

JANUARY 1994

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JANUARY 1994

Review was granted in the following cases during the month of January:

Secretary of Labor, MSHA v. Energy West Mining Company, Docket No. WEST 91-251. (Judge Lasher, November 23, 1993).

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 93-369. (Judge Amchan, December 30, 1993).

Review was denied in the following cases during the month of January:

Secretary of Labor, MSHA v. Materials Delivery, Docket No. VA 93-69-M. (Judge Amchan, December 7, 1993).

Slade Vanover v. Shamrock Coal Company, Docket No. KENT 93-359-D. (Judge Koutras, December 16, 1993).

Secretary of Labor, MSHA v. Southmountain Coal, Inc., and William R. Elkins, Docket No. VA 93-165, 166. (Judge Melick, Interlocutory Review of December 6, 1993 Order).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 25, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 92-717
 :
MID-CONTINENT RESOURCES, INC. :
 :

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding, arising under Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), the Secretary has proposed penalties for 20 citations and orders issued to Mid-Continent Resources, Inc. ("Mid-Continent"). The proposed penalties were reassessed by the Secretary as a result of the Commission's decision in Drummond Co., Inc., 14 FMSHRC 661 (May 1992). On January 19, 1993, the Secretary and Mid-Continent filed with Administrative Law Judge August F. Cetti a Joint Motion to Approve Settlement ("Joint Motion"). The parties agreed to reduce the proposed penalty for each citation and order by 40%. Included in the Joint Motion was Order of Withdrawal No. 3412700, issued under section 104(d)(2) of the Mine Act, which charged Mid-Continent with a violation of 30 C.F.R. § 75.400. Judge Cetti approved the settlement on February 8, 1993.

On September 7, 1993, the Secretary filed with the Commission's Docket Office a "Corrected Joint Motion to Approve Settlement" ("Corrected Motion"). The Corrected Motion states that "[b]y error, Order No. 3412700 issued May 1, 1990, for an alleged violation of 30 C.F.R. § 75.400, which is the subject matter of a discretionary review now pending and at issue before the Federal Mine Safety and Health Review Commission ... was included in this reassessment case." The parties further state that "this agreement does not include Order No. 3412700 issued May 1, 1990, which is pending" review.

The judge's jurisdiction over these cases terminated when his Decision Approving Settlement was issued on February 8, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a

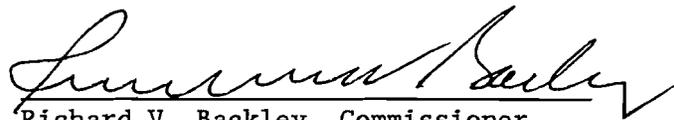
petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Neither party filed a petition for discretionary review within the 30-day period and the Commission did not sua sponte direct this case for review. Thus, the judge's order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem the Corrected Motion to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See, e.g., Island Creek Coal Co., 15 FMSHRC 962, 963 (June 1993).

Guided by Fed. R. Civ. P. 60(b)(1) & (6), the Commission has afforded relief from final judgments on the basis of inadvertence, mistake, and other reasons justifying relief. See, e.g., Klamath Pacific Corp., 14 FMSHRC 535, 536 (April 1992). The Corrected Motion states that the parties settled Order No. 3412700 in error. Accordingly, we conclude that the parties should be granted relief from Judge Cetti's Decision Approving Settlement.

For the reasons set forth above, we reopen this proceeding, grant the Corrected Motion and vacate that part of the Judge's decision that approved settlement of Order No. 3412700.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 3, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
 :
v. : Docket No. WEST 91-251
 :
ENERGY WEST MINING COMPANY, :
Respondent :
 :
 :

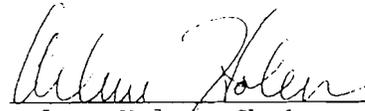
DIRECTION FOR REVIEW AND ORDER APPROVING PENALTY

The joint petition for discretionary review filed by the Secretary of Labor and Energy West Mining Company ("Energy West") is granted.

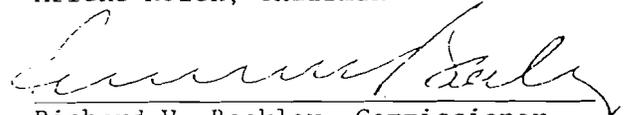
This case had been remanded to the administrative law judge for reanalysis of whether Energy West's violation was significant and substantial ("S&S") according to the criteria set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984). The judge determined that the violation was not S&S but he failed to reassess the civil penalty. In their petition, the parties request that the Commission assess a penalty and have stipulated that \$100 would be an appropriate penalty according to the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820(i)(1988).

In the circumstances of this case and in the interest of judicial economy, it is appropriate for the Commission to assess the penalty. See, e.g., Birchfield Mining Co., 11 FMSHRC 1428, 1429-30 (August 1989); Southern Ohio Coal Co., 4 FMSHRC 1459, 1465 (August 1982). Accordingly, upon review of the record and consideration of the six criteria, we approve the stipulated penalty of \$100.

Energy West is ordered to pay a civil penalty of \$100 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of payment, this proceeding is dismissed.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 4, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 91-1480-R
	:	PENN 91-1454-R
KEYSTONE COAL MINING CORPORATION	:	PENN 92-54-R

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether three citations alleging violations of the respirable dust standard, 30 C.F.R. § 70.100(a), issued to Keystone Coal Mining Corporation ("Keystone") pursuant to a "spot inspection program" instituted by the Department of Labor's Mine Safety and Health Administration ("MSHA"), were invalid because MSHA failed to adopt the program through notice-and-comment rulemaking.¹ Following an evidentiary hearing, Administrative Law Judge

¹ Section 70.100(a) sets forth the following statutory language of section 202(b)(2) of the Mine Act, 30 U.S.C. § 842(b)(2):

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings ... is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air....

(emphasis added). Section 202(f) of the Mine Act provides:

For the purpose of this [title], the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the

(continued...)

Avram Weisberger sustained the contests and vacated the citations, concluding that the spot inspection program, upon which the citations were based, was procedurally invalid. 14 FMSHRC 2017 (December 1992)(ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, permitted the American Mining Congress ("AMC") to participate as amicus curiae and heard oral argument. For the reasons that follow, we affirm the judge's decision.

I.
Background

A. Factual and Procedural Background

On July 17, 1971, the Secretary of the Interior and the Secretary of Health, Education, and Welfare published in the Federal Register, pursuant to section 202(f) of the Coal Act, a finding that the sampling of mine atmosphere during a single shift would not accurately measure the average concentration of respirable dust (the "1971 finding"). This notice states in part:

Notice is hereby given that, in accordance with section 101 of the Act, and based on the data summarized ..., the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2,179 working sections in compliance with the dust standard on the date of the analysis.... [R]esults of the comparisons ... [show] that a single shift measurement would not,

¹(...continued)

active workings of a mine is exposed (1) as measured, during the 18 month period following December 30, 1969, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health and Human Services, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health and Human Services find, in accordance with the provisions of section [101 of this Act], that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

30 U.S.C. § 842(f). Section 202(f) of the Mine Act was carried over without significant change from section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("Coal Act").

after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971).

Keystone operates the Margaret No. 11 and Emilie No. 1 underground coal mines in Pennsylvania. On August 14, August 21, and September 20, 1991, MSHA Inspector Brady Cousins issued citations to Keystone alleging violations of 30 C.F.R. § 70.100(a)(n.1 supra), because respirable dust concentrations of 4.4 milligrams per cubic meter of air ("mg/m³"), 2.8 mg/m³, and 4.7 mg/m³ had been found. 14 FMSHRC at 2024. Each citation was based upon a respirable dust sample taken by MSHA during a single shift on the previous day. G. Exs. 1, 3, 5. The citations were terminated after Keystone submitted three sets of five samples, each with an average dust concentration below 2.0 mg/m³. Keystone contested the citations and the matter proceeded to hearing before Judge Weisberger.

Judge Weisberger concluded that the spot inspection program was invalid because it had not been promulgated through notice-and-comment rulemaking. 14 FMSHRC at 2024. He determined that the 1971 finding precluded the Secretary from making compliance determinations based on single-shift samples. Id. at 2024-25. The judge also determined that, when promulgating final respirable dust regulations in 1980, the Secretary had not superseded the 1971 finding. Id. at 2025-26. The judge concluded that, because the 1971 finding had been made in accordance with the notice-and-comment rulemaking provisions of section 101 of the Coal Act, it could be rescinded only through the corresponding rulemaking provisions of section 101 of the Mine Act, 30 U.S.C. § 811. Id. at 2027. Applying principles articulated in Drummond Co., 14 FMSHRC 661 (May 1992), the judge also determined that the spot inspection program had been implemented in contravention of rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988)("APA"). Id. at 2027-29. Accordingly, the judge vacated the citations. Id. at 2029-30.

B. Enforcement of Respirable Dust Standards

In order to determine compliance with the Mine Act's respirable dust standards, MSHA and mine operators collect samples of the atmosphere in underground coal mines.

1. MSHA's sampling program

a. Multiple-shift sampling

In enforcing the respirable dust standards under the Coal Act and Mine Act, MSHA and its predecessor agency in the Department of the Interior have, for more than 20 years, based determinations of non-compliance on multiple-shift respirable dust samples. Tr. I 92; Tr. II 31; G. Ex. 17, p. 24 (1992 MSHA Task Group Report); K. Ex. 18, pp. 1.11-1.13. (1989 MSHA Handbook for inspectors). The operator is cited if the average dust concentration of five

samples,² i.e. taken over five shifts, exceeds the applicable dust standard.³ K. Ex. 18, pp. 1.11-1.13; Tr. I 120-25. Noncompliance specifically cannot be determined on the basis of a single-shift sample. K. Ex. 18, p. 1.12; Tr. I 120. Samples are voided for various reasons, including the presence of oversized particles, larger than 10 microns. G. Ex. 17, p. 19; K. Ex. 18, pp. 1.9-1.10. If a filter shows a weight gain of 1.8 mg. or greater over its pre-sample weight, an inspector examines it for oversized particles. Tr. I 97, 126; K. Ex. 19, p. IV-11 (MSHA Guidance Document).

b. Single-shift sampling: the spot inspection program

Since July 15, 1991, MSHA has conducted spot inspections at selected mines. Tr. II 61, G. Ex. 12. Respirable dust has been sampled for five occupations in each mechanized mining unit, during one full eight-hour shift.⁴ G. Exs. 12, 14. MSHA developed a table for inspectors, setting forth the level of a single-shift dust sample that would require an inspector to issue a citation. G. Ex. 12, pp. 2-3. Inspectors were instructed not to examine samples for oversized particles and not to void samples except for pump malfunctions. Tr. I 162-63; Tr. II 29, 33-36; Tr. III 16; G. Ex. 14, p. 2. These spot inspection procedures were not published in the Federal Register, Code of Federal Regulations, in MSHA's Program Policy Manual, or in any other public document.⁵

² Two to four samples can give rise to a citation if the average concentration is such that additional samples could not bring a five-shift average within the standard. K. Ex. 18, p. 1.12; Tr. I 120-125.

³ If a mine has significant quartz in the atmosphere, its applicable dust standard may be lower than 2.0 mg/m³. 30 C.F.R. § 70.101.

⁴ Following MSHA's issuance of numerous citations for alleged tampering with respirable dust samples, the Secretary of Labor, in April 1991, directed MSHA to review the respirable dust program and to make recommendations for improving it. G. Ex. 17, p. 5. The Assistant Secretary for Mine Safety and Health formed the Coal Mine Respirable Dust Task Group, which developed the spot inspection program. G. Ex. 17, pp. 5-6. Part I of the program established the spot inspection system, which included collection of dust samples on a single-shift basis, review of dust control plans and sampling parameters, and interviews of mine personnel; Part II established monitoring of operators' sampling activities. G. Exs. 12, 13.

⁵ MSHA issued an information bulletin announcing that nearly 600 mines had been targeted for spot inspections to provide the Task Group with data for improving the sampling program. G. Ex. 18, pp. 1-2. This bulletin also stated: "Although the primary purpose of the spot inspection program is to evaluate current mining procedures in order to improve the overall dust sampling program, ... MSHA inspectors will write citations on safety or health violations they may find." G. Ex. 18, p. 2.

2. Operator sampling program: multiple shift sampling

Pursuant to 30 C.F.R. Part 70, operators are required to collect, bimonthly, designated occupation dust samples over five full shifts for each mechanized mining unit.⁶ 30 C.F.R. §§ 70.201, 70.207. The five samples must be collected on consecutive normal production shifts or normal production shifts on consecutive days. Section 70.207. The samples are submitted to MSHA for analysis and compliance determinations. 30 C.F.R. § 70.209; G. Ex. 17, p. 16. Multiple-shift sampling by operators was not affected by MSHA's spot inspection program.

II.
Disposition

A. Whether the Spot Inspection Program Required Rulemaking under Section 202(f)

The Secretary argues that the judge erred in finding that rulemaking was required under section 202(f) of the Mine Act for implementation of the spot inspection program. He contends that the spot inspection program did not rescind the 1971 finding and, alternatively, that rulemaking was not required under the Mine Act because section 202(f) requires rulemaking only if the Secretary finds that single-shift sampling will not accurately measure respirable dust exposure. Keystone and AMC respond, in essence, that the spot inspection program was an attempt to circumvent the 1971 finding, and that the 1971 finding constitutes a legislative-type rule that may be amended only through notice-and-comment rulemaking.

1. The spot inspection program attempted to rescind the 1971 finding

The Secretary contends that the 1971 finding pertained to operator sampling and that the spot inspection program involves only MSHA sampling and, therefore, the 1971 finding and the spot inspection program are not contradictory.⁷ The 1971 finding was issued pursuant to section 202(f) of

⁶ A designated occupation is the work position determined to have the greatest respirable dust concentration. 30 C.F.R. § 70.2(f).

⁷ Citing the review restrictions in section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), Keystone argues that the Secretary has improperly raised this argument for the first time on review and that the Commission may not consider it. Although the Secretary did not present this specific argument before the judge, the Secretary had argued that the spot inspection program and the 1971 finding differed. S. Post-Hearing Br. at 23-25. On review, the Secretary has essentially enlarged that contention by presenting another reason to show that they differ. The arguments raised by the Secretary on review are sufficiently related to those presented to the judge that, in effect, they were passed on by the judge. See Dewey v. Des Moines, 173 U.S. 193, 197-98 (1899); United States v. Speers, 382 U.S. 266, (continued...)

the Coal Act, which defined the phrase "average concentration" of respirable dust for purposes of Title II. This title was carried over to Title II of the Mine Act, which includes the mandatory standards for respirable dust in underground coal mines. Title II applies to both operator sampling and to MSHA actions to ensure compliance, including sampling by MSHA. Section 202(g) specifically provides for MSHA spot inspections.⁸ Nothing in section 202(f) or section 202(g) suggests that section 202(f) applies differently to MSHA sampling. Thus, the 1971 finding, issued for purposes of Title II, applies broadly to both MSHA and operator sampling of mine atmosphere.

A consistent regulatory history over 20 years also belies MSHA's current assertion that the 1971 finding applied only to operator sampling. MSHA manuals indicate that, apart from the spot inspections begun in 1991, MSHA has never based determinations of non-compliance on single-shift samples. See K. Ex. 18, pp. 1.11-1.13 (1989 MSHA Handbook for inspectors); K. Ex. 21, pp. II-47 through II-54 (1978 MSHA Underground Manual for inspectors).

We reject the Secretary's additional contention that the spot inspection program did not supersede the 1971 finding because the finding pertained to compliance determinations while the program pertained to a broad perspective on dust exposure in mining. It is clear that the spot inspection program also resulted in compliance determinations and the issuance of citations -- as the present case illustrates.

Finally, we reject the Secretary's argument that the spot inspection program did not rescind the 1971 finding because the finding had already been superseded by the preamble to the Secretary's final respirable dust rules issued in 1980.⁹ The 1980 preamble contains no indication that a new finding

⁷(...continued)

277 n.22 (1965); Beech Fork Processing, Inc., 14 FMSHRC 1316, 1320-21 (August 1992)(citations omitted). Therefore, we consider the argument.

⁸ Section 202(g) of the Mine Act, 30 U.S.C. § 842(g), was carried over without significant change from the Coal Act.

⁹ In pertinent part, the preamble states:

The Secretary of the Interior and Secretary of Health, Education, and Welfare conducted continuous multi-shift sampling and single-shift sampling and, after applying valid statistical techniques, determined that a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m³. Accordingly, the Secretary of the Interior and the Secretary of Health, Education, and Welfare prescribed consecutive multi-shift samples to enforce the respirable dust standard.

45 Fed. Reg. 23990, 23997 (April 8, 1980).

on single-shift sampling was being made under section 202(f) of the Mine Act. Indeed, the preamble as a whole is replete with language indicating that the final respirable dust standards contemplate multiple-shift samples. See, e.g., 45 Fed. Reg. at 23997. (Multiple samples "upon which compliance determinations are made will more accurately represent dust in the mine atmosphere than would the results of only a single sample...") The 1980 preamble and regulations reaffirmed the 1971 finding that multiple-shift samples were more reliable than single-shift samples for determining compliance with applicable dust standards.¹⁰ Moreover, MSHA's subsequent enforcement actions continued to be based exclusively on multiple-shift sampling until July 1991.

We conclude that the spot inspection program, in basing compliance determinations on single-shift samples, attempted to rescind the 1971 finding in an improper manner. Moreover, as discussed below, we agree with the judge that the attempted rescission was invalid because it was not effected through formal rulemaking.

2. Notice-and-comment rulemaking is required for rescission of the 1971 finding

The Secretary argues, in the alternative, that section 202(f) of the Mine Act requires rulemaking in accordance with section 101 of the Act only when a determination is made that single-shift sampling is not a reliable means of testing atmospheric conditions. S. Br. at 15-16. Invoking Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984), the Secretary contends that this is the clear and unambiguous meaning of section 202(f), and that the Commission must give effect to it. S. Br. at 16-17.

Generally, the first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. If a statute is clear and unambiguous, effect must be given to its language. Id. at 842-43. Deference to an agency's interpretation of a statute may not be applied "to alter the clearly expressed intent of Congress." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)(citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be

¹⁰ AMC challenged the 1980 respirable dust regulations on the basis of inherent sampling variability. The Tenth Circuit Court of Appeals upheld the regulations, stating:

The Secretary did take steps to reduce the potential for variability. The rule provides for multiple shift sampling... All compliance determinations are based on the average dust concentration of five samples.

American Mining Congress v. Marshall, 671 F.2d 1251, 1259 (10th Cir. 1982)(citations omitted).

given effect. Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989)(citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "Chevron I" analysis. Id. at 1131. If, however, a statute is ambiguous or silent on a point in question, a second inquiry, a "Chevron II" analysis, is required to determine whether an agency interpretation of the statute is a reasonable one. Id.

Section 202(f) expressly requires notice-and-comment rulemaking with regard to a finding that would reject single-shift sampling. Congress's evident intent, that such a finding be made in accordance with notice-and-comment rulemaking, bespeaks an equal intent that, once such a finding is made, it may be rescinded only through the same formal process. See Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 413 (7th Cir. 1987). The Secretary's argument fails to take into account the fact that the 1971 finding was made.

In the alternative, if section 202(f) is not plain, a Chevron II analysis reveals that the Secretary's interpretation of it as asserted in this litigation is not a reasonable one. Section 202(f) addresses the accurate measurement of respirable dust in a mine's atmosphere and the requirement for notice-and-comment rulemaking if single-shift measurement will not provide such accurate measurement. The Secretary's interpretation here rests on his inference that sampling over a single shift will accurately measure dust exposure. But under the earlier, identical language of the Coal Act, the Secretaries, in the 1971 finding, unequivocally rejected single-shift sampling on the grounds that it does not "accurately represent the atmospheric conditions to which the miner is continuously exposed." 36 Fed. Reg. at 13286. Further, as discussed above, the preamble to the Secretary's final respirable dust rules reaffirmed that multiple-shift samples were more reliable than single-shift samples. Except for inspections conducted under the spot inspection program, the Secretary continues, in both the operator sampling program and the MSHA sampling program, to base compliance determinations on multiple-shift sampling.¹¹ The Secretary's litigation position here is inconsistent with his other formal statements issued in accordance with notice-and-comment procedures and with his other enforcement actions.

We agree with the judge that the 1971 finding may be rescinded only according to notice-and-comment rulemaking requirements.

B. Whether the Spot Inspection Program is Exempt from APA Rulemaking Requirements

The Secretary argues that the judge erred in concluding that rulemaking was required under the APA because the spot inspection program is exempt as a rule of agency practice or procedure or, alternatively, as an interpretative

¹¹ 30 C.F.R. §§ 70.201, 70.207; K. Ex. 18, pp. 1.11-1.13; G. Exs. 12, 13.

rule.¹² S. Br. at 18-29. Keystone and AMC respond that the program is not procedural because it has a substantial impact on operators and that it is not interpretive because it seeks to change the definition of "average concentration" rather than merely to explain or clarify existing law. K. Br. at 21-23; AMC Br. at 16-17.

Section 553 of the APA requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. Under the APA, a "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...." 5 U.S.C. § 551(4). The APA provides, however, that the notice-and-comment process does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A).

1. Spot inspection program is not a procedural rule

In Drummond, the Commission explained the procedural rule exemption to APA requirements: "it covers agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which parties present themselves or their viewpoints to the agency." 14 FMSHRC at 688, quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980). The exception does not apply where agency action encroaches on substantial private rights and interests. 14 FMSHRC at 688 (citation omitted).

The spot inspection program does not merely alter the manner in which parties present themselves or their viewpoints, nor does it merely set enforcement strategy or targets. Rather, it changes the standard of review for determining compliance with respirable dust requirements, resulting in a substantial impact on the rights and interests of operators. See Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979); National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983). Under the spot inspection program, an operator can be cited in circumstances under which it otherwise could not be cited.

Contrary to the Secretary's argument (S. Br. at 21), the APA's procedural rule exemption does not apply to the spot inspection program under American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987). The directives at issue in American Hosp. Ass'n improved the chances of detecting non-compliance with federal reimbursement standards by increasing the "frequency

¹² Keystone argues that the Secretary makes this argument for the first time on review. APA exemptions were explicitly raised before the judge by Keystone and were implicitly raised by the Secretary. K. Post-Hearing Br. at 18-21 & n.11; S. Reply Br. to ALJ at 8. The argument made by the Secretary on review is substantially related to issues that were before the judge. See n.7 supra. Accordingly, we consider the Secretary's argument.

and focus of ... review."¹³ Id. at 1050. The court based its determination that the procedural rule exemption applied on the fact that this was "not a case in which HHS has urged its reviewing agents to utilize a different standard of review in specified medical areas...." Id. at 1051. It noted further that "[w]ere HHS to have inserted a new standard of review governing ... scrutiny of a given procedure ..., its measures would surely require notice and comment...." Id. In this case, the Secretary has sought to establish a new standard of review in determining compliance with the respirable dust requirements based on single-shift samples and on altered criteria for determining valid samples, a standard that may not accurately determine the quantity of respirable dust in the atmosphere.¹⁴

2. Spot inspection program is not an interpretive rule

In Drummond, the Commission stated that an interpretive rule is an agency statement "as to what [the agency] thinks the statute or regulation means," which "seeks merely to clarify or explain existing law." 14 FMSHRC at 684-85 (citations omitted). In American Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the U.S. Court of Appeals for the D.C. Circuit stated, in relevant part, that a purported interpretive rule has legal effect and is, therefore, substantive if it effectively amends a prior legislative rule.

The spot inspection program does not, as argued by the Secretary, merely interpret section 202(f). S. Br. at 26. Rather, as we have shown, the program attempts to rescind the 1971 finding that single-shift samples are not accurate in determining the "average concentration" of respirable dust in a mine. The 1971 finding was issued as a legislative rule as required under section 202(f), and the spot inspection program attempted substantively to rescind the finding. Accordingly, we reject the Secretary's contention that the spot inspection program is exempt from APA rulemaking requirements as an interpretive rule.

¹³ The operator in this case has not challenged the selection of mines for spot inspection. Thus, the Secretary's reliance on United States Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984), which addresses targeting of employers for inspection under the Occupational Safety and Health Act, is also misplaced.

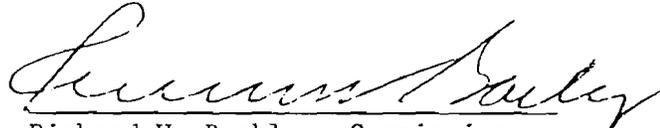
¹⁴ The 1971 finding unequivocally rejected single-shift sampling on the grounds that such sampling was inaccurate, and the preamble to the Secretary's final respirable dust rules reaffirmed that multiple-shift samples were more reliable than single-shift samples. Also, as noted earlier, under the spot inspection program inspectors were instructed not to examine samples for oversized particles and not to void samples except for pump malfunctions. Tr. I 162-63; Tr. II 29, 33-36; Tr. III 16; G. Ex. 14, p. 2.

III.
Conclusion

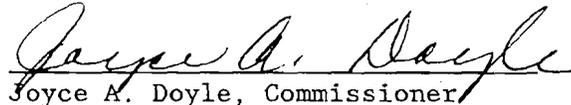
The spot inspection program constitutes a legislative-type rule. The 1971 finding, which it seeks to contravene, was issued in accordance with the Mine Act's notice-and-comment rulemaking procedures and may be rescinded only in the same manner. We agree with the judge's determination that, because the Secretary failed to implement the spot inspection program in accordance with section 202(f) of the Mine Act and the rulemaking provisions of the APA, compliance determinations under the program are invalid. For the foregoing reasons, we affirm the judge's vacation of the three citations issued under the Secretary's spot inspection program.



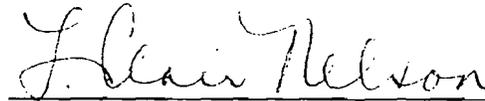
Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

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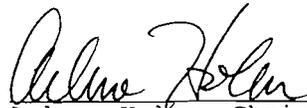
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

January 7, 1994

JIM WALTER RESOURCES, INC. :
 :
v. :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 93-127-D
on behalf of JAMES JOHNSON :
 :
and :
 :
UNITED MINE WORKERS OF AMERICA :
 :

ORDER

On December 16, 1993, Jim Walter Resources, Inc. ("Jim Walter"), filed a petition with the Federal Mine Safety and Health Review Commission under Section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2)(1988). The Administrative Law Judge presiding in this discrimination proceeding has not yet issued his final order on damages. The Commission has dismissed as premature petitions seeking review of a judge's decision finding liability in discrimination cases before the decision on damages is issued. See Kenneth A. Wiggins v. Eastern Associated Coal Co., 5 FMSHRC 1668 (October 1983). Jim Walter's petition is premature and is dismissed without prejudice. Jim Walter may file a petition for discretionary review after issuance of the judge's decision on damages.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 10, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 91-598-R
	:	WEST 92-335
WYOMING FUEL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). Following an evidentiary hearing, Administrative Law Judge John J. Morris found that Wyoming Fuel Company ("Wyoming Fuel") violated its ventilation plan and that the violation was significant and substantial in nature ("S&S").¹ 14 FMSHRC 1758 (October 1992)(ALJ). The Commission granted Wyoming Fuel's petition for discretionary review, which challenges these findings, and heard oral argument. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Wyoming Fuel owns and operates the Golden Eagle Mine, an underground coal mine, near Trinidad, Colorado. On July 28, 1991, Inspector Melvin Shiveley of the Department of Labor's Mine Safety and Health Administration ("MSHA"), accompanied by Wyoming Fuel fireboss² Gene Castillo, inspected the northwest longwall of the mine.

¹ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

² A fireboss is "[a] person designated to examine the mine for gas and other dangers." Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral and Related Terms at 429 (1968).

Inspector Shiveley observed water on the headgate side of the longwall between crosscuts 70 and 75 in the No. 3 entry, between crosscuts 73 and 74 in the No. 2 entry, and in various places in the No. 1 and No. 2 bleeder rooms. On the tailgate side, he found water "basically everywhere" in the No. 1 and No. 2 bleeder rooms. Tr. 21. Shiveley determined that the water was generally between 4 and 28 inches in depth. Castillo, wearing waders, walked in waist-deep water in the No. 2 bleeder room between crosscuts 68 and 69. On the basis of these observations, Shiveley concluded that Wyoming Fuel violated its approved ventilation plan, which requires that pumps be installed to remove water accumulations presenting a hazard. The inspector issued an order pursuant to section 104(d)(2), 30 U.S.C. § 814(d)(2), alleging a violation of 30 C.F.R. § 75.316, which requires the adoption of ventilation plans.³ The order stated that water conditions would prevent the fireboss from safely examining and evaluating the performance of the bleeder system. Shiveley designated the violation S&S and determined that it was the result of Wyoming Fuel's unwarrantable failure to comply with the cited ventilation plan provision.

The judge found that the water accumulations were hazardous and credited the testimony of Shiveley and other MSHA witnesses as to the nature of the hazards presented. 14 FMSHRC at 1761-63. The judge determined that the testimony of Wyoming Fuel's witnesses regarding the "water accumulations and related hazards" was "not persuasive." 14 FMSHRC at 1762. In addition, the judge noted that Wyoming Fuel's preshift examiners' reports listed the water in the bleeders as a "hazardous condition." *Id.* The judge also determined that the violation was S&S, but that it was not the result of Wyoming Fuel's unwarrantable failure. 14 FMSHRC at 1764-65.

³ Section 75.316 states:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The coal mine ventilation standards were significantly revised, effective August 16, 1992. See 57 Fed. Reg. 20868 (May 15, 1992). References in this decision are to the Secretary's former ventilation standards, found at 30 C.F.R. Part 75.300 et seq. (1991), which were in effect at the time of the alleged violation.

II.

Disposition of Issues

A. Whether Wyoming Fuel violated the ventilation plan provision

Wyoming Fuel submits that it did not violate its ventilation plan because: (1) pumps had been installed and operated; (2) the weekly examiner did not need to travel in areas of significant accumulations of water to check the integrity of the bleeder system;⁴ and (3) the water did not present a hazard in any event. The Secretary argues that the judge correctly determined that Wyoming Fuel violated its ventilation plan by permitting water to accumulate in sufficient quantity and depth to present a hazard.

Wyoming Fuel's ventilation plan requires that "[p]umps will be installed to remove water that accumulates in sufficient quantity or depth to present a hazard." Ex. S-2. It is undisputed that Wyoming Fuel had installed pumps and that they had been operating. It appears, however, that the pumps were inoperative at the time of Shiveley's inspection because of a problem with the compressor. Tr. 35-36, 49, 66. It is also undisputed that the presence of water in the bleeders does not, by itself, violate the plan. The plan is violated, however, when water accumulations that present a hazard are not removed. We reject Wyoming Fuel's argument that it complied with the plan by operating pumps in an attempt to remove water from the area. The Mine Act is a strict liability statute and an operator may be held liable for violations without regard to fault. Asarco, Inc. - Northwestern Mining Dep't, 8 FMSHRC 1632, 1634 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989).⁵

Wyoming Fuel also argues that the plan provision is satisfied because the weekly examiner was able to examine the bleeder system to ensure that it was functioning properly without walking through hazardous accumulations of water. Wyoming Fuel's interpretation of the provision limits its applicability to the weekly examiner. The provision, however, does not contain language limiting its application to certain miners. Ex. S-2. We agree with the Secretary that the plan is violated if water is allowed to accumulate in sufficient quantity or depth to present a hazard to those entering the bleeders. We conclude that the plan provision applied to

⁴ Wyoming Fuel was required to have the bleeder system examined at least once each week by a certified person. See 30 C.F.R. § 75.316-2(f)(2). The latest weekly examination took place on July 26, 1991, two days before Shiveley's inspection.

⁵ Wyoming Fuel's efforts to remove the water are relevant, however, to the degree of negligence that should be attributed to a violation. We note that, while Inspector Shiveley had designated the degree of negligence as high, the judge found Wyoming Fuel's negligence to be moderate. 14 FMSHRC at 1766.

Castillo, whose assigned duties required him to travel through significant water accumulations.⁶

Finally, we conclude that substantial evidence⁷ supports the judge's finding that water accumulations in the bleeder system on July 28 presented a hazard. 14 FMSHRC at 1761-63. As the judge noted, Castillo's use of waders in traversing the bleeder system is indicative that the excessive water presented a hazard, since waders are not standard issue clothing in a coal mine. 14 FMSHRC at 1761.

The judge's finding was also based on his explicit credibility determinations⁸ in favor of MSHA's witnesses, especially Inspector Shiveley. 14 FMSHRC at 1761-62. Shiveley testified that the mine floor was uneven and that pieces of loose coal and cribbing were submerged below the water on the mine floor. Tr. 38-39. See also Tr. 99 (MSHA Inspector Ned Zamarripa). These conditions presented a stumbling hazard. Tr. 39. He also testified that a miner attempting to walk the rib line to avoid water accumulations could pull down the rib if he were forced to grab it. Tr. 30-32, 37, 41. See also Tr. 104 (Zamarripa). Shiveley further testified that the coal in the mine is soft and tends to "sluff." Tr. 30, 41. In addition, water accumulations in bleeder systems can impede ventilation and increase the danger of hazardous methane accumulation. Tr. 37, 46, 98-99, 103, 213.

⁶ Castillo was in the bleeder system to inspect the pumps and perform preshift examinations. W.F. Br. at 7, 10; Ex. W.F.-2. Castillo described his duties as a fireboss as follows:

Checking the pumps, make sure the water is being pumped out of the mine, checking the lift stations, the bleeders, make sure those pumps are running, checking the -- checking the bleeders to make sure they're doing what they're suppose to do.

Tr. 193-94.

⁷ The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

⁸ The Commission has recognized that a "judge's credibility findings and resolutions of disputed testimony should not be overturned lightly." Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981); Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987).

B. Whether the violation was S&S.

A violation is properly designated as being S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted). See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies formula criteria). The Commission has held 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)(emphasis in original).

Wyoming Fuel argues that the S&S finding is erroneous because the third Mathies element was not established and that the judge erred in relying on the Commission's decision in Eagle Nest, Inc., 14 FMSHRC 1119 (July 1992). Wyoming Fuel emphasizes that the maximum water depth in the mine, 28 inches, was limited to one discrete area and that the water was clear. The Secretary contends that the judge's S&S finding is supported by substantial evidence.

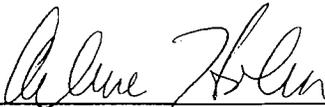
We agree with the Secretary that substantial evidence supports the judge's S&S finding. In finding the third Mathies element satisfied, the judge credited Shiveley's testimony. 14 FMSHRC at 1764, citing Tr. 40, 43. Shiveley testified that it was reasonably likely that an injury of a reasonably serious nature would result from the violation. Tr. 40-41. He testified that people have drowned by falling in water while walking in waders. Tr. 39-40. The inspector also indicated that a miner could stumble and hit his head or twist an ankle, or that a loose rib could strike someone, possibly causing drowning. Tr. 41. The judge also found that waders by themselves can cause the wearer to slip, particularly where the mine floor is not easily seen. 14 FMSHRC at 1764. Finally, Shiveley's testimony contradicts Wyoming Fuel's contention that the water was clear. Tr. 38-39. In any event, the Commission's decision in Eagle Nest did not suggest that accumulations less murky, deep or extensive than the accumulations in that

case might not be S&S.⁹ We reject Wyoming Fuel's argument to that effect. Determination of whether a violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

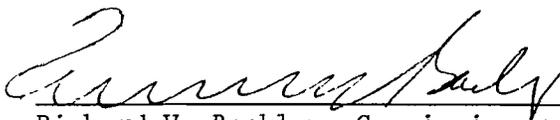
III.

Conclusion

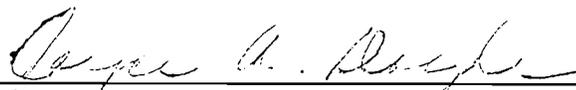
For the foregoing reasons, we affirm the judge's decision that Wyoming Fuel violated its ventilation plan and that the violation was S&S.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

⁹ In Eagle Nest, water accumulations were murky, up to four feet deep, extensive, and had to be traversed to permit an examination. 14 FMSHRC at 1120-21. The judge, on remand, found the violation to be S&S. 14 FMSHRC 1800 (November 1992) (ALJ).

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Administrative Law Judge John J. Morris
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1244 Speer Boulevard, Suite 280
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

January 10, 1994

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of PERRY PODDEY

v.

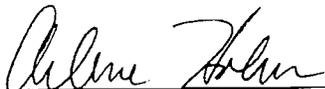
TANGLEWOOD ENERGY, INC.,

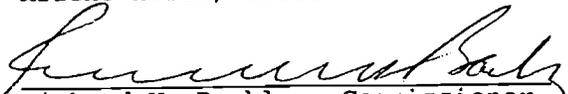
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Docket No. WEVA 93-339-D

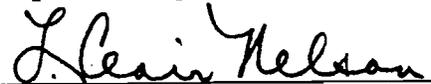
ORDER

On December 29, 1993, the Secretary of Labor ("Secretary"), filed a petition with the Federal Mine Safety and Health Review Commission under Section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2)(1988). The Administrative Law Judge presiding in this discrimination proceeding has not yet issued his final order on damages. The Commission has dismissed as premature petitions seeking review of a judge's decision finding liability in discrimination cases before the decision on damages is issued. See Kenneth A. Wiggins v. Eastern Associated Coal Co., 5 FMSHRC 1668 (October 1983). The Secretary's petition is premature and is dismissed without prejudice. The Secretary may file a petition for discretionary review after issuance of the judge's decision on damages.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce K. Doyle, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K Street, N. W., Sixth Floor
Washington, D. C. 20006

January 26, 1994

SECRETARY OF LABOR, MINE SAFETY :
AND HEALTH ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. VA 93-165
 : VA 93-166
SOUTHMOUNTAIN COAL, INC. :
 :
AND :
 :
WILLIAM RIDLEY ELKINS :

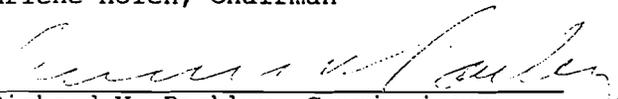
ORDER

Southmountain Coal Company, Inc., ("Southmountain") has filed a petition seeking review by the Commission of the December 6, 1993, order of Administrative Law Judge Gary Melick in which he denied Southmountain's motion for certification for interlocutory review. Southmountain's motion requested that the judge certify to the Commission his ruling that the Secretary had established "adequate cause" to excuse a four-day delay in assessing a proposed penalty under Commission Rule 28(a), 58 Fed. Reg. 12158, 12167 (March 3, 1993), to be codified at 29 C.F.R. §2700 (1993). Southmountain styled and referenced its petition to the Commission "pursuant to Commission Rule 70", although it apparently is seeking interlocutory review under Commission Rule 76, 58 F.R. at 12172.

Upon consideration of Southmountain's petition and the Secretary's response, we conclude that Southmountain has failed to establish a basis for granting interlocutory review and, therefore, we deny the petition.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 28, 1994

AIR PRODUCTS AND CHEMICALS, INC. :
 :
 v. : Docket No. PENN 91-1488-R
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners

ORDER

BY THE COMMISSION:

On January 12, 1994, Air Products and Chemicals, Inc. ("Air Products") filed with the Commission a Motion for Stay Pending Appeal of the Commission's December 9, 1993, decision in this matter. 15 FMSHRC 2428 (December 1993).^{*} The Secretary filed opposition to the motion on January 21, 1994.

Air Products filed its motion pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), provides that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding at such time as the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider Air Products' motion. See Helen Mining Co., 14 FMSHRC 1993, 1994 (December 1992).

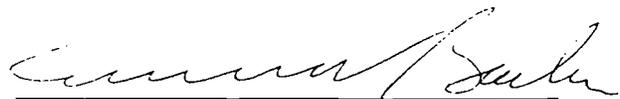
Upon consideration of Air Products' motion and the Secretary's opposition, we conclude that Air Products has failed to establish that a stay should be granted. See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Jim Walter Resources, 9 FMSHRC 1312 (August 1987). In view of this conclusion, we need not discuss the Secretary's arguments

^{*} Air Products filed its notice of appeal with the United States Court of Appeals for the Third Circuit on December 22, 1993 (No. 93-3646).

concerning "temporary relief" under sections 105 and 106 of the Mine Act, 30 U.S.C. §§ 815 & 816. Accordingly, Air Products' motion is denied.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 3, 1994

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of	:	
JAMES HYLES,	:	Docket Nos. WEST 93-194-DM
DOUGLAS MEARS,	:	WEST 93-195-DM
DERRICK SOTO,	:	WEST 93-196-DM
GREGORY DENNIS,	:	WEST 93-197-DM
Complainants	:	
	:	
v.	:	
	:	
ALL AMERICAN ASPHALT,	:	All American Aggregates
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Complainants;
Naomi Young, Esq., Los Angeles, California,
for Respondents.

Before: Judge Cetti

These consolidated temporary reinstatement proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). Section 105(c) of the Mine Act, 30 U.S.C. § 815(c) (1988), prohibits operators of mines from discharging or otherwise discriminating against a miner who has filed a complaint alleging safety or health violations at a mine or engaged in other protected activity. If a miner believes that he has been laid off or otherwise discriminated against by any adverse action in violation of this section, he may file a complaint with the Secretary of Labor ("Secretary") who is required to initiate a prompt investigation of the alleged violation. If the Secretary finds that the miner's complaint was "not frivolously brought," he must apply to the Federal Mine Safety and Health Review Commission ("Commission") for an order temporarily reinstating the miner to his job, pending a final order on the complaint. The Commission is required to grant such an order if it finds that the statutory standard (not frivolously brought) has been met.

Although the Act does not require a hearing on the Secretary's application for temporary reinstatement, the Commission's regulations Procedural Rule 45(c) provide an opportunity for a hearing upon request of a mine operator, prior to the entry of a reinstatement order. The scope of such a hearing is limited to a determination by the Administrative Law Judge "as to whether the miner's complaint is frivolously brought," with the Secretary bearing the burden of proof on this standard. Jim Walter Resources v. Federal Mine Safety and Health Review Commission, 920 F.2d 738 (11th Cir. 1990).

I

Procedural History

In January 1993 the Secretary of Labor (Secretary) filed an application for an order temporarily reinstating the Complainants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis to the positions they had, heavy equipment operators, with Respondent All American Asphalt.

The Secretary's application for the reinstatement order stated the Complainants had been discharged in retaliation for engaging in protected safety activity and that the facts and circumstances of the case support a finding that the complaints of discrimination are non-frivolous under Section 105(c) of the Act.

The Secretary attached to his application the affidavit of James E. Belcher, the Chief of the Division of Technical Compliance and Investigation, Metal and Nonmetal Safety and Health. The affidavit states in part that investigation discloses the following facts:

a. At all relevant times, Respondent All American Asphalt engaged in the production of aggregate, and is therefore an operator within the meaning of Section 3(d) of the Mine Act;

b. At all relevant times, Applicants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis were employed by Respondent as miners within the meaning and scope of Section 3(g) of the Mine Act;

c. All American Aggregates Mine, located near Corona, Riverside County, California, is a mine as defined by Section 3(h) of the Mine Act, the products of which affect interstate commerce;

d. The alleged act of discrimination occurred on or after July 7, 1992, when Applicants Hyles, Mears, Soto and Dennis were effectively discharged by Respondent's Vice-President Michael Ryan;

e. Applicant James Hyles engaged in protected activity by filing a hazardous condition complaint with MSHA in April 1991 which resulted in 29 citations and orders and closure of the plant and by giving a statement to the MSHA special investigator in the subsequent Section 110(c) investigation in May 1991;

f. Applicants Douglas Mears, Derrick Soto and Gregory Dennis engaged in protected activity by giving statements to the special investigator in the Section 110(c) investigation in May 1991;

g. All four Applicants worked during the weekend in April 1991 when the hazard complaint was filed;

h. Respondents Ryan and Sisemore had knowledge of the Applicants' protected safety activity;

i. Respondents made statements to Applicants and other employees indicating that the person who filed the hazard complaint would be fired or forced to quit, demonstrating open hostility toward Applicants' protected safety activity;

j. Applicant Soto was threatened with lay-off shortly after the Section 110(c) special investigation was completed in May 1991;

k. In October 1991, Applicant Hyles was demoted from leadman on the second shift to loader operator on the first shift and his working conditions deteriorated;

l. Respondents' articulated basis for the demotion is pretextual;

m. On July 7, 1992, Applicants Hyles, Mears, Soto and Dennis were laid off along with 12 other miners, allegedly due to a drop in production;

n. By August 31, 1992, every other laid-off miner was recalled for work except Applicants Hyles, Mears, Soto and Dennis;

o. Other less senior miners were recalled to perform jobs which Applicants were entitled to pursuant to the union contract;

p. Applicants were subject to disparate treatment with respect to the operator's lay-off/recall policy;

q. On July 24, 1992, Respondents received MSHA's Notice of Proposed civil penalties for the 29 orders and citations issued as a result of the hazard complaint against All American Asphalt (\$45,000.00) and against Respondent Ryan as a corporate agent (\$9,500.00);

r. Respondents' articulated basis for laying-off and refusing to recall Applicants is pretextual.

In view of the foregoing facts, I have determined that Applicants Hyles, Mears, Soto, and Dennis were effectively discharged in retaliation for engaging in protected safety activity and the complaints filed by them are not frivolous.

/s/
James E. Belcher

On January 19, 1993, All American Asphalt filed a timely request for a hearing on the application for temporary reinstatement of the complainants. A hearing on the application was set by agreement of the parties on February 10, 1993, in Riverside, California. At the joint request of the parties this hearing was canceled on February 9, 1993. The parties stated that they had agreed on a voluntary reinstatement of the Complainants at the same wage and to the same or similar positions Complainants held at the time of their July 1992 layoff. It was also agreed that there would be compliance with the collective bargain agreement (Operating Engineers Local 12) with respect to any possible future layoff. The cases were not dismissed pending the filing of a written settlement with specific terms that both parties were willing to sign off on, particularly with respect to seniority.

On March 29, 1993, the Secretary filed a motion to Renew the Application for Temporary Reinstatement. The motion states in part the following:

Respondent has not complied in good faith with the terms of the settlement agreement, effectively voiding the agreement and necessitating a Temporary Reinstatement hearing and Order of Reinstatement by the Commission in order to enforce the Applicants' right to temporary reinstatement under the Mine Act.

From the date of voluntary temporary reinstatement, Respondent refused to assign Applicant Douglas Mears to his former position as a plant operator, assigning him to shovel manually instead of operating crushing equipment.

On March 24, 1993, Respondent laid-off all four Applicants under circumstances demonstrating that Respondent deliberately planned the layoff and manipulated the collective bargaining agreement in order to achieve the layoff of the four Applicants. By its actions, Respondent continues to deny the four Applicants the bona fide temporary reinstatement to which they are entitled.

On April 9, 1993, Respondent filed a timely request for a hearing on the Secretary's motion to renew application for tempo-

rary reinstatement. The matter was therefor set for hearing on the date agreed by the parties April 29 and 30, 1993, in Riverside, California.

This hearing was canceled when on April 23, 1993, the Secretary filed a motion to stay the application for temporary reinstatement, stating that on "April 22, 1993 counsel for All American notified counsel for the Secretary that All American plans to recall the four applicants to return to work on Monday, April 26, 1993."

On April 27, 1993, the Secretary filed a revised Motion to Stay Temporary Reinstatement Proceedings with a cover letter stating "the parties agree that the hearing scheduled for April 29 and 30, 1993, will not be necessary and requesting that the temporary reinstatement proceeding be stayed. Respondents opposed the motion to stay on the grounds that their proposed voluntary reinstatement should be approved.

Pursuant to the request of the parties the April 29-30 hearing was canceled and the parties were ordered to jointly file a written Temporary Reinstatement Agreement.

The parties discussed such an agreement but were never able to reach agreement on some of the necessary terms. In any event a joint written reinstatement settlement agreement was never filed. Reinstatement was apparently continued on a voluntary basis but not without controversy.

On October 5, 1993, the Secretary filed a motion entitled "Secretary of Labor's Motion for Order Requiring Bona Fide Temporary Reinstatement."

In the motion the Secretary alleges in part that Respondents have refused to employ the Complainants on a regular, full-time basis, have limited the regular hours worked and by refusing to recognize the original seniority dates of the four complainants as agreed by the parties.

On receipt of the Secretary's October 5, 1993, motion these reinstatement proceedings were set for hearing along with the hearing on the discrimination complaints WEST 93-336-DM through WEST 93-339-DM and WEST 93-436-DM through WEST 93-439-DM which were set by agreement of the parties on November 16 through November 19, 1993, and when time ran out on Friday November 19th the proceeding was continued for further hearing on December 13 through December 17, 1993.

II

At the conclusion of the hearing on December 17, 1993, the presiding undersigned Judge from the bench made an oral decision finding that the discrimination complaints were not frivolously brought and issuing an Order of Temporary Reinstatement. I ordered Respondent to immediately reinstate Complainants to the same position from which they were laid off at the same rate of pay and with the same or equivalent duties assigned to them prior to their layoff.

I hereby affirm in writing my bench decision and Order.

III

At the hearing on the Application for an Order of Temporary Reinstatement evidence was presented that the Complainants were employed by All American Asphalt primarily as heavy equipment operators, members of the Operating Engineers Union Local 12. In April 1991 All American Asphalt was in process of having work completed on the construction of its new finishing plant, a new addition to its rock crushing operation. The new finishing plant was run during the start-up weekend April 19-21, 1991, before many of the basic safety items were installed. Complainant James Hyles was employed as leadman at the time. Evidence was presented that he complained to Respondent's vice president and plant supervisor that the plant was not safe to run in its unfinished condition due to the fact that guarding on moving equipment, handrails, stop cords and catwalks were not completed. Each of the Complainants also complained to their leadman about running the plant in its unsafe condition.

The leadman, Complainant Hyles, videotaped the unsafe conditions during the start-up weekend and reported the unsafe conditions to the MSHA San Bernardino field office on Monday morning, April 22, 1991. The other Complainants encouraged him to do this. That same day MSHA responded by conducting a hazard complaint investigation which resulted in a closure order and the issuance of approximately 29 unwarrantable failure citations and orders for lack of guarding, handrails, and other safety equipment. MSHA subsequently conducted a Section 110(c) investigation of Vice-President Michael Ryan for authorizing the activity that resulted in the unwarrantable violations cited during the hazard complaint investigation.

In June 1991 each of the four Complainants were interviewed and gave a statement to MSHA Special Investigator Ronald Mesa during the Section 110(c) investigation.

The interviews were conducted in Mr. Mesa's vehicle which was parked in front of the main office at the plant.

Evidence was presented that after the hazard complaint investigation which resulted in closure of the mine, Complainants experienced adverse changes in working conditions. Complainant Soto was threatened with layoff and Complainant Hyles was demoted from his leadman position.

Evidence was also presented that in July 1992 All American Asphalt laid-off the four Complainants along with most of the work force. Complainants were initially told that the layoff would be for approximately one week while the crusher was moved and that only a few employees were needed to move the equipment. When the Complainants called in to inquire when they could return to work, Respondent informed them that no work was available because of a slowdown in production. Respondent had in fact recalled almost the entire work force and worked some employees overtime during July and August 1992 when the Complainants were told no work was available. Complainants assert that the only employees not recalled were the four Complainants and loader operator Martin Hodgeman.

Complainants presented evidence that in late August 1992, two of the Complainants went to the mine and observed that less-senior employees were working at the mine and that employees were working overtime, contrary to repeated statements of Respondent that no work was available.

In July 1992, MSHA issued the Notices of Proposed Civil Penalties totaling \$45,000.00 against All American Asphalt for the violations cited during the hazard complaint investigation.

On March 3, 1993, Respondent implemented a third shift for production, assigning four senior plant repairmen to perform production jobs during the third shift. Respondent presented evidence that the third shift was implemented on a temporary basis in order to run wet material through the plant.

After assigning the plant repairmen to perform the production jobs for three weeks, on March 24, 1993, Respondent announced a layoff which resulted in only the four Complainants being laid off.

With respect to the March 1993 layoff, it is the Secretary's position that Respondent deliberately manipulated the assignment of employees to different shifts and working hours in order to terminate the four Complainants. The Complainants had returned to work pursuant to a voluntary temporary reinstatement agreement on February 11, 1993. Respondent changed the production shift to the day shift and changed the maintenance shift to the second shift. The four Complainants were assigned to production jobs on the day shift.

The Secretary asserts that rather than simply discontinuing the temporary third shift and reassigning the four senior plant repairmen to their regular positions on the maintenance shift, Respondent required all of the third shift employees participate in a formal layoff and bid on jobs held by less senior employees. Each of the four Complainants was "bumped" (replaced) by a senior plant repairman, even though plant repair positions were available on the seniority list.

It is the Secretary's position that the facts support a strong inference that Respondents coerced the senior plant repairmen into bidding on the four Complainant's production jobs, in order to ensure the Complainants would be laid off.

The record contains a great deal more relevant evidence. There were eight days of testimony of 20 witnesses and over 100 exhibits. There is more than 2,000 pages of testimony which as yet has not been transcribed. There is a considerable amount of the evidence that tends to rebut or refute portions of the Secretary's evidence. I have not attempted to recite or discuss all the relevant evidence. The only issue to be decided in this reinstatement proceeding is whether the complaints of discrimination are frivolously brought. My ruling in this matter is limited to that single issue, keeping in mind that the Secretary has the burden of proof on that issue. I make no attempt to weigh the evidence or make any findings on the ultimate issues. Upon the basis of the record as a whole I find that the complaints of each of the four miners, James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis, is not frivolous and is not frivolously brought.

ORDER

Respondent, All American Asphalt, is hereby ORDERED to reinstate James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis to the positions from which they were discharged or laid off or to an equivalent position, at the same rate of pay and with equivalent duties.



August F. Cetti
Administrative Law Judge

Distribution:

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Mr. Gregory Dennis, 1128 Amarillo Street, Alta Coma, CA 91701

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 5 1994

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-776
Petitioner : A.C. No. 15-16728-03511
 :
v. : No. 2 Mine
 :
LYNX COAL COMPANY, :
INCORPORATED, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

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 two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violations and the case was docketed for hearing on the merits in Prestonsburg, Kentucky.

The parties now have decided to settle the matter, and they have filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>	<u>Settlement</u>
3818391	1/21/91	75.1722(b)	\$2500.00	\$2000.00
3813892	1/21/91	75.1728(c)	\$3000.00	\$2500.00

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size, ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 3818391, which was issued for the failure of Lynx Coal Company to provide guards to prevent persons from coming in contact with the tail roller system serving a low conveyor belt, the parties state that although the violation resulted in the section foreman being severely injured, there was a guard in place at the time of the accident that

partially restricted access to the pinch point between the belt and pulleys and that the operator's negligence was tempered by the fact the foreman acted outside the scope of his duties in placing himself in the situation in which he suffered injury.

With regard to Order No. 3818392, which was issued because coal spilled beneath a conveyor belt was removed while the belt was operating and which contributed to the severe injury of the section foreman, the parties state that the operator's negligence was tempered by the fact the foremen had been instructed in the proper procedures for removing such coal and nonetheless was acting outside his training and instructions.

CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the suggested reduction in the penalties assessed for the subject violations is warranted and that the proposed settlement disposition is reasonable and in the public interest. Pursuant to 30 C.F.R. § 2700.31, the motion IS GRANTED, and the settlement is **APPROVED**.

ORDER

Respondent has paid civil penalties in the settlement amounts shown above in satisfaction of the violations in question. This proceeding is **DISMISSED**.


David F. Barbour
Administrative Law Judge
(703)756-5232

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 5 1994

PEABODY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
: Docket No. KENT 93-318-R
: Citation 3551261; 1/6/93
:
: Docket No. KENT 93-319-R
v. : Order 3551262; 1/6/93
:
: Docket No. KENT 93-320-R
: Order No. 3551263; 1/20/93
:
SECRETARY OF LABOR, : Camp No. 1 Mine
MINE SAFETY AND HEALTH : Mine ID 15-02709
ADMINISTRATION (MSHA) :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
v. :
:
:
PEABODY COAL COMPANY, : Docket No. KENT 93-437
Respondent : A. C. No. 15-02709-03840
:
: Camp No. 1 Mine
: Mine ID 15-02709
:
:

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor;
David R. Joest, Esq., for Peabody Coal Company.

Before: Judge Amchan

Statement of the Case

On January 6, 1993, MSHA inspector Arthur Ridley went to the office of Respondent's Camp 1 mine and reviewed the results of Respondent's bimonthly sampling for respirable dust for the period November - December 1992 (Tr. 16 - 18). Respondent's

records indicated that for the 5 samples taken during this period, the average exposure of the continuous miner operator on mechanized mining unit 044 (MMU) was 2.4 mg/m³ (Jt. Exh. 4).

Upon review of these samples, Ridley issued citation 3551261 alleging a violation of 30 C.F.R. § 70.100(a), which requires that:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air...

This citation was issued pursuant to section 104(d)(1) of the Act in that it alleged that the violation was "significant and substantial" and due to the unwarrantable failure of Respondent to comply with the standard. A \$4,000 civil penalty was proposed for this alleged violation.

On January 6, 1993, Inspector Ridley also reviewed the results of Respondent's sampling of the continuous miner operator on mechanized mining unit 056 for the bimonthly sampling period of November - December 1992 (Tr. 58, 63). These 5 samples also averaged 2.4 mg/m³ (Tr. 63, Jt. Exh. 5). Ridley issued Respondent order number 3551262 pursuant to section 104(d)(1) of the Act. A \$6,000 penalty was proposed for the alleged violation on MMU 056.

On January 20, 1993, Ridley returned to Camp 1 and reviewed the respirable dust samples taken between January 4, and January 6, for the January - February 1993 bimonthly sampling period on mechanized mining unit 047 (Tr. 77 - 78, Jt. Exh. 6). These samples averaged 2.2 mg/m³. The inspector then issued order 3551263 pursuant to section 104(d)(2) of the Act. The Secretary subsequently proposed another \$6,000 penalty for the excessive respirable dust exposure on MMU 047.

Respondent in this case concedes that the violations occurred as alleged and that the violations were "significant and substantial" pursuant to presumptions enunciated in Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1084 (D. C. Cir. 1987). The issues in this case are whether the violations are due to Respondent's unwarrantable failure to comply with the standard, whether the violations were due to a high degree of negligence on the part of Respondent, and what are the appropriate penalties to be assessed for the violations. The Secretary's allegations of unwarrantable failure and high negligence are predicated on the number of citations issued within the prior 2 years for violation of the respirable dust standard with regard to each of the mechanized mining units cited in January, 1993 (Tr. 34 - 39, 65,

74 - 75, 83 - 85, 100 - 102).¹ The Secretary did not consider Respondent's compliance record with regard to respirable dust as a whole in determining whether the January 1993 citation and orders should be deemed to have resulted from high negligence and "unwarrantable failure (Tr. 74 - 75, 100 - 102)."

In the two years prior to January 1993, Unit 044 had been sampled in 10 of the 12 bimonthly sampling periods. Respondent had been out of compliance with regard to the MMU 044 on 4 of those occasions. On February 8, 1991, Respondent received a citation because the samples on unit 044 averaged 3.3 mg/m³ for the January - February 1991 bimonthly sampling period (Exhibit G-1). On March 28, 1991, a section 104(b) order was issued because the samples for the March - April 1991 bimonthly period averaged 2.2 mg/m³. On December 2, 1991, a section 104(a) citation was issued because the samples for the November - December 1991 bimonthly period averaged 2.7 mg/m³ (Exhibit G-2, page 2). On February 11, 1992, another citation was issued because the samples for the January - February 1992 bimonthly period averaged 2.8 mg/m³ (Exhibit G-2, page 3).

In the 12 bimonthly sampling periods during calendar years 1991 and 1992, mechanized mining unit # 056 was out of compliance with 30 C.F.R. § 70.100(a) 5 of the 12 times it was sampled. In February 1991, Respondent was cited because the January - February samples averaged 2.2 mg/m³ (Exhibit G-2). In July 1991, Peabody was cited again because the May - June samples averaged 2.7 mg/m³. In February 1992, another citation was issued because the January - February samples averaged 2.9 mg/m³ (Exhibit G-2, page 3). In April 1992, MSHA cited Peabody again because the samples for the March - April period averaged 2.6 mg/m³. The fifth violation during 1991 - 1992 was in the November - December 1992 sampling period and is addressed by order number 3551262.

Mechanized mining unit 047 was available for sampling in only four of the 12 bimonthly sampling periods during calendar years 1991 and 1992. In May 1991, Respondent was cited because the March - April samples averaged 3.0 mg/m³ (Exhibit G-3). The next time it was sampled was for the July - August 1992 sampling period and it was barely in compliance with an average concentration of 1.9 mg/m³ (Exhibit G-3, page 3). For the September - October sampling period the average concentration was 2.4 mg/m³ precipitating another citation (Exhibit G-3, page 4). MMU 047 was in compliance for the period November - December 1992, and then out of compliance for the January - February 1993 sampling period, which is addressed by order number 3551263.

¹At the time of the January 1993 citation and orders, Respondent had 6 mechanized units in operation.

The Secretary's position is that the number of violations of the respirable dust standard on each of these machines during a two year period indicates more than ordinary negligence and is sufficiently "aggravated" to constitute an unwarrantable failure to comply with the standard. Peabody, on the other hand, points to a number of steps it took, beginning in January 1992, to improve dust control, which it contends establishes that it was not "highly negligent" and makes the characterization of unwarrantable failure inappropriate.

Respondent's evidence in this regard consists primarily of the uncontroverted testimony of Michael W. Kirtley, who came to Camp 1 in July 1992 to be Compliance Manager at this facility (Tr. 173-74). The steps taken to remedy the excessive dust problem at Camp 1 were as follows:

Beginning in January 1992, Respondent installed water flow gauges on its continuous miners. This project, which took 6 months to complete, allows the miner operator to continuously monitor the amount of water coming through his machine (Tr. 179);

In February 1992, Respondent began a 6 - 7 month project to increase the size of the fittings on the water lines leading to the continuous miners from 1/2 inch fittings to 2 inch fittings (Tr. 181 - 182);

In March 1992, Peabody increased the water volume on its four continuous miners that are shuttle car units by 25 percent. The water volume of its two continuous miners that are continuous haulage units was increased by 50 percent (Tr. 182 - 83);

Beginning in February 1992, Respondent replaced the 2-inch plastic pipe in its water lines with 2-inch metal pipe, which allows for the use of greater water pressure (Tr. 183);

In March 1992, Peabody undertook to increase the size of the water lines going to the miners from 1 inch to 1 1/2 inches (Tr. 184);

In a 6 week period during November and December 1992, Peabody installed water sprays inside the ductwork of the scrubbers on the continuous miners to improve scrubber efficiency (Tr. 185);

In July 1992, the company replaced its water pumps with pumps that allowed for increased water pressure and, therefore, an increased volume of water (Tr. 188).

Peabody has also been working with Joy, the manufacturer of its continuous miners, since January 1992, to reduce the restrictions in the water lines on the mining machines (Tr. 187). Since the issuance of the citations at issue in this case, Peabody has acted upon a suggestion from inspector Ridley that it assign additional supervisory personnel to monitor its employees while they are being sampled for respirable dust exposure (Tr. 72 - 73, 96, 190). These supervisors insure that the sampled employee positions himself where he can minimize his dust exposure. The supervisor also checks on ventilation and water pressure (Tr. 191).

Assessment of Civil Penalties

Section 110(i) requires the Commission to consider 6 factors in assessing penalties. Having considered these factors I conclude that a \$5,000 penalty is appropriate for each of the violations at issue in this case.

The first factor, the operator's history of previous violations is the most important consideration in this case. Citation 3551261 was the fifth respirable dust violation on MMU 044 in a 2-year period. Order 3551262 was the fifth on MMU 056. Order 3551263 was the third of out 5 sampling periods on MMU 047. Although MSHA appears to have considered each MMU in isolation, I believe that consideration must be given to the fact that, in January 1993, after numerous prior respirable dust violations, 3 of Respondent's 6 mechanized mining units were in violation of the respirable dust standard. The number of violations of this standard, which in protecting miners from respiratory diseases, lies at the heart of the Act warrants a relatively high penalty, regardless of whether these violations meet the criteria of "unwarrantable failure."

By analogy, I would note that the Occupational Safety and Health Act, a statute with almost identical purposes to the Mine Safety and Health Act, provides for much higher civil penalties for repeated violations than for first time violations. Under the OSH Act, an employer may be penalized up to \$7,000 for a "serious" or "other-than-serious" violation but may be assessed a penalty of up to \$70,000 for a willful or repeated violation 29 U.S.C. 666 (a), (b), and (c). I would deem it contrary to the purposes of the Mine Act to assess a penalty in the instant case which did not impose a significantly higher penalty given the number of respirable dust violations on all of Respondent's mechanized mining units.

I find a \$5,000 penalty for each violation in this case appropriate, given Peabody's size. Peabody produces in excess of \$10,000,000 tons of coal a year and is, thus, a relatively large mine operator. The parties have stipulated that penalties of this magnitude will not effect Peabody's ability to stay in

business.

The gravity of the violations in this case are quite high. The parties have stipulated that the violations are "significant and substantial." However, I would note that the record in this case suggests that Respondent's employees have been regularly exposed to respirable dust levels above those allowed by the standard for a 2 year period. A penalty of anything less than \$5,000 would not be consistent with Congress' intent of using the full panoply of the Act's enforcement mechanisms to effectuate the goal of preventing respiratory disease Consolidated Coal Company v. FMSHRC, 824 F.2d 1071, 1086 (D.C. Cir. 1987).

Respondent demonstrated good faith in following the suggestions of inspector Ridley in terminating the instant violations and, thus, should not be penalized for not demonstrating such good faith. However, inspector Ridley's suggestions for abatement and Respondent's implementation of those suggestions leave something to be desired in terms of complying with the Act.

Section 70.100(a) requires that each operator shall **continuously** maintain the average concentration of respirable dust at or below 2.0 mg/m³. Pursuant to 30 C.F.R. § 70.207, sampling is to be taken during a normal production shift. This suggests that the sampling is to be representative of an employee's regular, daily exposure to respirable dust (Compare OSHA's standards such as 29 C.F.R. § 1910.1025(d)(iii)).

Sampling that is artificially low because supervisory personnel are constantly watching and directing the sampled employees would appear to be violative of section 70.207. If Respondent is taking other steps, such as frequent unannounced spot checks on the work practices of its continuous miner operators to assure that they minimize dust exposure as a regular practice, the company's abatement measures would appear to comply with the regulation. However, if the samples are under 2.0 mg/m³ only because Respondent is taking unusual steps while the bimonthly sampling is in progress, Peabody appears to be in violation of section 70.207.

On this record, it appears rather problematical that Peabody's current sampling techniques comply with the Act. While supervisors now make it a regular practice to watch employees during sampling, there is little indication that anything is being done to insure that employees follow the proper procedures when they are not being sampled. There is an indication that the requirements of Respondent's dust control plan has been discussed with employees at annual refresher training and on one other occasion (Tr. 213 - 215). However, nothing else indicates that Peabody has done anything to assure that employees on a regular and daily basis follow proper procedures with regard to

positioning themselves and using the line curtain or brattice to direct intake air to the working face (Tr. 213 - 215).

Degree of Negligence and Unwarrantable Failure

The sixth factor for penalty assessment is whether the operator was negligent. Inspector Ridley, when characterizing the instant violations as due to a high degree of negligence and Respondent's "unwarrantable failure" to comply with the standard, did so on the assumption that the company had failed to take any action to alleviate the situation (Tr. 39, 85, 141). Thus, the question is whether this record establishes a high degree of negligence and/or "unwarrantable failure" in light of measures testified to by Mr. Kirtley.

Analytically, I find the issues as to the degree of negligence and whether Respondent's conduct constitutes "unwarrantable failure" to be inseparable. I conclude that despite the measures taken by Peabody prior to the citation and orders in this case, Respondent's violations were due to more than ordinary negligence and that its conduct constitutes "unwarrantable failure."

First of all, it is unclear what, if any, relationship exists between the measures taken by Respondent to increase water supply to its working sections and the numerous citations issued to it for respirable dust violations. Given the numerous citations received, a prudent employer would undertake a comprehensive investigation of the reasons its sampling results exceeded the permissible exposure limit on a regular basis.

Had Respondent done this they would have discovered, as they discovered after the instant citation and orders, that the work practices of its employees were deficient. The recognition that its employees were not positioning themselves to minimize dust exposure and were improperly using line curtains could have been discovered (Tr. 213 - 215) before the issuance of the withdrawal orders.

Commission caselaw makes it quite clear that ordinary negligence does not constitute "unwarrantable failure." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991). However, when a company has repeated respirable dust violations on a number of mechanized mining units, its failure to do a comprehensive analysis of what is causing this problem is more than ordinary negligence. Given the importance in the statutory scheme of preventing respiratory diseases, the failure to leave any stone unturned in discovering the source of these violations is "aggravated." Finally, for Inspector Ridley to show up at Camp 1 in January 1993 and find **3 of the 6** mechanized mining units in violation of the respirable dust standard, should, in

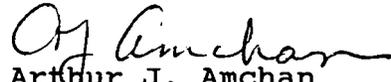
light of Respondent's compliance record during 1991 and 1992, create a rebuttable presumption that the violations were due to an unwarrantable failure to comply.

Had Respondent established that it had taken every conceivable step to rectify the problem, I would be inclined to find that the company's negligence was of an ordinary nature--if that. However, from the sampling done by MSHA in 1991 and 1992, (Tr. 48, 89) which indicated that compliance with the standard was achievable with the equipment already on site, Respondent was on notice that something else, such as closer attention to proper work practices, was necessary.

ORDER

1. Citation 3551261 is affirmed as a section 104(d)(1) citation. Order 3551262 is affirmed. Order 3551263 is affirmed.

2. Peabody Coal Company shall, within 30 days of the date of this decision, pay to the Secretary \$15,000 for the violations found herein.


Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 5 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-114
Petitioner : A.C. No. 15-11012-03521
v. :
: Camp No. 9 Prep Plant
: :
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for
the Respondent.

Before: Judge Amchan

Statement of Facts

This matter arises from an inspection conducted on September 18, 1992, by MSHA Electrical Inspector Michael Moore at Respondent's Camp 9 Preparation Plant. The September 18 inspection was a follow-up to an inspection he had performed on September 10, 1992 (Tr. 12-13, 27 - 28). On September 10, Mr. Moore sampled for methane underneath the cover of a conveyor belt at the bottom of the raw coal storage silo at the Preparation Plant and had obtained readings of 5.2 percent and 5.4 percent methane.

As the result of these readings, he issued an imminent danger order and a citation alleging a violation of 30 C.F.R. § 77.201, which prohibits a methane concentration of more than 1 percent in a structure, enclosure, or facility. Respondent contested this citation and order, both of which were ultimately vacated pursuant to a decision by Administrative Law Judge Roy J. Maurer, Peabody Coal Company, 15 FMSHRC 746 (ALJ April 1993).

As part of its effort to abate the citation and order of September 10, Respondent installed piping and a 25 horsepower fan to draw air out from under the cover of the raw coal belt conveyor. The fan was located inside the piping, 3 to 5 feet from and outside of the raw coal silo, 60 feet from the covered conveyor (Tr. 14, 65-66). When Inspector Moore examined the fan on September 18, he found two things wrong with it. First of all, it was plugged in with a flexible cord and secondly, its motor was not approved for a Class I location, in that it was not explosion-proof.

On September 18, Inspector Moore issued Respondent 2 citations alleging violation of 30 C.F.R. § 77.516. That standard requires that all wiring and electrical equipment installed after June 30, 1971, meet the requirements of the National Electrical Code (NEC) then in effect.

Citation 3547316 alleges a non significant and substantial violation of the standard in that the cord to the fan drawing air from the raw coal conveyor did not meet the requirements of Article 400-4 of the NEC. This article forbids the use of flexible cord as a substitute for the fixed wiring of a structure (Exh. G-2). MSHA contends that rigid conduit was required because the raw coal silo is a permanent structure (Tr. 15, 56).

Citation 3547318 alleges a significant and substantial violation of section 501 of the NEC. Pursuant to section 501-8, motors in Class I, Division 1 and in Class I, Division 2 locations must be explosion proof (Exh. G-4). A Class I location is defined by section 500-4 of the NEC as "those in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures." (Exh. R-1)

The Issues

Respondent contends that citation 3547316 is invalid because its exhaust fan was not a permanent installation. The fan was installed solely to terminate the imminent danger order and citation issued on September 10, which Peabody contested (Tr. 91). Upon vacation of this order and citation by Judge Maurer, Respondent removed the fan (Tr. 39).

It is unclear whether Petitioner's theory is that rigid conduit was required because the fan was a permanent installation or because the flexible cord constituted part of the wiring of the raw coal silo, which is a permanent structure (Tr. 14 -15). In either case, I conclude that the Secretary has failed to prove a violation of Article 400-4.

I find nothing in the record that would permit me to conclude that the flexible cord was part of the wiring of the raw

coal silo. Similarly, when the citation was written, Mr. Moore may have regarded the presence of the fan permanent, but Respondent did not. Respondent installed the fan only to terminate the September 10 citation and order, and fully intended to remove it if it prevailed before the Commission. Therefore, I vacate citation 3547316.

Citation 3547318 was also issued pursuant to Mr. Moore's findings on September 10. Judge Maurer has made a finding that the results of his sampling under the belt cover were invalid. However, the question remains whether the Secretary has established that the fan was located in a Class I location. There is no dispute that the fan was not explosion-proof, as required if it was located in a Class I location.

The record establishes that methane is released, at least some of the time, when coal is fed onto the covered belt conveyor (Tr. 97). The record does not establish anything definitive about the concentration of methane or potential concentration of methane underneath the cover. More importantly, there is nothing definitive concerning methane concentrations or potential concentrations at the fan. The methane readings at the fan on September 18 were zero (Tr. 41). All of Peabody's methane readings in the vicinity of the fan were zero (Tr. 88-89).

The Secretary's case is predicated on the theory that, if there is methane under the cover of the belt conveyor, you can never tell when you might have an ignitable or explosive concentration of methane at the end of the ductwork where the fan was located (Tr. 43-44). Respondent contends that the airflow of the belt conveyor and the effect of the fan itself removed whatever methane was present at the feeder (Tr. 104 - 108).

I conclude that, based on the record in this case, the Secretary's evidence is far too speculative to establish that the fan was located in a Class I location. The Secretary has not established that methane could have been present in explosive or ignitable concentrations at the location of the cited fan motor. Therefore, I vacate citation 3547318.

ORDER

Citations 3547316 and 3547318 are hereby VACATED and this case is dismissed.



Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 5 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 93-5
Petitioner : A.C. No. 46-01452-03901
v. :
 : Docket No. WEVA 93-92
CONSOLIDATION COAL COMPANY, : A.C. No. 46-01452-03916
Respondent :
 : Docket No. WEVA 93-100
 : A.C. No. 46-01452-03918
 :
 : Arkwright No. 1 Mine
 :
 : Docket No. WEVA 93-164
 : A.C. No. 46-01968-04084
 :
 : Blacksville No. 2 Mine

DECISIONS

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern 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 several alleged violations of certain safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Morgantown, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether

the alleged violations were "Significant and Substantial" (S&S), (3) whether the alleged violations were the result of an unwarrantable failure by the respondent to comply with the cited standards, and (4) 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.

Stipulations

The parties stipulated as follows in these matters (Tr. 9-11).

1. The presiding judge has jurisdiction to hear and decide these cases.
2. The subject coal mine is owned and operated by the respondent, and the mine is subject to the Act.
3. The inspectors who issued the contested violations were acting in their official capacity as MSHA inspectors and representatives of the Secretary of Labor.
4. True copies of the orders were properly served to the respondent's agents.
5. Payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.
6. The citations and orders contained in the petitioner's initial civil penalty proposal pleadings, including all appropriate modifications and abatements, are true copies of the citations and orders issued in these proceedings.
7. The preliminary requirements for the issuance of the section 104(d) (2) orders, have been met, and the section 104(d) "chain" applies to the subject mine.

Discussion

Docket No. WEVA 93-100

This proceeding concerns a section 104(d)(2) non-"S&S" Order No. 3718918, issued by MSHA Inspector Robert Huggins on July 27, 1992, citing an alleged violation of mandatory safety standard 30 C.F.R. § 75.514, and two section 104(d)(2) "S&S" orders (3720838 and 3718252), issued by MSHA Inspector Spencer A.

Shriver on August 12, and September 4, 1992, citing alleged violations of mandatory safety section 75.400. The respondent admitted and conceded the fact of violations with respect to the August 12, and September 4, 1992, orders, but denied that it violated the cited section 75.514, as stated in the July 27, 1992 order (Tr. 11-12).

The contested section 104(d)(2) non-"S&S" Order No. 3718918, July 27, 1992, citing an alleged violation of 30 C.F.R. § 75.514, states as follows:

The supply track on the 2 south section is not provided with mechanically and electrically efficient track bonding. The track is 350 feet long with no track bonds on any of the joints. The 300 volt D.C. trolley wire has been installed and is energized. There are man trips and supply cars on the track. At the end of the track the Galis D.C. roof bolter and the "Ako" D.C. rock duster is grounded to the track by ground clamps. The Galis roof bolter and the "Ako" rock duster is not energized at this time. When talking with the UMWA representative he informed me that the track had been laid for at least two months. Track motors use this track to place up supply cars on the section. The mine floor which the track is laid on is dry and rock dusted. A citation was also issued along with this order for inadequate preshift examination. The preshift examination book shows that the track had been examined and no violations were found or reported. The previous order which this order was written on is No. 3107321 dated 4-11-88.

Petitioner's Testimony and Evidence

MSHA Inspector Robert Huggins confirmed that he issued the violation and order after observing that none of the rail joints on the cited supply tracks were bonded. He stated that he asked company representative L.A. Smith, who accompanied him during his inspection, about the matter, and Mr. Smith stated that "they had messed up" (Tr. 20). Mr. Huggins stated that there were approximately fifteen 30-foot lengths of track rails over the cited 350 feet of rails which lacked track bonding (Tr. 21).

Mr. Huggins stated that he had no special training as an electrician, and he relied on MSHA's section 75.514, July 1, 1988, Program Policy Manual guidelines (Exhibit P-7), which state as follows (Tr. 23):

This section requires that conductors be joined together with clamps, connectors, track bonds or other suitable connectors to provide good electrical connections.

At least one rail on secondary track haulage rails shall be welded or bonded at every joint, and cross-bonds shall be installed at intervals of not more than two hundred feet.

Mr. Huggins confirmed that the cited supply track was secondary haulage and that there were no welds at any of the track joints and no cross bonding. He believed that the MSHA policy provision was readily available to the respondent. He confirmed that mantrips, a rock duster, and a roof bolter were on the supply track and that the ground clamps were connected to the rail at the end of the track with "alligator like clamps". The power supplied to the track was 300 volt D.C. current (Tr. 25-27). Mr. Huggins described the condition of the track rails, and he was told that they had been installed for over two months and some of them were "surface bent" (Tr. 28). The track rails were connected with fishplates, which are strips of metal that are attached rail-to-rail with bolts (Tr. 27-28).

Mr. Huggins described the hazards associated with the cited conditions, and he explained that he designated the violation as an "S&S" violation, but that this was later modified to a "non-S&S" violation by an MSHA conference officer" and that he (Huggins) was never notified of the conference or contacted by the conference officer (Tr. 28-32).

Mr. Huggins confirmed his "high negligence" and unwarrantable failure findings, and he stated that mine management knew about the cited conditions because the matter of track bonding was discussed during the first day of his inspection of the mine. He estimated that this was "probably right after the fourth of July. The fifth or sixth, somewhere in there" (Tr. 32-33). He also stated that preshift examiners at other mine locations had noted the absence of track bonding, that superintendent Terry Suder indicated that the track had been installed prior to the development of the section and that they forgot to go back in and bond it, and that L.A. Smith "said they screwed up. Not those exact words" (Tr. 34). Mr. Huggins also indicated that it was quite obvious that the required track bonds were not in place, and that anyone walking the track should have observed the conditions (Tr. 35). He confirmed that the preshift books for the specific cited track area did not reflect the missing track bonds, and that he issued a citation for an inadequate preshift examination which was paid and not contested by the respondent (Tr.36). He further confirmed that people would walk the track numerous times during the day and that the track was used on all three shifts. Preshift examiners would also have occasion to be in the area, and other management personnel would have occasion to pass by the area (Tr. 37-42).

On cross-examination, Mr. Huggins stated that he took a class in electricity for non-electrical inspectors. He confirmed

that at the time he observed the cited track conditions nothing was moving on the track and he observed no arcing or sparking (Tr. 44). He observed no change in the operation of the jeep or jitney that he was riding on while traveling on the track, nor did he see any jeep lights go out or fade, and he did not feel any of the joints to determine if they were warm or hot. He confirmed that steel ties placed on wood were being used on the track in question (Tr. 45).

Mr. Huggins stated that the steel ties held the track sections together, but he did not consider the fishplates to be electrical connections between the rails. He confirmed if there were no efficient current return on the tracks, the equipment on the tracks would not have been able to operate. Since the equipment was able to operate, he agreed that current was moving through the track (Tr. 47-49).

Mr. Huggins stated that he could not identify any one specific individual who was highly negligent with respect to the violation, but that "a good number of management people had been up and down the track". He believed that one or two people, as well as the preshift examiners, should have seen the cited conditions. He conceded that the same preshift examiners are not used every day, and that an examiner could miss a condition. However, he considered the fact that nothing was done after he discussed track bonding with management when he began his mine inspection, and Mr. Smith's admission that the respondent "screwed up" (Tr. 54-55, 59).

Mr. Huggins stated that the steel ties he observed were used ones and that they are usually rusty and dirty when they are installed and that "common sense" would indicate that "you wouldn't have an effective ground anyway" (Tr. 63). He did not consider a steel tie to be a suitable cross-bond because MSHA has never considered them to be acceptable and the entire mine is cross-bonded with regular cross bonds welded to the mine rail (Tr. 64).

Mr. Huggins described a "track bond" as a piece of copper twisted together like a wire rope with ends that are pounded onto the edge of the bottom of the rail and welded and tacked to make an efficient bond (Tr. 64). Mr. Huggins stated that he has never been in a mine that did not use track bonds and he confirmed that they are used on the tracks throughout the respondent's mine. He had never before the hearing in this case heard management take the position that fishplates and cross-ties were electrically sufficient pursuant to section 75.514, and in his opinion, there were no other suitable electrical connectors on the supply track at the time of his inspection (Tr. 65).

Mr. Huggins admitted that he made no determination as to whether or not the use of fishplates as bonding rendered the

cited track less than mechanically or electrically efficient, and only knew that the normal type of copper wire bonding that he had observed in other areas of the mine was not being used. He concluded that the use of copper wires was the acceptable method of bonding, and that the method being used was unusual (Tr. 68-69).

Mr. Huggins was of the opinion that the use of a fishplate as a track bond is not a good electrical connection because two pieces of rusted steel put together cannot make good contact for electrical connections. He conceded that he did not conduct any test to determine whether the use of the fishplates was an electrically efficient connection (Tr. 76). Mr. Huggins stated that an acceptable definition of a track bond is a piece of copper that goes either in front of or behind the fishplate and is welded to both ends of the rail (Tr. 76). He stated that when he discussed track bonding with management he did not specifically discuss the cited supply track but only spoke generally about bonding (Tr. 87).

MSHA Inspector Spencer Shriver testified that he is an electrical engineer and has bachelor's and master's degrees in electrical engineering from the West Virginia University (Tr. 89). He stated that he was familiar with the mine and had conducted prior electrical inspections and spot inspections at the mine. He stated as follows with respect to the use of track bonds (Tr. 91-93):

A. A track bond, it varies in length. It's about one and a half to two feet long. It has a metal clamp on the end which is pounded onto the flange of the rail, then welded in place. Then this piece of wire is welded across the track bond -- excuse me -- across the track joint to get an electrically efficient connection.

Q. Now, is this term, track bond -- Well, first of all, is the term, track bond, an accepted term for this device in the mining industry?

A. Yes, sir. I've never heard it called anything else, a track bond or bond, in the fifteen years I've been involved in it.

Q. When the term, track bond or rail bond, is used in the mining industry, is there any doubt as to what the reference is to?

A. Not in my opinion.

Mr. Shiver was of the opinion that the conditions cited by Inspector Huggins constituted a violation of section 75.514, and in particular, the sentence that states "all electrical connections or splices in conductors shall be mechanically and electrically efficient". He explained that the fishplates that hold the track rails together may be rusted or corroded and that "no matter how tight you get them, there is still some resistance in that connection" (Tr. 92).

Mr. Shiver explained the direct current circuitry used on the supply track in question and the application of MSHA's policy manual interpretation of section 75.514. He confirmed that in terms of compliance, MSHA considers the clamp and copper wire bond as the only acceptable means of insuring electrical and mechanical efficiency at all times (Tr. 95-102).

Mr. Shiver stated that he did not observe the cited track area because he was on the four right track conducting an inspection. He issued a citation at that track because two of the track joints had not been bonded. The track was connected with fishplates but was not bonded like all of the tracks in the mine. He confirmed that the track had been bonded to a point but personnel were called off that job and were dispatched to the track cited by Mr. Huggins (Tr. 105-107).

Mr. Shriver did not believe it likely that the use of fishplates provided electrically efficient connections because of the increased resistance caused by rusty rails. He confirmed that a voltage drop test can be conducted to determine the electrical efficiency of a conductor and that he has conducted such tests on several occasions at various mines. He stated that the hazards presented by the cited conditions included the possibility of electrocution, a fire due to hot joints, and a short circuit not being interrupted by reduced short circuit currents (Tr. 108-111). He further explained the injuries that could result from the hazards, and he believed that it was reasonably likely that a fatality could occur, irrespective of the MSHA conference officer's non S&S finding (Tr. 113-121).

On cross-examination, Mr. Shriver confirmed that he never observed the cited track before or during Mr. Huggins inspection and he did not conduct a voltage drop test on that track. When asked if the track connections in question were electrically inefficient, Mr. Shriver responded "not having been there and based on what I've been told, in my judgment, they would be electrically inefficient" (Tr. 124). He confirmed that he never observed the connections before they were bonded (Tr. 125).

Mr. Shriver stated that he was not familiar with the use of stud terminals to attach a rail bond to a track (Exhibit P-8), and that he has only seen welded connections. He confirmed that the inspection of track joints is not required during weekly

electrical examinations (Tr. 127). Mr. Shriver further explained the theory of track resistance, the hearing effects of welded bonding, and the application of MSHA's policy (Tr. 128-137).

Respondent's Testimony and Evidence

William Runyan, section foreman, confirmed that he escorted Mr. Huggins during his inspection and he described what occurred. He confirmed that there was a supply car, portal bus, two jeeps, a rock duster, and a roof bolter on the track in question, and that except for forty feet of the track which one could observe visually, the remaining portion was filled with the equipment he described. Mr. Runyan observed no evidence of any track heating, arcing, or sparking, and he stated that the roof bolter and rock duster were used on the section and operated efficiently and he had no reason to believe that there were any problems with the return electrical feed for these machines. He confirmed that Mr. Smith was not with the inspection party initially, but may have met it later at an intersection (Tr. 138-143).

Mr. Runyan confirmed that no tests were made to determine the efficiency of the connections on the cited supply track, and the respondent immediately responded to the order by bringing two people from the four right track section to begin bonding the rails in question (Tr. 144-145).

On cross-examination, Mr. Runyan stated that Mr. Smith was with inspector Shriver on the four right track section but he could not recall whether he met them underground or outside of the mine. Mr. Runyan believed that the track had been laid for at least four weeks prior to the inspection by Mr. Huggins, and he confirmed that he saw no track bonds on the cited section of supply track (Tr. 145-147).

In response to further questions, Mr. Runyan stated that the tracks in the mine are general bonded with the copper bonding device described by Mr. Huggins and Mr. Shriver. He confirmed that the cited tracks were connected with fishplates, and given the absence of water, the dry conditions, and the length of track that had been laid, he believed the use of fishplates was an acceptable bonding method. If more track had been laid, the fishplates may have presented a problem. Although it was hard to see under the cars on the track, he acknowledged that the people who laid the track would know it was not bonded. He did not know why the track was not bonded in the manner required by the inspectors (Tr. 148-154).

Robert L. Mabin testified that he was the section foreman on the two south section at the time of the inspection and had worked there for about a month. He confirmed that equipment had operated on the track without any indications of problems with the return circuit for the equipment. He never observed any

track arcing or sparking, and saw no visual evidence of heated track joints (Tr. 155-159).

On cross-examination, Mr. Mabin stated that the roof bolter may have been used four or five times during a two-month period on his shift, and he assumed that the cited supply track was not bonded because it only covered 350 feet (Tr. 162-164).

Section 104(d)(2) "S&S" Order No. 3720838, issued on August 12, 1992, cites an alleged violation of 30 C.F.R. § 75.400, and the condition or practice is described as follows:

At 4 right transfer, coal has spilled on outby side of headroller and chute, accumulating 4 feet high and forcing back under bottom belt of Main South No. 2 Belt. This condition was reported in the preshift examination book, and this hazardous condition was not promptly corrected. Persons shoveling accumulation stated that accumulations occur once or twice a week, and review of preshift examination book disclosed that accumulation was listed about ten times in last three weeks. Violation therefore occurred due to failure of operator to correct the underlying condition which permitted the accumulations to repetitiously occur.

The violation was left uncorrected for three hours after being listed in preshift examination book. The violation is particularly serious, since there have been many belt fires from such accumulations, warranting increased attention from operator to correct it.

The violation was listed several times in preshift examination book, indicating an underlying problem. The operator knew of violation and failed to promptly correct it. Therefore, operator had high negligence, and a serious accident is reasonably likely to occur.

Petitioner's Testimony and Evidence - Order No. 3720838.

Inspector Shriver confirmed that he issued the contested order on August 12, 1992, for coal accumulations that he observed at the locations described in his order, and he explained what he observed. The section foreman informed him that "he had been broke down and had not dumped any coal at all". Based on this statement, Mr. Shriver concluded that the accumulations had been present at least during the previous shift (Tr. 186-189). Mr. Shriver stated that the cited coal spill was roughly waist deep, five or six feet wide, and probably ten feet long (Tr. 190).

Mr. Shriver had no knowledge of any fires or injuries caused by coal accumulations at the mine in question. He identified a summary report of fires at other mines during the past five years, and he described the hazards associated with the cited accumulations and the reasonable likelihood of injuries resulting from the hazards.

Mr. Shriver stated that three belt rollers were turning in the coal accumulations and that the belt was "massaging the coal". He believed it was reasonably likely that a fire would start from that source. He stated that it was not uncommon for a roller to break or stick, and the belt rubbing on the roller would generate enough heat to ignite coal. In the event of a fire, it could reasonably be expected that serious burns from an explosion, or smoke inhalation from a fire would result (Tr. 192, 197-199).

Mr. Shriver stated that mine management knew about the cited accumulations because coal spillage at the four right transfer point had been recorded "about ten times the previous few weeks" in the preshift books which were countersigned by several company officials. Accordingly, Mr. Shriver concluded that the recurrent accumulations problems should have been known to these individuals. He also indicated that there was "a rather obvious big hole" in the sideboard at the transfer point which should have been detected by the onshift and preshift examiners (Tr. 200).

Mr. Shriver reviewed the preshift books for August 12, 1992, and explained some of the entries. He believed that the recurring spillage was caused by coal falling through the hole in the side board (Tr. 203). Mr. Shriver stated that he returned to the area a few days after the issued the order and found that the condition had reoccurred. He issued a citation, and the hole was repaired and the spillage has become practically nonexistent (Tr. 204).

Mr. Shriver stated that he has had occasion to issue citations for coal accumulations along the belts four or five times prior to the issuance of his order, and it was his understanding that the sideboard hole had existed since it was cut out to install a belt scraper, "probably about six weeks" (Tr. 207).

In response to a question concerning the "aggravated conduct" by the respondent in support of his unwarrantable failure finding, Mr. Shriver stated as follows at (Tr. 211).

- A. The fact that it had been recorded, I think, about ten times. I leafed back through the

fire boss book and I observed about ten occasions when a problem had been reported.

And the comments of the two men who came to shovel up the problem that they would have to shovel it up once or twice a week. And the fact that the belt examiners -- the on-shift is done by the section foreman.

And several times, in my opinion, the on-shift examination disclosed this problem and they were able to clean it up before the next shift start, in which case it would not be entered in the fire boss book. So there were actually times when it was there, but not recorded.

And based on all these factors, but mainly the fact that the mine foreman and the superintendent had countersigned the fire boss book, the running of the coal appeared to me to be more important than to fix the problem that was causing the accumulations.

On cross-examination, Mr. Shriver reviewed the relevant preshift examination book and explained some of the entries, and he confirmed that each time the accumulations were noted in the book they were cleaned up every time (Tr. 219). He confirmed that he considered the violation to be an unwarrantable failure because the accumulations continued to repeatedly occur and not because they were not cleaned up (Tr. 219).

Mr. Shriver confirmed that he did not test for methane, and he identified the ignition sources as the three rollers turning in coal and the belt rubbing on coal. He observed no hot rollers, and he considered it reasonably likely that death or serious injury would have resulted from the cited conditions (Tr. 220). Mr. Shriver confirmed that he did not observe any of the coal spilling out of the chute at the location of the hole, but when he next returned to that location, there was no spillage there (Tr. 224).

Mr. Shriver conceded that his order does not mention that any belt rollers were turning in coal, and after referring to his notes he stated that they say nothing about rollers turning in coal, but do indicate that "coal worked under the belt" (Tr. 228-229). The shift reports reflect that the accumulations that were reported and recorded were cleaned up each time, but that on August 12, 1992, when he was there, the individuals assigned to clean up the cited accumulations had not reached that area before he did (Tr. 237).

Mr. Shriver estimated that the cited spillage accumulation had been present for half of the preceding midnight shift, and that "it would take it a couple of hours to accumulate that much coal spillage" (Tr. 238). He confirmed that he reviewed the preshift books (Exhibit P-12) for ninety-five shifts prior to his order, and that spillage was reported twelve times. He agreed there would be many shifts where no spillage was reported because "the on-shift people apparently cleaned it up before they had to call it out". He also stated that "there was spillage there and people were cleaning it up on-shift, but if they couldn't get it all, then they would call it out as an entry in the preshift book" (Tr. 240).

Respondent's Testimony and Evidence

John G. Blue, shift foreman, stated that he was present at the cited area after Mr. Shriver issued his order. He confirmed that he reviews the preshift reports from the prior shift in order to determine the number of people needed to correct any recorded violative conditions within a reasonable time (Tr. 243). He stated that he assigned two people to clean up the spillage at the cited four right transfer location because the foreman who conducted the preshift told him the chute had plugged, that he found it and cleared the plug, but that there was spillage on the floor and around the ribs. The two men in question stopped along the way to drag another belt that was more of a priority because of float dust, and the foreman told him that the spillage in question was not touching any belt or rollers, and that it was not an immediate problem, but needed to be cleaned up (Tr. 243-244).

Mr. Blue stated that the spillage entries shown in the preshift books were not for the same cited conditions and that there were six different areas where spillage may occur (Tr. 247). He confirmed that the coal spillage, as well as all of the coal on the section, is damp and that the transfer point is "extremely wet". He further stated that he observed no ignition sources in the cited area, and he found it highly unlikely that the wet coal could have ignited (Tr. 250).

Mr. Blue believed that the cited accumulations had existed for no more than two hours and ten minutes under "a worst case scenario" (Tr. 250). He explained that the preshift examiner found the spill and told him about it when he came outside. Mr. Blue believed the spill occurred between 6:30 and 7:00, and he stated that the two men who were dispatched to the area to clean up the spill stopped at another belt area on their way to the cited location. He made the clean up assignment at 8:00 a.m., at the beginning of the shift (Tr. 253).

On cross-examination, Mr. Blue agreed that the cited accumulations had existed for at least two hours. He confirmed

that he met with the foreman of the prior night shift who informed him of the spillage and that he immediately assigned personnel to clean it up (Tr. 258). He agreed that there were accumulations at the cited location during the prior month, but he believed the cited accumulations may have been caused by a plugged chute (Tr. 260). However, he stated that "anything can cause spillage," that it was not uncommon, and that no rollers were turning in coal and no coal was in contact with the belt (Tr. 261, 269).

Robert C. Andersch, Jr., confirmed that he accompanied the inspector and that he was served with the order. He stated that the cited transfer point was "very wet" and that the spillage was caused by "some kind of a backup into the chute, some wet coal or muck" (Tr. 273). He did not notice any ignition sources, and although the belt was running, no coal had been mined prior to their arrival and there was no coal on the belt. He observed no belt rollers turning in coal or the belt touching and rubbing coal (Tr. 274).

Section 104(d)(2) Order No. 3718252, September 4, 1992, cites an alleged violation of 30 C.F.R. § 75.400, and the cited condition and practice states as follows:

At Main Butts No. 1 drive there is accumulation of fine coal and dust under the bottom belt from the tail roller to the drive roller nearest tipple. There is accumulation of wet coal and dust under and around a piece of belt over the north drive motor, with dry coal and dust under the connection box and packed against motor. Heat from motor had dried this material out, possibly resulting in spontaneous combustion. On the frame between the two motors, fine coal was packed so tightly that a pick hammer was required to dig it loose. The 4/0 AWG cable serving the drive motor nearest tipple had the nut come loose from the fitting into the junction box, and the cable had pulled out of the box, leaving opening into connections. Substantial dust had accumulated in the box. When the motor junction boxes were opened, the pilot and ground conductors in both motors were connected to same stud. The possibility of a fire from friction and motor heat, fire or explosion from dust, and water in the motor junction box with opening, and improperly wired ground monitor circuits, make a lost workday accident reasonably likely.

The record of preshift examinations revealed that spillage was reported on this belt from the tail (piece) to tipple. Nobody was working at the drive, which is the most likely location for a fire to result

from accumulation of coal. Operator therefore had high negligence in permitting these accumulations to exist.

Petitioner's Testimony and Evidence

MSHA Inspector Spencer A. Shriver testified that he was accompanied on his inspection of September 4, 1992, by the respondent's Safety inspector Fred Morgan. Mr. Shriver stated that an accidental spill had occurred two days earlier at another location and that he returned on September 4, to check on that cleanup and found the accumulations that he cited that day. He confirmed that the accumulations were all located in the same general location, but were different types of accumulations (Tr. 274-279).

Mr. Shriver described the locations and extent of the accumulations and stated that they ranged from damp to dry (Tr. 279-282). He believed the accumulations presented a fire hazard through spontaneous combustion at the location of the motors, and he described the hazards at the other locations (Tr. 282-285).

Mr. Shriver believed that the accumulations at the connection box had existed for "several days" or "several shifts" (Tr. 285-286). He believed that it was reasonably likely that an injury would result from the hazards presented by the accumulations, and he explained what could have occurred if normal mining operations were allowed to continue (Tr. 286-288).

Mr. Shriver stated that he based his "high negligence" finding on his belief that the accumulations between the motors had existed for several shifts and that he "had discussed this situation there with Mr. Cole couple of days earlier and he said that he would clean it up" (Tr. 288). Mr. Shriver also stated that the preshift examiner would travel the area each shift and should be looking for accumulations at the drives, tail pieces, and transfers, but that the location of the motors were not among the previous locations mentioned by mine foreman Cole (Tr. 289).

Mr. Shriver believed that the accumulations along the No. 1 belt drive rib had existed "over a period of time" and that it was cleaned up from the drive and left by the rib. The accumulation at the bottom belt had accumulated for "several days from normal accretion of dust and fine coal" (Tr. 291). He confirmed that none of the cited areas were the areas reported to him by Mr. Cole (Tr. 291-293). Mr. Shriver could not recall reviewing the preshift books to determine whether the cited accumulations had been recorded (Tr. 295). He also confirmed that he did not ask Mr. Cole about the cited accumulations (Tr. 296). He later remembered reviewing the preshift books and found that spillage was reported on the belt in question from the tailpiece to the tipple (Tr. 299).

On cross-examination, Mr. Shriver confirmed that the coal material packed against the motor was black and dry, that he did not sample it, and did not check for methane in the area (Tr. 306-307). He believed that the main ignition source was the junction box. He stated that the cable entered the box through a fitting that had "backed off" from the inside, but he saw no bare wires. The insulation was somewhat damaged, and with the continued vibration, he believed it would have cut through into the energized wires over several shifts. He confirmed that the area "was fairly damp" and was equipped with a sprinkler fire suppression system (Tr. 308). He confirmed that the material between the drive tipple was the result of a spill, and he conceded that he did not include the accumulations along the rib as part of his order (Tr. 309).

Respondent's Testimony and Evidence

Frederick D. Morgan, Sr., respirable dust foreman, confirmed that the spillage under the belt tailpiece and tipple had been reported and called out and two men and a foreman were working on it. The area was damp and well rock dusted (Tr. 312-316). Mr. Morgan confirmed the existence of the accumulations cited by the inspector (Tr. 317-323).

Robert L. Mabin, testified that he was the regular section foreman at the two south section on September 4, 1992. He confirmed that there was a large spill at the belt transfer point, that the section was idled, and that he assigned two men to work on the spillage that had been reported on the preshift (Tr. 327). He explained what work was done to address the spillage, and he stated that the area is always wet and is equipped with an operable fire suppression system (Tr. 329-330).

Docket No. WEVA 93-5

This proceeding concerns a section 104(d)(2) "S&S" Order No. 3121715, issued by Inspector Spencer A. Shriver on June 18, 1992, citing an alleged violation of 30 C.F.R. § 75.400. The cited conditions are described as follows:

On 3 right section, ID No. 028, the tailpiece of the 3 right belt, the tail roller is turning in fine dry coal about 18 inches high and 18 inches long. Area was covered with red dust. Float dust had covered 4 inch water pipe and belt structure for about 35 feet outby to inby rib of next crosscut. Float dust became suspended in air when water pipe was patted.

Section foreman said he had made last check at 10:30 A.M., and due to problems with section equipment,

had only dumped half-dozen or less buggies of coal on belt. Accumulations of fine coal and dust had occurred at least during previous midnight shift, and probably much earlier.

Most belt fires are caused by rollers turning in coal. An accident is therefore reasonably likely. Such a fire would generate dense smoke which would affect persons working on belt. Accident would reasonably result in lost workdays. Section Foreman should have found and corrected violation between arrival on section at 8:30 a.m. and issuance of order at 11:50 a.m.

Assistant Mine Superintendent was on section for 20 minutes before inspector knowing authorized representative of secretary was heading for section. He and section foreman were at feeder, 20 feet from tailpiece, when violation was observed. Operator therefore had high negligence in permitting violation to exist.

The respondent's counsel conceded that the cited accumulations existed and constituted a violation of section 75.400, and that the crux of this case is the his dispute with the inspector's unwarrantable failure and "S&S" findings (Tr. 9-10).

Petitioner's Testimony and Evidence

Inspector Shriver stated that he conducted the inspection on June 18, 1992, and he explained what he found. He stated that there was a considerable amount of red coal dust on the ribs and belt structures and that "anytime I had seen that red dust in the past, it usually meant that a roller was turning in coal for some length of time". He believed that the dust had turned red because "it was slightly oxidized by the friction of the roller grinding in the coal" (Tr. 11-19). The accumulations next to the roller were dry and the area under the belt drive was wet (Tr. 26).

Mr. Shriver stated that the hazards associated with the violation included the roller turning in the coal and generating heat which turned the dust red, and the possibility of smoke inhalation exposure to people in the area. He was also concerned about a methane ignition on the section and believed that the face was two to three hundred feet from the accumulations (Tr. 30). He believed that an injury was reasonably likely, and that persons in the area would be exposed to smoke inhalation, or severe burns in the event of a float coal dust ignition

(Tr. 31-32). He also believed that it was reasonably likely that a fire would have resulted if normal mining operations continued and the roller continued turning in the accumulations (Tr. 32).

Mr. Shriver believed that the accumulations under the roller existed for "several shifts" because the material "was more like it had been gradually dribbled down into this area, and it would have taken a few days to get to this point" (Tr. 33). He confirmed that only "a couple of buggies" of coal had been mined before he arrived, and he did not believe this was sufficient to have caused the accumulations in question.

Mr. Shriver stated that the cited area was required to be preshifted, and he checked the morning report and found that the conditions had not been reported. He estimated that the accumulations had existed for "several days", "fifteen or twenty shifts", or "six days" (Tr. 33-36). He further stated that it was difficult to determine how long the accumulations existed, but since little coal had been mined, "it would have had to have been accumulated during the previous midnight shift" (Tr. 37).

Mr. Shriver believed that the assistant mine superintendent should have known about the conditions because the conditions were obvious and he went into the section ahead of him for an inspection, and the section foreman told him that he had examined the area approximately an hour and twenty minutes earlier. Under the circumstances, Mr. Shriver concluded that "the company's agents did know about it" and that "combined with the length of time it had been in place", he believed that this constituted aggravated conduct (Tr. 39). Mr. Shriver conceded that he had no evidence that the superintendent and foreman actually saw the cited accumulations, and no one admitted going by the area and seeing the accumulations (Tr. 41-43).

Mr. Shriver explained the "aggravated factors" amounting to an "unwarrantable failure" violation as follows (Tr. 43-44):

- A. The fact that there was an accumulation there and, in my opinion, it had been there for a substantial length of time; the fact that the condition was obvious to a competent observer, such as a section foreman; that he told me he had made his check of the area at ten thirty; and also that the assistant superintendent was in the area. I felt at the time he should have observed it.

- Q. Now, during those preceding six days which you felt this accumulation had been present, was this an area that mine management would have passed through often?

- A. The section foreman on each section should have examined the area for the preshift examination for the following shift.
- Q. The preshift. Would any other members of mine management have been through this area during the preceding six days?
- A. It's difficult to say. They frequently do go through there, but to pinpoint any specific person at any specific time, I could not do that.

On cross-examination, Mr. Shriver stated that when he has found similar red dust conditions in the past "it is a condition that requires several shifts to achieve", and that "we would find it had been there for several shifts" (Tr. 49). He was not sure that the red dust was combustible, and he has never tested it (Tr. 49). The material contacting the belt "was not smoking and it was not on fire", and he did not test or feel it for heat content (Tr. 55).

Mr. Shriver stated that he made no methane checks and had no indication of any methane problems. He was satisfied that the section foreman checked for methane, and Mr. Shriver could not recall seeing any areas inby the crusher, feeder and belt tailpiece that were not adequately rock dusted (Tr. 57). He explained his "S&S" finding as follows at (Tr. 55-59):

- A. If there were an ignition of methane on the section and we have an accumulation of float dust like we had on the structures here as has happened in some other mines, the concussion of the methane ignition can suspend the float dust and cause a coal dust explosion which is very severe. As in, I believe it was the south mountain mine, we had several fatalities in that case.

* * * *

- A. Well, it's reasonably likely there would be a serious accident either from a methane ignition or from the roller turning in the coal, causing a fire.
- Q. Is that a second ignition source that you're hypothesizing here? It could start with a methane ignition somewhere up near the face, or it could come from an ignition of the coal being contacted by the roller?

A. That is right.

Q. But you did not see any indication of heat with respect to that roller turning in coal.

A. Other than the condition of the dust I observed.

Q. No smoke, though.

A. No.

Q. No smell of combustion.

A. No.

* * * *

Q. The second hypothetical source of ignition, the ignition of the coal by the roller, the friction between the coal and the roller, that wouldn't cause the kind of concussion that would mobilize float dust, would it?

A. I don't believe it would.

In response to further questions, Mr. Shriver stated that he detected no permissibility violations at the face that would constitute potential ignition sources, and saw no ventilation problems (Tr. 63-64). He conceded that when he makes an "S&S" determination, he considers "a worst case scenario" if mining were allowed to continue (Tr. 64).

Mr. Shriver stated that he checked the preshift book and found no recorded violative conditions, but he did not check the preshift books for the five or six days prior to his inspection (Tr. 67). When asked if the accumulations had not been cleaned up, and if mining were allowed to continue, whether the tail roller turning in the accumulations would have ignited the coal, he replied as follows at (Tr. 69):

A. I think it's reasonably likely that it would have ignited. I base that on conversations with people I work with up at the District. Most of them have been at least section foreman or mine foreman and they indicate that rollers turning in coal, if left for a long period of time, will frequently result in a fire.

Respondent's Testimony and Evidence

Leonard J. Lewandoski, section foreman, testified that he worked the midnight shift on June 18, 1992, and conducted the preshift examination of the belt and tailpiece, commencing at 5:15 a.m. Upon examination, he found that the tailpiece "was clean" (Tr. 71-72).

On cross-examination, Mr. Lewandoski stated that he saw no "red coal" when he traveled the area, and he observed no tail roller turning in fine, dry coal. He has served as section foreman since December, 1981, and has observed "a brownish red" dust that results from rusty belt rollers. He observed no accumulations of any kind when he conducted his examination (Tr. 72-77).

Robert C. Andersch, Jr., stated he served as the inspection escort for Mr. Shriver on June 18, 1992, when he conducted his electrical inspection. He confirmed that two accumulations were found at the tail roller of the three right section tailpiece, one on each side of the roller. He estimated the accumulations to be 12 inches high, with 3 to 5 inches submerged in water, and they were "brownish" in color (Tr. 79). Mr. Andersch described the materials as "residue coming off of the belt since our water sprays down at the drive were inoperative" (Tr. 80).

Mr. Andersch stated that he observed the tops of the accumulations "barely rubbing on the belt," but not onto the roller. He also observed accumulations and brown dust at a V-scraper located 10 feet outby the tail roller, and the tops were dry, but the bottoms were wet. He further stated that he has never seen any "red dust" as described by the inspector, and he would classify it as "brown" (Tr. 81-83).

John E. Godwin, stated that he was the assistant mine superintendent on June 18, 1992, and that between 9:30 and 10:00 A.M., the belt was reported as being dry (Tr. 84). Upon inspection of certain belt sprays he found that the belt was dry, and he described what occurs when the belt runs "off-center" (Tr. 86-89).

Mr. Godwin stated that the section had been moved two days prior to the inspector's arrival, and he believed the accumulations could not have been present for more than two days (Tr. 90). He believed that the "orangish brown dust" on each side of the v-scraper was caused by the black and orange colored rubber material used in the construction of the scraper and that it was "residue and belt deposits" from the dry running belt (Tr. 95-96).

Mr. Godwin conceded that accumulations were present, but he did not believe that a (d) order was justified because the pile was small and he observed no roller turning in the dust (Tr. 98-100). He attributed the brown color of the accumulations to the dry belt and not oxidation, and he believed that coal can accumulate in seconds with the belt running off at the tailpiece (Tr. 101).

Inspector Shriver was recalled by the presiding judge and stated in part as follows at (Tr. 109):

This type of dust that I observed in the area, I've found when I see that dust - I didn't go to the nearest tailpiece or what have you on the belt -- I usually find that there is coal there, the rollers turning in coal. That has been my experience.

Q. When you see red dust, the rollers are turning in coal?

A. Reddish dust. Whether it's brown or red -- I'm not that good at distinguishing colors, but I've found on several occasions that when I seen that color material in the area --

Q. Could it have been brownish or orange or brown?

A. Reddish brown.

On cross-examination, Mr. Shriver was of the opinion that the "reddish dust" was caused by the tail roller, and he explained as follows at (Tr. 113):

A. Turning in the coal and suspending the reddish dust into the air and depositing it on the ribs and bottom; primarily because on several occasions in by inspecting experience, I've found a similar type of dust, and when I got to the cause of it, it was a roller turning in dust -- or a roller turning in coal.

Mr. Shriver stated that the longer a roller turns in coal dust, the more dust is generated, and that a roller turning in dust for a half-hour to two hours could turn the dust brown. He confirmed that the cited dust accumulations consisted of "a light coating of the ribs" rather than piles of material, and in his opinion, they had existed "at least in the preceding shift and probably much longer". He confirmed that his unwarrantable failure finding was based on how long the condition existed and the fact that the section foreman told him he had examined the

area (Tr. 116-120). Mr. Shriver believed that the foreman should have observed the condition, and in his opinion, the foreman didn't examine the area very closely (Tr. 124).

Mr. Shriver confirmed that he did not measure the accumulations in question and only "eyeballed it across the back of the tail roller". In his judgment it was "one and a half feet in length in the direction of the belt" (Tr. 125). He believed that it took 25 minutes for two men to clean it up with a shovel, but that they were doing other work as well (Tr. 127-128).

Docket No. WEVA 93-92

This proceeding concerns four (4) section 104(a) "S&S" citations issued by Inspector Spencer A. Shriver. Citation No. 3720837, issued on August 12, 1993, citing an alleged violation of 30 C.F.R. § 75.400, was settled by the parties and the respondent agreed to pay the full amount of the proposed civil penalty assessment of \$506. The proposed settlement was approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 131-132).

The three remaining contested citations are as follows:

Section 104(a) "S&S" Citation No. 3718250, issued on September 3, 1992, cites an alleged violation of 30 C.F.R. § 75.701-3(a), and states as follows:

At No. 45 pump on main haulage, the 250 volt DC fuse box does not have a frame grounding conductor. The conductors in and out of the fuse box are subject to vibration from passing locomotives, so possibility of abraded insulation and an energized box is reasonably likely. There have been several fatalities from contacting trolley in past year; however, area at fuse box was dry, so injury could reasonably be lost workdays. These boxes have been changed from AC to DC for over a year, and have had several weekly electrical examinations. This box has never had a frame-grounding conductor. Operator therefore had moderate negligence in permitting violation to exist.

Section 104(a) "S&S" Citation No. 3718251, issued on September 3, 1992, cites an alleged violation of 30 C.F.R. § 75.518, and states as follows:

At 35 Jug Pump on Main Haulage the fuse in fuse holder is TRS 20R ampere rated. The pump is new and covered with blue paint, and name plate could not be found. However, this type of pump is 1 horse power or less, requiring a 5 ampere fuse. If pump became overloaded toxic fumes could be emitted, traveling about 2 miles

to lynch air shaft. Two motormen are in this area shuttling loads and empties back and forth. A lost workdays accident involving two motormen is therefore reasonably likely. Weekly electrical examiner checklist calls for 5 ampere fuse on this pump. Operator therefore had moderate negligence in permitting violation to exist.

Section 104(a) "S&S" Citation No. 3718256, September 4, 1992, cites an alleged violation of 30 C.F.R. § 75.512, and states as follows:

An inadequate examination of electrical equipment is being made at this mine. The following violations which were abundantly obvious were cited:

1. The fuse box at No. 45 pump had never had a frame grounding conductor. Box has been installed about a year - 104(a) No. 3718250.
2. The fuse protecting No. 35 pump was 10 amperes. The weekly examiner check list calls for a 5 ampere fuse for this pump - 104(a) No. 3718251.
3. The cable in the belt drive junction box at main butts drive was pulled out of the box. Condition was extremely obvious - 104(a) No. 3718253.
4. The pilot and ground conductors on the cables to the main butts drive motors were connected to one stud. Motors have been installed for about two years. Weekly examination should include check of pilot circuit - 104(a) No. 3718254.

Weekly examinations which permit these kinds of violations to go undetected is reasonably likely to result in lost workday accidents. These examinations have been made over several months with no follow up to determine adequacy. Operator therefore had moderate negligence.

Petitioner's Testimony and Evidence

Citation No. 3718250. Inspector Shriver stated that he issued the citation after finding that a 250 volt D.C. Square -D fuse box located along the main haulage at the location of the No. 45 pump was not properly frame grounded to hold the potential

on the box to a low value approaching zero volts if the box became energized. The condition constituted a violation of section 75.701-3(a), because none of the grounding methods stated in the regulation were used to frame ground the box (Tr. 139-143).

Mr. Shriver described the hazards associated with the lack of proper frame grounding and the likelihood of deterioration of the grommet holding the conductor entering the box. He explained that the power conductor entering the box could become abraded over time, and if it were cut through to the insulation the fuse box could be energized and would subject someone to "a fairly severe shock" (Tr. 143-150).

Mr. Shriver stated that the grommet holding the power conductor in place was "in good shape", and that it was "a tight fit" as the conductor entered the hole in the box. The cited condition concerned the one wire that entered the hole and was not tied or grounded to the box to complete the circuit (Tr. 151-154).

Mr. Shriver identified copies of prior citations issued at the mine for missing frame grounds and fittings (Exhibits P-6 through P-10). He confirmed that the cited box in this case would be subject to vibration by a passing locomotive, and that persons conducting a weekly examination of the box could not see that the frame grounding conductor that entered the box was not connected or grounded to the frame. He was not aware of any injuries at the mine in the past five years because of failure to ground a fuse box. He further testified about his reasons for his "S&S" finding (Tr. 160-184).

Citation No. 3718251. Inspector Shriver confirmed that he issued the citation after finding that a fuse providing short circuit protection for the one horsepower D.C. pump was four times the capacity of what it should have been. The fuse that he found was a 20 ampere fuse, and it should have been one that ranged from five to six amperes to provide proper short circuit or overload protection. He stated that the cited standard section 75.518, was violated because the proper fuse type was not used and the respondent's counsel did not dispute this (Tr. 187).

Mr. Shriver described the hazards associated with the cited condition, and he stated that the oversized fuse would not deenergize the pump if it "seized up or stalled for any reason". If the pump were to overheat it would be the source of toxic fumes or smoke or it would start a fire by igniting the coal, exposing two motormen who normally shuttle through the area to these hazards (Tr. 187-188). Mr. Shriver believed that it was reasonably likely that the pump motor would seize and overheat because the bearings go bad and mud or rocks that do not go

through the pump strainer could become wedged in the motor and cause it to stall (Tr. 188-189).

With regard to any injuries resulting from the hazards presented, Mr. Shriver stated as follows at (Tr. 189-190):

Q. What injuries could these persons be reasonably expected to suffer from the fumes and other hazards you've described?

A. Smoke inhalation, which can be lost workdays.

Q. How serious would you reasonably expect those injuries of smoke inhalation to be?

A. Lost workdays.

Q. Now, what was the likelihood that a serious injury would have resulted from the condition you found if normal mining operations had continued?

A. I think it's reasonably likely.

Mr. Shriver did not know how long the oversized fuse had been in the box, and he stated that the respondent knew the required fuse size because of a chart posted in the safety office (Tr. 191).

Citation No. 3718256. Inspector Shriver stated that when he next returned to the mine on September 4, 1992, he found two electrical violations at the connection box on the drive motor at the main butts number one belt drive. He found a cable pulled out of the box and a ground conductor and pilot conductor connected to one stud, and he issued citations for these conditions (Exhibits P-13 and P-14). These violations, coupled with the two previous fuse violations, led him to conclude that the required weekly electrical examinations were not adequate, particularly since the first three conditions were quite obvious (Tr. 195).

Mr. Shriver believed that at least three of the cited violative conditions would have been present at the last weekly electrical examination and he described the hazards associated with inadequate electrical equipment examinations, and the injuries that would reasonably likely result (Tr. 196-200).

Mr. Shriver did not know when management first knew that electrical examinations were inadequate and he stated that inadequate examinations have been "a chronic problem" at the mine for several years. He confirmed that he has issued several citations and orders in the past for the same conditions, and

also supplied the maintenance supervisor with references from the electrical inspector's manual as guidance for making the examinations (Exhibits P-15 through P-20; Tr. 201-205).

On cross-examination Mr. Shriver stated that it was his practice in most cases to cite the respondent for inadequate electrical examinations after he has issued citations for the individual electrical violations. He explained that he does this "If I find a significant number of violations and if it is spread over a large part of the mine" (Tr. 206-210).

Mr. Shriver further clarified and explained the violative condition associated with Citation No. 3718250. He explained that the failure to connect the grounding conductor did not provide for "a solid connection to the mine track" for purposes of providing proper grounding protection as required by the cited standard (Tr. 214-222). Mr. Shriver further explained that vibration caused by passing trolleys would subject the power conductor insulation to abrasion at the point where the conductor entered the No. 45 pump box (Tr. 223-226).

With regard to the inadequate fuse on the No. 35 portable "Jug pump", Mr. Shriver stated that he did not know how often the pump would clog or blow fuses (Tr. 228). Mr. Shriver could not recall if the 20 ampere fuse was put back after he found it, and he "suspected" that it was because there were none readily available and he allowed time for the respondent to obtain a new fuse. He could not recall if the No. 35 pump were tagged out of service, and he confirmed that the No. 45 pump was not taken out of service (Tr. 230). He did not believe that the two pumps were in unsafe operation condition requiring their removal from service pursuant to section 75.1725(a) (Tr. 232).

Respondent's Testimony and Evidence

Inspector Escort Frederick D. Morgan, Sr., confirmed that he is not an electrician. He stated that the area in question was dry, that the pumps themselves are all grounded, and that a rubber mat was provided for the No. 45 pump fuse box which was mounted securely to the wall. The power wire conductor was suspended from an insulated spad and there is very little vibration (Tr. 243-249). He conceded that the failure to connect the frame ground wire was a violation (Tr. 249).

With regard to the No. 35 jug pump, Mr. Morgan stated that the closest coal was ten feet away, and if a pump fire had occurred, he found it unlikely that it would ignite the coal. He confirmed that Mr. Shriver re-installed the oversized fuse after checking it and the pump was reenergized (Tr. 250-251).

Donald S. Buckalew, maintenance foreman for 25 years, confirmed that he was familiar with all of the citations issued

by Mr. Shriver. Mr. Buckalew stated that the examination of electrical equipment is his responsibility. He stated that there are 80 pumps located over seventeen miles, and that each pump has 17 different permissibility items that need to be checked. He identified a check list and instructions that he gives to his personnel for checking the pumps (Exhibit R-2; Tr. 257-259).

Mr. Buckalew stated that both of the pumps in question are included on the check list and they are included as part of the required weekly electrical examinations. He believed that the pump installations in question were included as part of the weekly examinations conducted just prior to the issuance of the citations, and he identified a form that reflects that both pumps were examined by a certified electrician on August 27, 1992, and that "no dangerous conditions were found" (Exhibit R-1; Tr. 263).

Mr. Buckalew confirmed that the ungrounded No. 45 pump fuse box had been in that condition for six to eight weeks (Tr. 264). He stated that he has preventative maintenance and electrical inspection programs in place, and grommets and bushings are included. He confirmed that the pump with the 20 ampere fuse could burn up or quit functioning if it were stuck or a rock fell into the impeller, or the fuse blew (Tr. 266).

On cross-examination, Mr. Buckalew confirmed that he observed the fuse box prior to the issuance of the citation and the ground connection had not been made (Tr. 217). He agreed that the condition should have been detected during the electrical examination (Tr. 274).

Findings and Conclusions

Docket No. WEVA 93-100

Fact of Violations

This case concerns three contested section 104(d)(2) orders. The respondent admits that the two orders issued by Inspector Shriver on August 12, and September 4, 1992, citing accumulations of coal and coal dust, constituted violations of section 75.400 (Citation Nos. 3720838 and 3718252). The respondent's dispute is with the inspector's special "significant and substantial" and unwarrantable failure findings. Under the circumstances, I conclude and find that the respondent's admissions, coupled with the inspector's testimony and evidence, establish the two violations of section 75.400 and they **ARE AFFIRMED**.

Section 104(d)(2) non-"significant and substantial" Order
No. 3718918, July 27, 1992, 30 C.F.R. 75.514

In this instance the respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. 75.514, a statutory provision which provides as follows:

All electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.

MSHA's July 1, 1998, Program Policy Manual, Volume V, Part 75, with respect to section 75.514, states in relevant part as follows (Exhibit P-7):

This section requires that conductors be joined together with clamps, connectors, track bonds, or other suitable connectors to provide good electrical connectors. ...

Where track is used as power conductor, efficient connections require that:

1. ...
2. At least one rail on secondary track-haulage rails shall be welded or bonded at every joint, and cross bonds shall be installed at intervals of not more than 200 feet.
3. ...
4. In rooms where electric equipment is dependent upon the room track rails as a power conductor, rail joints shall be secured by means of fish plates, angle bars, or the equivalent, and at least one rail shall be bonded at each joint.

Visible arcing or heating at rail joints indicates poor connections or poor bonding.

In the case of Secretary of Labor (MSHA) v. North American Coal Company, 1 FMSHRC 1895 (November 1979), Commission Chief Judge Paul Merlin vacated fourteen (14) citations alleging violations of mandatory safety standard 30 C.F.R. 75.514, after concluding that this standard did not apply to track haulage bonds and fishplates as alleged in the citations.

Judge Merlin took note of the fact that the legislative history of section 75.514, refers to electrical connections "in wiring," and that there is no reference to track haulage or to bonding "although such references easily could have been made if this had been what Congress intended," 1 FMSHRC at 1897.

Judge Merlin also took note of the fact that bonding and track haulage are dealt with separately and specifically in a companion situation pursuant to MSHA's Part 57, safety standards for underground metal and nonmetal mines (30 C.F.R. 57.12042), and he suggested that MSHA should have undertaken rulemaking to cover the situation in coal mines pursuant to MSHA's Part 75 safety standards. Noting the absence of any evidence to establish that the cited haulage system was not "electrically efficient," and the conflicting testimony of MSHA's own experts, Judge Merlin further commented that "... MSHA itself does not really believe 75.514 applies to track haulage bonds and fishplates, but is selectively applying this mandatory standard only where it wants to," 1 FMSHRC at 1899.

In the instant case, the parties are in agreement that the critical issue is whether or not the track "bonding" or connecting devices used by the respondent at the cited secondary haulage area constituted suitable mechanically and electrically efficient connections in satisfaction of the requirements found in the cited mandatory section 75.514 (Tr. 51).

The burden of proof in this case lies with the petitioner. In order to establish a violation, the petitioner must prove by a preponderance of the credible and probative evidence that the connection devices that were being used when the inspector found them were unsuitable and did not provide the required mechanically and electrically efficient electrical connections for the cited haulage track in question.

The petitioner takes the position that the testimony of Inspector Shriver, which is based for the most part upon the observations of Inspector Huggins, the individual who issued the violation, establishes that the electrical connections between the cited supply track rails were electrically inefficient. The petitioner also take the position that in the absence of one of the connection methods outlined in MSHA's policy, the conditions of the tracks in question prevented the existence of an electrically efficient connection.

The respondent takes the position that the use of fishplates, bolts, and steel ties as connecting devices for the cited 350 feet of secondary supply track provided suitable or good electrical connections in compliance with section 75.514, and were in fact "other suitable connectors" that provided good electrical connections within the meaning of MSHA's stated policy.

Inspector Huggins, found that the devices used by the respondent to provide the track rail connections were "unusual and new" to him. He did not believe that they provided any electrical connection on the tracks, and he obviously believed that a track bonding device comprised of a copper wire rope that is pounded and welded onto the track was the "normal" bonding method for insuring an efficient bond and connection (Tr. 64-65).

Inspector Huggins, who is not an electrician, and who lacked any special electrical training other than a course for non-electrical inspectors, testified that he relied on MSHA's policy manual in issuing the violation. I am convinced by his testimony that he would accept nothing short of the "normal" copper track bonding device that he observed in his experience as an inspector as compliance with section 75.514. Indeed, the parties agreed that if Mr. Huggins had found the type of track bond that he was familiar with he would not have issued the violation.

Mr. Huggins confirmed that the tracks were grounded with a clamp, that they were connected together with fishplates and bolts, were installed on wood supports, and were tied together with steel ties (Tr. 25, 28, 45). Although he confirmed that he did not have a good view of the tracks under the supply cars that were parked on the track, he described the track as "old, rusty, and surface bent." These track conditions, coupled with the absence of the type of "track bond" that he was familiar with, led Mr. Huggins to conclude that there was "a lack of efficient return of electrical current back through the current source" (Tr. 27, 48). In short, he concluded that in the absence of the track bond that he was used to seeing, the connections provided by the fishplates, bolts, and steel ties, were not suitable to insure an efficient mechanical and electrical connection.

Mr. Huggins conceded that the steel ties holding the track rails together were properly installed. He confirmed that he saw no evidence of any track sparking or arcing, and when he rode into the area on the track jitney he noticed no change in its operation or performance, and did not notice any fading of the lights (Tr. 45, 47). Notwithstanding his testimony that the lack of track bonds and the existing track conditions would prevent efficient current return on the tracks and would render the equipment on the track inoperable, Mr. Huggins conceded that since the equipment was able to operate, current had to be moving through the track (Tr. 47-49).

Inspector Huggins candidly admitted that he conducted no tests to determine whether the use of fishplates provided an electrically efficient connection and that he simply relied on MSHA's policy which he believed mandated the use of a welded copper track bond as an acceptable method of bonding on secondary track haulage. Mr. Huggins further conceded that he made no determination as to whether the devices being used by the

respondent to connect and bond the tracks rendered them less than mechanically and electrically efficient. He admitted that he could not make such a determination without testing, but still was of the opinion that the cited connections were inefficient (Tr. 75-76). As noted earlier, Mr. Huggins has no electrical expertise, and I have given little or no weight to his opinion.

Although Mr. Huggins described the tracks as rusty and dirty and suggested that an efficient connection was impossible under those conditions, he confirmed that the steel ties that connected the rails together will conduct electricity if they are installed correctly, and he conceded that they were so installed (Tr. 47). He also conceded that there were electrical connections on the tracks and stated that "there had to be some or it wouldn't run" (Tr. 74).

Inspector Shriver, an electrical engineer, stated that the clamp and copper wire bond is the only acceptable means of insuring electrical and mechanical efficiency at all times. However, I note that under MSHA's policy, fishplates are permitted as a means of securing rail joints in rooms where electric equipment is powered by a track rail that functions as a conductor.

Mr. Shriver was of the opinion that the conditions cited by Inspector Huggins constituted a violation of 75.514, because the fishplates may be rusted or corroded, resulting in a resistance in the connection and a loss of efficiency. However, Mr. Shriver did not observe the cited supply track and he had no personal knowledge as to whether the tracks were in fact rusty or corroded. Even if he did, I give little weight to his suggestion that the electrical efficiency of a connection may be determined by simply looking at it. Indeed, Mr. Shriver testified that a voltage drop test could be conducted to determine the electrical efficiency of a conductor and he confirmed that he had conducted the tests on several occasions. He later recanted, and stated that a voltage drop test was not necessary to determine an electrically efficient connection. I find this testimony to be contradictory and rather equivocal.

Mr. Shriver conceded that he never viewed the cited connections before abatement, and even though he was not present when the violation was issued, he was of the opinion that "based on what I've been told, in my judgment, they would be electrically inefficient" (Tr. 124). I conclude and find that Mr. Shriver's opinion is highly speculative and lacking in any evidentiary support, and I have given it little weight.

As noted earlier, as a condition precedent to establishing a violation of section 75.514, the evidence must prove that the type of connections alleged to be out of compliance are in fact electrically and mechanically inefficient. Relying on, and

citing the absence of a welded bond of the kind provided for in MSHA's Policy, which does not have the force and effect of a mandatory standard that does not even mention track bonding, is insufficient "evidence" to establish a violation. In this case, I find no credible probative evidence to establish a violation. Accordingly, the contested order is VACATED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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 significant and substantial "if, 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 reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial 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); Youghioghney & 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).

Order No. 3720838

The respondent concedes that the cited coal accumulations at the transfer point where the belts came together and dumped coal constituted a violation of section 75.400. Inspector Shriver's credible and unrebutted testimony establishes that there was a substantial accumulation of coal, approximately four feet deep, or "waist high", extending over an area five to six feet wide and ten feet long. According to Mr. Shriver, the coal was piled up to the edge of the main south belt, which was at a forty-five degree angle to the other belt, and it had accumulated and backed up under the main south belt where the bottom belt turned over the tail roller, and that some of the coal had backed up on the belt chute (Tr. 188-191). Mr. Shriver stated that the accumulations were damp, but that the coal that had accumulated and backed up under the main south belt had dried out at the location where the bottom belt turned over the tail roller.

Inspector escort Andersch described the accumulations as "a considerable amount of coal spillage" (Tr. 273). Mr. Andersch and shift foreman Blue testified that the accumulations were very wet, and Mr. Blue agreed that the extent of the spillage was such that the spilled coal had covered over the wet coal to the point where the wet coal may not have been noticeable (Tr. 249).

Mr. Shriver testified that two belt rollers and the tail roller of the main south belt were turning in the coal that had accumulated and backed up under the belts, and that the main south belt "actually humped up a little bit from the coal being under it" (Tr. 192). Mr. Shriver considered the three rollers turning in coal, and the belt "massaging the coal", as ignition sources for a fire that he believed was reasonably likely to occur (Tr. 192). If a fire had occurred, Mr. Shriver believed that anyone working on the section where the air ventilation traveled from the belt transfer point in question to another belt location and regulator would be exposed to smoke inhalation, and if an explosion were to occur, serious burns could be reasonably expected (Tr. 197-199).

Mr. Andersch and Mr. Blue testified that they observed no rollers turning in the coal and no coal that was in contact with

the belt. However, Mr. Blue agreed that belt rollers turning in coal would dry out the coal if the roller was warm and caused friction (Tr. 269). Further, Mr. Blue confirmed that he arrived at the scene at approximately the same time that the men who were assigned to clean up the spill did, and he conceded that Mr. Shriver may have already ordered the belt shut down and that he (Blue) would not have seen any rollers turning in the coal (Tr. 271). All of the witnesses agreed that the belt was in operation and moving, but that no coal had been mined before the inspector observed the accumulations, and no coal was being moved on the belts at that time.

Inspector Shriver conceded that his order does not specify that any belt rollers were turning in the coal, and that his notes do not reflect that this was the case. However, considering the extent of the accumulations, the fact that they were pushed up and under the tail roller and belt rollers, and had backed up through the chute, and the fact that the belt was moving over the turning rollers, Mr. Shriver concluded that the rollers were turning in the coal. Mr. Shriver reiterated that the coal that had accumulated and was pushed back under the main south belt where the two belt rollers and tail roller were located caused the belt to be "humped up a little bit from the coal" (Tr. 230). Having viewed Mr. Shriver during his testimony, he impressed me as credible on this issue and I find his testimony regarding the rollers turning in the coal accumulations to be consistent and believable, particularly in light of the extent of the accumulations as described by Mr. Shriver, and as corroborated by the respondent's witnesses.

Mr. Shriver confirmed that he made no tests for methene, and that and the coal producing face was approximately 1,000 feet from the cited belt transfer point where he found the coal accumulations (Tr. 219, 221). Under the circumstances, and in the absence of any other evidence reflecting the existence of conditions that could present an explosion hazard, I cannot conclude that an explosion was reasonably likely to occur as a result of the cited accumulations.

I conclude and find that the cited coal accumulations presented a discrete fire hazard. Although the evidence reflects that the accumulations ranged from damp to very wet, Mr. Shriver did not believe that the dampness of the coal would have affected the likelihood of an injury because the heat from the rollers turning in the coal would dry it out rapidly, and if an ignition occurred, the coal would dry out further and burn (Tr. 193). As noted earlier, Mr. Blue agreed that a warm roller subject to friction would dry out the coal, and he confirmed that the spillage and accumulations that were present covered up the wet coal to the point where the wet coal was not readily observable, and Mr. Shriver's credible testimony that the accumulations under the main south belt had dried out is unrebutted.

In view of the foregoing, I conclude and find that in the normal course of continued mining at the time the inspector observed the cited coal accumulations, it was reasonably likely that an ignition would have occurred as the coal continued to accumulate and turn in the rollers of the moving belts, and that a belt fire was reasonably likely to occur as a result of these accumulations and ready sources of ignition that were present. I further conclude and find that in the event of a belt fire, it would be reasonably likely that the men on the section would suffer smoke inhalation, and fire related injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in the regard IS AFFIRMED.

Order No. 3718252

In its posthearing brief, the respondent admits that while the violation did not result in any serious injuries or deaths, it was still significant and substantial because the spill was of major proportions, it had resulted in an electrical cable being pulled from a junction box, and it required the efforts of a number of miners to reestablish a walkway along the belt, exposing them to slip and trip hazards. Under the circumstances, and taking into account the testimony of the inspector in support of his "S&S" finding, which I find credible, I conclude and find that his finding was properly made and IT IS AFFIRMED.

Unwarrantable Failure Violation Issue

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 recent 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); Youghiogheny & 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 Youghiogheny & 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 of 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," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Order No. 3720838

The petitioner argues that the recurrent nature of the accumulations, as evidenced by Mr. Shriver's multiple observations of accumulations occurring in the same location from the same cause, as well as the numerous entries in the preshift books that evidenced the recurrent problem at this location, both serve to establish Consol's indifference to this recurrent safety problem and establishes the unwarrantable nature of the violation.

The respondent asserts that coal spills and accumulations at belt transfer areas are not unusual repetitive problems in any mine using conveyor belt haulage, and acknowledging that such accumulations might be violations of section 75.400, the respondent maintains they do not constitute unwarrantable violations unless they are allowed to remain in place for extended time periods and are not taken care of within a reasonable period of time. In this case, the respondent believes

that the cited accumulations, as well as the prior accumulations relied on by the inspector, were promptly cleaned up.

In support of its position that the violation was not the result of its unwarrantable failure to comply with section 75.400, the respondent points out that the spillage cited by Mr. Shriver occurred because of a clogged belt chute which caused a backup of coal when it spilled out through the open space at the top of the chute, and not because of any "hole" deliberately cut into the chute by the respondent. The respondent acknowledged that it was aware of the spillage because it had been reported by the preshift examiner, and that the foreman had promptly assigned two miners to clean up the spillage on the very next shift.

Inspector Shriver confirmed that the prior coal accumulations that had occurred at the four right transfer point as reflected by the entries in the preshift examiner's book, "were probably cleaned up every time" (Tr. 219). He further confirmed that he considered the violation to be an unwarrantable failure because the accumulations repeatedly occurred, and not because they occurred and were not cleaned up (Tr. 219, 226). With respect to the coal spillage conditions recorded in the preshift books as early as July 12, 1992, at the four right transfer point, Mr. Shriver agreed that these conditions would have been cleaned up and that this prior spillage was not the same spillage he observed at the time of his inspection on August 12, 1992 (Tr. 225).

Mr. Shriver believed that the coal accumulation that he observed had to have occurred before 5:00 A.M. on the morning of his inspection or during the midnight shift. Considering the amount of spillage, he estimated that the accumulation had been there during half of the midnight shift because "it would take a couple of hours or more to accumulate that much coal spillage" (Tr. 238). Based on his review of the fire boss books, Mr. Shriver believed that the recurring spillage was being cleaned up on-shift, and if all of it could not be cleaned up, it would be called out as an entry in the preshift book and "the next shift would have to catch up" (Tr. 240).

Shift foreman Blue testified that under the worst case scenario, "there is no way this coal could have been present far more than two hours and ten minutes" (Tr. 250). Mr. Blue's credible and un rebutted testimony reflects that the midnight shift foreman advised him of the spillage situation and that Mr. Blue assigned two men to clean it up during the morning shift. Mr. Blue explained that the men were on their way to clean up the spillage but stopped at another area to take care of another problem, and that this delayed them (Tr. 252, 255).

I take note of the fact that Mr. Shriver's order itself makes reference to "persons shovelling accumulations". Petitioner's counsel conceded that coal accumulations were being cleaned up in another area, that the cited transfer point was scheduled to be cleaned up by the cleanup personnel dispatched by Mr. Blue, but they had not reached that location before the inspector (Tr. 254). Counsel agreed that if the cleanup crew had started cleaning up at the cited transfer point, rather than stopping along the way to address another problem, they would have arrived and started shovelling before the inspector arrived and it was possible that the violation would never have been issued (Tr. 254-255).

The petitioner's suggestion that a violation may have been avoided if the shovelling crew had been in action when the inspector arrived undercuts the petitioner's position that recurrent accumulations constitutes indifference amounting to aggravated conduct. Insofar as the recurrent nature of the accumulations is concerned, it seems clear to me that the respondent promptly addressed these conditions as they occurred, including the accumulations cited by Mr. Shriver in this instance.

Recurrent coal accumulations are inherent by-products of large scale mining operations and they are not unusual events justifying unwarrantable failure orders simply because no one is shovelling them up when an inspector happens on the scene and finds them. Each case must be decided on its own facts. Here, the evidence clearly establishes that the respondent acted with reasonable promptness to address the accumulations in question. Under the circumstances, I agree with its position and cannot conclude that the petitioner has established a case of aggravated conduct in supporting of the inspector's unwarrantable failure finding. Accordingly, that finding IS VACATED, and the contested order IS MODIFIED to a section 104(a) "S&S" citation.

Order No. 3718252

The petitioner concludes that it has clearly established the unwarrantable failure nature of the violation in that the cited accumulations had been present "for a few days in a location that is more likely than others to be involved in serious problems and fires" and that the preshift and weekly examiners "did not recognize these obvious violations". The petitioner further concludes that this amounts to aggravated conduct supporting the inspector's unwarrantable failure finding.

The respondent suggests that when the order was issued the inspector was dissatisfied with where people were working to clean up the massive spill that had occurred in that he noted in his order that nobody was working at the drive where he believed

it was most likely that a fire would occur from the accumulations. The respondent further suggests that in order to support his unwarrantable failure finding, the inspector, at the hearing, testified that the reason the respondent was highly negligent was the fact that its management knew about the accumulations for several days.

The respondent asserts that the fact that the respondent knew about the coal spill on the beltline should not be considered an aggravated situation in that mine foreman Cole had discussed the spill with the inspector and had assigned people to work on the cleanup at the time the inspector arrived on the scene. The respondent maintains that with the exception of the solidified material around the belt drive, the other accumulations cited by the inspector were materials that had resulted from the massive spill a few days earlier.

The respondent acknowledges that the material around the drive motors had apparently been there for some period of time prior to the spill, but that its combustibility was undermined, and its consistency was such as to make it unlikely that it could go into suspension. Since the combustible content of the material was not known, the respondent concludes that it would be impossible to base a violation entirely upon this accumulation alone, and that it should not be viewed as a basis for an unwarrantable failure charge based on an accumulation of inert material in proximity of a couple of electric motors. Conceding that the existence of inert materials may be a violation of section 75.1725(a), if the materials rendered the motors unsafe to operate, the respondent maintains that the material must be shown to be combustible before section 75.400, can be cited.

The respondent acknowledges that a massive spill occurred at a critical mine location, but points out that management knew about the spill and promptly began work to correct the situation. The respondent asserts that cleanup could not be accomplished in a matter of hours starting at all locations at once, and it points out that the section foreman had to first establish a walkway to facilitate the cleanup in an orderly and safe manner and he did not consider the belt drive area to be a critical problem that needed to be taken care of before anything else. The respondent concludes that the inspector decided that he would have cleaned up the spill differently by starting at the belt drive, and that since this was not done, he decided to issue the order for an unwarrantable failure to properly address the spill.

Inspector Shriver's order cited the main Butts No. 1 belt drive, and it describes fine coal and dust accumulations under the bottom belt from the tail roller to the drive roller nearest the tipple, accumulations of wet coal and dust under and around a piece of belt over the North drive motor, with dry coal and dust under the connection box and packed against the motor, fine coal

packed tightly between the two motors, and "substantial dust" accumulations inside the drive motor junction box.

The evidence reflects that for approximately two days before the September 4, 1992, inspection an accidental massive spill had occurred on the belt. Two men were assigned to clean up the spill, and Mr. Shriver did not issue any citation for that spill because mine foreman Cole was aware of it and Mr. Shriver gave him an opportunity to clean it up. Upon his return to the area on September 4, Mr. Shriver found one man shovelling and a "sizeable" portion of the spill still remained. He issued a citation for that spill and proceeded with foreman Morgan to the main butts drive where he found the accumulations cited in his order (Tr. 294-295).

Mr. Shriver estimated that the accumulations between the motors had existed for "several days" or "several shifts" (Tr. 285-286, 288). He based his "high negligence" finding on his belief that the respondent knew about the accumulations in that they had existed for several days and "he had discussed the situation there with Mr. Cole a couple of days earlier and he said that he would clean it up" (Tr. 288). He also considered the fact that the tipple operator who was with him as the miner's representative when they walked up to the drive on September 4, "said that he had worked some on it the day before. In fact, there was a guard left off where he had shoveled on it" (Tr. 288-289). Mr. Shriver later testified that the accumulations discussed with Mr. Cole were not the same ones he cited at the drive, and that he found those independent of any conversations with Mr. Cole (Tr. 293-295).

Although the order states that the preshift examination records reflected reported spillage on the belt from the tail piece to the tipple, Mr. Shriver initially could not remember whether he reviewed the preshift book (Tr. 295). When reminded of the statement in his order, Mr. Shriver repeated it on the record (Tr. 299).

Mr. Shriver confirmed that the distance from the tail roller to the drive roller, which encompasses the area described in his order, was less than 100 feet, and that the belt was shut down for approximately an hour and fifteen minutes to clean up the accumulation (Tr. 304).

Although Mr. Shriver believed that the preshift and weekly examiners should have observed the cited accumulations, there is no evidence that he spoke with these individuals, and they were not called to testify. Further, even though mine foreman Cole may have known about the spillage at the drive, Mr. Cole did not speak with him at the time the order was issued, and Mr. Cole was not called to testify (Tr. 296).

When asked to describe the "aggravated conduct" that prompted him to issue the order, Mr. Shriver replied "permitting the condition to exist for a long period of time" (Tr. 298). When asked to explain how long a period of time he had in mind, Mr. Shriver responded "probably on the order of weeks" (Tr. 298).

Dust foreman and inspector escort Morgan testified that the coal spillage from the tailpiece to the tipple had been called out and reported in the preshift book and that a foreman and two men were working on it when he and Inspector Shriver arrived at the scene (Tr. 314). Aside from the fresh spill, Mr. Morgan confirmed that the cited accumulations at the motors had been there prior to the spill that had occurred two days earlier and it had accumulated in the process of cleanup with water hoses. Mr. Morgan described the material as "a mixture of rock dust, and ground up coal" that had become wet and then dried out and had become hard (Tr. 317-318).

Mr. Morgan also acknowledged the presence of some spillage that had been dragged back from the large spill along the beltline and he indicated that the foreman decided that he first had to establish a safe walkway along the beltline and clean up the spilled coal before moving on to the belt drive area. He confirmed that foreman Mabin shut down the section in order to have enough people to address the situation and they were in the process of cleaning up the area from the tail roller to the tipple when he and Mr. Shriver arrived at the area. Mr. Morgan acknowledged that no one was working at the belt drive at that time (Tr. 319).

Mr. Morgan testified that the accumulations between the cited motors could have been part of the spillage that had been called out because the coal that spills between the belts is carried back to the drive area and is dragged off into that area (Tr. 320) Mr. Morgan stated that there was an appreciable amount of materials packed between the motors, and he conceded that if he had made the preshift examination he would have called it out as needing cleaning up (Tr. 320). Mr. Morgan was of the opinion that the material was not combustible (Tr. 321).

Mr. Morgan described the material packed between the motors as "a mixture of rock dust and coal and stuff" (Tr. 323). A pick hammer was used to break the material loose and scrape it out and he characterized the consistency of the material as "powder that had gotten wet, and packed" and that he could have dug into it with his finger (Tr. 323-324).

Section foreman Mabin confirmed that the section was idled because of the coal spill at the main South belt transfer. The spill had been reported on the preshift examination and he and two of his crew members proceeded to clean up the area from the main butts tailpiece to the tipple. Mr. Mabin testified that he

walked the entire length of the belt, and concluded that he first had to establish a walkway where the spillage was over five high before doing anything else. He conceded that there was spillage at the drive, and stated "the most important thing was to take my two men and establish a walkway. And the drive was not the problem" (Tr. 327-329).

After careful review of all of the evidence in this matter, I conclude and find that the petitioner has failed to make a case of aggravated conduct on the part of the respondent. In this regard, I find the testimony of the inspector to be rather confusing and conflicting with respect to the question of management's knowledge of the conditions and the length of time that the cited accumulations existed.

Mr. Shriver first testified that the accumulations had existed for several days or several shifts and that he had discussed them with the mine foreman. He later testified that the cited accumulations were not the same ones he discussed with the foreman, and that they had existed "for weeks".

Although Mr. Shriver stated that the respondent's allowing the cited accumulations to exist "for a long period of time" amounted to aggravated conduct, I find no evidentiary support for this conclusion. Although Mr. Shriver generally alluded to the preshift reports, which he initially could not remember reviewing, and copies of several reports covering a period from mid-July, 1992, to mid-August, 1992, were introduced as evidence (exhibit P-12), I find them of little value and weight, and none of these reports cover the immediate three week period before the issuance of the order on September 4, 1992. Further, the "spillage" reported in these reports cover a number of mine areas, and such generalized, non-specific book entries are of little or no evidentiary value, particularly when they remain unexplained.

The respondent's credible and un rebutted evidence establishes that at least two days before the inspector discovered the accumulations that he cited, a massive spill had occurred in the same general area and the respondent was addressing the spill by first establishing a walkway to allow further work to continue before doing any other work. The section had shut down for this work, and I find nothing unreasonable about the manner in which the respondent was proceeding to clean up. On the facts of this case, I believe that one could reasonably conclude that the accumulations cited by Mr. Shriver in the midst of the respondent's clean up efforts in connection with the larger spill, would have been addressed and taken care of before full coal production was again started. Under all of these circumstances, I conclude and find that the petitioner has failed to establish the unwarrantable failure

nature of the violation, and the inspector's finding in this regard IS VACATED. The citation is modified to a section 104(a) "S&S" citation.

Findings and Conclusions

Docket No. WEVA 93-5

As noted earlier, the respondent has conceded that the cited coal accumulations at the tailpiece of the 3 right belt constituted a violation of 30 C.F.R. § 75.400, as stated in the section 104(d)(2) "S&S" Order No. 312175, issued by Inspector Shriver on June 18, 1992. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violation

I conclude and find that the credible testimony of the inspector supports his "S&S" finding. The respondent has conceded the violation, and I conclude and find that the belt tail roller turning in the fine dry coal constituted a discrete fire hazard. Although the inspector did not check for, or find any methane, I find that the roller turning in the coal constituted a potential source of ignition that could have ignited a fire if normal mining operations were to continue and the roller continued to turn in the accumulations. I further conclude and find that in the event of a belt fire, it would be reasonably likely that the men on the section, including the face area approximately two to three hundred feet away, would suffer at least smoke inhalation, and fire related injuries of a reasonably serious nature. Accordingly, the inspectors "S&S" finding IS AFFIRMED.

Unwarrantable Failure Violation

Inspector Shriver based his unwarrantable failure finding on the length of time that he believed the accumulations had existed, his belief that the section foreman should have found and corrected the violation between his arrival on the section at 8:30 a.m. and 11:50 a.m., when the order was issued, and the fact that the assistant mine superintendent was on the section for twenty minutes he (Shriver) arrived, and knew that he was on his way to the section.

The presence of the assistant superintendent on the section, and the fact that the section foreman should have observed the conditions, is insufficient evidence of aggravated conduct, and at most may support an ordinary negligence finding. Further, Mr. Shriver conceded that there was no evidence that the superintendent or the foreman actually saw the accumulations.

Mr. Shriver estimated that the accumulations had existed for time periods ranging from "the prior midnite shift", to "several shifts", "fifteen or twenty shifts," "several days", or "six days" (Tr. 33-37). These estimates were based on the fact that as little as "two buggies" of coal had been produced on the section, and Mr. Shriver's opinion that the "red" or "brownish" color of the coal dust was the result of the belt roller turning in the coal accumulations "for some length of time".

Section foreman Lewandoski testified credibly that he worked the midnight shift on June 18, 1992, and preshifted the belt and tailpiece at 5:15 a.m., and he found no accumulations and indicated that the belt was "clean". Assistant mine superintendent Godwin conceded that the accumulations were present, but he indicated that the section had been moved two days prior to the inspection, and that the accumulations could not have existed for more than two days. He attributed the "orangish brown" coal dust color to the residue and dry deposits from a belt scraper of similar colors.

Although Inspector Shriver checked the preshift book for the shift in question, he did not check the books for the previous days (Tr. 67-68). I conclude and find that Mr. Shriver's time estimates based on the color of the coal dust that he observed are speculative and lacking in probative value. I believe that Mr. Shriver's order was prompted by his belief that the section foreman or assistant mine foreman who were on the section before he arrived for his inspection should have found them and had them cleaned up. Even if this were established, I would find no basis for concluding that this amounted to aggravated conduct warranting an unwarrantable failure order. Under these circumstances, I conclude and find that the petitioners evidence does not support the inspectors unwarrantable failure finding, and IT IS VACATED. The order IS MODIFIED to a section 104(a) "S&S" citation.

Docket No. WEVA 93-92

Findings and Conclusions

Fact of Violations

As noted earlier, section 104(a) "S&S" citation No. 3720837, August 12, 1992, citing a violation of 30 C.F.R. § 75.400, was settled by the parties and the respondent agreed to pay the full amount of the proposed civil penalty assessment of \$506.

With respect to section 104(a) "S&S" Citation No. 3718250, September 3, 1992, citing a violation of 30 C.F.R. § 75.701-3(a), for failure to provide frame grounding for the cited fuse box, and section 104(a) "S&S" citation No. 3718251, September 3, 1992, citing a violation of 30 C.F.R. § 75.518, for having an oversized

fuse in the fuse holder of the 35 Jug pump, the respondent does not dispute the fact that the cited conditions constituted violations. Under the circumstances, the respondent's admissions, coupled with the testimony of the inspector who issued the citations, establishes the violations as charged. Accordingly, the two citations in question ARE AFFIRMED.

Section 104(a) "S&S" Citation No. 3718256

In support of his conclusion that the examinations of electrical equipment at the mine were inadequate, Inspector Shriver relied on the two electrical violations that he found the day before on September 3, 1992, concerning the oversized fuse for the No. 35 Jug pump, and the lack of frame grounding for the No. 45 pump fuse box (Citation Nos. 3718250 and 3718251). He also considered two additional electrical violations that he issued in the course of his inspection on September 4, 1992, for a belt drive junction box cable that had been pulled out of the box, and the connection of a pilot conductor and a ground conductor of a drive motor to a single stud.

Mr. Shriver stated that it was his practice to issue a violation for inadequate electrical examinations after he has issued separate citations for the individual electrical violations. In this instance, having found four electrical violations in two successive days of inspections, he concluded that the electrical examinations that either failed to detect, or ignored, the violative conditions, were inadequate. He also believed that inadequate electrical examinations have been "a chronic problem" at the mine for several years, and he alluded to the fact that he has issued several violations in the past for the same conditions that he cited during his inspections of September 3, and 4, 1992.

Exhibits P-15 and P-17 through P-19, are copies of prior citations for violations of section 75.512, issued by Inspector Shriver in 1990 and 1991, for inadequate examination of electrical equipment. Exhibits P-6 through P-10, are copies of citations issued by Mr. Shriver on February 28, 1990, for various electrical violations of sections 75.701, and 75.515. Although the petitioner did not produce any more recent prior citations covering the period from February, 1990, and January, 1991 to September, 1992, these prior citations do lend some support to inspector Shriver's assertion that the respondent has had problems with the sufficiency and adequacy of its electrical examinations required by section 75.512.

The respondent is charged with making inadequate electrical examinations of its electrical equipment. The relevant and applicable language of section 75.512, is found in the first sentence which requires that "all electric equipment shall be

frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions".

The respondent's un rebutted evidence reflects that both of the pump locations cited by Inspector Shriver on September 3, 1993, were examined by a certified electrician on August 27, 1992, and they were included on a check list used for the required weekly electrical examinations. Although I find nothing in section 75.512, that makes reference to "adequate" or "inadequate" examinations, I believe the clear intent of the standard is to insure that the required examinations are conducted in such a manner to insure that potentially hazardous electrical conditions are timely detected, corrected, and maintained in safe operating condition.

Inspector Shriver's credible and un rebutted testimony reflects that at least three of the four electrical violations that he discovered and relied on when he issued the violation in question were quite obvious. Respondent's maintenance foreman Buckalew admitted that the ungrounded No. 45 pump fuse box had been in that condition for a long period of time, and that the ground connection had not been made. He agreed that the condition should have been detected during the electrical examination.

Although I recognize the fact that electrical equipment conditions may change between examinations, and that a violative condition, standing alone, may not reflect that the examinations are inadequate, on the facts of this case where the inspector cited three or four violations within a relatively short period of time, and had in the past cited the respondent for a number of electrical violations, as well as violations for failure to adequately examine its electrical equipment, I cannot conclude that the inspector here acted unreasonably. Considering the intent of section 75.512, and the un rebutted fact that the violative conditions had existed for some time and should have been detected and corrected by the respondent before the inspector found them, I conclude and find the required electrical examinations were inadequate, and that the petitioner has established a violation of section 75.512. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violations

Section 104(a) "S&S" Citation No. 3718250

Inspector Shriver cited the violation because the fuse box was not grounded in that the frame grounding conductor inside the box was not attached and there was no external frame ground attached to the box going back to the track.

Mr. Shriver stated that a hazard would exist if the grommet where the conductor entered the box were to pop out and

distintergrate due to a vibration of the trolley wire from passing motor cars. If the grommet failed, the conductor would abrade against the sharp edge of the hole in the box and would cut through the insulation to the bare copper wire inside the conductor, energizing the fuse box (Tr. 143). When asked how likely it was that a grommet would come loose under normal mining operations, Mr. Shriver stated that on prior occasions at different locations on the same haulage he has found grommets that either failed or disintegrated (Tr. 144). In his opinion, once a grommet has popped out, it would take about a week before the insulation would be worn through (Tr. 146).

Inspector Shriver made reference to several prior violations that he issued in 1990 for missing or improper fittings, and he indicated that the cables or conductors would be subject to the same type of haulage vibrations as in the instant case (Exhibits P-6 through P-10; Tr. 155-160). I take note of the fact that in one instance where Inspector Shriver cited a violation of section 75.515, and noted that a sharp edge of the hole through which a conductor passed had abraded the conductor insulation, he found that the violation non-"S&S" (Exhibit P-9).

In the instant case, Inspector Shriver conceded that there was nothing wrong with the grommet or fitting through which the power conductor entered the fuse box, and that it provided a tight fit where the conductor entered the box (Tr. 151). Mr. Shriver agreed that the fact that the ground wire inside the box was not tied to the box did not, of itself, present any injury hazard (Tr. 152). He also agreed that the area was dry and did not likely present a fatal injury hazard if the box were energized, and he was aware of no accidents at the mine related to the cited condition (Tr. 162). Further, Mr. Shriver believed that the box had been without a frame grounding conductor, which was the cited condition in this case, for approximately a year and that nothing happened during all of this time (Tr. 166). Under all of these circumstances, I cannot conclude that it was reasonably likely that the grommet or fitting in question, which was in fact installed and in good condition, and which provided a good tight fit for the cable which entered the box, would disintegrate or pop out due to any vibrations from any passing haulage traffic. That event would have to occur before the completion of any "S&S" chain of events sufficient to establish an "S&S" violation. In this instance, the condition which prompted the citation had existed for a year according to the inspector, yet the grommet or fitting showed no sign of deterioration. Mr. Shriver confirmed that the fuse box was not tagged out or removed from service, and it continued in use (Tr. 230). Under all of these circumstances, I conclude and find that the inspector's "S&S" finding was speculative and unsupported, and IT IS VACATED. The citation IS MODIFIED to a non-"S&S" citation.

Section 104(a) "S&S" Citation No. 3718251

Mr. Shriver did not believe that the cited pump in question was in an unsafe condition requiring it to be immediately removed from service (Tr. 232). He believed that an "S&S" violation could range from "dangerous" (bad roof and bare, energized conductors), to "medium grade and low grade S&S violations where, for a few hours, they can remain in service" (Tr. 232). Mr. Shriver believed that the oversized fuse was replaced in its holder after the rating was checked and the pump was allowed to continue in service for nearly six hours in order to allow the respondent time to replace the fuse with one of proper size (Tr. 229). Inspector Escort Morgan confirmed that Mr. Shriver put the fuse back after checking it, and that the pump was re-energized (Tr. 251-252).

Mr. Morgan stated that the pump was installed in a pit or a hole, and that it was ten feet from the closest coal rib and approximately fifteen feet from the mine roof (Tr. 250). Mr. Morgan described the pump motor as "small" and he believed that any fire in the motor would only damage the pump itself and would not ignite the rib or roof coal (Tr. 251).

Inspector Shriver described the "jug" pump in question as a small portable pump approximately one-foot in diameter that could readily be moved by one person (Tr. 227). His principal concern was that the pump motor could "seize up" or stall, causing a fire that would ignite the rib coal and result in noxious fumes from the motor windings or smoke inhalation from the coal fire (Tr. 188). Although Mr. Shriver indicated that the motor pump bearings may go bad or that small rocks may become wedged in the motor, causing it to stall (Tr. 189), when asked how often this was likely to occur, or how often such a pump becomes clogged, stuck, or blows a fuse, Mr. Shriver responded "I don't have any specific knowledge in that area" (Tr. 228).

I find no credible evidence to establish that it was reasonably likely that the pump motor in question would seize or stall, thus causing it to burn up the motor. Even if a motor fire were to occur, given the small size of the motor and the fact that the motor was installed in a pit, some ten to fifteen feet from the coal rib and roof, I find it unlikely that any fire would ignite the rib and roof coal. Aside from the motor winding, there is no evidence that other combustible materials were near the pump. Under the circumstances, I cannot conclude that the violation was "S&S", and the inspector's finding in this regard IS VACATED. The citation IS MODIFIED to a non-"S&S" citation.

Section 104(a) "S&S" Citation No. 3718256

Inspector Shriver testified that the hazards associated with the failure to perform adequate electrical examinations "are almost without limit", and he cited several examples of missing and overlooked frame grounds, inadequate short circuit and overload protection, fine dust inside a motor box, and other undetected conditions that may develop into serious and hazardous permissibility violations, some of which could develop into situations presenting potential electrocution and shock hazards (Tr. 197-200).

I agree with the inspector's "S&S" finding in this instance. The failure to adequately examine electrical equipment to make certain that it is in safe operating condition presented a discrete safety hazard in that miners who work around the equipment might not be aware of hazards and potential hazards. Ignorance of these hazards would reasonably likely result in injuries of a reasonably serious nature. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Docket No. WEVA 93-164

This case concerns a section 104(a) "S&S" Citation No. 3716846, issued on October 21, 1992, by MSHA Inspector Robert L. Huggins, citing an alleged violation of 30 C.F.R. § 75.514, and it states as follows:

The supply track is not mechanically and electrically efficiently bonded for approximately 150 feet for the 3-5 section MMU 067-0. This area is from the end of the supply track to approximately 150 feet outby. There was grounding clamps connected to the end of the rail which provide grounding protection for electrical equipment which is being used to clean up and support roof around the fall area at the end of the track. A track bolter is being used to bolt top in this area along this track area.

This case was assigned to me on October 19, 1993, after the hearing in Docket No. WEVA 93-100, which also involved an alleged violation of section 75.514, issued by Inspector Huggins. The parties agreed that my decision in the prior case would apply in this case (See Chief Judge Merlin's October 19, 1993, Order of Assignment).

In the prior case I vacated the violation after finding and concluding that the petitioner failed to prove that the respondent's track bonding method was not mechanically and electrically efficient. Assuming that the evidence in this case would be the same, and in light of the agreement by the parties that my decision in Docket No. WEVA 93-100, would be dispositive

of this case, I incorporate by reference my findings and conclusions in the prior case and conclude that the citation here should be vacated on the ground that the petitioner has failed to prove the alleged violation. Accordingly, the citation in question here IS VACATED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a large mine operator and the parties have stipulated that payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner's computer print-outs for the Arkwright No. 1 Mine, reflect that for the period covering June 18, 1990, through September 3, 1992, there were seventy-nine (79) violations of section 75.400, including those contested in these proceedings. Sixty-nine of these violations were issued as section 104(a) citations. For an operation of its size, I cannot conclude that this is a particularly egregious compliance record. However, given the number of past accumulations violations, the respondent needs to continually address its cleanup practices.

The computer print-outs also reflect four (4), prior paid citations of 30 C.F.R. § 75.518, and twelve (12), prior paid citations of 30 C.F.R. § 75.512, all of which were issued as section 104(a) citations. I cannot conclude that this is a particularly bad compliance record.

Good Faith Abatement

In the absence of any evidence to the contrary, I conclude and find that the respondent timely abated the violations in good faith.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that those violations affirmed as "S&S" violations were serious violations, and those modified and affirmed as non-"S&S" were non-serious violations.

Negligence

I conclude and find that all of the section 75.400, violations that I have affirmed resulted from the respondent's failure to exercise reasonable care amounting to a moderately

high degree of negligence, and that the remaining violations resulted from a moderate and ordinary degree of negligence.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

Docket No. WEVA 93-100

1. Section 104(d)(2) non-"S&S" Order No. 3718918, July 27, 1992, citing an alleged violation of 30 C.F.R. § 75.514, IS VACATED, and the proposed civil penalty assessment IS DENIED AND DISMISSED.
2. Section 104(d)(2) "S&S" Order No. 3720838, August 12, 1992, citing a violation of 30 C.F.R. § 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the citation IS AFFIRMED.
3. Section 104(d)(2) "S&S" Order No. 3718252, September 4, 1992, citing a violation of 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the citation IS AFFIRMED.

Taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations that have been affirmed, and the respondent IS ORDERED TO PAY THEM.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3720838	8/12/92	75.400	\$1,200
3718252	9/4/92	75.400	\$1,500

Docket No. WEVA 93-5

Section 104(d)(2) "S&S" Order No. 312175, June 18, 1992, citing a violation of 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified, IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of \$1,000, for the violation.

Docket No. WEVA 93-92

1. Section 104(a) "S&S" Citation No. 3720837, August 12, 1992, citing a violation of 30 C.F.R. § 75.400, has been settled. The respondent IS ORDERED to pay the agreed upon settlement amount of \$506 in settlement of the violation.
2. Section 104(a) "S&S" Citation No. 3718250, September 3, 1992, citing a violation of 30 C.F.R. § 75.701-3(a), IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of \$250, for the violation.
3. Section 104(a) "S&S" Citation No. 3718251, September 3, 1992, citing a violation of 30 C.F.R. § 75.518, IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified, IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of \$250 for the violation.
4. Section 104(a) "S&S" Citation No. 3718256, September 4, 1992, citing a violation of 30 C.F.R. § 75.512, IS AFFIRMED, and the respondent IS ORDERED to pay a civil penalty assessment of \$500, for the violation.

Docket No. WEVA 93-164

Section 104(a) "S&S" Citation No. 3716846, October 21, 1992, citing an alleged violation of 30 C.F.R. § 75.514, IS VACATED, and the petitioner's proposed civil penalty assessment IS DENIED AND DISMISSED.

IT IS FURTHER ORDERED that payment of the aforementioned civil penalty assessments, including the settlement amount, shall be made to the petitioner (MSHA) within thirty (30) days of the date of these decisions and Order. Upon receipt of payment, these matters are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 7 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-254-M
Petitioner	:	A.C. No. 31-00212-05542
v.	:	
	:	Lee Creek Mine
TEXASGULF INC.,	:	
Respondent	:	

DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner; T. Carlton Younger, Jr., Esq., Texasgulf, Inc., Raleigh, North Carolina, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks a civil penalty assessment in the amount of \$50 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.12067. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Raleigh, North Carolina. The parties waived the filing of posthearing arguments, but I have considered their oral arguments at the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty; and (2) the appropriate civil penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. 30 C.F.R. § 56.12067.
4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is subject to the jurisdiction of the Mine Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. The respondent is a large mine operator.
4. The cited conditions were timely abated by the respondent in good faith.
5. The respondent's history of prior violations is reflected in an MSHA computer printout (Exhibit P-18).

Discussion

Section 104(a) non-"S&S" Citation No. 4094761, issued on February 2, 1993, by MSHA Inspector Terry Scott, cites an alleged violation of 30 C.F.R. § 56.12067, and the cited condition or practice is described as follows:

The transformer casing at the "I" portable substation (high voltage) was within 3 feet of the chain link fence.

Petitioner's Testimony and Evidence

Billy B. Foster, respondent's General Foreman, was called as an adverse witness and testified that he is an electrical engineer and is the second line supervisor over the electrical maintenance personnel. Referring to photographic Exhibits P-1, P-2, and P-3, Mr. Foster pointed out the cited transformer casing in question and described its component parts. He also explained and described the other electrical equipment shown in the photographs. He stated that the transformer casing appears to be

"butted right up against" the chain link fence shown in the photographs and that there is little space between the transformer casing "fins" and the fence (Tr. 11-19).

Mr. Foster stated that in his 34 years of experience he has never seen or heard of an energized transformer casing (Tr. 20). Mr. Foster identified and marked the energized parts shown in Exhibit P-1, and the energized wires, insulators, and small transformers shown in Exhibit P-2 (Tr. 20-24).

Petitioner's counsel stated that the photographs depict substation "J", which is representative of the identical equipment located at substation "I" and the remaining non-conforming substations on mine property that include equipment less than three feet horizontal from the fence (Tr. 26). Counsel further explained that Inspector Scott observed 26 transformers at the time of his inspection and issued the citation citing only one of the substations because of MSHA's current policy not to issue multiple citations for similar violations (Tr. 27).

Respondent's counsel contended that all of the transformers are not similar, and he pointed out that the inspector only cited substation "I" and that the evidence should focus on that particular equipment. Counsel further pointed out that the configuration for substation "I" is substantially different from those shown in the photographs in question (Tr. 29-30).

Petitioner's counsel stated that MSHA does not have a photograph of the cited substation "I" and he could not explain why one was not obtained. Counsel stated that the respondent's photographs, Exhibits R-1 through P-5 depict the cited substation "I" (Tr. 30-31).

Mr. Foster confirmed that photographic Exhibits R-1 and R-2 represent substation "I" with the MSHA approved abatement, and that Exhibits R-3 through R-5, show the conditions found by Inspector Scott. The cited transformer casing, which includes the "radiator" type fins, and the "skin and body" of the transformer, is shown in Exhibit R-3 (Tr. 31-32). After viewing the photographs, and confirming that he made no measurements, Mr. Foster "assumed" that the casing in question is less than three feet from the fence and he stated that "I'd have to go by what the citation says" (Tr. 31-33).

Mr. Foster stated that the fence shown is six feet high and he did not recall the distance from the height of the fence to the inside of the transformers. He stated that the incoming voltage on the "I" substation is 23,000 volts and that the outgoing voltage is 4,160 volts (Tr. 34).

Respondent's counsel confirmed that photographic Exhibits R-1 through R-5, are of the cited substation "I". He explained that the substation is mounted on a skid and that the fence immediately surrounding the substation is installed around the perimeter of the skid. The skid is used to facilitate the moving of the substation from one location to another. The outer fence shown in Exhibits R-1 and R-2, was installed to achieve compliance and abate the citation.

Petitioner's counsel confirmed that if the skid-mounted fence were moved further away from the transformer and other substation equipment to provide three-feet of clearance, or a "walkway" between the equipment and the fence, MSHA would consider this to be in compliance with the cited standard (Tr. 34-36). Respondent's counsel stated that this could be done, but that it would require the reconstruction of the skids. However, he believed that the cited substation was in compliance with only the skid-mounted fence around it (Tr. 34-38).

On cross-examination, Mr. Foster stated that an ungrounded transformer casing could present a dangerous hazard if it became energized. However, the grounding would prevent this from happening and this is the primary consideration in the design and maintenance of a substation. Mr. Foster pointed out the energized parts in Exhibits R-1 through R-5, and he stated that measurements taken established that the nearest distance from the fence to any energized parts was three-feet three-inches. He also indicated that the six-foot high fence distance does not include the barbed wire installed at the top of the fence (Tr. 41).

Dennis H. Miller, respondent's safety and health supervisor, was called as an adverse witness. He stated that the substations have always been mounted on skids without the fence mounted directly on the skid. The fence was installed on the ground and it was grounded. He confirmed that the skid-mounted fence shown in Exhibit R-3, was the one cited by Inspector Scott, and that the additional outer fence was installed to abate the citation. Both fences are still in place (Tr. 42-44).

Mr. Miller stated that the purpose of the fence is to keep unauthorized and unqualified persons from the substation. Referring to Exhibit R-3, Mr. Miller could not state the distance between the transformer casing and the fence, or from the "high voltage" sign on the fence to the coils, and he confirmed that he made no measurements (Tr. 45). Assuming that the fence were less than three-feet away, Mr. Miller did not believe that there was a hazard of employees reaching and touching the transformer casing. Mr. Miller stated that he has never heard of an energized transformer casing (Tr. 45).

In response to further question, Mr. Miller stated that the outer fencing gate is locked and precludes access to the skid mounted substation (Tr. 47). He stated that the transformer casing for substation "I" is not energized and that if someone touched it nothing would happen (Tr. 51-52).

MSHA Inspector Terry A. Scott, testified as to his experience, which included work as a high voltage lineman, an underground electrician repairman, and work with transformers similar to the ones at issue in this case. He has also had transformer training and completed a two-year course in industrial electricity at Mayo State Vocational School in Paintsville, Kentucky (Tr. 54-58).

Mr. Scott stated that when he observed the transformer on February 2, 1993, it was mounted on a skid that was approximately 12 to 14 inches high, and that the fence was mounted on the skid as shown in photographic Exhibit R-3 (Tr. 58). Referring to the photograph, Mr. Scott testified that he measured the distance from the fence to the "Danger-High Voltage" sign, and that the distance to the fence from one side of the transformer casing was 14 to 18 inches, and on the other side, the distance to the fence was 8 to 12 inches (Tr. 58-59). An additional substation "J" shown in photographic Exhibit P-4, was also measured and the measurements were similar (Tr. 60). The petitioner's counsel confirmed that since the measurements reflected that the transformer parts were less than three feet from the fence, there was a violation of section 56.12067 (Tr. 60).

Mr. Scott stated that he issued the citation because the transformer casing was less than three feet from the fence that was installed on the skid around the substation (Tr. 62). He believed that the intent of the three-foot clearance requirement in section 56.12067, between the fence and the transformer "is for working inside the area," and "to keep anyone from poking or sticking any kind of objects in toward the transformer or into the energized parts" (Tr. 62).

Mr. Scott stated he abated the citation after the respondent installed a portable outside fence that eliminated the hazard when the gate is locked, and that the purpose of the fence is to keep unauthorized personnel out of the substation, (Exhibits R-1 and R-2; Tr. 62). The outside portable fence prevents anyone from touching the transformer live parts because it is more than three feet away (Tr. 63).

Mr. Scott stated that he was aware of a ground fault that occurred on a transformer. He explained that a ground fault occurs when a live wire touches a part of the grounded frame (Tr. 63).

Mr. Scott stated that during his inspection he spoke with Karl Simons, respondent's electrical engineer, and safety superintendent Howell Miller, and Mr. Simons contended that the cited transformer was totally enclosed because it had a fence around it. However, Mr. Scott believed that a "totally enclosed" transformer was one with no terminals on the exterior (Tr. 66).

In response to further questions, Mr. Scott stated that the abatement shown in Exhibits R-1 and R-2, which still includes the skid mounted fence less than three inches from the transformer casing, is still in compliance even though no one is able to work on the transformer because of the lack of clearance, because he was informed that no one goes inside the fence to work (Tr. 68). He confirmed that if the skid mounted fence were taken down, and the exterior portable fence with a locked gate were kept in place, it would comply with section 56.12067 (Tr. 68).

Mr. Scott confirmed that he cited only the transformer casing for being less than three feet from the skid mounted fence, and that he did not contend that any transformer energized parts or wiring were within three feet of the fence (Tr. 69). The respondent's counsel took the position that the three items noted in the standard must be considered together, and that the casing, as well as the energized parts or wiring, must all be in fact energized in order for the standard to apply (Tr. 69-70).

On cross-examination Mr. Scott confirmed that he issued the citation because the transformer casing was within three feet of the skid mounted fence (Tr. 71). He was of the opinion that the standard applies to unenergized casings, and stated that "anybody that knows anything about electricity knows that transformer casings are not energized" (Tr. 72). He explained that an ungrounded or improperly grounded casing is not energized unless a ground fault occurred (Tr. 73).

Mr. Scott explained his understanding of the meaning and intent of the words used in the cited standard, and he indicated that the word "casing" is independent of the words "energized parts" and "wiring" (Tr. 73). He also indicated that his supervisor concurred in his interpretation (Tr. 76). He confirmed that if the fence were less than three feet from any wiring, energized or not, it would be a violation (Tr. 76).

Mr. Scott confirmed that he measured the distance from the fence to the transformer casing with a wooden ruler from outside the fence, and he doubted that he could get his hand through the fence and confirmed that the only way to access the fence would be with a key to the lock (Tr. 80).

Mr. Scott believed that the intent of the standard was to protect people working in the particular area and to prevent people from poking anything into energized parts. He indicated

that his primary concern is to prevent the casing or energized parts from being close to the fence where someone was able to touch it with some foreign object (Tr. 82).

Mr. Scott confirmed that he has discussed the moving of the substations with company officials and agreed that mounting the fence on the skid is solving some problems. However, he believed that the skids need to be extended to move the fence three feet from the transformer casing, and he did not believe that this would be a problem and that the skids could be fabricated in the mine shop (Tr. 85-86).

Mr. Scott further stated that section 56.12067, pertains to transformers, the transformer casing, and wiring, regardless of whether it is energized or deenergized wire (Tr. 87). He confirmed that he later learned from the National Electrical Code about the three-foot work area clearance requirement between a transformer casing and the fence (Tr. 88). When asked to reconcile the fact that the skid-mounted fence with less than three-foot clearance between the fence and transformer casing is still in place after abatement, Mr. Scott responded "I made a mistake. I should have had this fence removed. That's about all I can say about that" (Tr. 89). He believed that the abated conditions as depicted in photographic Exhibits R-3, R-4 and R-5, are not in compliance with the standard (Tr. 89).

Terrance D. Dinkel, electrical engineer and technical adviser, MSHA Safety and Health Technology Center, Denver, Colorado, holds a Bachelor's Degree in electrical engineering from the university of Colorado and a Master's Degree in Management from the American Technology University. He confirmed that he did not view the cited transformer substation "I", but did view the others that were photographed, including substation "J". He identified a copy of an MSHA letter of interpretation relating to mandatory safety standard 30 C.F.R. § 77.509, applicable to surface coal mines, and which contains language substantially identical to that found in the cited standard section 56.12067 (Exhibit P-16; Tr. 101-106).

Mr. Dinkel identified a copy of a U.S. Bureau of Mines Information Circular regarding fences or barriers for outdoor transformer stations (Exhibit P-17). He stated that he has never known of an "energized casing", but that it can theoretically exist. If a transformer casing elevated on a pole becomes energized there is no hazard if no one can reach it. In his opinion, the intent of the eight foot fence elevation found in section 56.12067, is to keep unauthorized personnel and bystanders away from the transformer installation, and the three-foot clearance requirement is to assure sufficient clearance for qualified people when they go in and do their work (Tr. 113-114). He stated that photographic Exhibits R-1 and R-2, which show the skid-mounted fence and the second outer fence, do

not reflect total abatement of the cited condition because of the still existing restricted clearance for people who have to work around the transformer (Tr. 115).

On cross-examination, Mr. Dinkel stated that the Bureau of Mines circular information is no longer in effect (Tr. 116). He confirmed that the respondent's transformer stations are secured with locked fences and fence doors (Tr. 116-117).

Respondent's Testimony and Evidence

Dennis H. Miller testified that he discussed the citation with Inspector Scott when he issued it and there was a disagreement as to whether the transformer casing was an energized piece of equipment. Mr. Miller stated that the discussion took place in his office and that electrical superintendent Karl Simons was present (Tr. 125). Mr. Miller confirmed that the transformers need to be on skids because they are moved often as mining advances. There are about 30 skid-mounted transformers at the site and they are moved at least twice a year (Tr. 126).

Mr. Miller explained that at one time the skid had no fence around it, but that in 1988 or 1989, he had a discussion with MSHA inspector Thel Hill, and as a result of this the fencing was installed on the skids (Tr. 128-129). He stated that the height of the fence from the ground to the top is six feet, and with the added barbed wire, it is higher. According to the measurements taken, the distance from the energized transformer parts to the closest part of the fence is 3.3 feet. He believes that the cited substation is in compliance with the standard in question (Tr. 130).

On cross-examination, Mr. Miller stated that at the time of his conversation with Mr. Hill, Mr. Hill was shown a substation and was informed about what the company intended to do "and that proposal was agreed with" (Tr. 132). Mr. Miller further explained that the company proposal was made orally to Mr. Hill (Tr. 133).

Billy Foster was recalled by the respondent, and he confirmed that he accompanied Mr. Hill and Company safety specialist Billy Salter to look at a fenced substation as part of the respondent's proposal to install fences around the skid-mounted transformers. Mr. Foster stated that additional MSHA inspectors viewed the skids on different occasions, and he identified them as Ed Jusso and Ron Lilley (Tr. 135). He confirmed that the work was done with some outside help from a fencing and welding contractor, at an estimated total cost of \$90,000 to \$120,000 (Tr. 137).

On cross-examination, Mr. Foster could not recall the particular substation that was shown to the inspectors "because they were coming in at different times, and we had different units out of service each time" (Tr. 137). He stated that no reference was made to section 56.12067 when the inspectors viewed the substation, and he could not state whether the cited substation "I" was ever viewed (Tr. 139). Mr. Foster confirmed that after the inspectors stated "that looks okay to me," he believed it was sufficient for compliance (Tr. 139). He confirmed that nothing was reduced to writing, that the discussions with the inspectors were informal, and the skid mounted fenced configuration was not questioned further until the contested citation in this case was issued (Tr. 141).

Johnny B. Dagenhart, electrical engineer, Clapp Research Associates, Raleigh, North Carolina, was accepted as an expert witness in electricity and electrical engineering (Tr. 143). He stated that he was "somewhat familiar" with the respondent's operations and visited the mine site on one occasion the week prior to the hearing. He confirmed that he was familiar with the transformer fencing and the MSHA regulation in question, and he is of the opinion that the respondent is in compliance with that regulation (Tr. 143-144).

Mr. Dagenhart was of the further opinion that only energized transformer casings and wirings and energized parts should be covered by the regulation. He believed that the skid-mounted transformer installation as installed by the respondent supplies equivalent protection. He stated that the overriding concern in installing fences around transformers and substations is "to protect from inadvertent contact of persons with exposed energized parts" (Tr. 145).

Upon review of the MSHA letter of April 4, 1985 (Exhibit P-16), which mentions the application of section 110-34(e) of the National Electric Code, Mr. Dagenhart stated that this section does not apply to transformer substations because it refers to working spaces in front of switches, cabinets, and other such devices. He further stated that "utility-like functions" are covered by the National Electrical Safety Code (Tr. 147).

On cross-examination, Mr. Dagenhart stated that there are exposed energized bushings on the top of the transformer, but that the casing is not energized. In the event of a ground fault, if the casing is not grounded, it may become energized (Tr. 149). He further explained as follows at (Tr. 153):

- A. Well there -- If you're in physical contact with a transformer that is properly grounded, there's not gonna be a problem under normal circumstances. If a ground fault occurs,

naturally that equipment casing becomes energized for a brief period of time, the time it takes for a fuse or a breaker to deenergize that transformer, for that period of time.

However, with the grounding of a transformer and the grounding of a fence, the two are simultaneously grounded to the same point. And electrically, there's no difference between the casing of that transformer and the fence around it.

So the argument about touching a transformer during a ground fault, the same thing can happen if you're leaning up against the fence when a ground fault occurs. So it's really a difficult situation to say that -- It's impossible to say that the transformer is more hazardous than the fence in this case. And under normal circumstances they're both fine.

Mr. Dagenhart stated that other than location, the outer fence installed on the ground is no different than the skid-mounted fence and it has to be grounded back to the transformer and the transformer casing (Tr. 156).

Thel Hill, retired MSHA inspector, was called in rebuttal by the petitioner. He confirmed that he inspected the respondent's operations from 1978 through 1989, but that he did not recall any conversations concerning the skid mounted transformers. He confirmed that Mr. Salter always accompanied him during his inspections, and he could not recall seeing any transformer protection plans or designs (Tr. 158-159).

Background

The respondent operates an open pit phosphate mine, and its electrically operated equipment is frequently moved to different mining areas at the site as they are being developed. Electrical service is provided by transformers mounted on "sleds" so that they can readily be moved to the new mining locations. The respondent originally relocated its transformers by preparing a new site, moving the skid mounted transformers to the new site, and building a separate fence around the relocated transformers. In order to move the facility again, a crane was used to lift the fence so that the skid-mounted transformer could be moved to the next location. However, out of concern for overhead power lines, the respondent concluded that it would be more prudent and safe to erect a fence around the skid on which the transformer is located, thus avoiding the possibility of the crane contacting

the overhead power lines. The skid-mounted transformer, with the attached fence around it, would then be moved to the new location. The respondent maintains that this procedure and transformer configuration had the approval of an MSHA inspector who has since retired.

The cited alleged violative condition in this case was abated by leaving the skid-mounted fence in place and simply installing a second portable fence with a locked gate around the skid-mounted fence enclosing the transformer substation. The substation is now surrounded by two fences; an "inner" fence mounted on the transformer substation skid that still does not provide a three-foot access clearance to the transformer, and a second "outer" portable fence that has a locked gate preventing access to the skid altogether.

Petitioner's Arguments

The petitioner asserts that since the cited skid-mounted transformer casing was less than three feet from the fence, a violation of section 56.12067, has been established. The petitioner takes the position that the regulatory language "energized parts, casings, or wiring" should be interpreted and applied alternatively or separately, and that the cited transformer casing in question was properly cited, regardless of whether it was energized or not. Assuming that I find that the standard does not apply to the transformer, petitioner's counsel asserted that it can be established that "energized parts and wiring" were within three feet of the fence, and that this establishes a violation (Tr. 8-9; 151-152).

Respondent's Arguments

The respondent takes the position that the present skid-mounted transformer configuration, with the protective fence around the perimeter of the skid, complies with the requirements of section 56.12067, and provides an equivalent and practical safe method for relocating the frequently moved transformer and keeping unauthorized personnel out.

The respondent further argues that section 56.12067, should be construed to apply to energized parts, energized casings, and energized wires. Since the cited transformer casing is not, and was not energized, the respondent concludes that a violation has not been established (Tr. 9-10; 77).

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of 30 C.F.R. § 56.12067, which provides as follows:

Installation of transformers.

Transformers shall be totally enclosed, or shall be placed at least 8 feet above the ground, or installed in a transformer house, or surrounded by a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wiring (Emphasis Added).

Contrary to the petitioner's suggestion that energized parts and wiring were also within three feet of the fence, the inspector confirmed that he only cited the transformer casing and that he was not contending that any energized parts or wiring were within three feet of the fence (Tr. 69). Under the circumstances, and in the absence of any amended citation, the petitioner is bound by the citation as issued, and it has the burden of proving that the transformer casing, which I find was less than three feet from the fence, was in violation of section 56.12067.

The respondent's suggestion that the petitioner is estopped from citing it with a violation because a former inspector approved the transformer configuration in question IS REJECTED. The inspector in question could not recall any discussions with the respondent concerning the transformers. Even if he had approved the installation of the skid-mounted fence in question, MSHA would not be bound by this and at most, it would only serve to mitigate any penalty assessment if a violation were found.

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1980), the Commission rejected the doctrine of equitable estoppel with respect to a mine operator's liability for a violation. However, the Commission viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which may be considered in mitigation of the civil penalty. Further, Commission Judges have consistently rejected an operator's reliance on prior inspections and the lack of citations, and have held that the lack of prior inspections and the lack of prior citations does not estop an inspector from issuing citations during subsequent inspections. See: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Sertex Materials Company, 5 FMSHRC 1359 (July 1983); Emery Mining Corporation v. Secretary of Labor, 5 FMSHRC 1400 (August 1983), aff'd, 10th Cir. U.S. Court of Appeals, 3 MSHC 1585.

The inspector believed that the intent of section 56.12067, is (1) to provide and maintain at least a three-foot clearance between the transformer and related equipment and the fence so as to provide ready access to the equipment for anyone working on it, and (2) to prevent anyone from poking or sticking objects through the fence into the transformer or energized parts (Tr. 62). The inspector further believed that the installation of an additional outside portable fence with a locked gate around the skid mounted fence that enclosed the substation to abate the violation eliminated the hazard, and as long as the outer fence gate is locked, he concluded there would be no violation because "the purpose of the fence now is to keep unauthorized personnel out of the substation", and "no one can touch the live parts. No one can touch the transformer casings" (Tr. 62-63).

The inspector confirmed that the installation of the second portable fence would effectively prevent anyone from entering the transformer substation. However, notwithstanding this abatement action, he further confirmed that the skid-mounted fence is still in place and is still less than three feet from the transformer casing, and is not in compliance with section 56.12067. He earlier testified that the fence was in compliance, even though there was a lack of clearance because he was told that no one works inside the fenced area (Tr. 68). When asked to reconcile these rather contradictory enforcement and abatement actions, the inspector stated that he had made a mistake and should have had the skid-mounted fence removed (Tr. 89).

MSHA's technical adviser Dinkel was of the opinion that the fence height requirement stated in section 56.12067, is intended to keep unauthorized personnel and others away from the transformer installation, and that the three-foot clearance requirement is intended to assure sufficient clearance for qualified personnel while working on the equipment.

MSHA's policy manual guidelines do not address section 56.12067, or section 77.509(a), a standard that applies to transformer installations at a surface coal mine with language substantially identical to that found in section 56.12067. However, the petitioner introduced a copy of an April 14, 1985, letter by MSHA's Coal Mine Safety and Health Administrator in response to an inquiry from a manufacturer of skid-mounted substations (Exhibits P-16). The inquiry by the manufacturer states as follows:

Most substations have a high voltage house and a low voltage house throat connected to a transformer or a high voltage structure connected to cover-mounted bushings then throat connected to the low voltage

house. In the first case, there are no exposed live parts on the transformer- they are throat enclosed. In the second case, exposed live parts are above NEC requirements or throat enclosed.

For these two instances and in trying to comply with Section 77.509, part(a) of the code, is a fence necessary? If so, is it necessary to maintain three feet clearance around the cooling radiators when they are in a different segment than the bushings?

MSHA's response to the inquiry states in relevant part as follows:

. . . . In the first case, a substation fence is not required by 30 C.F.R. § 77.509, provided there are no exposed live parts on the high-voltage house, low-voltage house, or power transformer. However, if any of these components of the substation contain exposed live parts, then the entire substation is required by 30 C.F.R. § 77.509 to be enclosed by a fence. (Emphasis added).

In the second case, a substation fence is required by 30 C.F.R. § 77.509 because the power transformer contains exposed live parts. (Emphasis Added).

Finally, the intent of the clearance requirements specified in 30 C.F.R. § 77.509(a) is to provide adequate work space around all equipment in a substation. Consequently, the three-foot clearance requirement in 30 C.F.R. § 77.509(a) applies to cooling radiators on power transformers even when they are in a different segment than the bushings.

Petitioner's counsel conceded that the aforesaid letter is an "opinion letter" and not an MSHA policy statement (Tr. 104). He further asserted that it was introduced in support of his position that the intent of the standard is also to provide a three-foot clearance for any work performed on the transformer (Tr. 105).

The citation issued by the inspector in this case simply states that the transformer casing was within three feet of the fence. It seems to me that if the inspector intended to cite the respondent with a failure to maintain a three-foot "walkway" clearance around the transformer substation, he should have said so in his citation and supported it with some credible evidence that work is in fact performed on the transformer inside the fenced area. He did neither.

I take note of the possible application of more appropriate standards that may apply to inadequate work clearances. For example, section 56.11001, found in Subpart J, dealing with travelways, requires a safe means of access to all working places. Section 56.11008, requires the conspicuous marking of restricted clearances that create hazards to persons. Section 56.12019, requires suitable clearance where access is necessary at stationary electrical equipment or switch gear.

Although the respondent's counsel suggested that any transformer repair work is not done on location, that the fence is taken down and the transformer is moved elsewhere for this work, that the transformer configuration does not allow for anyone to do work inside the skid-mounted fence area, and that a switch is simply thrown (Tr. 50, 120), he elicited no testimony or evidence to support these proffers.

The burden of proof in this case lies with the petitioner, and it was incumbent on the petitioner to prove its case. The petitioner presented no evidence to establish that work was in fact performed inside the skid-mounted transformer fenced area, or that mine personnel do in fact venture inside that area to perform work. The only sworn testimony on this issue is the inspector's admission that "they told me they don't go in there to work" (Tr. 67), and this is supportive of the respondent's position.

I conclude and find that a piece of electrical equipment, such as a transformer, would be considered "energized" when the electricity supplying it with electric power is turned on. Insofar as the transformer casing is concerned, the evidence reflects that under normal operating conditions the transformer casing itself is not considered to be energized, notwithstanding the fact that the transformer is supplied with electricity and is energized.

Respondent's electrical expert Dagenhart believed that the installation of a fence around the transformer substation was intended to prevent persons from inadvertently contacting exposed energized transformer parts (Tr. 145). Mr. Dagenhart does not consider a transformer casing to be an energized part unless it is ungrounded, in which case he would consider the casing to be "energized under any circumstances" (Tr. 149). He also agreed that in the event of a ground fault, the casing would become energized during the time it would take a fuse or circuit breaker to deenergize the transformer, and that in the event of any grounding or fuse breaker failure the casing could remain energized indefinitely (Tr. 153, 155).

The inspector believed that the three-foot clearance requirement found in section 56.12067, is intended to provide working space between the fence and the transformer and to keep

anyone from poking or sticking objects into the transformer or energized parts (Tr. 62). He confirmed that his belief in this regard was based on his understanding of the National Electrical Code (Tr. 88). Petitioner's counsel conceded that the code is not incorporated by reference as part of section 56.12067, (Tr. 98-90; 110).

The inspector believed that a transformer casing would only be energized if there were a ground fault, and that this would constitute a hazard (Tr. 61, 72-74). He confirmed that the casing is considered a part of the transformer and that there is wiring inside the casing (Tr. 74). The inspector agreed that he could not place his hand through the fence, and he confirmed that his primary concern was that in the event of a ground fault, and with the casing close to the fence, someone would be able to touch the casing with a foreign object (Tr. 80, 82, 88-89).

MSHA technical Advisor Dinkel, an electrical engineer, believed that an energized casing within reach of someone would be a hazard. He further believed that the 8-foot fence requirement found in section 56.12067, is intended to keep unauthorized persons away from the transformer substation, and that the 3-foot clearance requirement is to provide adequate work space when work is performed inside the fenced substation.

Although I have some doubt that the clear intent of the three-foot clearance requirement found in section 56.12067, is to provide a walkway or ready access to the equipment, I cannot conclude that the inspector's belief in this regard was an unreasonable interpretation and application. However, in the absence of any evidence that the respondent ever performed any work on the transformer inside the skid-mounted fenced substation area, or that such work would be performed at that location in the normal course of mining operations, I cannot conclude that the petitioner has proved that the failure to provide such an access area inside the skid-mounted fence around the transformer constituted a violation of section 56.12067.

I conclude and find that the primary intent of section 56.12067, in requiring a substantial fence around the transformer station is to prevent unauthorized persons from venturing inside the fenced area and inadvertently contacting exposed energized parts. The respondent's suggestion that the words "energized parts, casings, or wiring" must be read together, and that in order to establish a violation in this case it must first be established that the cited transformer casing was energized before a fence may be required IS REJECTED. The petitioner's credible and un rebutted evidence establishes that ground faults that may energize a transformer casing do occur, and that when they do, they present a potential hazard of shock or electrocution. Under the circumstances, I believe that interpreting and applying the standard to require a fence only

after a casing becomes energized would be less than prudent and unreasonable. However, on the facts of this case, and even though the cited casing was within three feet of the fence, I cannot conclude that it was unprotected and presented a hazard. As noted earlier, there is no evidence that anyone worked in and around the skid-mounted transformer substation, and the inspector conceded that he could not place his hand through the fence to reach the transformer casing. Under all of that circumstances, I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) non-"S&S" Citation No. 4094761, February 2, 1993, citing an alleged violation of 30 C.F.R. § 56.12067, IS VACATED, and the petitioner's civil penalty proposal IS DENIED AND DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 7 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-239
Petitioner : A.C. No. 48-01052-03515
 :
v. : FMC - Skull Point Mine
 :
FMC WYOMING CORPORATION, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

Matthew F. McNulty III, Esq., VAN COTT, BAGLEY,
CORNWALL & MCCARTHY, Salt Lake City, Utah,
for Respondent.

BEFORE: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent FMC Wyoming Corporation ("FMC") with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

A hearing on the merits was held in Salt Lake City, Utah on September 1, 1993.

The parties filed post-trial briefs.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

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

B. FMC is the owner and operator of Skull Point Mine, MSHA I.D. No. 48-01052.

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

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

E. The subject citations were properly served by a duly authorized representative of the Secretary 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.

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

G. The proposed penalties will not affect Respondent's ability to continue in business.

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

I. FMC is a medium size mine operator with 839,453 tons of production in 1991.

J. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 3243012

This citation, issued under section 104(a) of the Act, alleges FMC violated 30 C.F.R. § 77.501.¹

¹ The cited regulation provides:

77.501 Electric distribution circuits and equipment; repair.

No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except

The citation reads:

Electrical repairs were being performed on a 70 amp 3 phase 480 VAC lighting distribution circuit breaker located in the tiple motor control center panel, Mec 2 (equipment #508). Disconnect devices for the circuit were not locked out and suitably tagged by the person performing such work.

Citation No. 3243013

This citation, issued under section 104(a) of the Act, alleges FMC violated 30 C.F.R. § 77.1710(c).²

The citation reads:

Protective gloves were not being worn by an electrician while trouble-shooting and/or making repairs on a 70 amp 3 phase 480 VAC lighting distribution circuit breaker.

Based on the credible evidence I enter the following:

FINDINGS OF FACT

1. MICHAEL MOE, an hourly employee, was employed by FMC for seven years as a master electrician. (Tr. 11, 80).
2. On March 10, 1992, Moe grounded a screw driver in the circuit breaker; this caused a panel flash. (Tr. 12).

that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

² 77.1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below.

(c) Protective gloves when handling materials or performing work which might cause injury to the hands, however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

3. As a result of the grounding Moe was not shocked but he sustained burns to his hands, face and neck; he was unable to work for two months and was hospitalized for 8 or 10 days. (Tr. 12, 13, 17).

4. Moe began his work by shutting off a 480 volt circuit breaker in order to tighten some loose connections on the bottom side of the breaker. Turning the breaker to "off" de-energizes the lower half but not the upper side of the breaker. (Tr. 16; Exhibit R-4 shows the breaker box; the burned area is shown at the left edge of the left breaker slightly to the left of the left screw shown in the center of R-4).

5. In his trouble-shooting Moe determined one of the leads in the circuit breaker was loose. (Tr. 14).

6. The motor controlled by the electricity was not running; the breaker had functioned properly because it had tripped. (Tr. 14).

7. When Moe was using the amp meter to check the equipment he was not wearing gloves. (Tr. 15).

8. The equipment Moe was working on was a motor control panel containing a motor starter, a circuit breaker and thermal overloads. Its function was to reduce voltage to start 480 volt motors. (Tr. 16).

9. The screw driver was ten inches long. As Moe was tightening the loose wire he leaned the screw driver against the metal frame of the motor control center. (Tr. 16).

10. There was a disconnect device on the motor control panel. (Tr. 18). To de-energize the top portion of the panel you could go to a different building and de-energize a large breaker that shuts down the entire system. As an alternative each individual unit can be de-energized by pulling out one or all of the 12 individual units. (Tr. 19, 25).

11. Moe did not lock or tag out the equipment when working on the top part of the motor control center. (Tr. 19).

12. Moe remembered receiving an FMC policy manual (Ex. R-2) that talks about lock-out and de-energization policies. (Tr. 22).

13. As a result of this accident Moe was disciplined by FMC. (Tr. 23).

14. Troubleshooting is finding any problem and fixing it. The fixing of any problem would constitute a repair. (Tr. 23,

24). Moe thought he was repairing the equipment when he was injured. (Tr. 25).

15. RONALD J. RUDY accompanied Moe on the date of the accident. (Tr. 29, 30).

16. Moe was not wearing gloves on March 10th. (Tr. 32).

17. PAUL PRICE has been an MSHA electrical engineer for over 13 years. His duties include the investigation of electrically oriented accidents. (Tr. 34, 35).

18. The motor control panel is an electrical distribution circuit. Basically it takes a larger amount of electricity and distributes it as reduced loads. (Tr. 36).

19. When an electrician is working on a distribution circuit MSHA requires that the circuits be locked out and tagged; further, when troubleshooting a worker must wear gloves. (Tr. 36).

20. When he was using the meter and examining the system Moe was troubleshooting. For such work gloves are required. (Tr. 37).

21. Gloves would protect someone from being electrocuted while troubleshooting. MSHA's records indicate workers have been hurt while troubleshooting without using gloves. (Tr. 38).

22. It is illegal to troubleshoot while the circuits are energized. (Tr. 39).

23. As a result of not de-energizing the equipment there are three hazards: burns, electrocutions, and blasts. (Tr. 42).

24. In this case a loose connection caused a wire to be warm to the touch. (Tr. 43).

25. MSHA's program policy manual does not require gloves while an electrician is working. (Tr. 44).

26. The use of gloves would not have prevented Moe's accident. (Tr. 45).

27. Moe did not lock out or tag out before working on the energized portion. (Tr. 48).

28. RON HALE testified for FMC. He is in charge of all maintenance at the mine. In addition, he is a master electrician. (Tr. 55-56).

29. In his investigation Hale found leather gloves three and one half feet from the electrical panel. The gloves were next to Moe's volt meter and hard hat. (Tr. 75).

30. FMC's lockout procedure is contained in Exhibit R-2. Moe was familiar with the procedure. (Tr. 61).

31. During the annual refresher training, lockout procedures and de-energization were discussed. (Tr. 65).

DISCUSSION AND FURTHER FINDINGS
AS TO CITATION NO. 3243012

Moe grounded his screwdriver when he tightened the loose screw shown in the recessed portion of the upper part of the circuit breaker in Exhibit R-4. At the time he was performing electrical work on the distribution circuits. The evidence further shows that while performing this work the disconnecting devices were not locked out. Moe indicated the disconnecting device is located in a different building. An alternative disconnect could have been accomplished by removing the breaker can, but neither was done.

It is true that the breaker switch was in the "off" position (see Ex. R-4). However, even with the breaker lever on the "off" position the upper portion of the breaker remained energized. The loose screw being tightened by Moe and the blast scar were in the upper portion of the can.

The Judge is aware of the testimony of Ron Hale. From his investigation Hale concluded Moe was working on the "T leads" which were de-energized. (Tr. 59, 69).

At some point, as Hale contends, Moe was also most likely working on the de-energized "T-leads" located in the bottom half of the breaker can. However, when Moe caused the panel flash, he could only have been working on the top energized portion of the circuit breaker. (See Fact, par. 4). Hale confirms this scenario, since he did not dispute the fact that the top half was energized. He further identified the burn mark shown on Exhibit R-4. (Tr. 76-78).

In its oral argument FMC has confused the upper and lower portion of the breaker can. I find that electrical work was being performed on the energized upper portion when Moe tightened the loose screw. Moe admits he did not lock out or tag the equipment when he was performing such work. (Tr. 19).

The facts establish that a violation of 30 C.F.R. § 77.501 and Citation No. 3243012 should be affirmed.

DISCUSSION AND FURTHER FINDINGS
AS TO CITATION NO. 3243013

The uncontroverted evidence shows Moe was not wearing protective gloves while troubleshooting. Moe was troubleshooting when he was using the amp meter to check the equipment.

On the uncontroverted evidence, Citation No. 3243013 should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The citations herein where denominated by the Secretary as "Significant and Substantial."

An "S&S" violation is described in section 104(d)(1) of the Mine 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." A violation is properly designated significant and substantial "if, 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 reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "Significant and Substantial" 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.

In United States Steel Mining Company, Inc. 7 FMSHRC 1125, 1129, 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); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In considering the Mathies formula, I find there were underlying violations of two mandatory safety regulations, namely § 77.501 and § 77.1710. Further, a measure of danger was contributed to by the violations. The third facet, a reasonable likelihood that the hazard contributed to will result in an injury is established as to Citation No. 3243012 by the injury and hospitalization of electrician Moe.

The reasonable likelihood that the injury in question will be reasonably serious is established by the hospitalization of electrician Moe.

FMC contends the S&S allegations cannot be sustained. However, the facts and Commission precedent establish a contrary conclusion as to the failure to de-energize (§ 77.501). The S&S allegations as to Citation No. 3243012 should be affirmed.

The failure to wear gloves is a separate violation from the failure to de-energize. It is true that MSHA requires workers to wear gloves only when troubleshooting the equipment. (Tr. 36, 37). I further agree he was repairing but not troubleshooting when the panel flash occurred. However, part and parcel of Moe's activities at the time of this accident included troubleshooting without gloves and, since workers have been hurt, even electrocuted in such circumstances, an S&S violation is established as to Citation No. 3243013.

OK and VW Coal Company, 13 FMSHRC 1063, 1067 (July 1991), relied on by FMC is not inopposite the views expressed here.

CIVIL PENALTIES

The statutory criteria for assessing civil penalties are contained in section 110(i) of the Act, 30 U.S.C. § 820(i).

FMC's favorable history indicates it was assessed 11 violations for the two years ending March 11, 1992. (Ex. M-1).

The proposed penalties will not affect FMC's ability to continue in business. (Stipulation).

The S&S allegations as to Citation No. 3243013 should be vacated.

FMC was not indifferent to de-energizing electrical equipment and it also furnished gloves to its electricians. In view of this evidence, I conclude the assertion of moderate negligence must be reduced for this non-supervisory employee.

As previously discussed, the gravity of the violations was high.

FMC demonstrated good faith in attempting to achieve prompt abatement.

On balance, I believe the penalties set forth in this order are appropriate.

For the foregoing reasons I enter the following:

ORDER

1. Citation No. 3243012 is affirmed and a penalty of \$2,000.00 is **ASSESSED**.

2. Citation No. 3243013 is affirmed and a penalty of \$1000 is **ASSESSED**.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 10 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 93-241
Petitioner : A.C. No. 12-02033-03593
v. :
: Buck Creek Mine
BUCK CREEK COAL COMPANY, INC., :
Respondent :

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S.
Department of Labor, Chicago, Illinois for
Petitioner;

Patrick A. Shoulders, Esq., Ziemer, Stayman,
Weitzel & Shoulders, Evansville, Indiana for
Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor against Buck Creek Coal Company, Inc. pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges a violation of Section 75.360(a), 30 C.F.R. § 75.360(a), of the Secretary's mandatory safety standards. For the reasons set forth below, I find that Buck Creek committed the violation alleged, that the violation was not of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, but that the violation was caused by Buck Creek's unwarrantable failure to comply with the mandatory safety standard.

The case was heard on October 26, 1993, in Sullivan, Indiana. Inspectors John D. Stritzel and Michael A. Bird testified on behalf of the Petitioner. Mr. H. Michael McDowell, Vice President of Human Resources, testified for the Respondent. The parties have also filed post hearing briefs which I have considered in my disposition of this case.

FINDINGS OF FACT

The essential facts are not contested. Mine Safety and Health Administration Inspectors Stritzel and Bird arrived at

Respondent's Buck Creek mine in Sullivan County, Indiana, at 6:45 A.M. on Monday, April 26, 1993, for the purpose of making a ventilation technical investigation. The mine had been idle since the completion of the day shift at 3:30 P.M. on Saturday, April 24, 1993.

On arriving at the mine office, the inspectors discovered that the next shift did not begin until 9:00 A.M. While waiting, they checked Buck Creek's preshift book and noted that the preshift examination for the next shift had not been recorded.

Further investigation indicated to the inspectors that there were miners in the mine other than the preshift examiners. The preshift examination of the north side of the mine had begun at 6:22 A.M., was completed at 7:22 A.M. and was called to the surface at 7:30 A.M. The examination of the south side began at 7:00 A.M., was completed at 7:30 A.M. and was called out at 7:35 A.M.

Inspector Stritzel spoke on the phone with Charles Austin, the mine manager and one of the preshift examiners, when Austin called out at 7:35 A.M., and asked him who was in the mine. When Austin acknowledged that there were miners in the mine in addition to the preshift examiners, Stritzel told him to come out of the mine and to "bring everyone in the mine with you out." The inspector also told Austin that he was "issuing a 104-D code order."

Inspector Stritzel interviewed everyone who had been in the mine: Austin and Charles Chin, who were performing preshift examinations of the north and south sides of the mine, and Carlos Maggard, Dave Sales and Terry O'Bannon, who were performing maintenance on a disabled mantrip at the foot of the slope of the mine. The maintenance crew had gone into the mine at 6:45 A.M.

Inspector Stritzel issued a withdrawal order under Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2),¹ alleging a

¹ Section 104(d)(2) provides in pertinent part:

If a withdrawal order with respect to any area in a coal . . . mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

violation of Section 75.360(a) of the Regulations in that "[t]hree miners entered the mine at 6:45 A.M. without a valid pre-shift examination of the mine being completed" (Joint Ex. 1, Tr. 31-34). The order was terminated at 9:00 A.M. when "all miners were instructed by Gary Timmins, Safety Dir. to not enter [the] mine until the pre-shift exam for the on coming shift is completed and the results called out and entered into book" (Joint Ex. 1, TR. 39).

Respondent argues in his Proposed Findings (RPF) and Memorandum in Support (Memo) that the maintenance crew was not part of the "coal mining" shift beginning at 9:00 A.M., entered the mine during "idle hours" and was working in an "idle" area of the mine so that no preshift examination was required (RPF 7-9, Memo 2). This argument, with its references to "every working section" and "active workings" of the mine, apparently relies on a former version of the Regulations. At any rate, the argument does not hold up under either the old or the new Regulation.

FURTHER FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Section 75.360(a) provides that:

Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.

Section 75.360 is similar, but not identical, to Section 303(d)(1) of the Act, 30 U.S.C. § 863(d)(1). It replaced Section 75.303(a), 30 C.F.R. § 75.303(a), in 1992, when subpart D was revised. Section 75.303(a) was identical with the Act.²

"Shift" is not defined in Part 75 or anywhere else in the Regulations or the Act. However, it seems apparent that just because the men were entering to perform maintenance rather than

² The main differences between the new regulation and the old regulation and the Act are that Section 75.360 is separated into various subsections while Section 75.303(a) and the Act consisted of one continuous paragraph, some of the language in the new Regulation has been updated and changed and the new regulation is more specific and requires more areas of the mine to be inspected.

to mine coal does not mean that they were not part of the shift.³ Nor does the fact that they began work before the official start of the shift mean that they were not part of the shift. They were undoubtedly part of the group of miners coming to work that morning and would be working during the shift (Tr. 214). In fact, the evidence indicates that the repair of the mantrip was necessary before the rest of the shift could go into the mine (Tr. 167). Moreover, any doubt whether the crew was part of the shift must be resolved in favor of inclusion since the purpose of the Act and the Regulation is to insure as nearly as possible that the mine is safe to enter. Secretary of Labor & UMWA v. Jones & Laughlin Steel Corp. & Vesta Mining, 7 FMSHRC 1058, 1062 (July 1986).

Respondent both at the hearing and in his Findings and Memo argues that the maintenance crew were not in the "active workings" of the mine, apparently in the belief that such areas were the only areas into which entry was prohibited prior to completion of the preshift examination. A superficial reading of Section 75.303(a) could lead to that conclusion, however, under Section 75.360(a) there is no question of distinguishing between "active workings" and "idle" areas of the mine. It prohibits entry into any underground area of the mine.

Furthermore, even under the old regulation, Respondent's argument fails because when Section 75.303(a) was in effect, Section 75.2(g)(4), 30 C.F.R. § 75.2(g)(4), defined "active workings" as "any place in a coal mine where miners normally work or travel" (emphasis added).⁴ It is undisputed that the three maintenance men were at the foot of the slope, a place where anyone entering or leaving the mine had to travel (Tr. 171-172, 207). Thus, they were in an area into which entry was prohibited prior to completion of the preshift examination even under the old rule.

³ Section 70.2(1), 30 C.F.R. § 70.2(1), defines "production shift" in terms of the work done on the shift and not the crew make-up of the shift. This would argue against Respondent's assertion that there is a distinction between coal producers and others as to whether they are part of a "shift," since it is undisputed that the oncoming shift in this case was going to be producing coal.

⁴ Section 75.2 was revised, effective August 16, 1992. "Active workings" is defined exactly the same in the revised section. See also Section 318(g)(4) of the Act, 30 U.S.C. § 878(g)(4), ("'active workings' means any place in a coal mine where miners are normally required to work or travel").

Having concluded that the maintenance crew was part of the oncoming shift, Respondent's argument that the crew entered the mine during "idle hours" and, therefore, that no preshift examination was required before entering need not be addressed. According to Respondent, this contention is based on Section 303(d)(2) of the Act, 30 U.S.C. § 863(d)(2), (RPF 9-11, Memo 2).⁵ However, it is noted in passing that it is undisputed that an examination satisfying the requirements of Section 303(d)(2) had not been made within eight hours of the crew's entry (Tr. 209). Consequently, this argument must rest on the inconsistent premise that an uncompleted preshift examination, which does not permit entry into the mine until it is completed, can satisfy the requirements of Section 303(d)(2) and permit entry into the mine before it is completed.

Fact of Occurrence

Section 75.360(a) provides that "before anyone on the oncoming shift, . . . , enters any underground area of the mine" (emphasis added) a preshift examination must be made. Section 75.360(g) further requires that:

A record of hazardous conditions and their locations found by the examiner during each examination and of the results and location of air and methane measurements shall be made in a book provided for that purpose on the surface before any persons other than certified persons conducting examinations required by this subpart enter any underground area of the mine. (Emphasis added).

Obviously then, a preshift examination has not been completed and miners cannot enter the mine until the results of the preshift examination have been entered in the preshift book on the surface. It is unchallenged that Maggard, Sales and O'Bannon entered the mine before the results of the preshift examination had been recorded. Therefore, I conclude that Respondent violated Section 75.360(a) as alleged. See Secretary of Labor v. Birchfield Mining Company, 11 FMSHRC 31, 35 (January 1989).

Significant and Substantial

The violation was cited as being "significant and substantial." 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

⁵ Section 303(d)(2) provides: "No person . . . shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this subsection has been made within eight hours immediately preceding his entrance into such area."

cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of 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.

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); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

In his Brief in Support of Proposed Findings (Sec. Brief), the Secretary takes the position that a violation of Section 75.360 is per se a "significant and substantial" violation because "[i]t stands to reason that until a preshift examination has been conducted to prove otherwise, the mine contains

conditions which could reasonably be expected to cause an injury of a reasonably serious nature to anyone who enters those areas unaware" of the conditions present (Sec. Brief 14). While this may be true as a general proposition, based on the facts of this case and existing case law, I cannot agree that the violation in this case was "significant and substantial."

Applying the Mathies formula, I have already found that there was (1) a violation of a mandatory safety standard. I also find that there was (2) a discrete safety hazard in that the mine had been idle since Saturday, April 24 and had a history of roof falls and high methane levels (Tr. 35, 118).

However, I do not find (3) a reasonable likelihood that the hazard contributed to would result in an injury because: (a) two of the three men on the maintenance crew were certified preshift examiners (Tr. 164-65) who, it can be inferred, would have been more acutely aware of potential hazards than the average miner; (b) they only entered the mine as far as the foot of the slope; and (c) the preshift examination of the north side of the mine began at 6:22 A.M. so that when the three men entered at about 6:45 A.M. the area into which they went had already been examined and no hazards were noted.⁶ Accordingly, I conclude that the violation was not "significant and substantial." Birchfield, supra, at 34-5.

Unwarrantable Failure

The violation was cited as having been caused by Buck Creek's unwarrantable failure to comply with the mandatory safety standard. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

In Emery Mining, supra at 2001, the Commission stated that:

"Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of 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,"

⁶ Mr. McDowell's testimony that the area at the foot of the slope had been examined at 6:10 A.M. (Tr. 177) is clearly erroneous. Despite that, I am satisfied that the area had been examined by the time the three maintenance men entered the area.

"thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness or inattention.

A preshift examination of a mine has been required at least since the 1952 Coal Act. 30 U.S.C. § 479(d)(7)&(8) (1964) (repealed 1969). Entry into the mine of persons, other than the preshift examiners, before the results of the examination are recorded in the preshift book at the surface has also been prohibited since the 1952 Coal Act. Id. In fact, the preshift examination is so fundamental to mine safety and such an established requirement that it would be astonishing to find any miner who was not aware of it. Certainly the miners at Buck Creek were aware of the requirement (Tr. 186-87, 210). Accordingly, I conclude that failure to follow the requirement in this case was the result of more than inadvertence or thoughtlessness and, thus, the result of an unwarrantable failure on Buck Creek's part.⁷ Cf. Birchfield, at 38 (finding a violation of 30 C.F.R. § 75.303(a) to have resulted from the operator's unwarrantable failure).

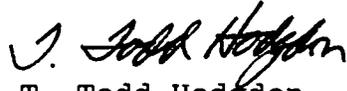
CIVIL PENALTY ASSESSMENT

The Secretary has proposed a penalty of \$5,500.00 in this case. In making my own assessment, I have considered the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). The pleadings indicate that as of July 12, 1993, the mine had an annual production of 1,126,362 tons which was the overall production of Respondent's mines. I conclude that Respondent is a large operator and that imposition of a civil penalty will not affect its ability to continue in business. In view of its size, I cannot conclude that Respondent's 317 violations in the past two years is excessive. Based on my finding that the violation was not "significant and substantial" I conclude that the gravity of the violation was not high, however, I do find that Respondent demonstrated a high degree of negligence in allowing the violation to occur. Finally, I find that the Respondent demonstrated good faith in abating the violation. Under these circumstances, I find that a civil penalty of \$3,000.00 for the violation is appropriate.

⁷ In reaching this conclusion, I do not decide what difference, if any, McDowell's self-serving, uncorroborated, hearsay testimony that the three men called into the mine before entering to determine if it was safe to go in (Tr. 180, 195) makes, since I do not credit that testimony.

ORDER

Buck Creek Coal Company is **ORDERED** to pay a civil penalty of \$3,000.00 for a violation of Section 75.360(a) of the mandatory safety standards within 30 days of the date of this decision. Upon receipt of payment, this proceeding is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge
(703) 756-4570

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 11 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-244
Petitioner : A.C. No. 15-08293-03556
v. :
: Docket No. KENT 93-608
R B COAL COMPANY, INC., : A.C. No. 15-08293-03563
Respondent :
: No. 4 Mine

DECISION

Appearances: Donna E. Sonner, Esquire, Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Richard D. Cohelia, Safety Director, R B Coal
Company, Pathfork, Kentucky, for the Respondent

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging R B Coal Company, Inc. (R B) with three violations of mandatory standards and seeking civil penalties of \$7,700 for those violations. The general issue is whether R B violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Docket No. KENT 93-608

At hearing the Secretary moved for approval of a settlement agreement for the one Section 104(d)(1) order at issue in this case, Order No. 3829445. The operator agreed to pay the proposed penalty of \$2,600 in full. I have considered the representations and documentation of record in support of the motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The order following this decision will incorporate that settlement.

Docket No. KENT 93-244

Citation No. 3832908, issued pursuant to Section 104(d)(1) of the Act,¹ alleges a "significant and substantial" violation of the mine operator's roof control plan under the standard at 30 C.F.R. § 75.220 and charges that "the approved roof control plan was not being complied with in No. 4 right brake [sic] where the depth of the cut was measured 26 feet deep." Order No. 3832910, also issued under Section 104(d)(1) of the Act, similarly alleges a violation of the roof control plan and charges that "the approved roof control plan was not being complied with in No. 3 entry of 001 section the depth of the cut was 24 feet deep from the last row of roof bolts." The violations were alleged to have occurred on August 29, 1992.

It is undisputed that the relevant roof control plan provides that "continuous miner runs shall not exceed 20 feet in depth" (Gov't Exhibit No. 4, p. 7). It is also undisputed that the admitted continuous miner runs of 26 feet and 24 feet were in violation of the roof control plan. R B maintains, however, that the violations were neither "significant and substantial" nor the result of its "unwarrantable failure."

¹ Section 104(d)(1) of the Act provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Roger Dingess, a roof control specialist for the Mine Safety and Health Administration (MSHA), has significant roof control experience and, in the mining industry, has been a roof bolter and supervisor. Pursuant to a code-a-phone complaint on August 28, 1992, the MSHA District office manager directed Dingess to conduct an investigation at the R B No. 4 Mine. The mine was not operating on August 28 so Dingess returned the following day and observed two miners working underground. Mine Superintendent Paul Goins accompanied Dingess as they proceeded to the No. 5 face. Dingess measured with a tape a place that had been cut on the left hand side and found it to be 26 feet deep. Thereafter proceeding to the No. 3 entry Dingess measured a cut on the left side at 24 feet. Noting that the roof control plan allows for a maximum 20 foot cut, Dingess proceeded to issue the citation and order at bar.

Dingess concluded that the violations were "significant and substantial." He noted that the mine roof in both areas consisted of thick "draw rock" and the roof was fractured. Dingess described "draw rock" as a massive rock layer between the mine roof and coal seam which tends to "let loose and fall out." Because of these conditions Dingess opined that it was highly likely for fatal injuries to occur to the roof bolter operator and to a miner operator operating from the deck. According to Dingess the roof bolter would be particularly vulnerable as he would be the next person to enter the excessively deep entries in the mining cycle.

Dingess testified the roof was so bad in some areas outby the deep cuts that some roof had fallen and had been rebolted. Even Superintendent Goins acknowledged that there had been cracks appearing between the roof bolts and they had "bad roof." Goins testified that "you never know when it's [the roof in this mine] is going to go bad."

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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 Co. v. Secretary, 862 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 1021 (1987) (approving Mathies criteria).

The third element of the Mathies formula requires that the Secretary establish a reasonable likelihood that the hazard contribute to will result in an event in which there is an injury. (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991)).

Within this framework of law and evidence it is clear that both violations herein were "significant and substantial" and quite serious. I reach this conclusion based on a combination of factors, including the excessively deep cuts, the undisputed fractures and "draw rock" in the mine roof and the previous recent history of problems with "draw rock" in this area of the mine. I have also considered the Mine Superintendent's acknowledgement of the existence of bad roof in this mine and the unpredictability of roof falls therein.

The Secretary also alleges that the violations were the result of the operator's "unwarrantable failure" to comply with the cited standard. Inspector Dingess concluded that both conditions should have been observed by the foreman during the course of his preshift examination. It is not disputed that, in fact, no preshift examination had been performed prior to the shift in which the violations were discovered by the inspector. It is further undisputed that the roof had been cut on the evening shift of August 28 and that a preshift examination, if required for the shift at issue (the 6:00 a.m. to 2:30 p.m. day shift) should have been performed between 3:00 and 6:00 a.m. on the morning of August 29.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (1997), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991). The Commission has also stated that use of a "knew or should have known test by itself would make unwarrantable failure indistinguishable from ordinary

negligence," and accordingly the Commission rejected such an interpretation. See Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103 (1993).

In support of his "unwarrantable" findings the Secretary first argues that the miners working on the shift during which the deep cuts were made were not task-trained on the specific continuous miner used to create those cuts. This argument is apparently advanced to rebut R B's contention that the continuous miner used to cut these deep cuts, a Simmons Rand 500 model, was about 18 inches higher and four feet longer than the miner the crew was familiar with and that its controls were two feet further away from the cutter head. According to R B the continuous miner operator was unaware of the two-foot difference in the machines and while using the remote control misjudged the depth of the cuts.

While I agree with the Secretary that the absence of appropriate task training may have been a factor in this misjudgment, it is unclear whether the position of the controls in relation to the cutter head of the machine would necessarily be covered in such training and, in any event, I do not find that such failure amounts to such an aggravated omission as to constitute "unwarrantable failure." While the Secretary also maintains that the deep cuts were readily visible to the continuous miner operator, the evidence is inconclusive in this regard. Moreover, the negligence of the miner operator alone could not under the circumstances be imputed to R B.

The Secretary also maintains that the failure of R B to have performed a preshift examination of the cited entries, amounted to such an aggravated omission as to constitute "unwarrantable failure." The Secretary maintained at hearing that under the standard at 30 C.F.R. § 75.303² the operator was required to inspect during the preshift examination, among other areas, the cited entries. The failure to perform such an examination of the cited entries was, according to the Secretary, therefore a particularly aggravated omission constituting "unwarrantable failure."

R B maintains, however, that only two miners were underground at the time and that those miners were working on brattice at the tailpiece outby the section. R B argues that since no one was scheduled to work that shift in the area of the cited faces, there was no need to perform a preshift examination of those face areas. R B's position is clearly correct. Nothing in 30 C.F.R. § 75.360 requires that the

² The preshift examination requirements under 30 C.F.R. § 75.303 were superseded effective July 1, 1992 by 30 C.F.R. § 75.360.

face areas at issue in this case be subject to a preshift examination when persons are neither working nor expected to work there during the shift. Accordingly, the failure to have conducted a preshift examination of the cited face areas may not be considered as a basis for "unwarrantable failure" or high negligence findings.

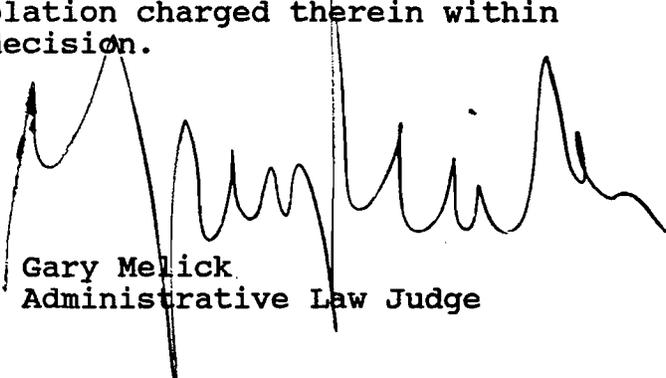
While the Secretary further argues that the cited conditions should also have been discovered by management during an on-shift examination, it is not disputed that, even if an on-shift examination was required in the cited areas, the time for conducting such an exam had not yet expired when the conditions were cited. Accordingly, the argument is vacuous.

In the absence of any other evidence of unwarrantability or high negligence, I conclude that the Secretary has failed to meet her burden of proof in this regard. Accordingly, the citation and order at bar must be modified to citations under section 104(a) of the Act.

Considering the criteria under Section 110(i) of the Act, the penalties noted in the following order are deemed appropriate.

ORDER

Citation No. 3832908 and Order No. 3832910 are hereby modified to citations under Section 104(a) of the Act. R B Coal Company, Inc. is hereby directed to pay civil penalties of \$500 each for the violations charged in these citations within 30 days of the date of this decision. In addition, Order No. 3829445 is affirmed and R B Coal Company, Inc. is directed to pay a civil penalty of \$2,600 for the violation charged therein within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 19 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-634-M
Petitioner : A.C. No. 26-00827-05519
: :
v. : Cortez Gold Mine
: :
CORTEZ GOLD MINES, :
Respondent :

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
Laura E. Beverage, Esq., JACKSON & KELLY, Denver,
Colorado,
for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in Elko, Nevada, on October 6, 1993. The parties filed post-trial briefs.

Citation No. 3928117

This citation issued under Section 104(a) of the Act alleges Respondent violated 30 C.F.R. § 56.14207.¹ It is further alleged the citation was significant and substantial.

The citation reads as follows:

The # M-6 pickup truck was observed parked on a grade while the wheels were not chocked or turned into the bank. This vehicle was left unattended. The vehicle transmission was placed in natural (sic) and the park brake released, at this time the vehicle started to roll down the grade.

STIPULATION

The parties stipulated as follows:

1. The mine site and history of violations is as contained in the proposed assessment. (Tr. 8).
2. Cortez showed good faith in abating the violation.
3. Payment of the proposed penalty will not adversely affect the operator's ability to continue in business. (Tr. 8).
4. Cortez is covered by the Act and subject to its regulations. (Tr. 56).

MSHA's EVIDENCE

JERRY MILLARD, an authorized representative of the Secretary of Labor, has conducted several hundred inspections over 13 years. (Tr. 9, 10).

On June 10, 1992, he inspected the Cortez site. (Tr. 10). In the inspection he observed a half-ton pickup truck (F-150)

¹ The cited regulation reads as follows:

§ 56.14207 Parking Procedures for unattended equipment.

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

located on an access road between the thickner tanks and the grinding plant. (Tr. 11, 15).

The truck was parked facing downhill on 5 to 6 degree grade. The inspector did not see any chocks and the vehicle's wheels appeared to be in a straight forward position.

The inspector asked company representative Pruitt to test the vehicle by putting it in neutral and then releasing the brake to see if it would roll. These functions verify whether there was a grade that would permit the truck to roll. (Tr. 11, 15).

The inspector was concerned because in the past six to eight months there had been three fatalities in MSHA's Western District. All three fatalities were related to small vehicles and service type vehicles.

In cross-examination Mr. Millard clarified that he could not say if the brakes on the vehicle failed, but he could only determine that the vehicle had rolled. (Tr. 19).

The inspector believes that if a truck is parked unattended on a grade the park brake should be set and the transmission put in the "park" position. In addition, the wheels should either be turned into a berm or chocked.

The vehicle here lacked chock blocks. There was a berm two feet away but the truck wheels were not turned into it. (Tr. 12).

When the described test was performed by Mr. Pruitt the vehicle started rolling forward and picking up speed. It rolled about 50 feet. (Tr. 13, 14).

After the described test they repositioned the vehicle; the front wheels were turned into the berm and parked within two feet of it. (Tr. 13, 28).

The inspector then issued a citation. (Tr. 14, Ex. P-1).

When the inspector parked his vehicle on the day of the inspection a similiar test indicated his vehicle would not roll. (Tr. 17).

The inspector admitted he couldn't say if the fatal accidents he referred to involved a vehicle with a park brake failure. However, the vehicles had rolled.

Mr. Millard's MSHA supervisor originally brought the matter of chocking to the inspector's attention. (Tr. 19).

The inspector's first citations for similiar violations were issued between 1988 and the early 1990's after the three fatalities had been reviewed. (Tr. 22).

Mr. Millard designated Citation No. 3928117 as an S&S violation. (Tr. 29). This evaluation was based on the gravity involved and an injury could reasonably be expected. (Tr. 29).

The standard is intended to protect against a vehicle rolling. (Tr. 30).

Prior to 1992, the inspector did not issue citations for this type of violation involving pickup trucks such as the Cortez Ford F-150. (Tr. 23, 24).

Mr. Millard was not aware of performance standards for parking brakes applicable to self-propelled mobile equipment. He always goes by the manufacturer's recommendations but he did know what they were on the F-150. (Tr. 27).

The issuance of a citation in this situation was a change in enforcement policy ordered by his supervisor, Paul Belanger. (Tr. 24).

Mr. Millard had not seen any written documentation advising operators of the change in enforcement policy. (Tr. 24). There was nothing in writing concerning the change in applying such a standard to require manual chocking to F-150 type vehicles. (Tr. 24-25).

When the inspector came on the stationary vehicle at the Cortez site it was in a parked position and the park brake was set. (Tr. 25, 26). He did not have any reason to suspect the parking brake was not adequate to hold the vehicle. (Tr. 26).

PAUL BELANGER, a supervisory special investigator, is employed at MSHA's office in Vacaville, California. (Tr. 33). He is required to carry out all of the mandates of the 1977 Mine Act.

He reviews citations issued by the inspectors as well as the characterizations of negligence, gravity and S&S. (Tr. 34).

Mr. Belanger assumed the vehicle in question was a half-ton pickup or three-quarter ton, standard sized pickup truck. He also studied the regulation. (Tr. 35, 36).

In Mr. Belanger's opinion a pickup truck in the half ton range is not excluded from the regulation. (Tr. 36).

After conferring with his District Manager, Vern Gomez, Mr. Belanger confirmed that the standard applied to the truck. (Tr.

36). The national MSHA office has expressed no concern as to this enforcement policy. (Tr. 37).

The standard was changed in 1988 from Section 9 to Section 14. It was also combined from two separate standards. It now consists of a single standard. Mr. Belanger did not consider there had been change in enforcement policy. (Tr. 38).

Two of the three fatalities in MSHA's Western District involved small vehicles of this type; another was a small utility type vehicle. (Tr. 39).

Concerning the three fatalities: all the vehicles rolled independently of a driver; they were parking on grades and all three resulted in a worker being crushed or run over by the equipment.

In connection with this citation Mr. Belanger was in agreement with the inspector's characterization of "moderate negligence" and reasonably likely "gravity." (Tr. 39, 40).

Mr. Belanger believed that if an accident occurred it would be permanently disabling. (Tr. 41). Accidents involving vehicles of this type usually resulted in a fatality.

The standard was changed in 1988 as indicated in the Federal Register. (Tr. 42, 53, Ex. P-2).

Other mine operators raised the question whether there had been a change in policy. (Tr. 52).

MSHA has no written policy relating to chocking a vehicle on grades. (Tr. 53).

CORTEZ'S EVIDENCE

TIM PRUITT, has been the Cortez safety training coordinator for three years. (Tr. 57).

He is familiar with the requirements of Part 56 and he accompanies MSHA inspectors on the job site. (Tr. 58).

He and mill foreman, Gary McGill, were traveling with Inspector Millard.

The Ford F-150 supervisor's truck was parked on a gravel access road. The hill where the truck was located was sloped between 4 and 6 percent. The truck was not pointing straight down slope but somewhat across the hill. (Tr. 59, 60). It was approximately 15 feet from the descaling pond and berm that goes around the pond. (Tr. 60-61).

Photographs were taken of a similiar vehicle. (Exs. R-1 through R-9).

The foremen use the road at least once a day. There have not been any changes in the gravel roadway or the berm around the pond. (Tr. 66-68).

The F-150 truck is appropriate for highway travel.

On the day of the inspection the truck was in second gear. Either first or second gear would be a standard park position for this type of transmission. In addition, the emergency brake was set. With a manual type transmission the witnesses' definition of a park position would be a gear low enough to prohibit the transmission and the engine from turning over. (Tr. 69, 70).

With the exception of a shovel there was nothing in the back of the truck. (Tr. 70).

In Mr. Pruitt's opinion the park position of the truck would hold the truck in place.

Mr. Pruitt had previously worked on and driven trucks of this type. (Tr. 70).

On this type of truck when the operator depresses the pedal, the cable pulls on a lever inside the brake drum. In turn the brake pads are pushed against the brake drum. This prevents the wheels from turning. (Tr. 71).

The setting of the park brake is similiar to an automobile when the operator depresses the pedal inside the cab.

On this roadway the maximum grade would be 10 percent. (Tr. 71). Five hundred pounds would be the maximum load for this type of truck. (Tr. 72).

Manual chocking is when you physically use some mechanical device to prevent the wheels from turning. This generally has the same effect of setting a park brake. (Tr. 72). The park brake is more effective because it locks both rear wheels. On the other hand you manually chock one wheel. (Tr. 73).

Mr. Pruitt was not aware of any history of accidents in a mine where a park brake failed. (Tr. 73).

When Mr. Pruitt released the parking brake the truck in five to six seconds at a walking speed of two to three miles per hour rolled 15 feet to the berm. (Tr. 74, 78).

Mr. Pruitt had never previously conducted a similiar test. (Tr. 75).

Manual chocking had never been previously required and he believed this was a change in MSHA policy. (Tr. 75).

Prior to 1992 it was not common practice in the industry to manually chock transportation-type vehicles such as the one in question.

Prior to June 10, 1992, Cortez had not been cited for such a violation. (Tr. 76). No MSHA representative said pickup trucks were excluded from the regulation. Not since the change of 1988 had he seen anything written indicating pickup trucks were excluded from the standard. (Tr. 77).

Mr. Pruitt has seen a parking-brake failure on five-ton trucks. He described such failure as the truck being unable to hold the load on the grade where it was parked. (Tr. 78).

As a mechanic he has seen parking-brake failures where brakes were worn out and had to be replaced. (Tr. 78).

Cortez has a preventative maintenance program. Most P.M. is at 3,000 miles. This includes a check of the brakes.

It is a common practice to leave a vehicle of this type unattended with the parking-brake set and in a park position. (Tr. 80).

Performance standards on self-propelled mobile equipment require that parking-brakes hold a vehicle from moving on the maximum incline or slope where it would be parked and also with a typical load. (Tr. 81). In Mr. Pruitt's opinion the parking-brake would meet the performance standard. Mr. Pruitt was also familiar with the standard that requires all brakes to be maintained in an operating condition.

Mr. Pruitt has seen chock failures occur but not on the type of vehicle involved here. (Tr. 81).

JOHN BUNCH has been the Director of Safety, Security and Training at Cortez for over four years. He is familiar with Parts 56 and 57 of MSHA's regulations. (Tr. 82-84).

In addition, he is familiar with MSHA's enforcement policies and he has traveled with MSHA inspectors many times. (Tr. 84).

Mr. Bunch is familiar with 30 C.F.R. § 56.14207. It is his understanding that the F-150 Ford pickup was in a park position prior to the issuance of the citation. (Tr. 84). In addition, the parking-brake was engaged.

The pickup was parked diagonally on a 4 to 5 percent slope. (Tr. 86, Ex. R-1).

Prior to June 10, 1992, MSHA had never raised an issue as to a manual chocking requirement for these types of vehicles. (Tr. 87). Mr. Bunch believed that applying a manual chocking standard to a Ford F-150 would be a change in policy. (Tr. 87-88).

It is not standard mining practice to manually chock vehicles like this at other mines. Further, MSHA did not apply such a requirement at other facilities or at Cortez prior to the time the citation was issued.

Prior to 1992 MSHA inspectors have not carried manual chocks nor had Mr. Bunch ever seen a chock on a MSHA vehicle. (Tr. 88-89).

If a parking brake is provided it must be maintained in an operating condition. Some self-propelled equipment do not have a parking brake. (Tr. 89-90).

Considering the mechanics of the truck park position and the load (none) the park position would be sufficient to hold the truck stable. (Tr. 90, 91).

The truck was a 1988 Ford F-150. Mr. Bunch identified the 1988 Service Manual for such vehicles. (Tr. 91-92, Ex. R-10). When the pedal in the cab is depressed the levers pull forward. This activates the brake shoe against the inside of the drum and stabilizes both rear wheels. (Tr. 92-93). (Page 5 illustrates the brake pedal and the control assembly as shown in View W, Ex. R-10).

The parking brakes on the Ford F-150 truck serve as a mechanical inhibitor for the wheels. (Tr. 95). Chocking is manually placing a device against a wheel to prevent the wheel from turning and the vehicle from moving. The effect of chocking is not different than the effect of setting a parking brake automatically.

The park brake was adequate to hold this vehicle. (Tr. 95).

Mr. Bunch was not aware of any incidents where parking brakes had failed. (Tr. 96).

In this case the pickups have a regularly scheduled P.M. program where fluids are changed and brakes are checked. (Tr. 96).

During the conference it was not implied there was a change in the enforcement practice; however, Mr. Bunch understood there had been such a change. There had been no written documentation announcing this change.

Finally, Cortez had never been charged with a violation of 30 C.F.R. § 56.14207 in a situation involving a Ford F-150 truck. (Tr. 97).

Mr. Bunch agreed that since 1988 MSHA had never told him that F-150 trucks were excluded from this regulation.

Eighty-five percent of the trucks are equipped with power steering and weigh about 2,100 pounds. (Tr. 99, 100).

When Mr. Bunch has seen brakes become inoperable he would chock them. (Tr. 100).

DISCUSSION AND FURTHER FINDINGS

The evidence is essentially uncontroverted.

ISSUE

The issue is whether the wheels of a F-150 Ford pickup truck must be chocked or turned into a bank when the vehicle is parked on a grade.

Cortez initially argues the 1988 revisions to Subpart M and Subpart H whereby the previously distinctive rules for mobile and self-propelled equipment were merged into a single category of mobile equipment created vagueness as to the inclusions of passenger pickup vehicles under 30 C.F.R. § 56.14207.

I am not persuaded the revisions created any vagueness. Prior to August 25, 1988, the precursor standard of 30 C.F.R. § 56.14207 was codified at 30 C.F.R. § 56.9037. The initial standard and the revisions in 1988 were essentially the same. Each standard began with the term "mobile equipment." While "mobile equipment" was not further defined until 1988 it would have a common dictionary meaning of "capable of moving or being moved." ²

In 1988 the revision the new subparts define "mobile equipment" as "wheeled, skid-mounted, track-mounted or rail-mounted equipment capable of moving or being moved." Further, "whenever the final rule refers to equipment capable of moving itself, it uses the term "self propelled mobile equipment, for which a separate definition is not necessary." (Subpart E Definitions, Ex. D-2).

In sum, the F-150 mobile pickup truck was mobile equipment under 30 C.F.R. § 56.9037 and under 30 C.F.R. § 56.14207. No

²

Webster's New Collegiate Dictionary at 732.

vagueness was created by the Secretary's revisions in August 1988.

I agree with Cortez that the evidence establishes that MSHA did not enforce this regulation as to F-150 pickup trucks before the August 1988 revision. However, it has been established that non-enforcement does not bar MSHA from citing violations. Conesville Coal Preparation Company, 12 FMSHRC 639, April 1990.

Cortez further argues that since 30 C.F.R. § 56.14207 fails to provide adequate notice it is necessary to apply the reasonably prudent person test in determining the interpretive validity of the regulation.

Many of the Secretary's regulations are designed to deal with the myriad of circumstances that can arise in the mining industry. For example, see the leading case of Ideal Cement Company, 12 FMSHRC 2409, (November 1990) involving 30 C.F.R. § 56.9002³ (1987). As a result of the design of the regulations many of them are subject to the claim that they are overly broad or vague.

This case is no different. Cortez asserts it did not have fair notice that its F-150 half-ton pickup truck was subject to the contested regulation.

In such circumstances, the Commission has ruled that the appropriate test in interpreting and applying such broadly worded standards is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal, 12 FMSHRC at 2416; Cyprus Tonopah Mining Corporation, 15 FMSHRC 367, 375 (March 1993).

In support of its position that it did not have fair notice of the requirement Cortez relies on Lanham Coal Co. Inc., 13 FMSHRC 1710 (October 1991).

Lanham was remanded by the Commission to Judge James A. Broderick to "determine, through application of the reasonably prudent person test, whether Lanham had fair notice that 30

³ The standard provided that: Equipment defects affecting safety shall be corrected before the equipment is used.

C.F.R. § 77.1710(g) ⁴ required the use of safety belts or lines under the circumstances of this case." 13 FMSHRC 1341.

In his decision after remand (13 FMSHRC 1710) Judge Broderick vacated the citation on the basis of several findings. Those were that (1) prior to the accident, neither the operator nor the MSHA inspector who issued the citation considered the cited standard applicable to the tarping of trucks, (2) the inspector had never previously cited the practice and had never used safety belts in such circumstance, (3) MSHA had no standards or guidelines that covered the practice and (4) Lanham had no specific notice that the practice violated the standard that dealing with safety belts and lines.

In this case the facts fairly establish (1), (2) and (4). However, Cortez knew or should have known of MSHA's requirements of parking procedures for unattended equipment because MSHA's regulation fairly covered the practice. As a result Lanham is not controlling.

Cortez further contends that even if 30 C.F.R. § 56.14207 could be read to encompass passenger pickup vehicles, the operator complied with the regulation.

Specifically, it is asserted that the vehicle's engine was off, the transmission was in the park position and the manual brake was cable activated.

Cortez's argument does not address the relevant portion of the regulation; namely, the last sentence of 30 C.F.R. § 14207 which provides:

When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked ⁵ or turned into a bank.

⁴ The regulation involved 30 C.F.R. § 77.1710 entitled "Protective Clothing; requirements provides in pertinent part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

⁵ Webster's New Collegiate Dictionary at 194 defines a chock as "a wedge or block for steadying a body (as a cask) and holding it motionless, for filling in an unwanted space, or for blocking the movement of a wheel."

It is clear from the evidence that the pickup was parked on a 5 to 6 degree grade. In addition, its wheels were neither chocked or turned into a bank.

Cortez has attached to its post-trial brief as Exhibit A MSHA's Program Information Bulletin No. P93-29 dated November 4, 1993.

I decline to take official notice of the bulletin. Its subject matter does not appear relevant to this case since it deals with automatic transmission defects in certain named Ford vehicles.

Cortez finally claims the violation was not Significant and Substantial.

A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; ... (2) a discrete safety hazard ... that is a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to 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 Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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) (emphasis in original).

In the instant case the Secretary failed to establish the third facet of the Mathies formulation. The inspector noted the pickup was stationary and he saw no reason to suspect the brake was not adequate to hold the weight of the vehicle on the existent grade. (Tr. 26).

Evidence was offered by the Secretary concerning prior fatalities involving unattended vehicles running over workers.

The comparison fails. The credible evidence establishes the vehicle was stationary with adequate transmission and brakes. (Tr. 25, 54).

The S&S allegations should be stricken.

For the foregoing reasons the citation should be affirmed.

CIVIL PENALTY

Section 110(i) of the Act mandates consideration of certain criteria in assessing appropriate civil penalties.

The size of Cortez is stipulated to be 1,221,241 production tons and the size of the mine itself is 362,640.

The payment of the proposed penalty will not adversely affect Cortez's ability to continue in business.

There is no evidence of the operator's prior history.

Cortez was negligent as company vehicles were left unattended without taking the necessary precautions as required by the regulations.

The gravity of the violation was low since the parking and transmission adequately held the pickup truck on the grade.

Cortez demonstrated good faith in abating the violative condition.

Considering the statutory criteria I conclude that a civil penalty of \$75.00 is appropriate.

Accordingly, I enter the following:

ORDER

Citation No. 3928117 is affirmed and a civil penalty of \$75.00 is assessed.


John J. Morris
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 19 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 93-11
Petitioner : A. C. No. 46-05907-03655
v. :
U. S. STEEL MINING COMPANY, : Docket No. WEVA 93-340
INC., : A. C. No. 46-05907-03685
Respondent : Docket No. WEVA 93-368
: A. C. No. 46-05907-03688
: Shawnee Mine

DECISION APPROVING SETTLEMENT

Appearances: Javier I. Romanach, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Maurer

These cases are before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). An evidentiary hearing in these matters was held on November 18, 1993, in Beckley, West Virginia. At the conclusion of that hearing, the parties filed a motion to approve a settlement agreement and to dismiss these cases.

The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>CITATION NO.</u>	<u>PROPOSED ASSESSMENT</u>	<u>PROPOSED SETTLEMENT</u>
<u>WEVA 93-11</u>		
3738158	\$ 136	\$ 136

WEVA 93-340

3579354	189	50 ¹
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WEVA 93-368

3976690	50	50
3976694	50	Vacated
3578514	<u>50</u>	<u>Vacated</u>

TOTAL	\$ 475	\$ 236
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I have considered the representations and documentation submitted in these cases, as well as the testimony contained in the record of proceedings, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of \$236 within 30 days of this order.


Roy J. Maurer
Administrative Law Judge

Distribution:

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Billy M. Tennant, Esq., 600 Grant Street, Room 1580, Pittsburgh,
PA 15219-4776 (Certified Mail)

dcp

¹/ Citation No. 3579354 is modified to delete the "significant and substantial" finding.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 24 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-1079
Petitioner : A.C. No. 15-11012-03520
v. :
: Camp 9 Preparation Plant
: :
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for Petitioner;
David R. Joest, Esq., Henderson, Kentucky, for
Respondent.

Before: Judge Amchan

Statement of Facts

On the morning of July 21, 1992, MSHA Inspector Philip Dehart examined a refuse pile at Respondent's Camp 9 Preparation Plant (Tr. 12). This pile, which consists of debris from washed coal, is approximately 100 feet high and bigger than 100 feet x 100 feet horizontally (Tr. 21). Mr. Dehart found 2 pools of water on the refuse pile. One was about 40 feet by 20 feet and an inch deep and the other was about 35 feet by 20 feet and also an inch deep (Tr. 13 - 14).

Mr. Dehart issued Respondent Citation No. 3551344, which alleged that the refuse pile was not graded to allow for proper drainage and that the inadequate grading violated Peabody's approved plan for the refuse area (Exh G-1). Water on the refuse pile creates a potential fire hazard due to spontaneous combustion (Tr. 10 - 11). However, MSHA apparently did not consider the water on Camp 9's refuse pile to present a hazard to miners as of July 21, 1992 (Tr. 19 - 20).

The citation referenced 30 C.F.R. § 77.215 as the regulation violated. However, there is no standard requiring a mine operator to comply with an approved refuse pile design plan (See Tr. 22 - 25).

At trial, the Secretary argued that the facts in this case establish a violation of 30 C.F.R. § 77.215(e). This issue has been tried with the consent of Respondent (Tr. 25). Section 77.215(e) requires:

Refuse piles shall not be constructed so as to impede drainage or impound water.

Respondent's position on the merits is that the refuse pile was not designed to impound water (Tr. 45). The 2 pools of water observed by Inspector Dehart were the result of heavy rains the previous evening and differential settling of the refuse in the pile (Tr. 40). Peabody contends it complied with the regulation by reshaping the refuse pile as soon as it could do so safely (Tr. 44).

Peabody submits that there is no way to avoid differential settling and that to prevent a hazard developing from standing water it reshapes the pile with rubber-tired vehicles. Respondent argues that, to do this before the pile dries, would be hazardous to the operators of its dump trucks, bull dozers and scrapers.

Moreover, Respondent contends that the pile was not **constructed** to impound water. In fact, it is designed so that water will drain off the pile and flow away from the pile (Tr. 40 - 42).

Issues

The issues in this case are whether the fact that there were standing pools of water on Respondent's refuse pile establishes that water was impounded and, if so, whether the evidence establishes that the pile was constructed so as to impede drainage or impound water. I conclude that the Secretary has not met his burden of proof on either of these issues.

The testimony of Gordon Ingram, an engineering supervisor for Respondent at Camp 9, that the accumulation of water on July 21 was unavoidable is uncontroverted. This testimony is also not inconsistent with Mr. Dehart's testimony that dessication cracks indicated that there had been other pools of standing water on the pile before July 21.¹

The word impounded suggests a purposeful rather than an

¹The citation alleged a violation only with regard to the 2 pools of water observed on July 21, 1992 (Exh. G-2). Moreover, the record does not establish that the dessication cracks could only have been present if Respondent failed to take reasonably prompt steps to reshape the refuse pile after a rainstorm.

accidental accumulation of water. In some circumstances, one could reasonably conclude that the lack of any corrective action to remove water, which had accidentally accumulated, might be an impoundment. However, Mr. Ingram's uncontroverted testimony establishes that the accumulation of water in this case was the unavoidable result of differential settling of the refuse. It also establishes that Respondent tried to remove the water as soon as it was reasonably safe to do so.

Moreover, even if any accumulation of water is an impoundment, there is no evidence in this record to support a finding that Respondent's refuse pile was **constructed** to impede drainage or impound water within the meaning of section 77.215(e). However, I agree with petitioner that, in some circumstances, a failure to take timely corrective action to remove water that has collected on a refuse pile may violate section 77.215(e).

A refuse pile is in an ongoing state of construction. Therefore, a failure to timely reshape areas in which water has collected may be "construction" within the meaning of the standard. However, the record, in this case, does not establish that the water present on the refuse pile on July 21, 1992, was present due to any intentional act of Respondent or a failure to take reasonably prompt abatement measures.

In conclusion, it has not been established that the refuse pile was constructed so as to impede drainage or impound water. I, therefore, vacate Citation No. 3551344.

ORDER

Citation No. 3551344 is hereby VACATED and this case is dismissed.



Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

David R. Joest, Esq., 1951 Barrett Court, P. O. Box 1990, Henderson, KY 42420-1990 (Certified Mail)

/jff

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 25 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-1034
Petitioner : A.C. No. 15-02706-03722-R
v. :
: Hamilton No. 2 Mine
ISLAND CREEK COAL COMPANY, :
Respondent :

DECISION

Appearances: Anne T. Knauff, Esquire, Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Marshall S. Peace, Esquire, Lexington, Kentucky,
for the Respondent

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.*, the "Act," charging the Island Creek Coal Company (Island Creek) with violations of mandatory standards. The general issue before me is whether Island Creek violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are also addressed as noted.

The parties moved to settle Citation/Order Nos. 3418856, 3420270, 3548984, 3548985, 3549015, 3549019, 3548656 and 3548657, proposing a reduction in penalties from \$9,979 to \$8,326, deleting the "significant and substantial" findings from Citation Nos. 3548984, 3549015, and 3549019, vacating Order No. 3420253 and modifying Citation No. 3418856, Order No. 3548657, and Order No. 3548985 to citations under Section 104(a) of the Act. I have considered the representations and documentation submitted in this case and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of these penalties will be incorporated in the order accompanying this decision.

The one citation remaining, Citation No. 3549007, alleges a "significant and substantial" violation of the mine operator's roof control plan under the mandatory standard at 30 C.F.R. § 75.220 and charges as follows:

The addendum to the roof control plan was not being followed as required by letter dated 6-18-90 in the main east Antioch Mains where a section of supply entry was driven 26 feet wide for a distance of 200 feet. The WF steel beams, 26 feet long spaced in between each truss bolt, seven (7) of these beams was [sic] not installed as required by the approval of the addendum.

It is not disputed that the "addendum" to the roof control plan set forth in the Secretary's letter dated June 18, 1990, became an enforceable part of such plan. The addendum reads as follows:

Your request dated June 5, 1990, for permission to widen the existing supply road from the approved 20 feet width, to a maximum of 26 feet wide for a distance of 200 feet on the No. 4 unit, in the Antioch Mains, for two Parallel sets in the same entry is approved, provided:

The 200 feet shall be truss bolted on 4 feet [sic] centers with 6 inch WF Steel Beams, 26 feet long, spaced in between each truss. The steel beams shall be supported with steel legs on each end and in the middle. Additional support such as steel beams and legs and or cribs shall be installed in the connecting crosscuts. Steel beams shall be secured to the mine roof on each end and the middle.

The testimony of experienced Inspector Harold Gamblin of the Mine Safety and Health Administration (MSHA) is not disputed. Gamblin testified that on January 8, 1991, he was performing a routine inspection of the subject mine when he observed that the referenced addendum to the roof control plan was not being followed. Gamblin stated that pursuant to the addendum, the mine operator was permitted to utilize a 26 foot-wide supply road, six feet wider than ordinarily permitted, only on condition that additional roof support was provided. That additional support required "I" beams placed every four feet between the truss bolts. Gamblin estimated that there should therefore have been 50 beams in place over the 200 foot-long supply road and noted that seven beams were missing. According to Gamblin, representatives of the mine operator told him that they were waiting for "clips" to install the horizontal beams at these seven locations.

Inspector Gamblin opined that the violation was "significant and substantial" because the roof in the area was weak and soft and was in an area where roof failures had already occurred. It was his opinion that it was very likely for there to be roof failures under these conditions. Gamblin concluded that if there

was a roof fall, it would have been reasonably likely to have contributed to reasonably serious injuries because of frequent travel through the area, i.e., 10 to 12 people at a time passing throughout the day. Gamblin also noted that the normal entry width is 20 feet and that MSHA allowed the 26-foot-wide entry only on condition that the additional support set forth in the addendum to the roof control plan was in place. He also observed that vibrations caused by diesel equipment used in this mine caused serious vibrations that could also contribute to unstable roof conditions.

Island Creek, in its post-hearing brief, now admits that the cited conditions were in fact violations of its roof control plan and now disputes only the associated "significant and substantial" findings. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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 injury in question will be of a reasonably serious nature.

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

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 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Within the above framework of law and the undisputed facts in this case it is clear that the violation was indeed "significant and substantial" and quite serious.

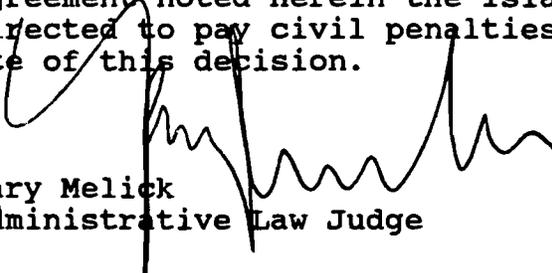
Inspector Gamblin further observed that the operator was negligent in causing the violation inasmuch as it was obvious

that the beams were missing. Representatives of the operator were clearly also aware that the beams were missing in admitting that they were waiting for clips to install the beams. Finally, Gamblin observed that the seven beams had been missing for a long period of time. He estimated they had been missing for at least 30 days since mining had progressed inby the cited area about 2,000 feet. In light of this undisputed evidence it is indeed clear that the violation was result of high operator negligence.

In light of the above evidence, and considering all the factors under Section 110(i) of the Act, I find that a civil penalty of \$300 to be appropriate for the violation charged in Citation No. 3549007.

ORDER

Island Creek Coal Company is hereby directed to pay a civil penalty of \$300 for the violation charged in Citation No. 3549007 within 30 days of the date of this decision. As a result of the settlement agreement noted herein the Island Creek Coal Company is further directed to pay civil penalties of \$8,326 within 30 days of the date of this decision.


Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 25 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-160
Petitioner : A. C. No. 15-15670-03542
v. :
 : Mine: #1
MAYO RESOURCES INCORPORATED, :
Respondent :

DECISION

Appearances: Thomas A. Grooms, Esquire, Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee for Petitioner;
Mr. Larry Mills, Lovely, Kentucky for Respondent.

Before: Judge Fauver

This is an action for civil penalties under § 110(a) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801
et seq.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, probative,
and reliable evidence establishes the following Findings of Fact
and Further Findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates an underground coal mine known as
Mine No. 1, which produces coal in or substantially affecting
interstate commerce.

2. In 1991 Respondent produced 2,600,713 tons of coal, of
which 48,713 tons were produced at Mine No. 1.

3. On July 16, 1992, Federal Mine Inspector Theodore
Herrera issued two of the three citations at issue. On July 28,
1992, he issued the third citation.

4. Citation No. 4029449 alleges a violation of 30 C.F.R.
§ 75.400. Combustible materials, including float coal dust, in
accumulations from 6 to 10 inches deep were beneath the No. 1
belt for a distance of about 100 feet. The float coal dust was
dry and subject to ignition.

5. Citation No. 4029500 alleges a violation of 30 C.F.R. § 75.1725(a). The beltline had three stuck conveyor belt rollers. They had been stuck for a sufficient time to have flat places worn where the belt rubbed against them.

6. The stuck rollers involved in Citation No. 4029500 were covered with float coal dust, which was involved in Citation No. 2049499.

7. At the time, the belt was operating and transporting coal. The mine was producing coal on three shifts, 24 hours per day.

8. The size of the accumulations indicated that the float coal dust had accumulated for at least three working shifts. The wear on the stuck rollers indicated that they had been stuck for at least one shift and possibly a week.

9. The combination of combustible accumulations and stuck rollers rubbing against the belt in float coal dust created a serious threat of fire or explosion. Smoke caused by fire or explosion would probably be carried forward to the working faces where miners were working.

10. The third citation, No. 4030042, alleges a violation of 30 C.F.R. § 75.517. A permanent splice in the trailing cable to a Lee Norse roof-bolting machine was not properly insulated, and was not protected, as required by the standard. The inner electrical leads were exposed creating an electrocution hazard. Inspector Herrera observed this condition while the roof-bolting machine was operating. The splice had been torn exposing the inner energized electrical leads. The exposed leads had no insulation so that they were completely exposed to the touch. The cable was subject to frequent handling by miners working in the vicinity of the roof-bolting machine, and thus created a highly dangerous condition.

11. Government's Exhibit No. 1, a computer printout of the operator's compliance history for 24 months before the citations, shows a very poor level of compliance. In the 2-year period, the operator received citations or orders with assessments of civil penalties for a total of \$27,039. Of this amount, the operator paid \$7,166, contested \$2,478 and ignored \$17,395 in final civil penalty orders (i.e. penalties not litigated). In addition to ignoring final penalty orders, the history shows a number of previous violations of the standards at issue in this case. These include violations of § 75.400 for combustible accumulations along the belt lines, violations of § 75.1725 for stuck rollers on the No. 1 belt line, and violations of § 75.517 for cable hazards on a Lee Norse roof-bolting machine.

DISCUSSION, FURTHER FINDINGS AND CONCLUSIONS

Citations Nos. 4029499 and 4029500

The combination of these citations increases the gravity of the two violative conditions: accumulations of loose coal, coal dust and float coal dust in the presence of stuck belt conveyor rollers that created a ready ignition or heat source.

Accumulations of loose coal, coal dust and float coal dust are one of the most serious threats to the safety of miners and one which Congress sought to eliminate in passing the Mine Act. As the Commission stated in Black Diamond Coal Mining, 7 FMSHRC 1117, 1120 (1985)

We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. (Section 75.400) is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979) The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating else where in a mine.

The violations involved in these citations were obvious and highly dangerous. Failure to prevent or correct the hazards before the inspector observed them demonstrates aggravated conduct beyond ordinary negligence.

The violations were also reasonably likely to result in serious injuries, and were therefore "significant and substantial" violations within the meaning of the Act. Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984); Energy West Mining Co., 15 FMSHRC 1836, 1839 (1993).

Citation No. 4030042

The violation proved under this citation was obvious and highly dangerous. The damaged cable, which was exposed to the touch, presented an immediate threat of death or serious injury to the operator of the Lee Norse roof bolter and to the miners who had occasion to handle the cable. The violation was "significant and substantial" (Mathies, supra).

Operator's Size and Compliance History

The operator is a fairly large coal producer (over two million tons in 1991). It has a poor compliance history, showing a significant number of delinquent civil penalties (\$17,395) in the 2-year period preceding the violations in this case, and a significant number of violations of the same standards involved in this case. Indeed, some of the prior violations involve the same beltline and equipment.

Considering all of the criteria in § 110(i) for assessing civil penalties, I find that the following penalties are appropriate:

Citation No. 4029499	\$ 3,500
Citation No. 4029500	3,500
Citation No. 4030042	<u>5,000</u>
	\$12,000

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated the safety standards as alleged in Citation Nos. 4029499, 4029500 and 4030042.

ORDER

WHEREFORE IT IS ORDERED that:

1. The above citations are AFFIRMED.
2. Within 30 days of the date of this Decision, Respondent shall pay civil penalties in the amount of \$12,000.


William Fauver
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Mr. Larry Mills, c/o Mr. James H. Booth, P.O. Box 190, Lovely, KY 41231 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 25 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-127-D
On Behalf of JAMES JOHNSON,	:	Mine ID 01-01401
Complainant	:	
and	:	No. 7 Mine
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
JIM WALTER RESOURCES,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant; David M. Smith, Esq., Mark Strength, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for the Respondent.

Before: Judge Fauver

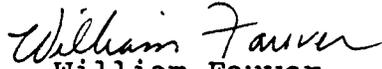
The Decision on November 18, 1993, held that Respondent discriminated against James Johnson in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.S. § 801 et seq. The discrimination included a two-day suspension without pay. Jurisdiction was retained pending a final decision on damages.

I find that James Johnson is entitled to back pay for the two-day suspension (March 14 and 15, 1992) in the total amount of \$564.70 plus interest from March 15, 1992, until the date of payment of the back pay.

ORDER

1. Within 30 days of the date of this Decision, Respondent shall pay James Johnson back pay of \$564.70 plus interest accrued from March 15, 1992, until the date of payment, interest to be computed in accordance with the Commission's decisions prescribing the method of computing interest.

2. This Decision and the Decision of November 18, 1993, constitute the judge's final disposition of the issues in this proceeding.


William Fauver
Administrative Law Judge

Distribution:

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Mary Lu Jordan, Esq., United Mine Workers of America, 900 Fifteenth St., N.W., Washington, D.C. 20005 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 25 1994

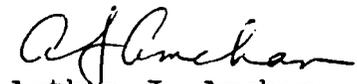
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of PERRY PODDEY,	:	Docket No. WEVA 93-339-D
Complainant,	:	
	:	MORG CD 93-01
v.	:	
	:	Coal Bank No. 12
	:	
TANGLEWOOD ENERGY, INC.,	:	
Respondent	:	

DECISION ON DAMAGES

On November 29, 1993, the undersigned issued a decision finding Respondent in violation of section 105(c) of the Act and directing the parties to file a stipulation regarding the amount due Mr. Poddey. Pursuant to this stipulation, Respondent is hereby ordered to pay Mr. Poddey \$9,094.38. This figure represents the back wages due Mr. Poddey from January 7, 1993, through May 17, 1993 minus \$4,000 received in unemployment compensation benefits from the state of West Virginia. It also includes interest calculated at the short-term federal interest rate on all net backpay earnings (gross backpay minus unemployment insurance benefits) through the end of calendar year 1993, payment for Mr. Poddey's travel expenses related to this case, and compensation for one day of work missed to attend the hearing in this matter.

ORDER

Respondent is hereby ordered to pay Perry Poddey \$9,094.38 within 20 days of this decision and order. This constitutes my final decision in this matter.



Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 26 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-433-DM
ON BEHALF OF	:	
JAMES A. WEATHERINGTON,	:	NE-MD 93-01
Complainant	:	
	:	
v.	:	
	:	
THOMASVILLE STONE & LIME	:	
COMPANY,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 93-434-DM
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	NE-MD 93-02
ON BEHALF OF	:	
DALE H. HOKE,	:	
Complainant	:	Thomasville Mine
	:	
v.	:	
	:	
THOMASVILLE STONE & LIME	:	
COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

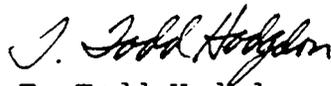
Before: Judge Hodgdon

These cases are before me on complaints of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainants, by counsel for the Secretary, have filed a motion to withdraw their discrimination complaints and to dismiss the cases.

This motion is being made pursuant to a settlement agreement between the parties. In the agreement, the Respondent agreed "to remove, upon execution of this Agreement, any and all documents from all personnel and other files that it maintains on [the

complainants] related to the period and events at issue in this case" and the Complainants agreed to " withdraw the complaint of discrimination which was filed with the Mine Safety and Health Administration on October 30, 1992" and to authorize "the Secretary of Labor to seek dismissal of the Complaint filed with the Federal Mine Safety and Health Review Commission."

It appears that the parties have carried out their commitments under the settlement agreement. Accordingly, the motion to withdraw the discrimination complaints and to dismiss the cases is **GRANTED** and the captioned cases are **DISMISSED** with prejudice.



T. Todd Hodgdon
Administrative Law Judge
(703) 756-4570

Distribution:

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/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

JAN 31 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 93-111
Petitioner : A. C. No. 36-06967-03775
v. :
TANOMA MINING COMPANY, aka : Docket No. PENN 93-112
TANOMA MINING COMPANY, INC., : A. C. No. 36-06967-03773
Respondent : Tanoma

DECISION

Appearances: Maureen A. Russo, Esquire, Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
PA for Petitioner;
Joseph A. Yuhas, Esquire, Barnesboro, PA for
Respondent.

Before: Judge Fauver

This is an action for civil penalties under § 110(a) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et
seq.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, probative,
and reliable evidence establishes the Findings of Fact and
Further Findings in the Discussion below:

FINDINGS OF FACT

1. Respondent¹ operates an underground coal mine known as
the Tanoma Mine, which produces coal in or substantially
affecting interstate commerce.

2. On September 23, 1992, Federal Mine Inspector Gene T.
Ray issued Order No. 3486015 at the Tanoma Mine, alleging in
part:

No guards of any kind were installed on the
discharge roller and drive rollers of the C-1 No. 2

¹ To conform to the evidence, the caption is hereby AMENDED to
add the following to the name of Respondent: "aka Tanoma Mining
Company, Inc."

No guards of any kind were installed on the discharge roller and drive rollers of the C-1 No. 2 belt drive. This belt drive had been installed on September 22, 1992 and coal was loaded with this drive on September 23, 1992 on the 12:00 a.m. to 8:00 a.m., shift. This condition is easily observed and the area had been pre-shifted. This drive is also in a location where responsible persons travel on a frequent basis during the shift and should have been observed. This area was a wet slippery location and persons could fall and come in contact with these rollers.

After an MSHA-operator conference, the order was modified to read:

Due to the results of a Health and Safety Conference. This order is hereby modified to show Section I No. 8 as deleting the first sentence and including the following.

Adequate guarding was not provided for the discharge roller and drive rollers of the C-1 No. 2 belt drive in that a wooden plank was attached to posts on each side of the belt drive that persons could reach over, under and around and become caught in the inadequately guarded rollers. This order is also modified to show Section I No. 9(c) as 75.1722(b) instead of 75.1722(a).

The regulation cited, 30 C.F.R. § 76.1722(b), states:

75.1722 Mechanical equipment guards.

(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

3. The operator had installed a board on each side of the low belt drive. Each board, nailed to 2 posts, was about 14 feet long, 4 to 6 inches wide, and about 1 to 1-1/4 inches thick.

4. On the "clearance side" of the belt drive, the discharge roller extended about 20 inches beyond the edge of the belt. The board was about 36 inches from the mine floor, and about 4 feet from the pinchpoint of the drive roller. Each end of the board extended about 6 inches from the post, leaving an exposed area of the belt drive of 2 or 3 feet. The discharge roller was not reasonably accessible to accidental contact because the discharge roller was above the center of the main belt, 56 to 57 inches above the mine floor. The nearest

pinchpoint on the drive rollers was about 45 or 46 inches from the board. A person falling under the board might reach out to break the fall and come in contact with a pinchpoint on a belt drive roller. Also, a person might fall beyond the end of the board and accidentally come in contact with a belt drive roller pinchpoint.

5. On the "tight side" of the belt drive, the nearest pinchpoint of the drive rollers was about 2 feet from the board and the travelway was about 2 feet wide. The nearest pinchpoint of the discharge roller was also close to the board. Persons on the tight side might fall and accidentally come in contact with a pinchpoint of a drive or discharge roller.

6. The mine floor around the belt drive was wet and slippery.

7. A low belt drive discharges coal onto a main belt. The low belt is mobile, and usually moves in a month or two, whereas the main belt is immobile and kept in one place for a long period.

8. Low belts are stopped for maintenance work (lubrication, adjustments, repairs, etc). Also, cleanup work around a low belt is usually done when the belt is stopped. However, at times miners may shovel or clean up around a moving belt. Miners travel on the clearance side of the belt and on less frequent occasions may have duties on the tight side of the belt drive.

9. The operator used the board-and-posts method of guarding low belt drives for years, and continued to use this method after the citation was terminated. To abate the condition cited by Inspector Gay, the operator installed belting material to prevent contact with the belt drive and discharge rollers. However, when the low belt conveyor was moved after the citation, the belting material was not used and the operator resumed the same practice of using a board nailed to two posts as the only guard of the low belt drive.

10. Before and after the citation issued by Inspector Gay, low belts drives were frequently inspected by MSHA but no other MSHA inspector cited a violation for the board-and-posts method of guarding a low belt drive.

Citation No. 3708614

11. On October 13, 1992, Federal Mine Inspector Joseph E. Colton issued Citation No. 3708614, alleging in part:

Guards were not provided to prevent a person from contacting the rotating tail pulley of the Low belt

located in the 016 active section. This tail pulley was approximately 9" in diameter and centered 10" above the mine floor. Both sides of this conveyor system tail pulley area contained a 13" x 7 1/2" opening on each end of this pulley and bearing block assembly. And a 7 1/2" x 22" opening directly in front of this pulley. The tail piece is located 48" from the coal rib and the height of this entry is approximately 52".

12. On the sides of the tail pulley, there were openings about 13 inches by 7-1/2 inches on each end of the tail pulley and bearing block assembly. There also was an opening about 7-1/2 inches by 22 inches directly in front of the pulley.

13. Guarding for the tail pulley did not extend down the sides to prevent contact or to prevent a person from reaching in and coming in contact with pinchpoints.

DISCUSSION, FURTHER FINDINGS AND CONCLUSIONS

Order No. 3486015

30 C.F.R. § 75.1722(b) provides: "Guards at conveyor-drive, conveyor head, and conveyor tail pulleys shall extend a distance sufficient to prevent a person from reaching behind and becoming caught between the belt and the pulley."

The only guarding for the C-1, Number 2 belt drive was a four to six inch wide board on each side of the pulley, nailed on two posts and positioned about 36 inches from the ground.

Each board ended about 6 inches beyond the posts, and left the discharge rollers exposed on both sides of the belt. The boards served more as a warning, rather than a guard, and plainly did not "extend a distance sufficient to prevent a person from reaching behind and becoming caught between the belt and the pulley." Also, as stated in the Findings, above, in places the boards would not prevent accidental contact with the pinchpoints.

I therefore find a violation of § 75.1722(b).

The Secretary alleges that the violation was "significant and substantial." A "significant and substantial" violation is defined in § 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." The Commission has developed the following test (in Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984):

In order to establish that a violation of a mandatory safety standard is significant and substantial . . . 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further:

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); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether a violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

I find there was a reasonable likelihood that, if the condition remained unabated, a miner would come in contact with a roller pinchpoint and suffer a serious injury. Contact could result from reaching out to break a fall and becoming caught between the belt and roller.

I therefore find that the violation was significant and substantial.

The Secretary also alleges that the violation was "unwarrantable" within the meaning of the Act. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987), the Commission held that "unwarrantable" means aggravated conduct constituting more than ordinary negligence. Applying this test, I find that the Secretary has not proved an "unwarrantable" violation. The operator regarded the board-and-posts method as an adequate guard and a number of MSHA inspectors apparently had seen this type guard and not cited a violation. I find there was ordinary negligence.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of \$1,800 is appropriate for this violation.

Citation No. 3708614

On each side of the tail pulley there was an opening of about 7-1/2 inches by 13 inches. There also was an opening in front of the tail pulley. I find there was a reasonable likelihood that, if the condition remained unabated, a miner would come in contact with a roller pinchpoint and suffer a serious injury. I therefore find that this was a "significant and substantial" violation.

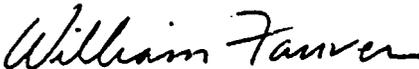
Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of \$288 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated 30 C.F.R. § 75.1722(b) as alleged in Order No. 3486015 with the exception of the allegation of an "unwarrantable" violation.
3. Respondent violated 30 C.F.R. § 75.1722(b) as alleged in Citation No. 3708614.

ORDER

1. Order No. 3486015 is converted to a § 104(a) citation without an allegation of an "unwarrantable" violation and as such is AFFIRMED.
2. Citation No. 3708614 is AFFIRMED.
3. Respondent shall pay civil penalties of \$2,088 within 30 days of the date of this Decision.


William Fauver
Administrative Law Judge

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/ew-fb

