FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 20, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 96-3
	:	A.C. No. 48-01215-03521
v.	:	
	:	Coal Creek Mine
S & M CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Stephen Kepp, Safety Director, S & M Construction, Inc., Gillette, Wyoming, for the Respondent.

Before: Judge Koutras

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820(a), seeking civil penalty assessments for alleged violations of mandatory training safety standards 30 C.F.R. 48.25(b) and 48.26(a). The respondent filed a timely answer and a hearing was held in Gillette, Wyoming. The petitioner filed a posthearing brief, but the respondent did not. However, I have considered its oral arguments made on the record in the course of the hearing, as well as the arguments advanced by the petitioner.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether

the alleged violations were Asignificant and substantial@ (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. ' 801 et seq.,

2. 30 C.F.R. '' 48.25(b) and 48.26(a).

3. Commission rules, 29 C.F.R. ' 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent is engaged in mining and selling of coal in the United States, and its mining operations aff the jurisdiction of the Mine Act.

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

4. The subject citations were properly served by a duly authorized representative of the petitioner upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The exhibits to be offered by respondent and the petitioner are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

6. The respondent demonstrated good faith in abating the violations.

7. The respondent produced 3,356,712 tons of coal in 1994.

8. The certified copy of the MSHA Assessed Violations History (Exhibit P-1) accurately reflects the history of the mine for the two years prior to the date of the citations.

Discussion

Section 104(g)(1) AS&S@ Order No. 3848781, issued at 5:30 p.m. on February 21, 1995, by MSHA Inspector Herbert A. Skeens, cites an alleged violation of 30 C.F.R. 48.26(a), and the condition or practice cited is described as follows:

> The following employees have not received the training required by 30 C.F.R. 48.26: Derward Lint employed since 5/17/94.
> Richard Chesmore employed since 1/17/95
> Raymond Holzer employed since 6/24/94
> John Milliken employed since 10/6/94
> Bill Morris employed since 5/13/94
> Craig Olson employed since 11/29/94
> Richard Villmow employed since 6/14/94
> Wilbert Williams employed since 5/31/94
> Burt Gleason employed since 10/26/94

All of the cited miners were ordered to be withdrawn from the mine. The order was modified on February 22, 1995, to allow miners Williams, Villmow, Holzer, and Chesmore to return to work because they received the required training. Miner Milliken was allowed to return to work on February 23, 1995, after his newly employed experienced miner training was documented. Except for miner Morris, who was no longer employed at the mine, the remain-ing miners were allowed to return to work on March 10, 1995, when their newly employed experienced miner training was documented.

The respondent=s answer states, in relevant part, as follows:

> This order states 9 employees were inadequately trained as experienced miners working at Coal Creek mine. The order states that due to inadequate training these individuals were reasonably likely to be injured and that the injury would result in a fatality.
>
> **In fact**: The least experienced miner had 4 years practicing his craft. Seven of the 9 have 15 years experience in their craft. All nine individuals had current training certificates issued by S&M Construction. Seven of the nine individuals have been employed by S&M for more than 4 years and had received annual training during that time frame.

The Secretary=s regulatory training requirements for miners working at surface mines and surface areas of underground mines are found in Part 48, Subpart B, Title 30, Code of Federal Regulations. Section 48.26(a) provides as follows:

> (a) A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties.
>
> (b) The training program for newly employed experienced miners shall include the following:
>
> (1) Introduction to work environment. The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.
>
> (2) Mandatory health and safety standards. The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.
>
> (3) Authority and responsibility of supervisors and miners= representatives. The course shall include a review and description of the line of

authority of supervisors and miners= representatives and the responsibilities of such supervisors and miners= representatives; and an introduction to the operator=s rules and the procedures for reporting hazards.

(4) Transportation controls and communication systems. The course shall include instruction on the procedures in effect for riding on and in mine conveyances; and controls for the transportation of miners and materials; and the use of mine communication systems, warning signals, and directional signs.

(5) Escape and emergency evacuation plans; firewarning and firefighting. The course shall include a review of the mine escape system; escape and emergency evacuation plans in effect at the mine; and instruction in the firewarning signals and firefighting procedures.

(6) Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work. The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) Hazard recognition, The course shall include the recognition and avoidance of hazards present in the mine, particularly, any hazards related to explosives where explosives are used or stored at the mine.

(8) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

Section 104(g)(1) AS&S@ Order No. 3848782, issued at 8:05 a.m., on February 22, 1995, by Inspector Skeens, cites an

alleged violation of 30 C.F.R. 48.25(b), and the cited condition or practice states as follows:

> Judy Gerber and Jack Knoell have not received new miner training required by 30 C.F.R. 48.25(b)(4)(8), and (12). Gerber has been employed at the mine since May 11, 1995, and Knoell since July 11, 1994. Both miners are to be withdrawn.

Both of the cited miners were allowed to return to work on February 24, 1995, when their new miner training was documented.

The respondent=s answer states, in relevant part, as follows:

> This order states 2 employees were inadequately trained as inexperienced miners working at Coal Creek Mine. The order states that due to inadequate training these individuals were reasonably likely to be injured and that the injury would result in a fatality. Gerber, one of the two individuals, was one of the first people hired by S & M at Coal Creek. She received her inexperienced miner training at the same time the original hires did -- over a period of days. She developed into our best, most versatile employee before taking a temporary leave. And Knoell has been a heavy machine mechanic for 20 years and traveled with experienced S & M mechanics when he first started working at Coal Creek.

30 C.F.R. 48.25(a) requires new miners to receive no less than 24 hours of prescribed training, and except as otherwise provided, the training shall be received before they are assigned to work duties. Subsection (b) of section 48.25(a), requires the training program for new miners to include the following courses:

> (1) Instruction in the statutory rights of miners and their representatives under the Act; authority and responsibility of supervisors.
>
> (2) Self-rescue and respiratory devices.

(3) Transportation controls and communication system.

(4) Introduction to work environment.

(5) Escape and emergency evacuation plans; firewarning and firefighting.

(6) Ground control; working in areas of highwalls, water hazards, pits and spoil banks; illumination and night work.

(7) Health.

(8) Hazard recognition.

(9) Electrical hazards.

(10) First aid.

(11) Explosives.

(12) Health and safety aspects of the tasks to which the miner will be assigned.

(13) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

Petitioner=s Testimony and Evidence

MSHA Inspector Herbert A. Skeens testified that he has been so employed for three and one-half years, and previously worked in the mining industry for 18 years. He is a high school gradu -ate, attended the MSHA Academy in Beckley , West Virginia, and has Virginia and Kentucky mine foreman=s certificates (Tr. 10-12). He confirmed that he conducted a Aspot inspection@ at the mine in February, 1995, for the purpose of reviewing the Part 50 reporting and Part 48 training records, and that respondent=s representative Steve Kepp accompanied him. Mr. Skeens described the mine as an open pit surface coal mine, and stated that the respondent began operating it sometime in April or May 1994 (Tr. 13).

Mr. Skeens confirmed that he issued the two contested orders in question. He explained that Mr. Kepp provided him with the information regarding employee training records, including MSHA training certificate 5000-23 forms. Mr. Skeens stated that he reviewed the training records for approximately 60 employees, and he and Mr. Kepp determined their hire dates. Mr. Skeens then reviewed the training certificates for each employee and found that the individuals who are named in the orders had not received the required training. He identified Exhibit P-7 as a training record Form 5000-23, and he explained the information on the form and how it is filled out (Tr. 15-20).

Mr. Skeens stated that it took him approximately 10 hours to review all of the training records furnished to him by Mr. Kepp. He explained that the Ahire dates@ shown for each cited employee were obtained from dated training certificates or from infor - mation provided by Mr. Kepp. (Mr. Kepp did not dispute any of the Ahire dates@ listed in the orders (Tr. 21).)

Mr. Skeens identified Exhibit P-2 as a copy of his order of February 21, 1995, citing nine employees for lack of train- ing. He stated that these employees should have received newly experienced miner training. With regard to cited miner Derward Lint, Mr. Skeens stated the records reflected that he had received annual refresher training through a contractor with an approved training program, but had not received any newly employed experienced miner training. He explained that newly employed experienced miner training includes three subjects that are not covered or included in annual refresher training, and he identified them as hazard recognition, introduction to work environment, and authority and responsibility of supervisors and miners= representatives, and explained the course contents (Tr. 22-25).

Mr. Skeens stated that eight of the nine employees listed received annual refresher training, but not the proper newly employed experienced miner training, which would have included the aforementioned three training course subjects. In short, they missed these three courses. With regard to one employee, Burt Gleason, he could find no records indicating that he had any training (Tr. 26). Further, there were lapses of a week to

six months from the hire dates of some of the employees until they were trained, and he testified to the hire dates and

training dates for cited employees Lint, Chesmore, Holzer, Milliken, Morris, Olson, Villmow, and Williams (Tr. 26-28).

In support of his gravity findings associated with the February 21, 1995, order, Mr. Skeens stated as follows (Tr. 29-30):

Q. Okay. You indicated on the citation form that an injury was reasonably likely. What did you mean by that?

A. Go ahead.

Q. How did you come to that conclusion?

A. Well, any miner that doesn't have the proper training is considered to be a hazard to themselves and a hazard to others. These subjects that we discussed earlier are pertinent to a miner's health and safety. Going out there and not knowing anything about the mine site, the mine conditions, the traffic patterns, the blasting rules, the blasting procedures, the authority and responsibility of the supervisors, those types of things could easily lead to an accident.

Q. And you said that injury might be fatal. How did you come to that conclusion?

A. Well, with just the hazards associated with that mine. You've got high walls 60 to 80 feet in height. You got people working underneath them; working above them; working close to them; spoil banks. You've got the conditions of the mine that a person could drive off that high wall if they didn't know where he was.

There's a lot of work before daylight hours, a lot of work after dark. I know when you're out there if you don't know where you are, you better make sure, because you could run off of a high wall face.

Mr. Skeens defined a Asignificant and substantial@ violation as Aa violation of health or safety standard, and that violation is reasonably likely to result in injury or illness, and that injury or illness would be of a reasonably serious nature@ (Tr. 31).

Mr. Skeens stated that the mine has a complicated work schedule with four crews reporting for work between the hours of 4:00 a.m. and 10:00 a.m., and working different shifts, but he could not explain the work schedule and indicated that work might be taking place around the clock at any given time (Tr. 30).

Mr. Skeens stated that he based his Ahigh@ negligence finding on the fact that during a prior inspection in November, 1994, he issued two section 104(g)(1) orders, and during a close-out conference and other discussions with Mr. Kepp, and possibly other management persons, compliance with Part 48 was discussed (Tr. 31, 52).

Mr. Skeens reviewed a copy of a settlement decision issued by Commission Judge Manning on October 26, 1995, and he identified two November 28, 1994, orders citing a violation of section 48.26(a) and a mechanic for not receiving newly employed experienced miner training, and a blaster for not receiving hazard training required by section 48.31 (Tr. 32, 35).

With regard to the order he issued in this case on February 22, 1996, Mr. Skeens confirmed that he based the order on the fact that his review of Training Forms 5000-23 indicated that cited miners Gerber and Knoell had not received all of the required training. He identified the three missing training segments as introduction to work environment, hazard recognition, and health and safety aspects of tasks assigned (Tr. 35).

Mr. Skeens stated that he did not determine the job positions held by each of the eleven employees that he identified in his orders as lacking the required training. He stated that Asome of these people are what I call utility; they do a lot of different things@ (Tr. 37). He stated that Richard Villmow was a front-end loader operator, but Acould very well end up doing mechanic work on it if something happened to the loader. He has observed Mr. Villmow steam cleaning or washing the loader, and doing maintenance work. He stated that Amost of these

employees, if something happens, then they=re required to pitch in and help the mechanic or do another job task.@ He stated that Mr. Chesmore is a mechanic, and he has observed Mr. Lint operating a pan scraper several times. He believed that Ms. Gerber worked in the coal handling plant in the control room or performing clean-up duties. He also believed that people working in the large plant could be at any plant location at any time (Tr. 38).

Mr. Kepp took issue with Mr. Skeen=s testimony regarding the job tasks in question. He stated that Mr. Lint was a welder and would not be operating a scraper. He stated that Ms. Gerber=s primary job was truck driver, but conceded that she could be engaged in clean-up duties if the plant was not running coal (Tr. 39-41). Mr. Skeens did not dispute Mr. Kepp=s information, and Mr. Kepp agreed that an employee needed to be trained regardless of his job task or assignment (Tr. 41).

On cross-examination, Mr. Skeens identified the contractor who trained one of the cited employees as AS & M Construction, Inc.,@ and he confirmed that this company had an approved training plan (Tr. 42). In reviewing the records of the individuals identified in Order No. 3848781, he found other training certificates for different types of training, such as annual refresher or task training, but he was not sure that S & M Construction, Inc., provided that training (Tr. 42).

Mr. Skeens stated that there is a difference between training provided by a contractor and a operator because they have different training plans, even though they may be similar. He explained that a contractor employee who goes to work for a mine operator must be trained by that operator. He confirmed that Mr. Lint had received contractor training, and that except for Mr. Lint and Mr. Gleason, the other employees received annual refresher training Ain an untimely manner@ from the Coal Creek Mine operator. If these employees were working for the contractor, they should have been trained under the contractor=s plan (Tr. 44).

Mr. Skeens stated that he was not sure about the length of time required for training. He was of the opinion that taking 30 to 45 minutes for experienced miner training could be Acutting it a little short,@ and it would depend on the individual miner,

the trainer, and the mine policy (Tr. 45). Mr. Skeens agreed that if a miner is absent from the mine site for any period of time, he cannot receive training and he would not be exposed to the particular hazards at that mine (Tr. 47).

Mr. Skeens confirmed that the Aemployed since@ dates for each of the listed cited employees only refers to the dates they started work at the Coal Creek Mine, and one cannot infer from the dates shown that these were the first dates they started working at a coal mine performing their particular job tasks (Tr. 48).

In response to further questions, Mr. Skeens stated that task training for anyone working in a mine must be given before commencing a new task, and that a newly employed experienced miner must receive training before commencing any work duties. Newly employed persons, regardless of experience, have to be trained the day they are hired (Tr. 50).

When asked to reconcile one of his prior violations of November, 1994, concerning a blaster who had not received hazard training, where he nonetheless made a gravity finding that he would not be exposed to a fatal injury, Mr. Skeens explained that the cited individual (Hansen) was an experienced blaster who was comprehensively training at other mines, but not at the mine where he was performing duties when the violation was issued. Mr. Skeens characterized the lack of mine specific hazard training as Aa technicality@ (Tr. 53).

In response to further questions concerning the jobs performed by the cited employees, Mr. Skeens and MSHA counsel stated as follows (Tr. 54-56):

> THE COURT: In the case at hand now, with the exception of one or two people, you really don=t know what these other people did in terms of their jobs?
>
> THE WITNESS: I can=t recall what they did. I know I=ve observed each one of them at one time or another. Some are mechanics, some are dozer operators, loader operators, heavy equipment operators is most of them.

THE COURT: Do you have any information as to what the accident record is at this mine operation? Have they had accidents? Have they had fatalities? Do you know what their profile might be?

MS. NOBLE: No. We have statistics as to the number of violations this mine and several other mines in this area, which we intend to introduce. But as to accident rates, I don't have those available here. I don't have any reason to think that their accident rate is any higher than mines in this location -- in this area.

* * * * * *

THE COURT: What kind of situation results in fatal accidents?

MS. NOBLE: What kind would result?

THE COURT: Yeah. Someone working under a high wall? And if he's not trained in high wall recognition, that's the kind of situation you're testifying to?

MS. NOBLE: Yeah.

THE COURT: Is there any information that any of these individuals were required to work under a high wall?

MS. NOBLE: No.

Larry L. Keller testified that he is the manager/supervisor of the MSHA field office in Gillette, Wyoming, and that he is Inspector Skeen's supervisor. He testified as to his experience and training, including service as an inspector from 1972 to 1978. He confirmed that he visited the mine in question in June and November, 1994, accompanying inspectors who were inspecting the mine. He confirmed that he attended a conference with Mr. Kepp in connection with the section 104(g)(1) orders that were issued during the November, 1994, inspection and that he and Mr. Kepp discussed across-over training from S & M Construction,

Incorporated, three digit contractor number to the seven digit mine identification number as a mining operator and entity@ (Tr. 58-61).

Mr. Keller stated that S & M Construction, Inc. is a local contractor engaged in highway construction projects, road construction, and Aprobably pipe laying.@ A part of that company, S & M Construction, Incorporated, has a seven digit mine operator=s entity number and is the operator of the mine. The construction company can provide all of the training required of a miner who works at the mine except for the three of four training items, such as the introduction to work environment, duties and responsibilities of the foreman, and miners= representatives at the mine site, and some additional hazard type training. A contractor cannot provide this training for the mine operator (Tr. 62-63).

Mr. Keller stated that the respondent had approximately 50 employees in 1994 and produced 3,000,000 tons of coal, and in 1995 the mine produced approximately 8,000,000 tons. MSHA=s prior history computer print-out for the mine for the period January, 1994, through January, 1996, reflects 72 violations (Tr. 64).

On cross-examination, Mr. Keller confirmed that on November 27, 1994, MSHA training specialist Judy Tate from the McAlester, Oklahoma office, conducted a review of training records at the mine and no violations were issued as a result of this review. He stated that Ms. Tate was not authorized to issue any citations and reviewed Part 48 training records and Part 50 accident reporting records for completeness. She would probably bring any errors to his attention, and he would probably send someone to the mine to check the matter (Tr. 69-73).

In response to a question as to how an inspector can reasonably conclude that lack of training will result in a fatality if he does not, on a case-by-case basis, determine the hazard exposure for the particular individual, Mr. Keller responded as follows (Tr. 74-75):

> THE WITNESS: Through the years, the statistics in the mining industry has shown this agency that newly employed inexperienced miners suffer more injuries and

have suffered more fatalities in this industry than older, more experienced employees.

Therefore, we base a lot of those type of determinations on the gravity of what our experience has been in this industry, and what our experience has been in compiling the information that would require mine operators to present to us.

THE COURT: That's an inexperienced miner you're talking about?

THE WITNESS: Basically, yes, inexperienced.

THE COURT: Let's take an experienced miner. An experienced miner who hasn't had hazards recognition, statutory rights of miners and introduction to work environment. My first question is, is that likely to be a fatality in all cases?

THE WITNESS: No, not in all cases. He's probably experienced through his work history. Each one of those things are individual, anyway. He probably knows what those hazards are, basically, but going from one mine site to another on those three open topics, we're asking -- each mine presents unique hazard in itself.

THE COURT: Right.

THE WITNESS: Each mine has traffic rules that are different from a previous mine. Or different mines, their blasting signals could be different. If he's gained all that experience at a particular mine, his association to those hazards is probably pretty knowledg

Mr. Keller acknowledged that an inspector who issues training citations based on his review of records would have no way of knowing whether an employee is knowledgeable about his work environment or whether he can recognize a hazard unless he speaks with the employee. He stated that in cases where an entire mine is under 104(g) withdrawal because of training, it

would be impossible to interview every miner and the inspector must assume that the mine operator cannot provide what was not done during any training (Tr. 76).

Inspector Skeens was recalled by the petitioner and he confirmed that when he issued Order No. 3848781 concerning the newly employed experienced miners, he explained to Mr. Kepp that the employees in question needed newly employed experienced miner training, including the three courses previously mentioned, rather than the annual refresher training that their training certificates indicated they received. He stated that Mr. Kepp did not indicate to him that any of the nine individuals had taken the three missing courses (Tr. 79-80).

Respondent=s Testimony and Evidence

Stephen Kepp testified that he has served as the respondent=s safety director for five years, is a certified MSHA surface instructor, and holds Wyoming State surface mining foreman=s papers. He also holds a bachelor=s degree in accounting and a master=s degree in business administration. He has 16 years of mining experience and is aware of MSHA=s training and paperwork requirements that are his responsibility as safety director (Tr. 82).

Mr. Kepp stated that S & M Construction was awarded the contract to operate the mine over eight other companies because of its continuously improved safety record. There have been three lost-time accidents since the respondent has operated the mine, and there have been no lost time accidents since October 28, 1995 (Tr. 83).

Mr. Kepp stated that the employees cited in Order No. 3848781 are all experienced in their crafts, are aware of their surroundings, and are knowledgeable of any hazards that may exist in the course of performing their duties. He did not believe that any of them presented a hazard to themselves or to others (Tr. 85).

Mr. Kepp discussed the experience level of the cited employees as follows (Tr. 83-85):

> ... Derward Line is a welder; he has 15 years of experience. Dick Chesmore has 19 years of experience working -- he is a plant mechanic. That's how he's classified; he has 19 years of experience. He has 17 years with Amax Coal at Belle Ayr Mine. Very knowledgeable individual, and very, very safety conscious.
>
> Ray Holzer is a dozer operator. He has been with S & M Construction since the company was founded ten years ago. He has 25 years of experience as a dozer operator. John Milliken is a blade operator with 20 years of experience. And has been with S & M Construction since March of 1987. Bill Morris is a welder; he has four years of experience, and has been with S & M since 1992.
>
> Craig Olson is another blade operator, with 11 years of experience. He is our finished blade operator, meaning that his skills are extremely high. Richard Villmow has 18 years of experience as an equipment operator. He's operated several pieces of equipment for S & M while out at Coal Creek. Bill Williams is 72 years old. He has four years of experience with S & M Construction as an equipment operator. He currently operates a 627 Caterpillar scraper. Burt Gleason is a plant mechanic with 16 years of experience. And I believe that experience was from Exxon's Rawhide Mine here in the basin.

Mr. Kepp stated that Mr. Knoell is a mechanic who received the proper training when he arrived at the mine, but it was not documented. He indicated that Mr. Knoell was escorted for the first several days so he could learn the roads to the pits where the machines might be working. Judy Gerber was one of the first individuals hired, and she was trained on the equipment, and was part of a mine tour when she was informed of mine areas that may present hazards. She is the daughter of another construction company owner and she has been around construction equipment all of her life (Tr. 86).

Mr. Kepp stated that Lint, Holzer, Milliken, Morris, Olson, Villmow, and Williams had annual refresher training provided by

S & M Construction, the contractor, and it was similar to the training provided by S & M Construction, the operator of the mine. He stated that every employee who starts out at the mine is escorted around so that he knows the roads and traffic patterns, and they each must watch a hazard training film which covers all topics, except the responsibility of supervisors and miners= representatives. However, he could not state with certainty that the topic was covered with newly employed individuals (Tr. 86-87).

On cross-examination, Mr. Kepp stated that he is in charge of safety for both the mine operator part and contractor part of S & M=s operations. His experience includes loading coal trains, the limited operation of some heavy equipment, and 16 years of surface coal experience (Tr. 90-92).

Mr. Kepp believed that Mr. Chesmore was very safety conscious because he was an active participant in a January 1995 refresher training course. Mr. Kepp also believed that, based on their experience, the nine cited employees were aware of their work surroundings and had the ability to recognize hazards. Further, with the exception of Mr. Villmow, none of the employees had any lost time accidents (Tr. 94-97).

Mr. Kepp stated that a 20-minute video that is mine specific to Coal Creek Mine is viewed by the employees, and that one would Ahave a good idea of what went on at the mine@ by watching the video. He conceded that simply viewing the video would not cover all of the training requirements for newly employed experienced miners or inexperienced miners (Tr. 97).

Mr. Kepp stated that the three training topics previously mentioned were covered as part of the employee training, but the training was not documented by preparing a Form 5000-23. He stated that all personnel who start work at the mine are given a mine tour, and an equipment operator would be tested and given hazard training before he is hired and starts work. He confirmed that the training subject related to the authority and responsibility of supervisors and miners= representatives was not included as part of the hazard training video, but that it was Avery likely@ included as part of the mine tour conducted by him

or a shift supervisor (Tr. 95-100). He also alluded to first day tours and escorts for Mr. Knoell and other new employees (Tr. 101).

Mr. Kepp stated that all of the cited employees were Aprobably@ trained in his office after the orders were issued, and that the Forms 5000-23 were then executed and shown to Inspector Skeens in order to abate the orders (Tr. 102-104, 112). In response to a question as to why he would need to re-train the cited employees if they had in fact been trained in the first place, Mr. Kepp stated that after the prior record reviews by Ms. Tate, MSHA=s training representative, she was not sure of the kinds of training that needed to be provided and suggested that he provide newly employed experienced miner training to all mine employees and that he did so in his capacity as the mine operator=s trainer and that this Awould probably get me covered@ (Tr. 104-105).

When asked why he had not prepared the 5000-23 Forms for the cited employees after they were trained, Mr. Kepp stated that Awith respect to these nine individuals, they did have what I thought was correct and current training forms@ (Tr. 105). He also believed that the employees had been trained by the contractor (S & M) and, although not trained by the mine operator (S & M), he believed Aall along that these people did have current training@ by Atechnically the same corporate entity@ (Tr. 107).

Mr. Kepp believed that the orders issued by Inspector Skeens were exaggerated because seven of the cited nine employees had current craft training and had been trained in the introduction to their work environment, hazard recognition, and the statutory rights of miners, but conceded that there was no documentation of this training (Tr. 108).

With regard to the order citing Mr. Knoell and Ms. Gerber, Mr. Kepp stated that Athese people did receive their training. I just didn=t get three boxes checked off on these individuals.@ After subsequently filling out the form, the inspector abated the order (Tr. 112).

Petitioner=s counsel agreed that in view of the fact that the cited employees worked for the contractor and the mine

operator, basically the same company, there may have been confusion in early November, 1994, regarding the type of training that was required. However, after the prior orders were issued in late November, 1994, for the same type of violations, there was no confusion and Mr. Kepp Ashould have gotten everything up to date then and kept it up to date@ (Tr. 110). Mr. Kepp conceded the lack of documentation, and further explained as follows (Tr. 113-114):

> THE WITNESS: What I=ve agreed to is that documentation has not been done and these orders are exaggerated. They should have been not S and S citations for failure to document training. That=s my position.
>
> THE COURT: How would the inspector know whether or not all these people received all this training when he appears at the mine there and starts perusing the records? Did you tell him what you testified to today about how you thought all these people had been trained.
>
> THE WITNESS: I=m sure at the time -- no, I did not make any statements along that line.

Mr. Kepp stated that he filled out new training forms to abate the orders that were issued, and when asked why he simply did not document the training, rather than re-training the cited individuals to abate the orders, he responded (Tr. 116-117):

> A. I guess maybe to answer that question, I wanted to get something established. Something organized with a pattern such that when I made a statement, ›[y]es, he did receive newly employed experienced miner training,= it was the steps that I covered, and I wanted to start with the first individual. Through and up to today, I do it the same way.
>
> * * * *
>
> Q. So you wanted to make sure the second time that you filled it out in order to terminate the with-drawl order. You wanted to make sure that everything was really included?

A. Something I cannot do, something I will not do is just check off a box and sign the form. That carries it=s own set of penalties, including personal penalties, and I=m not going to do that.

** * * *

A. I guess maybe it=s just dotting the i=s and crossing the t=s.

Q. So this time you dotted the i=s and crossed the t=s, and the withdrawal orders were terminated?

A. That=s correct.

Findings and Conclusions

Fact of Violations

Order No. 3848781. The respondent is here charged with a violation of 30 C.F.R. 48.26(a), because of its alleged failure to provide newly employed experienced miner training to nine of its employees. Inspector Skeens testified credibly that he issued the violation after reviewing the respondent=s employee training records, and comparing their Ahire dates@ (which are not disputed) with the available training records. Although Mr. Skeens found that eight of the cited employees had received annual refresher training by the respondent in its contractor capacity, and that one had received no training, he determined that the refresher training for the eight employees in question did not include three of the training courses required by section 48.26(a), namely, Introduction to Work Environment, Authority and Responsibility of Supervisors and Miners= Representatives, and Hazard Recognition, as required by section 48.26(b)(1), (3), and (7) (Tr. 22-26).

Inspector Keller explained that the respondent=s company consists of two parts, a road and highway construction contractor with a three digit MSHA identification number, and a contractor mine operator with a seven digit MSHA identification number. He stated that a construction contractor may provide all of the training required of a miner working at a mine except for the

items that were omitted in this case, and that a contractor cannot provide this training for the mine operator (Tr. 62-63).

Inspector Skeens testified that when he issued the order he explained to Mr. Kepp that the cited employees needed newly employed experienced miner training, including the three omitted courses, rather than their annual refresher training, and that Mr. Kepp did not indicate to him that any of them had taken the three missing courses (Tr. 79-80).

None of the cited miners were called to testify in this case. Mr. Kepp asserted that seven of the miners had annual refresher training provided by the respondent in its AContractor@ capacity, and that it was Asimilar@ to the training provided by the respondent in its mine operator capacity (Tr. 86). Although he alluded to a video viewed by nine employees, he conceded that simply viewing and video would not cover the training require-ments in question (Tr. 97).

Although Mr. Kepp maintained that the three training courses in question were covered as part of employee training, he admitted that it was not documented by the proper MSHA forms and that the course dealing with the authority and responsibility of supervisors and miners= representatives was not part of the video, but Avery likely@ a part of a mine tour (Tr. 99). Since the cited employees were trained by the Acontractor,@ but not the Amine operator,@ he believed that they had current training by Atechnically@ the same corporate entity (Tr. 107).

Mr. Kepp admitted that he did not inform Inspector Skeens about his belief that the employees had been trained, and he agreed that he did not document the alleged training that he claims was given. He believed that the order in question was exaggerated and that it should have been issued as a non-@S&S@ citation for failure to document training (Tr. 113).

After careful review of all of the testimony and evidence, I conclude and find that the petitioner has established a violation of the cited training standard by a preponderance of the credible and probative evidence adduced in this case. Accordingly, section 104(g)(1) Order No. 3848781 **IS AFFIRMED**.

Order No. 3848782. The respondent is charged with a violation of 30 C.F.R. 48.25(b), for its alleged failure to provide new miner training for two employees who had worked at the mine for 8 and 10 months prior to the issuance of the violation on February 22, 1995. The inspector cited the employees after determining that they had not been trained in three of the 13 courses required by section 48.25(b)(4), (8) and (12), namely Introduction to Work Environment, Hazard Recognition, and Health and Safety Aspects of Assigned Tasks.

Inspector Skeens confirmed that he issued the violation after reviewing the training records provided by Mr. Kepp and determining that the two cited employees did not receive all of the required training, namely, the three missing cited training courses (Tr. 35). He stated that newly employed individuals must be trained the day they are hired, and must be task trained before commencing a new task (Tr. 50).

Mr. Kepp asserted that cited employee Knoell received Aproper training@ when he arrived at the mine, but that it was not documented. As for Ms. Gerber, Mr. Kepp stated that she has been around construction and equipment all of her life, was trained on the equipment, and was part of a mine tour when she was informed of mine areas that may present hazards (Tr. 86). As noted earlier regarding the viewing of a video, Mr. Kepp admitted that it would not cover all of the training requirements for newly employed inexperienced miners (Tr. 97). He also alluded to first day tours and escorts for Mr. Knoell and other new employees (Tr. 101), but none of this is documented or corroborated and, as previously noted, none of the cited employees were called to testify. Mr. Kepp conceded the lack of documentation (Tr. 113).

After careful review of the testimony and evidence, I conclude and find that the respondent has not rebutted the credible testimony and evidence adduced by the petitioner in support of this violation. I conclude and find that the petitioner has established a violation of the cited training standard by a preponderance of the credible and probative evidence. Accordingly, section 104(g)(1) Order No. 3848782 **IS AFFIRMED**.

Significant and Substantial Violations

A AS&S@ violation is described in section 104(d)(1) of the Act as a violation Aof such nature as could significantly and substantially contributed 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 rea - sonable 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 further that the third element of the Mathies formula ›requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.: U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984).

The Commission recently 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., Docket No. SE 94-244-R, decided April 19, 1996.

In Highwire Incorporated, 10 FMSHRC 22, 67-68 (January 1988), I affirmed an inspector=s AS&S@ findings where the facts and circumstances clearly established that a lack of task training presented a reasonable likelihood of serious injuries associated with such a violation. Highwire involved a fatal truck accident that occurred when the driver lost control of the truck on a curve and overturned. The mine operator was charged with several violations, including a violation of 30 C.F.R. 48.26, for failing to provide newly employed experienced miner training to the truck driver. Contrary to the instant case, the Secretary in Highwire provided probative testimony and evidence concerning the operator=s training plan, the driver=s job and experience, and sufficient evidence supporting its AS&S@ position.

In Patch Coal Company, 10 FMSHRC 782 (June 1988), I affirmed several citations for failure of the mine operator to give newly employed experienced miner training to equipment operators in violation of 30 C.F.R. 48.26(a), but vacated the inspector=s S&S

findings associated with each of the citations. My reasons for vacating these findings were based on the inspector=s general and speculative testimony regarding certain perceived hazards, and his assumptions that a lack of training would expose miners to injuries and fatalities generally associated with any mining operation, rather than on any specific prevailing mining conditions from which one could reasonably conclude that the newly employed miners were in fact exposed to mine hazards in their new work environment which would likely result in injuries of a reasonably serious nature.

In Sunny Ridge Mining Company, Inc., 13 FMSHRC 928, 931 (June 1991), former Commission Judge James A. Broderick affirmed a violation of 30 C.F.R. 48.26(a) because of the operator=s failure to train 11 newly employed experienced miners. However, he vacated the inspector=s AS&S@ findings and modified the vio - lation to non-@S&S@ after concluding that the evidence did not establish that the hazard contributed to by the violation would reasonably likely result in a serious injury. In support of his findings, Judge Broderick noted that the evidence established that the miners were experienced and that the mine environment was not particularly dangerous or threatening.

In the instant case, there is no evidence of any fatal accidents at the mine, and the petitioner has no information concerning the mine accident profile (Tr. 54). However, Mr. Kepp testified that the respondent was awarded the contract to operate the mine because of its continuously improved safety record, and while there were three lost time accidents since the respondent has operated the mine, there have been no lost time accidents since October 28, 1995. He confirmed that the three accidents involved two broken wrists and a broken ankle, and explained that the mine operated for 462 days accident free before the accidents which occurred within a seven-week period (Tr. 83). There is no evidence that any of these incidents involved a lack of training.

While it is true that most of the miners completed the required training after their Ahire dates,@ there is no credible or probative evidence to establish that the delay exposed them to any particular hazards. Mr. Kepps= credible and unrebutted testimony reflects that all of the cited employees were experi - enced equipment operators with many years of service with the

respondent or other mining companies. Although Mr. Kepps did not dispute any of the employee Ahire dates@ listed in the orders, Inspector Skeens agreed that these dates only reflect when the individuals began work at the mine, and he conceded that one cannot infer that these were the dates the individuals first started performing their particular job tasks. He also confirmed that in reviewing the training certificates of eight of the cited employees, he found training certificates for different types of training, such as annual refresher or task training, and he confirmed that the respondent had an approved MSHA training plan.

As noted earlier, Mr. Kepp testified credibly to the work experience of the cited miners. In addition to annual refresher and other training that they had received, he testified that employees who start work at the mine for the first time are escorted so that they know the roads and traffic patterns, and that they are required to watch hazard training films and a 20-minute mine specific video about the mine. He further testified that cited employee Knoell was escorted to his work location for the first several days to familiarize himself with the roads, and that Ms. Gerber was informed about the mine areas as part of a mine tour. Although I cannot conclude that these procedures necessarily fulfilled MSHA=s training requirements to the letter, absent any evidence to the contrary, they do mitigate the hazard and gravity exposure associated with these violations.

Inspector Skeens testified that a lack of knowledge about the mine site, the mining conditions, traffic patterns, and the blasting rules and procedures Acould easily lead to an accident.@ However, Mr. Skeens admitted that he did not determine the job positions held by the cited employees, did not speak with them, could not recall what they did, and simply observed them Aat one time or another@ (Tr. 37, 54-56). Supervisory Inspector Keller acknowledged that an inspector who issues training citations based solely on a review of the training records would have no way of knowing whether or not the cited employee is knowledgeable about his work environment and can recognize a hazard unless he speaks with him (Tr. 76).

Although it may be burdensome for an inspector to develop all of the relevant facts in determining the potential hazard exposure for all employees at a large mining operation, the instant case only involves less than 12 employees who received

annual refresher training, and who apparently completed the training courses required by the cited regulations, except for those dealing with their work environment, hazard recognition, and the responsibilities of supervisors and miners= representatives. I find no evidence in this case to support any reasonable conclusion that missing a course on the responsibilities of supervisors and miners= representatives had any adverse impact on the safety of the cited miners.

With respect to the required training course subjects on hazard recognition and work environment, I agree that they are important components of any approved training program. However, in this case, the inspector=s conclusion that injuries were reasonably likely was based on his belief that improperly trained miners are considered a hazard to themselves and to others. Although one may agree with this generalized conclusion, I conclude and find that an inspector must develop some factual evidence, on a case-by-case basis, to establish that the cited miners would reasonably likely suffer injuries of a reasonably serious nature because they were not timely trained on hazard recognition and their work environment at the particular mine where they are employed.

In the absence of any evidence concerning the required job tasks performed by the cited employees and the presence or likelihood of any adverse mining conditions that they would encounter in performing these tasks, I cannot speculate or conclude that the absence of some of the required training would reasonably likely lead to an accident or fatality.

In support of his findings that any injury could reasonably likely be expected to be fatal, Mr. Skeens testified that the mine has 60 to 80 feet highwalls, and that Apeople@ work above, below, or close to these highwalls, and that a Aperson could drive off that highwall if they didn=t know where he was.@ He also indicated that work is performed at the mine before and after daylight hours, and that someone Acould run off a high wall face@ if they did not know where they were. However, there is no evidence that any of the cited miners worked at times other than a normal daylight work shift, and no evidence was presented connecting any of the cited employees with these hazards. Indeed, in response to a bench question as to whether there was any information in this case that any of these individuals

were required to work under a highwall, petitioner=s counsel responded, ANo.@ (Tr. 56).

I take note of one of the prior November 1994, violations issued by Inspector Skeens to the respondent citing a blaster who had not been hazard trained as required by 30 C.F.R. 48.31, before commencing his work duties in a coal pit (Exhibit P-3, pg. 15). Mr. Skeens determined that the blaster was allowed to work on the day of the violation and on one prior occasion, and although he found that the cited blaster was exposed to the cited condition and could suffer Aa lost workday accident,@ he concluded that an accident was unlikely, and that the violation was non-@S&S.@

Mr. Skeens explained that the cited blaster in question was experienced, had hazard training from other mines, and the fact that he did not have the particular hazard training for the respondent=s particular mine Areally came down to a technicality@ (Tr. 53). In the instant case, I have difficulty reconciling the petitioner=s concern about the lack of training to assure that a miner is aware of the potential hazards at a particular mine where he is employed, with Mr. Skeens= rather contradictory belief that the failure to task train the blaster in question was merely Aa technicality,@ warranting a non-@S&S@ finding.

On the facts of this case, and after careful review and consideration of Inspector Skeens= testimony in support of his AS&S@ findings as to each of the violations, I conclude and find that these findings were based on general and speculative assumptions that a lack of training would expose miners to injuries and fatalities generally associated with any mining operation, rather than on any reliable and probative evidence that the job tasks performed or expected to be performed by the miners, coupled with their lack of several required training courses, and the prevailing mining conditions under which they were expected to work, presented conditions from which one could reasonably conclude that they were in fact exposed to mine hazards likely to result in injuries of a reasonably serious nature. In short, I conclude and find that the petitioner has failed to establish by a preponderance of the credible and probative evidence adduced in this case that the violations were AS&S.@ Accordingly, the inspector=s findings in this regard are rejected and they **ARE VACATED**.

Size of Business and Effect of Civil Penalty Assessments on the Respondent=s Ability to Continue in Business

Inspector Keller believed that the mine was producing Ain the neighborhood of eight million@ tons in 1995, and had approximately 50 employees in 1994 (Tr. 63-64).

The parties stipulate that the respondent=s 1994 coal production was 3,356,712 tons, and that the respondent is a medium-to-large sized mine operator (Tr. 4-5).

Although the respondent=s representative Alined through@ a proposed stipulation that MSHA=s proposed penalty assessments will not affect the respondent=s ability to continue in business, he stated that Awhat I was concerned about is our company is in a loss situation for the year and it certainly would have an impact@ (Tr. 118). In response to a bench inquiry as to whether or not MSHA=s proposed penalty assessments would put the respondent out of business, Mr. Kepp stated ANo, sir, it would not, I did not mean to imply that@ (Tr. 118).

Absent any information or evidence to the contrary, I cannot conclude that the penalty assessments that I have made for the violations in this case will adversely affect the respondent=s ability to continue in business, and I conclude and find that they will not.

History of prior Violations

Inspector Keller made reference to a computer print-out for the 24-month period from January 1994 through January 1, 1996, and indicated that it reflected a total of 72 violations (Tr. 64). However, the actual print-out referred to by Mr. Keller was not offered, and it is not part of the record.

MSHA=s computer print-out for the subject mine for the period April 18, 1994 to February 21, 1995 (Exhibit P-1) reflects that the respondent paid civil penalty assessments for 28 violations, including one violation of section 48.25(a), two violations of section 48.29(c), and one violation of section 48.31. The violations that were the subject of a prior settlement (Exhibit P-3) are included in the print-out, and I note that three of these violations were issued because of the respondent=s

failure to have the training records for two miners available at the mine, and for not completing a training form for one miner. In each of these instances, the miners were in fact trained.

For an operation of its size, I cannot conclude that the respondent has an overall poor compliance records. However, in view of its prior training violations, I believe that the respondent needs to pay closer attention to MSHA=s training regulations. Mr. Kepp, in his capacity as safety director and the mine official responsible for training, must devote more time and attention to insure that all miners are properly trained, and that all of the required training documentation is timely and properly maintained. In several instances during the course of the hearing, Mr. Kepp appeared uncertain when he stated that one training segment Avery likely@ was included as part of a mine tour, and that all of the cited employees were Aprobably@ trained in his office to abate the violations (Tr. 95-102). In any event, I have considered the respondent=s compliance record in assessing the penalties for the violations which I have affirmed and find that on the record here presented, any additional increases over those penalty amounts are not warranted.

Good Faith Compliance

The petitioner asserts that the respondent was cited for high negligence Asince it failed to exercise reasonable care in locating violations within a reasonable period of time and in taking appropriate action to see that those violation were abated@ (Posthearing Brief pgs. 5-6). I agree with the conclusion that the respondent failed to exercise reasonable care, but I reject the petitioner=s assertion that the respondent failed to abate the violations that are in issue in this case. The petitioner stipulated that the respondent demonstrated good faith in abating the violations, and, at page 7 of its brief, the petitioner recognizes that the respondent demonstrated good faith in abating the violations cited in this case.

The petitioner=s Afailure to abate@ argument is apparently based on the notion that after the November 1994 training violations were issued, abated, and terminated, any subsequent training violations may be construed as non-abatement. I find absolutely no support for any such theory, and it is rejected.

I conclude and find that the respondent demonstrated good faith in abating the violations in this case.

Gravity

Although I have found that the violations were not AS&S,@ I nonetheless conclude and find that the failure to provide the prescribed training were serious violations.

Negligence

Inspector Skeens testified that his Ahigh@ negligence finding associated with Order No. 3848781 (Exhibit P-2) was based on two prior section 104(g)(1) training orders that he issued in November, 1994, and his close-out conference discussions, and other discussions that he had with Mr. Kepp, and possibly other mine management people, concerning compliance with MSHA=s Part 48 training requirements (Exhibit P-3, Tr. 31).

With regard to Order No. 3848782 (Exhibit P-4), Inspector Skeens checked the Ahigh@ negligence block on the face of the order form, but offered no testimony in support of this finding. The hearing transcript reflects that Inspector Skeens was handed hearing Exhibits P-2 and P-4 by petitioner=s counsel, and after looking at Exhibit P-2 confirmed that it was one of the orders that he issued (Tr. 20). He then proceeded to testify about that order (Tr. 20-31).

Inspector Skeens identified page 6 of Exhibit P-3 as one of the prior section 104(g)(1) orders he issued on November 28, 1994, and confirmed that it was Arelated@ to Order No. 3848782, the second citation that had not as yet been discussed (Tr. 32).

Inspector Skeens then proceeded to testify as to his reasons for issuing Order No. 3848782 (Tr. 35-38). After cross-examination (Tr. 58), MSHA witness Larry Keller was called to testify. Apart from his comment that his prior order of November 28, 1994, where he also found Ahigh@ negligence Awas related to Order No. 3848782, Inspector Skeen offered no testimony in support of his Ahigh@ negligence finding with respect to that order.

MSHA field supervisor and manager Larry L. Keller confirmed that he accompanied inspectors during the November 1994 inspection when some section 104(g)(1) orders were issued and that he attended a conference with Mr. Kepp where Across-over@ training and three-digit contractor and seven-digit mine operator entity identification numbers were discussed (Tr. 59-60). However, Mr. Keller offered no testimony concerning Inspector Skeens= negligence findings with respect to the contested orders in this case, and he was never questioned about this issue.

Apart from Inspector Skeens= testimony that his Ahigh@ negligence finding concerning Order No. 3848781 was based on two prior orders issued in November, 1994, and his discussions with Mr. Kepp at that time concerning MSHA=s training require- ments , and his testimony that one of the prior November orders Awas related@ to Order No. 3848782, the petitioner offered no further testimony in support of the inspector=s Ahigh@ negligence findings.

At page 3 of its brief, the petitioner states that the special penalty assessments followed the respondent=s Aunwar- rantable failure to comply with MSHA=s training regulations,@ and at page 6, the petitioner states that the violations Aexhibited an unwarrantable failure@ by the respondent to ensure the health and safety of its miners. Following these statements is a conclusion (page 8) that the violations in this case were designated as Aunwarrantable failure,@ a statement at page 7 that MSHA elected to special assess the violations Abecause the operator exhibited an unwarrantable failure to comply@ with the cited training standards, and arguments in support of the alleged unwarrantable failure violations (Brief, pgs, 6-7).

Inspectors Skeens and Keller presented no testimony or evidence either alleging or supporting any section 104(d) unwarrantable failure findings in this case. Inspector Skeens= orders were issued as section 104(g)(1) orders, and the pleadings filed by the petitioner never alleged or charged the respondent with any unwarrantable failure violations. Although the inspector was free to issue citations or orders pursuant to section 104(d)(1) or (d)(2), and ordering the withdrawal of miners pursuant to section 104(g)(1), he did not do so. He simply issued the section 104(g)(1) orders withdrawing the affected miners, and he never modified the orders to reflect any

unwarrantable failure charges and the petitioner never amended its pleadings to reflect any unwarrantable failure charges. Its attempts to do so now through its posthearing brief **ARE REJECTED**. I find no evidentiary support for the petitioner=s assertions that the violations constitute unwarrantable failures by the respondent to comply with the cited standards.

I take note of the fact that the petition for assessment of civil penalties filed in this case by the petitioner includes an MSHA Form 1000-179, containing the notation ASpecial Assessment-See Attached Narrative.@ However, the narrative statement was not attached as part of the initial pleadings, and it was produced by the petitioner for the first time at the hearing (Exhibit P-6).

MSHA=s narrative special assessment findings reflect a decision to specially assess the violations in accordance with its penalty assessment criteria found in 30 C.F.R. 100.5. This regulation contains eight violations categories under which special assessments are appropriate, including unwarrantable failures and violations Ainvolving an extraordinarily high degree of negligence or gravity or other unique aggravating circum-stances.@ The narrative findings in support of the specially assessed violations in this case do not mention any unwarrantable failures to comply and include no discussion with respect to any Aextraordinary@ negligence, gravity, or Aunique aggravating circumstances.@ Indeed, the gravity finding reflects Aserious@ violations, and negligence findings based on a failure to exercise reasonable care.

As part of his inspection report in this case, Inspector Skeens executed an MSHA Form 7000-32, recommending a Aspecial assessment,@ and he described the Aserious or aggravating circumstances@ involved as the previously issued November 1994 training violations, and the closeout conference with the respondent following that inspection. I cannot conclude that the eight prior training violations, three of which did not involve a lack of training, and the fact that they were conferenced with the respondent, standing alone, constitutes Aaggravating@ circumstances. However, considering the fact that most of the prior violations were issued on November 28, 1994, just two or three months prior to the issuance of the violations in this case, and the unrebutted testimony of the inspectors that

these matters were discussed with safety director Kepp, I conclude and find that Mr. Kepp had a heightened duty to review his training records to insure compliance with the cited standards in question.

While there may have been some confusion concerning the respondent=s bifurcated contractor-operator training obligations prior to November, 1994, I agree with the petitioner=s argument that no such confusion existed when the February 1995 violations were issued. Under all of these circumstances, although the inspector=s testimony in support of his Ahigh@ negligence findings associated with the violations is rather sparse, I conclude and find that the record, as a whole, supports his Ahigh@ negligence findings as to both violations, and they **ARE AFFIRMED**.

Civil Penalty Assessments

The petitioner has proposed a Aspecial penalty assessment of $7,500 for Order No. 3848781, and a Aspecial@ assessment of $5,000 for Order No. 3848782. The petitioner asserts that these proposed Aspecial@ penalty assessments reflect an objective and fair appraisal of the facts presented, particularly in light of the respondent=s unwarrantable failure to comply with the cited standards, the Agravity of its negligence,@ its history of prior violations (especially of the same type), and its failure Ato identify the potential violations after having been notified of them in November 1994.@

It is clear that I am not bound by the petitioner=s proposed penalty assessments, and that I may impose penalty assessments de novo, after consideration of the penalty criteria set forth in section 110(i) of the Act, Westmoreland Coal Co., 8 FMSHRC 491, 192 (April 1986); Sellerburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff=d , 736 F. 2d 1147 (7th Cir. 1984). Where appro-priate, it is clearly within my discretion to assess penalties higher or lower than those proposed by the petitioner, or accept and affirm those proposed by the petitioner. On the facts and evidence of record in this case, I conclude and find the petitioner=s proposed penalty assessments are unsupported and not warranted.

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:

Order No.	Date	30 C.F.R. Section	Assessment
3848781	2/21/95	48.26(a)	$2,500
3948782	2/22/95	48.25(a)	$1,000

ORDER

IT IS ORDERED as follows:

1. Section 104(g)(1) AS&S@ Order Nos. 3848781 and 2848782 **ARE MODIFIED** as non-@S&S@ Orders, and as modified, they **ARE AFFIRMED**.

2. The respondent 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 this decision and order, and upon receipt of payment, this matter is **DISMISSED**.

George A. Koutras
Administrative Law Judge

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