondents in these proceedings in assessing the penalties which I have affirmed and I conclude that any additional increases over those penalty assessments are not warranted.

Gravity

Based on my AS&S findings and conclusions, I conclude and find that the violations that have been affirmed were serious violations.

Good Faith Compliance

I conclude and find that the violations were all abated in good faith by the respondents.

Negligence

Based on my unwarrantable failure findings, I conclude and find that the violations resulted from a high degree of negligence on the part of the respondents.

Size of Business and Effect of Civil Penalty Assessments on the Respondents Ability to Continue in Business

I conclude and find that Anchor Mining Company was a small to medium sized mining operation at the time of the violations. Mr. Simpkins stipulated that he has the financial ability to pay the assessed penalty in his case, and I find no credible evidence to the contrary. With regard to the respondent Anchor Mining Company, I find no credible evidence to establish that it lacks the resources to pay the penalty assessment for the violation that I have affirmed.

Civil Penalty Assessments

On the basis of my foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings:

Docket No. WEVA 95-169

<u>Order No.</u>	<u>Date</u>	<u>Section</u>	<u>Assessment</u>
4001122	10/12/94	77.1006(a)	\$4,500

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>
3745835	09/19/94	77.1607(g)	\$2,500

ORDER

IT IS ORDERED as follows:

1. Section 104(d)(1) AS&S@ Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a), IS AFFIRMED.
2. Section 104(d)(1) AS&S@ Order No. 4001124, October 12, 1994, 30 C.F.R. 77.1006(b), IS VACATED, and the proposed civil penalty assessment IS DENIED AND DISMISSED.
3. The section 110(c) charge that Respondent James Tackett violated mandatory safety standard 77.1607(g), as stated in section 104(d)(1) AS&S@ Citation No. 3745835, issued on September 19, 1994, IS VACATED and DISMISSED, and the proposed civil penalty assessment IS DENIED and DISMISSED.
4. The section 110(c) charge that Respondent James Simpkins violated mandatory safety standard 77.1607(g), as stated in section 104(d)(1) AS&S@ Citation No. 3745835, issued on September 19, 1994, IS AFFIRMED.
5. The respondents Anchor Mining Company and James Simpkins shall pay civil penalty assessments in the amounts shown above for the violations that have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of these decisions and order, and upon receipt of payment, these matters ARE DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

James B. Crawford, Esq., Office of the Solicitor,

U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington,
VA 22203 (Certified Mail)

John T. Bonham, Esq., David J. Hardy, Esq., Jackson & Kelly,
P.O. Box 553, Charleston, WV 25322 (Certified Mail)

\mca