

APRIL 1990

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APRIL 1990

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

Secretary of Labor, MSHA v. Hinkle Contracting Corp., Docket No. KENT 90-5-M.
(Judge Melick, March 9, 1990)

Secretary of Labor, MSHA v. Eastern Associated Coal Corp., Docket No.
WEVA 89-198. (Judge Weisberger, February 23, 1990)

Lancashire Coal Company v. Secretary of Labor, MSHA, Docket No. PENN 89-147-R,
etc. (Judge Koutras, February 27, 1990)

BethEnergy Mines, Inc. v. Secretary of Labor, MSHA, Docket No. PENN 88-149-R.
(Judge Melick, March 2, 1990)

Arnold Sharp v. Big Elk Creek Coal Company, Docket No. KENT 89-147-D. (Judge
Melick, Interlocutory Review of February 16, 1990 Order)

Michael Damron v. Reynolds Metals Co., Docket No. CENT 89-131-DM. (Judge
Broderick, March 3, 1990)

David Thomas & George Isaacs v. Ampak Mining Company, Docket Nos. KENT 89-13-D,
KENT 89-14-D. (Judge Melick, March 9, 1990)

Arch of Kentucky, Inc. v. Secretary of Labor, MSHA, Docket No. KENT 90-161-R,
etc. (Judge Fauver, March 16, 1990)

Ronald Tolbert v. Chaney Creek Coal Corporation, Docket No. KENT 86-123-D.
(Applicants motion to reopen for determination of additional compensation)

Review was denied in the following case during the month of April:

Secretary of Labor, MSHA v. Walker Stone Company, Inc., Docket No. CENT 89-37-M.
(Judge Fauver, February 27, 1990)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
v. : Docket No. KENT 90-5-M
HINKLE CONTRACTING CORPORATION :
:

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

By a petition for discretionary review filed March 23, 1990, Hinkle Contracting Corp. (Hinkle) seeks review of a decision issued by Commission Administrative Law Judge Gary Melick on March 9, 1990. 1/ The basis for Hinkle's petition is that a prejudicial error of procedure was committed when the judge issued his decision prior to receipt of Hinkle's brief. The petition requests that the judge's decision and order of March 9, 1990 be set aside and that Hinkle be allowed two weeks to file a brief in response to the Secretary's post-hearing brief.

In support of its petition Hinkle avers that at the end of the hearing in this case held before Judge Melick on January 30, 1990, counsel for the Secretary requested an opportunity to file a post-hearing brief and that in granting that request the judge advised Hinkle that its brief in response would have to be filed two weeks after receipt of the Secretary's brief. Hinkle further avers that by letter dated March 9, 1990, the Secretary transmitted its brief to Hinkle. In the meantime, the judge issued his decision on the matter on March 9, 1990, without benefit of Hinkle's brief in response to the Secretary.

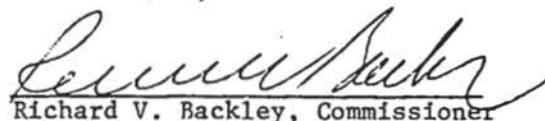
1/ Respondent Hinkle's March 23, 1990 filing is in the nature of a motion to set aside Judge Melick's March 9, 1990 decision and order and is directed to the judge himself. By operation of Commission Procedural Rule 2700.65(c), 29 CFR 2700.65(c), a judge's jurisdiction terminates when his decision is issued by the Commission's Executive Director, as was the case here. The Commission is therefore treating Hinkle's motion as a petition for discretionary review pursuant to Commission Procedural Rule 2700.70. 29 CFR 2700.70. See Capitol Aggregates Inc., 2 FMSHRC 1040 (May 1980).

By letter of March 27, 1990, the judge acknowledged the inadvertent issuance of his March 9, 1990 decision without consideration of the brief of either party and suggested that the Commission might wish to consider a remand of the proceedings for such consideration. On March 30, 1990 the Secretary filed a response in this matter agreeing that under the circumstances the judge's decision should be vacated and the case remanded to the judge for further consideration of the parties' post-hearing briefs.

Having considered the parties' and the judge's positions, we find that our decision in Green River Coal Co., 11 FMSHRC 800 (May 1989) is dispositive of this matter. We therefore grant Hinkle's petition for discretionary review, vacate the judge's March 9, 1990 decision and order, and remand the case to the judge for further consideration in light of the parties' post-hearing briefs. Respondent Hinkle shall have two weeks from the date of this order to file its post-hearing brief with the judge.



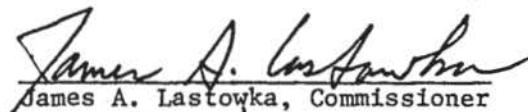
Ford B. Ford, Chairman



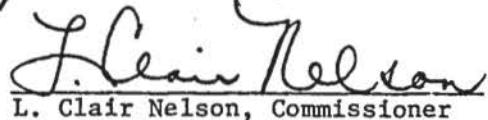
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 26, 1990

DONALD F. DENU :
v. : Docket No. LAKE 88-123-D
AMAX COAL COMPANY :

Before: Ford, Chairman; Backley, Doyle, Lastowka and Nelson
Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982) ("Mine Act"), Complainant, Donald Denu, alleges that Amax Coal Company ("Amax") violated section 105(c)(1) of the Mine Act. 1/ Commission

1/ Section 105(c), 30 U.S.C. § 815(c), provides in relevant part:

Discrimination or interference prohibited; complaint; investigation; determination; hearing

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... of any statutory right afforded by this [Act].

(2) Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file

(Footnote continued)

Administrative Law Judge Gary Melick held that Amax violated section 105(c) of the Mine Act by threatening Denu with disciplinary action and discharge for refusing to unplug a 6,900-volt power cable. 11 FMSHRC 317 (March 1989)(ALJ). We granted Amax's petition for discretionary review. For the reasons set forth below, we reverse the judge's decision.

Fn. 1/ continued

a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint.... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance....

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance....

At the time of the events giving rise to this proceeding, Denu was an electrician and local union president at Amax's Ayrshire Mine in Indiana. The Ayrshire Mine is a surface coal mine at which a dragline is used to remove the overburden and electrically powered shovels are used to remove coal. The 6,900-volt power cable ("power cable" or "cable") supplying electricity to the shovels in the pit crosses the bench where the dragline operates. The bench is cut about six to eight feet below the undisturbed ground and the pit is 85 feet below the bench. When it is necessary for the dragline to travel past the cable, the cable is unplugged at both ends, moved around the dragline and then plugged back in. As an aid to our discussion, a copy of Respondent's Exhibit 2, reduced in size, is attached to this decision and incorporated herein.

When the dragline approaches the power cable as it travels along the bench, the procedure for moving the cable around the dragline is commenced. First, the shovel operators are directed via radio to shut off their equipment. Next, the circuit breaker at the 6,900-volt substation (the "substation") located on undisturbed ground is switched off and the plug to the power cable is pulled from the substation. These steps de-energize the cable. The plug at the other end of the power cable is removed from the 6,900-volt circuit breaker box (the "switch box") located on the bench near the highwall above the pit. The switch box end of the cable is then moved around the dragline and reconnected at the switch box. Next the other end of the cable is plugged back in at the substation and the circuit breaker at the substation is switched on, which energizes the cable. Finally the shovels are switched on.

Usually, a pair of electricians travels by truck to the substation to switch off the power to the cable and to disconnect the plug. Then they travel by truck to the bench to unplug the other end of the power cable, move it around the dragline and plug it back in at the switch box. Finally they travel by truck to the substation to plug that end of the cable back in and turn on the circuit breaker. Sometimes, however, if the shovels are operating, and other electricians are available, a pair of electricians is dispatched to the substation to perform the tasks required at that location and a second pair of electricians is sent to the bench to perform the tasks required there. If this procedure is used, the two pairs of electricians communicate via radio to ensure that the switch is off and the cable is unplugged at the substation before the other end of the cable is unplugged at the switch box on the bench. Once the cable is moved and reattached at the switch box, the electricians on the bench immediately radio the electricians at the substation to re-energize the power cable.

Donald F. Denu is an experienced electrician with over nine years experience in the mining industry. On February 27, 1988, Denu was working the 4:00 p.m. to midnight shift. At 6:00 p.m. he was preparing with another electrician, Harrison Key, to disconnect and move the power cable to allow the dragline to pass. According to Denu, he and Key drove to the substation to de-energize the cable. Tr. 23. While there, Denu observed that there was only one cable connected at the substation. Tr. 33; Exh. C-1. While he and Key waited at the substation for a call to disconnect the cable, Vernon Knight, the second shift electrical

supervisor and Denu's immediate supervisor, radioed Denu and told them to proceed to the bench because he was bringing Don Kozar and Don Gehlhausen, two electricians, to disconnect the cable at the substation. Denu asked to remain at the substation but Knight told them to proceed to the bench. Tr. 23-33, 219, 223-224; Exh. C-1.

After Denu and Key returned to the bench, Denu called Knight and asked if he was going to be allowed to disconnect the power cable at the substation. Tr. 26-33; Exh. C-1. Knight replied that the other pair of electricians would perform the disconnect at the substation. A discussion followed wherein Denu told Knight that the procedure was improper and unsafe and that he would withdraw himself by refusing to unplug the head of the cable at the switch box. Knight radioed Brent Weber, second shift general supervisor, and told Weber to meet him at the bench. Knight drove to the bench with Kozar and Gehlhauser, got out of the truck and instructed Kozar and Gehlhauser to drive to the substation to standby for the disconnect. Tr. 23-33, 219, 223-224; Exh. C-1

A discussion between Denu, Knight and Weber took place at the bench. According to Denu, Knight told him that he would be disciplined for insubordination and Weber asked him if he knew what the consequences of his actions were. Denu stated that he replied that there should be no consequences to a person who withdraws himself from a situation that he feels is unsafe or is in violation of Federal law. According to Weber, he overheard Denu tell Knight over the radio that he would withdraw if he was required to unplug the cable at the switch box for the reasons he had expressed previously. Weber testified that when he arrived, he told Denu that he did not appreciate him talking about such matters over the radio. Weber testified that he did not mention disciplinary action until after Denu refused to unplug the cable. Tr. 33-37, 224-230, Exh. C-1.

Electrician Kozar called Denu via the radio and said that the cable at the substation was unplugged and the cable head was on the ground. Weber then ordered Denu to unplug the cable at the switch box. Denu replied that he was going to withdraw and again said it was not a safe practice. Weber testified that he replied that if Denu did not exercise in good faith his right to withdraw he would be subject to discipline. Weber went on to testify that Denu then got out of his truck and said that Weber was not threatening him with discipline or anyone else with this issue ever again. A short, heated discussion followed in which Weber told Denu that he was bordering on insubordination because he had come right up against Weber. Tr. 33-38, 103, 224-230; Exh. C-1.

Weber asked Key if he would unplug the cable at the switch box. Key, who testified that he did not find the procedure to be unsafe, complied. Denu then put on hot gloves and assisted Key in moving the disconnected cable around the dragline. Key then plugged the cable back into the switch box and Denu turned the circuit breaker off on the switch box. Kozar was called on the radio and told to plug the other end of the cable back into the substation and switch the circuit breaker on. After that was completed, Denu closed the switch on the switch box, which reapplied power to the shovels in the pit. Tr. 39-41; Exh. C-1.

Kozar testified that he did not walk along the cable or otherwise trace the cable from the switch box to the substation. He also testified that neither the cable head nor its receptacle was labeled. After he switched off the circuit breaker, unplugged the cable and put the cable head on the ground, he did not lock out or tag out the cable. Rather, he remained at the substation until it was time to plug the cable back in and switch on the circuit breaker. He stated that there was only one cable plugged in at the substation, that this cable went in the direction of the pit and that he did not see any other substations or switch boxes in the area that could have supplied power to the cable plugged in at the switch box on the bench. Although he could not state that he was 100% certain that he unplugged the correct cable, he believed that he did. He stated that he remembers seeing the power indicator light go out at the switch box or lights go off at the shovels when he threw the switch at the substation. He testified that at the time he felt sure that he had de-energized the correct cable. Tr. 101-104.

Near the end of the shift, there was a brief meeting with the union safety committeeman about Denu's work refusal. Weber, Knight, Denu and Robert Lee, the safety committeeman, were present. Lee stated that the labor contract requires that an MSHA inspector be notified if there is a disagreement on withdrawal actions. Weber responded that a federal electrical inspector was expected back the next working day (Monday, February 29, 1988). He also told Denu to report to the office of Larry Landes, human relations manager, before the start of his shift the next working day to determine if disciplinary action would be taken. Lee and Denu complained to Weber that the labor agreement was not being followed. The discussion centered around the labor agreement and was heated at times. Denu states that Weber's attitude was threatening. Tr. 42-44, 149-51, 229-31; Exh. C-1.

On Monday, February 29, 1988, the next work day after Denu's work refusal, William Deuel, an MSHA electrical inspector, was scheduled to terminate an electrical citation that had been abated. When the inspector arrived, Larry Ashby, AMAX's electrical maintenance manager, told him what had happened on February 27. Ashby asked if the company's radio disconnect procedure was still permitted by MSHA. As discussed below, Inspector Deuel had previously told him and Denu that radio communications may be used when disconnecting cables. Inspector Deuel called MSHA's Arlington headquarters in Ashby's presence and confirmed that radio communications are a proper procedure when disconnecting power cables. Inspector Deuel went to a safety committee meeting attended by management and union officials and explained that radio disconnect procedures are permitted by MSHA. Tr. 185-188. Jay Perry, the union safety committee chairman, told Denu about MSHA's interpretation prior to his meeting with Landes that afternoon.

At the afternoon meeting, Landes told Denu that the company was not going to take disciplinary action, that the matter was resolved and that the company did not anticipate this sort of problem occurring in the future. Lee testified that Landes said that if this problem happened again, disciplinary action would be taken. No disciplinary action was ever taken and nothing was put into Denu's personnel file as a result of this incident.

About a year before Denu's work refusal, on March 2, 1987, Denu had asked Inspector Deuel if it was improper for the company to ask him to unplug a shovel cable when other electricians were assigned to unplug the cable at the power source. Larry Ashby also participated in these discussions. Denu testified that Inspector Deuel replied: "I agree with you, Don, but I don't think the books [regulations] do." Tr. 93; Exh. C-28. Ashby recalls Inspector Deuel stating that MSHA did not consider the unplugging of cables to be electrical work and that the proper use of radio communications was acceptable. Ashby also testified that Inspector Deuel talked about an MSHA policy memo authorizing this procedure and that the inspector subsequently gave him a copy. 2/ Ashby did not discuss the matter further with Denu. Tr. 174-179; Exh R-8.

Denu brought this present action under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), 3/ after the Secretary of Labor determined that Amax did not violate section 105(c). Exh. R-3. At the hearing, Denu did not state directly what the hazard was in allowing one set of electricians to disconnect the plug at the substation and another set to move the cable. He did state his belief that such a procedure would violate 30 C.F.R. 77.501. 4/ This regulation requires that disconnecting devices be locked out and tagged out before electrical work is performed on electric distribution circuits. Denu maintained that the cable is an electric distribution circuit and that disconnecting the cable head from the bench box is electrical work. Tr. 49-50. He testified that the radio disconnect procedure used violates the standard because he is not personally allowed to lock out and tag out the disconnecting device, the plug, at the substation. 5/ Tr. 52. Denu also generally relied on the

2/ This MSHA memorandum, dated November 20, 1974, instructs MSHA inspectors not to issue citations when they observe an electrician at one location performing repair work on a high-voltage electrical system after another qualified electrician de-energized the circuit at a different location so long as the two electricians are in direct telephone or radio communication. Exh. R-8.

3/ See n. 1, supra.

4/ 30 C.F.R. 77.501, provides in pertinent part:

Electric distribution circuits and equipment; repair.

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

5/ Amax and apparently MSHA consider 30 C.F.R. 77.501 inapplicable when unplugging high voltage lines. The term "high voltage" is defined in 30 C.F.R. 77.2(s) as "more than 1000 volts." The provisions of 30 C.F.R. 77.704-1 govern high-voltage lines and provides in part:

(Footnote continued)

fact that there have been a number of fatalities and injuries at other mines caused by violations of section 77.501. Tr. 54, 59, 67. He stated that since he did not believe that Kozar and Gehlhauser traced the cable from the switch box back to the substation, and the cable and receptacle were not marked at the substation, there was no guarantee that Kozar de-energized the correct cable. Tr. 62. He stated that even if Kozar had locked the cable out, there would have been a violation and he would have refused to work because he would not have been "afforded the opportunity to perform that disconnect and lock out procedure myself." Tr. 69-70. Although Denu did not specifically articulate the hazard of unplugging a cable that is energized, Kozar testified that there could be a big flash or explosion and the person involved could receive burns or be electrocuted. Tr. 115-116.

Following an evidentiary hearing, Administrative Law Judge Gary Melick held that Amex violated section 105(c) of the Mine Act and awarded damages of \$1,000 as had been stipulated by the parties. 11 FMSHRC 563. ^{6/} The judge found that Denu entertained a reasonable, good faith belief that a hazardous condition existed at the time he was directed to disconnect the cable at the bench box. He found that there is "no dispute that it would have been extremely hazardous and likely to result in severe burns and/or electrocution to have disconnected the cable at the switch box if the cable had remained connected and energized at the substation or had been reconnected and re-energized." 11 FMSHRC at 321. He found that the cable could have been "intentionally or unintentionally" reconnected at the substation. Id. He then stated that while under the circumstances of this case, the chances may not have been great that the cable had not been "deenergized, disconnected and not

Fn. 5/ continued

Work on high-voltage lines.

(a) No high-voltage line shall be regarded as deenergized for the purpose of performing work on it, until it has been determined by a qualified person ... that such high voltage line has been deenergized and grounded. Such qualified person shall by visual observation (1) determine that the disconnecting devices on the high-voltage circuit are in open position, and (2) insure that each ungrounded conductor of the high-voltage circuit upon which work is to be done is properly connected to the system grounding medium....

The MSHA memorandum referenced in note 3 above, is based on this safety standard.

^{6/} Because Denu was not suspended or discharged by Amex the stipulated damages cover the costs associated with Denu's prosecution of his discrimination complaint. Of the \$1,000 in stipulated damages, approximately \$700 is wages lost to Denu because he missed six days of work while preparing and presenting his case.

reconnected, the danger of serious injury or electrocution was a near certainty if the cable at the substation had been inadvertently re-connected and reenergized." Id. The judge considered "these extreme consequences" to be a key component in his determination that Denu entertained a reasonable, good faith belief in a hazard. Finally, the judge concluded that threats of disciplinary action directed to a miner exercising a protected right constitute unlawful interference under section 105(c)(1), whether or not those threats are later carried out.

Under established Commission precedent, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. If an operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activity alone. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

A miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. Pasula, 663 F.2d at 1216 n. 6, 1219; Miller v. Consolidation Coal Co., 687 F.2d 194, 195 (7th Cir. 1982). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993. A good faith belief "simply means honest belief that a hazard exists." Robinette at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id. The Commission has rejected a requirement that miners who refuse to work must objectively prove that hazards existed. The miner must simply show that his perception was a reasonable one under the circumstances. Haro v. Magma Copper Co., 4 FMSHRC 1935 (November 1982); Robinette, supra. In determining whether the miner's belief was reasonable under the circumstances, the judge is to look to the miner's account of the conditions precipitating the work refusal, and to the operator's response in order to evaluate the relevant testimony as to "detail, inherent logic and overall credibility." Robinette, 3 FMSHRC at 812. The perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. Secretary on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (September 1983); Haro, supra.

The pivotal issue in this case is whether Denu was engaged in a protected work refusal. On the facts presented, the issue is not

whether Denu generally believed that it was hazardous to unplug an energized 6,900-volt power cable, but whether he entertained a reasonable, good faith belief at the time of his work refusal that he faced a hazard if he unplugged the power cable at the switch box as he had been instructed to do.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Nevertheless, "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera v. NLRB, 340 U.S. 474, 488 (1951). For the reasons discussed below, we conclude that substantial evidence does not support the judge's conclusion that "Denu did in fact entertain a reasonable, good faith belief that a hazardous condition existed at the time he was directed to disconnect the power cable at the 6,900 volt switch box." 11 FMSHRC 320-21.

Although Denu did not testify as to the hazards presented by unplugging an energized power cable, Kozar testified that a "big flash" can result and the miner could receive burns on his arms or could be electrocuted. Tr. 114-16. Since no evidence of record contradicts this testimony, the judge's conclusion that unplugging an energized 6,900-volt power cable presents a significant safety hazard is supported by substantial evidence.

It is clear, however, that at the time of Knight's order to unplug the power cable, Denu knew that Kozar was at the very same substation at which Denu had been when Knight ordered Denu to proceed to the bench. 7/ Denu also knew from his own personal observation that only one power cable was present at this substation. In fact, Denu had just proceeded to the substation to unplug the very same cable. Thus, when Kozar called Denu on the radio and told him that the plug was disconnected and on the ground, Denu could not have entertained a reasonable belief that Kozar had unplugged a different cable. Finally, Denu also knew that Kozar was a qualified electrician and that he and another electrician were going to remain at the substation for the short duration of the cable move and that they were to plug the cable back in at the substation only after Denu had notified them via radio that the cable move had been completed. Whatever uncertainties Denu may have had regarding whether all steps had been taken to de-energize the cable could have been resolved through use of the two-way radio system.

The record also makes clear that the issue of the safety of using two pairs of electricians in radio communication with each other when

7/ Indeed, if Denu entertained any doubts as to Kozar's location, he could have simply asked Kozar where he was when the two were in communication on the radio.

disconnecting power cables had arisen before. Denu had raised safety concerns with respect to this issue about a year before and was told by MSHA electrical Inspector Deuel that it was allowed under MSHA's safety standards. He also knew from previous discussions that AMAX believed it to be a safe and legal procedure.

Given the above facts as set forth in the record, we believe that Denu failed to prove that his belief that, at the time of the events at issue, if he had pulled the plug at the switch box as instructed by Knight he would have been exposed to an electrical hazard was reasonable. Instead, the record reveals that Denu refused to work because of generalized fears that if a mistake is made when working with 6,900-volt power lines, a serious accident can happen. 8/ The record does not show that he had a reasonable belief that such a mistake would be made or that an accident would happen if he unplugged this particular cable at the time of his work refusal.

Denu testified that he would not have unplugged the cable at the switch box unless AMAX allowed him to personally disconnect the power cable at the substation and put his own personal lock on the cable head. Tr. 74. He stated that even if Kozar had locked out the cable head at the substation, he would have refused to unplug the cable at the switch box. Thus, Denu was reserving to himself exclusively the right to unplug the cable at the substation. Nothing in the Mine Act or MSHA's safety standards grants a miner the right to insist that only he can de-energize a power cable if he is required to unplug the other end of the cable. Kozar was a qualified electrician in direct communication with Denu and nothing in the record suggests that he was regarded by Denu as being unreliable or incapable of safely performing the disconnect at the substation. Thus, in the absence of a reasonable fear that the cable was energized, Denu had no statutory right to insist that he be granted the exclusive right to personally perform all aspects of the assigned task.

Because we are bound to affirm an administrative law judge's findings of fact if supported by substantial evidence, we have carefully reviewed the judge's decision and have determined that several additional critical findings lack a substantial basis in the record. One significant

8/ In order to prove that his work refusal was reasonable and made in good faith, Denu introduced a number of exhibits to illustrate the hazards presented when an electrician works on an electrical circuit that has not been locked out. Exhs. C-4 through C-8. None of these exhibits concern the hazards present in unplugging or moving high voltage cables. The judge held that Denu was concerned about the hazards presented because he was "aware through MSHA 'Fatalgrams' of the potentially fatal consequences in similar if not identical situations." 11 FMSHRC 321. Denu attempted to introduce these "Fatalgrams" (MSHA notices of fatal mine accidents) at the hearing, but withdrew them when the judge and counsel for Amex questioned their relevance. Tr. 57-59. In addition, none of the other exhibits that were introduced shed light on the hazards presented in this case.

finding lacking record support is the judge's determination that the serious hazard presented by unplugging an energized 6900-volt power cable was "not significantly diminished" by the fact that Denu knew that the cable plug at the substation was out and lying on the ground. 11 FMSHRC at 322. The judge recognized that the record evidence establishes that Denu knew that (1) only one cable exited the substation, (2) this cable was likely the same cable that was plugged in at the switch box, (3) two qualified electricians were at the substation to disconnect this cable, and (4) one of the electricians told Denu via radio that the cable head was out and lying on the ground. Id.

In spite of this evidence, the judge found that "the serious hazards, previously discussed, are not significantly diminished by these considerations." Id. We find no basis whatsoever in the record to support this finding. Denu knew that during the short period of time required to move the cable around the dragline, two qualified electricians would be present at the substation to make certain that the only cable connected to the substation was unplugged and remained unplugged at the substation. There is no evidence in the record to suggest that these electricians were unaware of the procedure to be followed, that they were otherwise unqualified or that Denu had a reasonable fear that they would plug the cable back in at the substation prematurely. Thus, the record evidence demonstrates that the hazards of electric shock were not only "significantly diminished" but were in fact eliminated when Kozar told Denu that the cable head was disconnected and lying on the ground.

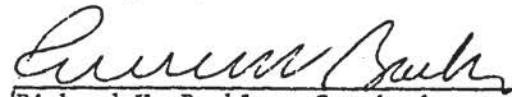
The judge also concluded that Denu had reason to believe that if the circuit breaker malfunctioned at the substation the cable could remain energized even though the switch was off and the indicator light on the switch box was off. Assuming this to be true, it is totally irrelevant because the undisputed testimony is that Kozar not only turned off the circuit breaker at the substation but also pulled the plug. The testimony concerning the hazards of a switch malfunction assume that the cable remains plugged in at the substation. The testimony makes clear that once the cable is unplugged at the substation it is impossible for the cable to remain energized. Therefore, a malfunction of the circuit breaker would create a potential hazard to the electrician unplugging the cable at the substation rather than to the electrician unplugging the cable at the switch box. Thus, substantial evidence does not support the judge's conclusion.

We stress that our conclusion is based on Denu's knowledge of certain facts at the time of his work refusal, particularly his knowledge that only one cable exited the substation and that Kozar, a qualified electrician, was dispatched to the substation to unplug the same cable that Denu prepared to unplug previously. Substantial evidence does not support the judge's determination that Denu reasonably believed that he faced a hazard if he followed the radio disconnect procedure in this particular instance.

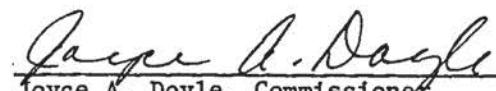
Accordingly, the judge's decision is reversed.



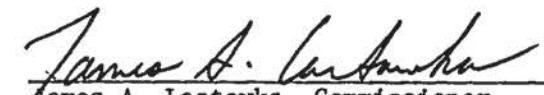
Ford B. Ford, Chairman



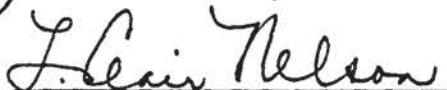
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson
L. Clair Nelson, Commissioner

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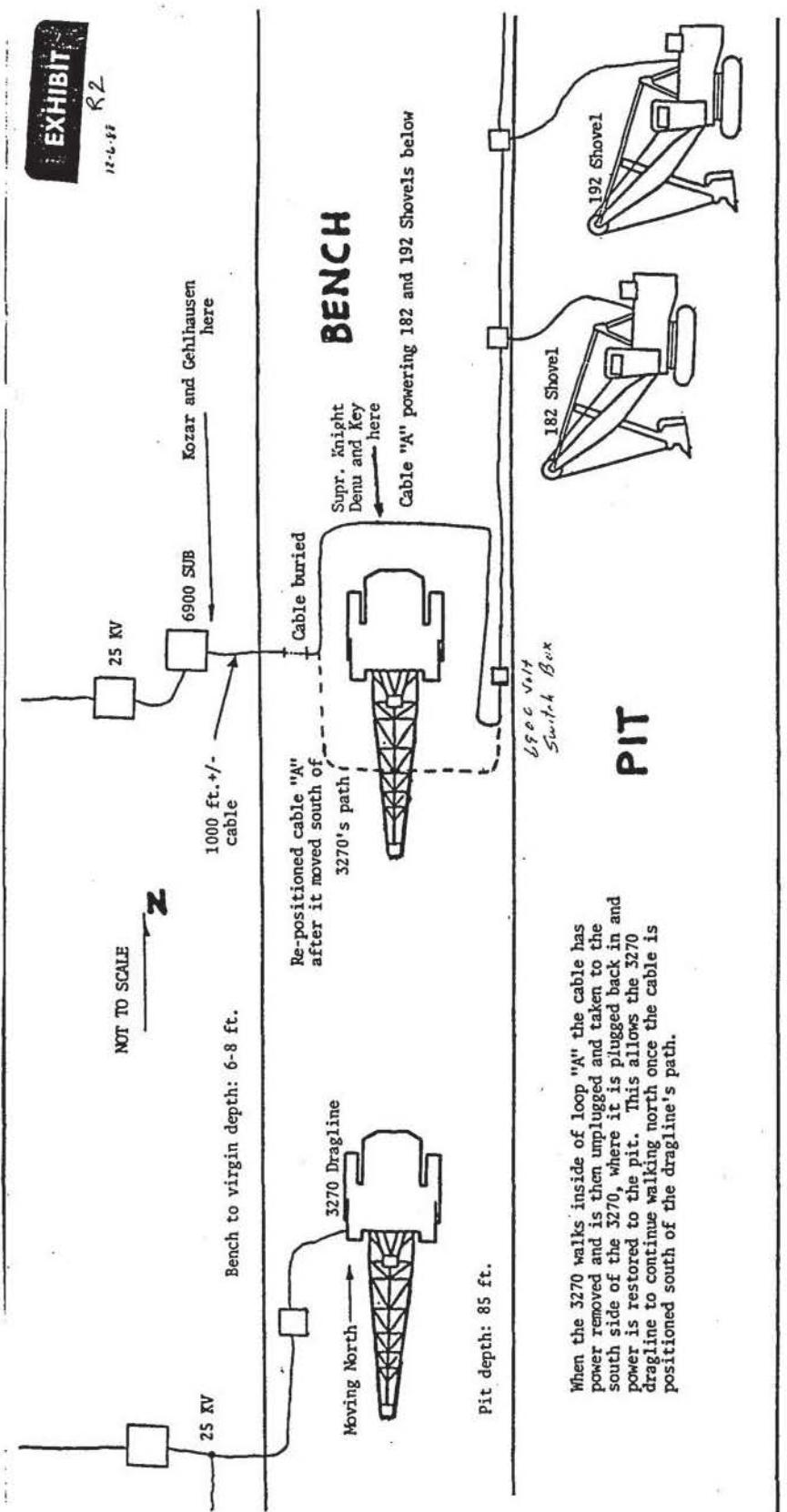
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EXHIBIT

11-4-67 R2



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 27, 1990

RONALD TOLBERT :
v. :
CHANAY CREEK COAL CORPORATION :
: Docket No. KENT 86-123-D
:

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982) ("Mine Act" or "Act"), complainant Ronald Tolbert has filed with the Commission a Motion to Reopen and Remand. By previous order, we directed the filing of supplemental memoranda concerning the request. Tolbert and amicus Secretary of Labor have submitted such memoranda. Respondent Chaney Creek Coal Company ("Chaney Creek") has not filed any response to Tolbert's motion and the supplemental memoranda. Upon consideration of Tolbert's motion and supporting memoranda filed with us, and for the reasons explained below, we reopen this matter and remand it to Commission Administrative Law Judge Gary Melick for further proceedings consistent with this opinion.

The relevant procedural history may be summarized briefly. This case was commenced by Tolbert's discrimination complaint against Chaney Creek filed with the Commission pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). On March 16, 1987, Judge Melick issued a decision concluding that Chaney Creek had discriminated against Tolbert in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), by refusing to rehire him from layoff status after he had testified on behalf of a complainant in another discrimination proceeding before the Commission. 9 FMSHRC 580 (March 1987)(ALJ). The judge ordered Chaney Creek to offer Tolbert employment. In a subsequent remedial order, Chaney Creek also was directed to pay Tolbert \$14,453 in back pay and interest through April 8, 1987, as well as any additional back pay and interest to date of reinstatement. Tolbert was awarded \$16,900 in attorney's fees. 9 FMSHRC 929 (May 1987)(ALJ).

Because the Commission did not grant Chaney Creek's petition for discretionary review, the judge's decisions became final decisions of the Commission by operation of the statute. 30 U.S.C. § 823(d)(1). Chaney Creek did not petition for review of these final Commission orders in a United States court of appeals. 30 U.S.C. § 816(a).

On October 1, 1987, Tolbert filed with the Commission a motion, opposed by Chaney Creek, to reopen the proceedings. Tolbert alleged that although Chaney Creek had reinstated him in May 1987, it had not paid him all the back pay and attorney's fees due. Tolbert further asserted that two other mining corporations and John Chaney individually were successors or alter egos of Chaney Creek and should be brought into this proceeding under applicable successorship doctrines. See, e.g., Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (March 1987), aff'd, Terco v. FMSHRC, 839 F.2d 236 (6th Cir. 1987). In an order issued on November 10, 1987, the Commission denied Tolbert's motion to reopen, stating:

The essential nature of the remedy sought by Tolbert is collection of a judgment debt. This relief involves, inter alia, enforcement and execution of the Commission's final decision in this matter. Such an enforcement request is properly directed to the Secretary of Labor. Under the Mine Act, the Secretary is empowered to seek compliance with Commission orders in the federal courts. See 30 U.S.C. §§ 816(b) & 818. We need not and do not express any opinion as to other avenues of relief that may be available to Tolbert.

Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 1847, 1848 (November 1987).

Thereafter, Tolbert requested the Secretary of Labor to petition a United States court of appeals for summary enforcement of the judge's orders. See 30 U.S.C. § 816(b). On January 25, 1988, the Secretary filed such a petition with the United States Court of Appeals for the Sixth Circuit. Tolbert also filed a motion to intervene, which was granted. On May 19, 1988, the Sixth Circuit granted the Secretary's enforcement petition and later certified its order as its mandate on June 22, 1988. Tolbert Motion Exhs. B & C (July 20, 1989) ("Motion").

The next major procedural development in this matter occurred on July 20, 1989, when Tolbert filed the present motion to reopen. The motion seeks an additional amount of back pay and interest for the period April 9, 1987, through Tolbert's reinstatement in May 1987, an additional amount of attorney's fees for legal work performed after April 8, 1987, additional interest on back pay owed to the present time because of Chaney Creek's failure to pay in full the back pay amounts awarded, and a determination of "whether Chaney Creek is the 'alter ego' of its owner, John Chaney . . . , and whether Chaney should therefore be held personally liable for the relief due Tolbert." Motion at 1. Tolbert alleges that Chaney Creek has paid him only \$7,000 of the back pay and interest owed and has paid counsel only \$2,500 in attorney's fees, and further states that Chaney Creek is no longer operating any

mines. Motion at 3-4. Counsel for the Secretary of Labor also filed a Motion for Leave to File a Memorandum as Amicus Curiae in support of complainant's reopening motion.

By order dated October 31, 1989, we granted the Secretary's amicus motion and accepted her memorandum. We noted that Tolbert "has failed to identify any specific basis or authority upon which the Commission can rely to reopen this proceeding to consider the merits of his request for relief." 11 FMSHRC 1942, 1943 (October 1989). We directed Tolbert and the Secretary to file supplemental memoranda addressing the jurisdictional authority supporting their request that this proceeding be reopened at this time. We also directed Tolbert to address the obvious question as to why the Sixth Circuit is not the "proper tribunal" before which he should pursue the alter ego issue. Id.

The chief question presented is whether the Commission possesses jurisdiction to reopen this proceeding. We answer that question in the affirmative. Tolbert's several requests for relief in his present motion are outgrowths of this case's prolonged procedural history. Tolbert heeded the Commission's order of November 10, 1987, and invoked the Secretary's representation to secure summary enforcement of the Commission's final orders in the Sixth Circuit. Tolbert now alleges that, despite this judicial enforcement, Chaney Creek has not complied with the judge's remedial order and that certain additional monetary matters relevant to the remedy require further adjudicative resolution.

Neither Tolbert nor the Secretary has pursued the possible course of prosecuting contempt proceedings in the Sixth Circuit to seek resolution of the remedial questions presented in the present reopening motion and to compel obedience to that Court's summary enforcement decree (see 30 U.S.C. § 816(b)). However, as the memoranda before us demonstrate, the developing law concerning contempt proceedings in analogous contexts shows that were such proceedings to be initiated, the Court would likely remand the matter to the Commission for further necessary findings of fact. See, e.g., Aquabrom v. NLRB, 746 F.2d 334, 336-37 (6th Cir. 1984); see also NLRB v. FMG Industries, 820 F.2d 289, 291-94 (9th Cir. 1986). We are persuaded that we possess jurisdiction to act and, in the interest of judicial economy, we exercise our discretion to reopen the matter.

When the Sixth Circuit issued its mandate, the Commission reacquired the power to assert its own jurisdiction over this matter. See, e.g., Newball v. Offshore Logistics, Int'l, 803 F.2d 821, 826 (5th Cir. 1986). A lower tribunal may consider and decide any matter not expressly or implicitly disposed of by the appellate decision and may conduct further proceedings not inconsistent with the mandate. E.g., Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949-50 (3rd Cir. 1985), and authorities cited. In granting the Secretary's petition for enforcement, the Sixth Circuit did not pass substantively on any of the matters asserted in complainant's motion and, accordingly, the Commission is not precluded from considering complainant's contentions.

Although the Mine Act specifically authorizes the Secretary of Labor to seek compliance with Commission orders in the federal courts

(30 U.S.C. §§ 816(b) & 818), and the Commission possesses no direct authority under the Act with respect to enforcement of its own orders, section 105(c)(3) of the Act does empower the Commission to grant a successful section 105(c)(3) complainant "such relief as it deems appropriate, including, but not limited to, ... rehiring or reinstatement ... with back pay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). As we have stated:

The remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., [4 FMSHRC 126, 142 (February 1982)]. As we have previously observed, "'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Co., 302 F.2d 152, 156 (5th Cir. 1962).

Secretary on behalf of Bailey v. Arkansas-Carbon Co., 5 FMSHRC 2042, 2049 (December 1983). See also, e.g., Brock on behalf of Parker v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985).

In light of the remedial purposes of section 105(c), we conclude that the Commission, in appropriate cases and on such terms as are just, may reopen a discrimination case for reasonable supplemental proceedings in aid of compliance. Indeed, the Commission has acted similarly without challenge in the past. In Secretary on behalf of Boone v. Rebel Coal Co., 5 FMSHRC 615, 615-16 (April 1983), the Commission granted the Secretary's post-enforcement motion to reassume jurisdiction in order to resolve a back pay compliance problem and remanded the matter to an administrative law judge "for expedited proceedings in compliance with the Court's [summary enforcement] order." Similarly, in Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508-09 (April 1988), upon a complainant's motion, we reopened a section 105(c)(3) discrimination case, which had been dismissed on the basis of the judge's approval of the parties' settlement agreement, to confirm the enforceability of the settlement agreement and the judge's order in view of respondents' abrogation of the agreement.

In reopening closed cases, the Commission has sought guidance in, and has applied "so far as practicable" and "as appropriate," Fed. R. Civ. P. 60(b) ("Rule 60(b)'), dealing with relief from judgments. See Commission Procedure Rule 1(b), 29 C.F.R. § 2700.1(b). See also, e.g., M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1270-71 (September 1986). Thus, in reopening the Danny Johnson case in aid of post-judgment compliance, the Commission relied on Rule 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). 10 FMSHRC at 508. While usually the Commission has utilized Rule 60(b) analysis to relieve defaulting respondents from Commission decisions entered against them, the terms of Rule 60(b) do not apply solely to losing parties, and 60(b) relief also may be sought by the prevailing party where, as here, a

problem in relief arises. See Danny Johnson, supra; 7 J.W. Moore & J.D. Lucas, Moore's Federal Practice Par. 60.22[1] (p. 60-174)(2d ed. 1987); Gray v. John Jovino Co., Inc., 84 F.R.D. 46, 47 (E.D. Tenn. 1979). See also, e.g., Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051-52 (2d Cir. 1982) (even non-parties, in appropriate circumstances, may possess standing to invoke Rule 60(b)(6) where they are sufficiently connected and identified with a successful party's suit). Thus, we conclude that Rule 60(b)(6) also supports the reopening of this matter because we find that "such action is appropriate to accomplish justice" here. Klapprott v. United States, 335 U.S. 601, 614-15 (1949). 1/

Accordingly, we reopen this matter so that we may turn to consideration of the substantive relief requested in complainant's motion. As to complainant's requests regarding additional sums of back pay, interest, and attorney's fees assertedly due, factual findings may be necessary; therefore, we remand this matter to Judge Melick (the originally presiding judge) for determination of whether the requested monetary relief is properly due and, if it is, for calculation of the amounts in question. See Robert Simpson v. Kenta Energy, 11 FMSHRC 1638, 1639 (September 1989).

Complainant's request for a determination as to John Chaney's possible alter ego status and, hence, derivative liability, may prove more troublesome. Discrimination litigation under the Mine Act, like other litigation, must reach finality. While the remedial goal of section 105(c) is to make whole victims of discrimination, that worthy purpose is not to be realized at the expense of fair litigation procedure or due process. The party whom Tolbert now seeks to add has never individually been a party to this proceeding, and we cannot finally determine from the present record whether John Chaney may properly be brought into this proceeding at this stage.

Given the present record on this issue, we therefore remand this matter to the judge for needed factual findings and legal analysis as to whether John Chaney may appropriately be joined in this matter at this late date. Specifically, and as a threshold issue, the judge is directed to determine whether the complainant should have determined John Chaney's alleged alter ego status at a more timely and seasonable juncture of this litigation and to determine the precise legal theory and authority upon which any such joinder may now be justified. John Chaney shall be afforded opportunity to be specially heard on these issues. If the judge concludes that John Chaney may properly be made party to these supplemental compliance proceedings, he shall continue to

1/ We caution, however, that reopening motions are committed to the sound discretion of the Commission. Cf. Randall v. Merrill Lynch, 820 F.2d 1317, 1320-21 (D.C. Cir. 1987). Given that the primary use of this rule in Commission practice is to relieve defaulting parties from default, such motions by prevailing parties will be examined carefully on a case-by-case basis. As the Court stated in Randall: "Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which ... courts are to use sparingly...." 820 F.2d at 1322.

be afforded full opportunity to participate on any and all liability or
remedial issues possibly affecting him. Cf. generally Golden State
Bottling Co. v. NLRB, 414 U.S. 168, 180 (1973); FMG Indus., supra, 820
F.2d at 291-92.

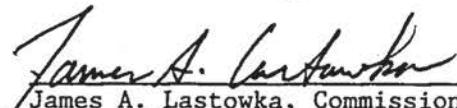
For the foregoing reasons, this matter is reopened and remanded to
the judge for proceedings consistent with this opinion.



Ford B. Ford, Chairman



Richard V. Backley, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

Commissioner Doyle, concurring in part and dissenting in part:

The administrative law judge's May 12, 1987, decision in this matter became a final order of the Commission in June 1987. In October 1987, Complainant Ronald Tolbert filed a motion before the Commission seeking to reopen this matter. He requested that it be remanded to the administrative law judge for a determination of whether, among other matters, John Chaney was liable to Tolbert because Chaney Creek and its owner were "alter egos," thus making Chaney liable for Tolbert's judgment against Chaney Creek. The Commission denied the motion because:

[t]he essential nature of the remedy sought by Tolbert is collection of a judgment debt....Such an enforcement request is properly directed to the Secretary of Labor. Under the Mine Act, the Secretary is empowered to seek compliance with Commission orders in the federal courts.

9 FMSHRC 1847, 1848 (November 1987).

Tolbert then requested the Secretary of Labor ("Secretary") to petition a United States Court of Appeals for enforcement of the judge's order against Chaney Creek. The Secretary so petitioned the Sixth Circuit and Tolbert intervened in the proceeding. The Sixth Circuit granted the enforcement petition against Chaney Creek and certified its order as a mandate in June 1988.

In July 1989, Tolbert again moved the Commission to reopen its final order of June 1987 and remand the matter for a determination of whether owner John Chaney is the alter ego of Chaney Creek and thus personally liable for the relief due Tolbert, a determination of the additional back pay and interest due Tolbert and a determination of the additional attorney's fees due Tolbert.

The majority has granted Tolbert's motion based on its determination that the "developing law" indicates that, if a proceeding were initiated before the Sixth Circuit, "the Court would likely remand the matter to the Commission for further necessary findings of fact." Slip op. at 3. (emphasis added.) They are, therefore, persuaded that the Commission possesses jurisdiction in the first instance to reopen the matter and, "in the interest of judicial economy, [the majority] exercise[s] [its] discretion to reopen the matter." Slip op. at 3. I disagree that the Commission has jurisdiction to reopen this matter, at this juncture, to determine the personal liability of a non-party, absent a remand from the court of appeals.

I am also of the opinion that an updated recalculation of the back pay and interest due Tolbert is unnecessary. I would grant Tolbert's motion to assess additional attorney's fees.

Section 106(b) of the Mine Act provides that the Secretary of Labor may obtain "enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals... and the provisions of subsection (a) shall govern such proceedings to the extent applicable." 30 U.S.C. §816(b). Subsection (a) of section 106 provides, in relevant part, that:

If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings... The Commission may modify or set aside its original order by reason of such modified or new findings of fact ..."

30 U.S.C. §816(a). (emphasis added.)

I believe that the statutory language is clear to the effect that, with respect to enforcement of a final order of the Commission, application must be made to the court of appeals for leave to adduce additional evidence. The language is also clear that it is the court that is to determine, in the first instance, whether there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission. 1/

1/ The cases relied on by the majority do not support its theory that the Commission "reacquired the power to assert its own jurisdiction over this matter." Slip op. at 3. Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943 (3rd Cir. 1985), deals specifically with the effect of a remand order previously issued by the appellate court. 761 F. 2d at 949-950. This case has not been remanded to the Commission. In Newball v. Offshore Logistics Int'l., 803 F.2d 821 (5th Cir. 1986), the district court had concluded on remand that the appellate court's mandate had not addressed some of the provisions of an order and had modified that order. (Subsequently, the appellate court concluded that the district court's modification of a final order, more than a year after its entry, was unauthorized.) 803 F.2d at 826, 827.

While Fed. R. Civ. P. 60(b) has previously been used by the Commission to reopen final orders, I believe that the majority's reliance on Rule 60(b)(6) to reopen this matter to allow Tolbert to pursue his alter ego theory is inappropriate. What is sought by claimant here is not relief from a final judgment but the extension of that judgment to a new respondent (John Chaney) pursuant to a new theory of liability (alter ego). Motion to Reopen and Remand at 13. No analogy can be drawn between reopening a case, pursuant to Rule 60(b), to confirm the enforceability of a settlement agreement that one of the parties is abrogating, as was done in Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506 (April 1988), relied on by the majority, and reopening this case in order to bring in a new party under a new theory of liability. Nor do I see any analogy between a case where non-parties adversely affected by a judgment were permitted to invoke Rule 60(b) against a party as was permitted in Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d Cir. 1982), also relied on by the majority, and this case where a party seeks to assert a new claim against a non-party. 2/

I am also of the opinion that it is unnecessary to reopen this matter for an updated calculation of the back pay and interest due to Tolbert at this time. As the Commission stated in Robert Simpson v. Kenta Energy, Inc., 11 FMSHRC 1638 (September 1989):

...given the back pay formula in the judge's remedial order and the principles announced in Clinchfield, infra, the precise amounts of back pay and interest may be determined in any tribunal of competent jurisdiction and it is not necessary to return to the Commission for periodic updatings of these amounts if collection difficulties are encountered.

11 FMSHRC at 1639.

2/ It should be noted that, while Rule 60(b)(6) motions need only be made within "a reasonable time," that clause cannot be used to extend the one year limitation applicable to clauses (b)(1)-(b)(3). Before turning to subsection (b)6, the court in Dunlop v. Pan American concluded that "[t]he claim clearly does not fall within the specific terms of subsections (b)(1)-(5)". 672 F.2d at 1051. "Where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of clause...(b)(6)." Newball, 803 F.2d at 827, quoting Gulf Coast Building and Supply Co. v. Local No. 480, 460 F.2d 105, 107 (5th Cir. 1972). The "one year limitation would control if no more than 'neglect' was disclosed by the petition." Klaprott v. United States, 335 U.S. 601, 613 (1949). It should also be noted that, under Rule 60(b)(2), the one year limit applies even when the additional evidence is newly discovered, which is not asserted here.

With respect to Tolbert's request for a supplementary award of attorney's fees, I agree with the majority that the matter should be remanded to the trial judge, but on different grounds than those advanced by the majority. Tolbert's motion in this respect is in the nature of a petition for the award of additional attorney's fees for time spent after the administrative law judge's award. A fee award petition is independent of and distinct from the decision on the merits. 2 Derfner Court Awarded Attorney Fees, Par. 18.04 at 18-34 (1989). "...a request for attorney's fees... raises legal issues collateral to the main cause of action..." White v. New Hampshire Department of Employment Security, 455 U.S. 445, 451 (1982). "Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits..." Id. at 451, 452. A motion for a fee award is not designed to alter or amend a judgment, "but merely seeks what is due because of the judgment." Id. at 452, quoting Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980). (emphasis added.) Thus, Tolbert's motion for assessment of additional attorney's fees is not governed by either section 106 of the Mine Act or the time constraints of Rule 60(b), but only by a "reasonable time" standard (455 U.S. at 454), and I would grant his motion with instructions to the judge to determine, as a threshold matter, whether the petition was filed within a reasonable time. 3/

I agree with the majority that the Commission is, in fact, the appropriate forum for any further fact finding that is required or appropriate in this matter. I must disagree, however, that the Commission possesses jurisdiction to conduct such fact finding on the alter ego issue, where Rule 60(b) does not apply, absent a remand from the court of appeals. Accordingly, I would deny Tolbert's motion to remand for a determination of this issue. I would also deny his motion for an updated calculation of back pay and interest due to Tolbert. I would grant his motion to remand for a determination with respect to additional attorney's fees due him.



Joyce A. Doyle
Commissioner

3/ While the courts of appeals for other circuits have determined otherwise, the Sixth Circuit has decided that "the tribunal that ultimately upholds the claim for benefits is the only tribunal that can approve and certify payment of an attorney fee" and in "making this award can consider all services performed by the attorney from the time the claim was filed with the [agency]." Webb v. Richardson, 472 F.2d 529, 536 (6th Cir. 1972). But see Gardner v. Menendez, 373 F.2d 428 (1st Cir. 1976); Whitt v. Califano, 601 F.2d 160 (4th Cir. 1979); Fenix v. Finch, 436 F.2d 831 (8th Cir. 1971); MacDonald v. Weinberger, 512 F.2d 144 (9th Cir. 1975).

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 2 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 90-34
Petitioner : A.C. No. 42-01697-03607
v. :
: Bear Canyon No. 1 Mine
C. W. MINING COMPANY, :
Respondent :

DECISION

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

Before: Judge Melick

This case is before me upon the petition for 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
C.W. Mining Company (C.W. Mining) with five violations of
mandatory standards and proposing civil penalties totaling
\$1,450 for the violations. The general issue before me is
whether C.W. Mining violated the cited regulatory standards
and, if so, the appropriate civil penalty to be assessed in
accordance with Section 110(i) of the Act.

Citation No. 3296377 issued July 5, 1989, pursuant to
Section 104(d)(1) of the Act¹ alleges a violation of the
mandatory standard at 30 C.F.R. § 75.512-2 and charges as
follows:

¹/Section 104(d)(1) 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 nature as could significantly

The weekly examination of electrical equipment was not conducted for all the electrical equipment being used underground at the Bear Canyon No. 1 Mine. The equipment involved consisted of all outby equipment in both working sections' electrical equipment. The last recorded date of an examination recorded in the book for such purpose was 6-22-89. Management is aware of this requirement and the chief electrician Nathan Atwood is responsible to make sure the examinations are complete and recorded.

In questioning a mine electrician who does the electrical examination, Mr. John Tucker, stated he did not check all the equipment due to break downs last week.

Management removed equipment from service after coming aware of the violation. It was noted during the examination on several pieces of equipment on the North Mains working section that several deficiencies [sic] existed on the equipment (Miner 10, Roof Bolter 5, std. shuttle car 2, off standard car 1)

The cited standard, 30 C.F.R. § 75.512-2 provides as follows:

The examinations and tests required by § 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition.

cont'd fn.1

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.

30 C.F.R. § 75.512 provides as follows:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Donald Gibson, a Coal Mine Inspector for the Federal Mine Safety and Health Administration (MSHA) and an electrical specialist with extensive experience as a miner and electrician, inspected the Bear Canyon No. 1 Mine on July 5, 1989. Early in the course of his inspection he examined the log books in which weekly examinations of electrical equipment are required to be recorded. It is not disputed that the last date then recorded in the log book for electrical examinations was June 22, 1989. According to Gibson, John Tucker, the mine electrician in charge of conducting the electrical examinations, at first admitted that he had not completed the examinations on all the electrical equipment because there had been several break downs on other electrical equipment that he had been directed to repair. Upon further questioning Tucker could not remember which equipment he had already examined and could not produce a checklist to show which equipment had already been checked. According to Gibson, Tucker then admitted that he had not performed examinations on any of the electrical equipment.

Twenty-two year old electrician John Tucker testified that he became a certified electrician at age 20 and had been performing nearly all of the electrical inspections at the subject mine since then. In apparent contradiction to his earlier admissions to Gibson, Tucker testified that he now believed that he in fact did perform an electrical inspection on the Thursday following June 22, because "that's the day we always do it". Tucker admitted telling Inspector Gibson that he had not completed the exam but claimed at hearing that he meant only that he had not entered the record of the examinations in the log book. He "completely forgot" to enter the results of his alleged examination in the log book. Tucker nevertheless did concede at hearing that the electrical examination he did perform failed to include areas of the electrical equipment where lids have to be removed.

Tucker could not recall at hearing that Inspector Gibson had asked which machines had already been checked. He admitted that there had been equipment breakdowns at the time he was supposed to be conducting his electrical inspection. According to Tucker, reporting the results of electrical inspections is a "less important duty" and admitted that he had not reported the results of the examination he purportedly made on June 27, even as of the date of Gibson's inspection on July 5.

C.W. Mining's Chief Electrician Nathan Atwood conceded that they had a history of failing to record electrical examinations at the Bear Creek Mine. Atwood also claimed that he was unaware that his electrician was not using a checklist to perform his electrical inspections and never asked Tucker whether he was in fact using a checklist. Atwood maintains that Tucker now uses a checklist.

Based on the undisputed record evidence alone it is clear that the violation is proven as charged. The testimony of electrician John Tucker is moreover without credibility. The credible evidence shows that not only did Tucker fail to report the weekly electrical inspections but he indeed failed to inspect any of the electrical equipment as required. The evidence that this is a recurrent problem at this mine and that even when the electrical inspections are performed they are done in a careless and slipshod manner adds to the aggravated nature of the violation and the negligence causing it. The obvious lack of training and supervision over Tucker by Chief Electrician Atwood also supports a finding of serious negligence.

In order to find that a violation is "significant and substantial" the Secretary has the burden of proving the existence of an underlying violation of a mandatory standard, the existence of a discrete hazard (a measure of danger to health or safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984).

Clearly the failure to conduct required electrical examinations is a most serious violation. In this case in particular Inspector Gibson found serious unreported violative conditions in various electrical equipment available for use in the subject mine. According to Gibson these uncorrected conditions could have caused fires or methane or dust explosions triggered by the electrical violations. In addition the violations in themselves could create a serious hazard of injuries or fatalities from electrical shock. The violation was therefore clearly of high gravity and "significant and substantial".

The violation was also the result of "unwarrantable failure" and high negligence. C. W. Mining has a history of failing to perform and record electrical examinations. With such a negligent history the failure of C.W. Mining's chief electrician to properly supervise and train the electrician in charge of the weekly electrical inspections is particularly egregious. The testimony of the electrician that even when he conducted examinations he did not bother to examine all parts of the electrical equipment during required weekly inspections e.g. areas where "lids" have to be removed, shows that even when examinations were performed they were performed in a grossly deficient manner. Under all the circumstances, I find in this case such aggravated conduct, omissions and gross negligence that I conclude the violation was a result of "unwarrantable failure". Emery Mining Co., 9 FMSHRC 1997 (1987), appeal pending (D.C. Circuit No. 88-1019).

Order No. 3411644, also issued pursuant to Section 104(d)(1) of the Act, alleges five violations of the standard at 30 C.F.R. § 75.503 and charges as follows:

The Lee Norse Miner, 2G-3653A-0 being used on the North Mains working section was not maintained in permissible condition.

An unauthorized field change was made on the machine. Also observed was [sic] several other conditions listed below:

1. The field change was the installation of an MCI Model 27434, Approval BFE-1047-87, fluorescent luminize lighting system consisting of (4) four lights.

Management was aware of filing the proper papers as having been informed by an MSHA inspector on or around June 29, 1989, who observed the miner located in the underground shop at the mine

The MSHA inspector, Mr. Robert Baker, informed Mr. Ken Defa, Superintendent, that any field changes should have the necessary paper work submitted for approval prior to operating the machine.

The machine was taken to the North Mains working section and put into production without notifying MSHA of any changes.

2. A packing gland on the inby end of the main controller was closer than the allowable 1/8 inch clearance. The gland was flush with the controller box.

3. An opening in excess of .005 inch was present in the pump motor cover lid and junction box.

4. A packing gland on the electric tram controller was closer than the 1/8 inch allowable

clearance. Measured to be 1/16 inch from the controller box.

5. The hose conduit covering the inner machine cable on the left cutter motor was not secured under the packing gland clamp. The cable appeared not to have been inserted far enough in the motor junction box and was taped over to obtain the same protection as the conduit.

The cited standard, 30 C.F.R. § 75.503 provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

According to Inspector Gibson, upon his return to the subject mine on July 10, 1989, around 6:40 a.m., he observed the cited Lee Norse Miner in the working section in the North Mains area with the noted conditions. The miner was then energized and he believed that it had just been used on a production shift because it was "warm".

It is not disputed that the subject miner was the type of equipment required to be "permissible" by law. It is likewise not disputed that if the conditions cited by Inspector Gibson in the subject order actually existed then the cited equipment would not have been in a "permissible" condition and therefore would have been in violation of the cited standard.

As noted, the order alleges five separate and distinct permissibility violations any one of which (assuming that it was a "significant and substantial" and an "unwarrantable failure" violation) would be sufficient to sustain the order. In this case I find that all five allegations of violations are proven as charged and that each was "significant and substantial" and the result of "unwarrantable failure".

The first violation charged in the order was that an unauthorized field change was made on the Lee Norse Miner being used in the North Main working section in that a flourecent lighting system consisting of four lights was installed on the machine without prior MSHA approval.

30 C.F.R. § 18.81(a) provides as follows:

An owner of approved (permissible) equipment who desires to make modifications in such equipment shall apply in writing to make such modifications. The application, together with the plans of modifications, shall be filed with Approval and Certification Center, Box 201B, Industrial Park Road, Dallas Pike, Triadelphia, West Virginia 26049.

It is not disputed that C.W. Mining failed to apply to MSHA for the field modification at issue. The violation is accordingly proven as charged. MSHA Inspector Robert Baker testified moreover that on June 29, 1989, while performing duties at the subject mine he was informed by Mine Superintendent Kenneth Defay about anticipated changes to be made on a continuous miner then in the shop including changes to the lighting system. Baker testified that he cautioned Defay to check to see whether he needed approval from MSHA for a field modification for the changes.

Defay acknowledged that Baker told him that he would need MSHA approval for field modifications for electrical changes but Defay testified that he thought Baker said that approval was needed only for "major" electrical changes. Defay claims that he thought lighting system changes needed no MSHA approval. Defay also claimed ignorance of the provisions of 30 C.F.R. § 18.81 (requiring MSHA approval for field modifications on permissible electrical equipment).

Chief electrician Nathan Atwood also claimed ignorance of the requirements of 30 C.F.R. § 18.81. Atwood maintains that in any event since the field change was subsequently approved by MSHA there was no hazard in failing to get its prior approval.

The record also shows however that the Co-op Mining Company, the predecessor operator of the Bear Canyon Mine and parent organization of C.W. Mining, previously corresponded with MSHA requesting approval for the installation of lighting systems at least five times in 1979 and 1980. Indeed two of the letters requesting modifications were authored by Mr. Stoddard who was then and is now president of the subject company.

Within the above framework it is clear that C.W. Mining Superintendent Kenneth Defay was specifically advised, only 10 days before the subject order was issued, of the need to verify whether prior MSHA approval was needed before making the anticipated field modifications. While there is some question as to whether MSHA Inspector Baker specifically told Defay that prior MSHA approval was necessary for a field modification to the lighting system, it is clear that Defay was placed on such notice from which he certainly had the obligation to verify whether or not such prior approval was necessary. His claims of ignorance cannot therefore be given any weight either toward negating the violation or in mitigating his negligence. The evidence is clear moreover that it was within the collective knowledge of C.W. Mining management that prior MSHA approval was indeed necessary for field modifications to the lighting system on the subject miner because that management had previously made such requests to MSHA. Under the circumstances the failure to

seek and obtain prior MSHA approval for the field modification was the result of negligence of such an aggravated nature as to constitute "unwarrantable failure". Emery Mining Co., supra.

The violation was also "significant and substantial". While it turned out in this case that indeed the modifications as made were subsequently approved by MSHA the purpose of the standard is to foreclose the possibility of dangerous conditions. Considering normal mining operations it may reasonably be inferred that failure to obtain prior MSHA approval for field modifications to permissible electrical equipment would reasonably likely lead to reasonably serious injuries in the mining environment. Mathies Coal Company, supra.

The second and fourth violations charged in the subject order concern insufficient packing in packing glands at two locations on the subject miner. The requirements for packing are set forth in 30 C.F.R. Part 18 Appendix II Figure 8. It is not disputed that without sufficient packing an arc or flame could reach the outside atmosphere and ignite coal dust or methane or that an electrical cable could become damaged. By way of defense to the charges C.W. Mining maintains only that the packing was indeed sufficient.

In light of the prior deficiencies found in the credibility of the operator's principal witness however I give greater weight to the unimpeached testimony of Inspector Gibson and find that indeed there was a deficiency in the packing as charged. In light of the undisputed evidence concerning the hazard involved with insufficient packing I also conclude that the violations were "significant and substantial". Mathies Coal Co., supra.

Insufficient packing of the packing glands is also the type of violation that should be discovered during an appropriate weekly electrical inspection. The failure of C.W. Mining to have conducted a weekly electrical inspection (a finding I have made in reference to Citation No. 3296377) supports the finding that these violations were also the result of gross negligence and aggravated conduct constituting "unwarrantable failure". Emery Mining Co., supra.

The order charges, thirdly that an opening in excess of .005 inch was present in the pump motor cover lid and junction box. Under 30 C.F.R. Part 18 Sub-Part D Appendix II Figure 5, a maximum clearance of .004 inch is allowed. C.W. Mining does not deny the existence of this violation as charged but maintains (through electrician John Tucker) that such a gap in excess of .005 inch does not involve any danger. However in light of this electrician's notable lack of

experience and established deficiencies in credibility I can give this opinion but little weight.

On the other hand I find the testimony of Inspector Gibson, a highly qualified and experienced electrician, completely credible. According to Gibson with such a gap in the pump cover lid and junction box there was a real danger that a short circuit or arc within the motor could escape into the outside mining atmosphere igniting methane or coal dust thereby inferentially causing flash fire or explosion. The violation was clearly therefore "significant and substantial". Mathies Coal Company, supra.

The violation was also the result of negligence of such an aggravated nature as to constitute "unwarrantable failure". Emergy Coal Co., supra. The electrician responsible for inspecting this electrical equipment has been found not to have even conducted the weekly electrical inspection that, if properly done, would have led to the discovery of this most serious violation. It is apparent moreover that even when the weekly inspections were performed not all parts of the electrical equipment were inspected, e.g. area where lids had to be removed such as the pump motor lid here involved. This violation was extremely serious and the cavalier and negligent attitude of the electrician responsible for these inspections is most disturbing.

Finally, the fifth violation charged in the subject order concerns the failure to have secured the hose conduit covering the inner machine cable on the left cutter motor under the packing gland clamp. According to the allegations the cable appeared not to have been inserted far enough into the motor junction box and was taped over to obtain protection similar to that provided by a conduit. For the reasons already noted I accord the testimony of Inspector Gibson full credibility.

According to Gibson the tape covering the cable did not afford the same degree of protection as the hose conduit and indeed the cable could produce an ignition source for a methane or dust explosion. The violation was therefore clearly "significant and substantial" and serious. Inasmuch as the violation was caused by the affirmative act of a worker and was subject to electrical inspections, the failure to have located and corrected this violation constitutes gross negligence and "unwarrantable failure".

Order No. 3411646 also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Accumulations of loose Coal, coal pieces and coal fines were permitted to accumulate in the #20

Room on the 2nd West working section. The accumulations began at the section feeder breaker and extended approximately 332 feet inby and measured to range between 2-12 inches deep x 11 feet wide. This entry was the shuttle car roadway. The shuttle cars are supplied 480VAC.

Also in the last open cross cut to the left of the #20 Room, accumulations of coal fines (first cuttings) was [sic] observed on the left and right ribs approximately 90 [sic] in length x 16 inches deep x 29 inches wide (measured).

The joy shuttle cars were observed running over these accumulations.

The graveyard foreman, Gaylon Atwood, was present on the section at this time. Also present on the section were the two(2) day shift foremen, Shin Stoddard and Randy Defa.

These accumulations were very obvious. Mr. Atwood stated, "the area around the feeder breaker had been cleaned around 1:30 a.m. this date but the entry was not cleaned. He also stated he observed the accumulations but did not feel they were (accumulations) that bad until the cleaning up of the accumulations was under way"

Mr. Atwood also performed the pre-shift examination of this section and these conditions were not observed at that time. (*Note a separate violation was issued for an inadequate preshift).

The cited, standard 30 C.F.R. § 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned-up and not be permitted to accumulate in active workings, or on electric equipment therein." Inspector Gibson testified that he in fact found the conditions cited in the above order during the course of his inspection on July 12, 1989. Although the accumulations were found in several areas he issued only one citation for the conditions. According to Gibson much of the material consisted of coal "fines" which he defined as pulverized coal that would not pass through a No. 20 sieve. It is not disputed that coal fines are more dangerous than other coal accumulations because they are more readily ignitable and would increase the intensity of any ignition. The violations were particularly hazardous according to Gibson because the shuttle cars were continuing to run over the accumulations thereby further crushing and pulverizing the coal dropped from the cars and the fact that the shuttle cars were electrically powered with trailing cables laying in the coal dust. Gibson opined that the accumulations were extensive and with the ignition sources present injuries and or fatalities were likely. Based on this credible testimony I

find the violation to be "significant and substantial" and serious. Mathies Coal Co., supra.

According to Gibson, Shane Stoddard the day shift oncoming foreman also admitted that the accumulations "looked bad". Stoddard informed Gibson however that he did not plan to clean the accumulations for another two hours and that is when Gibson issued the order at bar.

Gibson also concluded that the violation was the result of the operator's "unwarrantable failure". He observed that on his first day inspecting the subject mine he told Defa about the necessity for the clean-up of first cuttings. The cited accumulations were in his opinion also "very obvious". In light of this credible evidence I agree that the violation was indeed the result of "unwarrantable failure."

Order No. 3411647, also issued under Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 75.303(a) and charges as follows:

An inadequate preshift examination was conducted on the 2nd West working section on 7-12-89, by the graveyard foreman, Gaylon Atwood, for the oncoming day shift. Accumulations of loose coal, coal pieces and coal fines and first cuttings was [sic] permitted to accumulate in the No. 20 Room and last open crosscut to the left off No. 20 Room. These accumulations were obvious and very extensive.

The standard at 30 C.F.R. § 75.303(a) provides in relevant part as follows:

Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall ... examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; ... and examine for such other hazards and violations of the mandatory health or safety standards as an authorized representative of the Secretary may from time to time require.... Upon completing his examination, such mine examiner shall report the the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the

underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

In essence, the basis for this order was the failure to report in the preshift examination books the accumulations that were cited in Order No. 3411646 discussed supra. Gibson observed that the accumulations existed between 5:00 and 7:00 a.m. when the preshift examination was required to be performed and that the accumulations were not reported in the preshift book. According to Gibson, Foreman Atwood reportedly had performed the preshift examination in the cited roadway and 20 room but failed to report the cited conditions in the examination book. Gibson concluded that the violation was "significant and substantial" because the hazardous condition caused by the massive accumulations would not likely be corrected in the absence of a report in the preshift examination book and would therefore fail to assure miners of a safe working environment. I find Gibson's testimony credible in this regard and sufficient to support the violation and its "significant and substantial" findings.

Gibson also concluded that the violation was the result of "unwarrantable failure" for the reason that an experienced section foreman such as Atwood should not overlook such conditions. Again I find Gibson's testimony to be credible in this regard and that it fully supports the conclusions reached. Particularly because of the massive size of the accumulations the failure to have reported them constitutes aggravated negligence and "unwarrantable failure".

Order No. 3411648 also issued pursuant to Section 104(d)(1) of the Act, also charges a violation of the standard at 30 C.F.R. 75.400. The order charges as follows:

Accumulations of dry coal pieces, loose coal, and float coal dust was [sic] permitted to accumulate on the Joy Miner 2G-2519A-25(S/NJM1868), being used on the 2nd West working section.

These accumulations were present and observed on top of and under the covers of the entire machine.

These accumulations of float dust ranged from a film 1 inch deep x 18 inches wide x 60 inches long on top of the miner. Under the covers a film up to 5 inches deep x 9 inches wide x 60 inches long.

The accumulations of float coal dust and coal pieces under the shields (covers) were on, under, and around the electrical compartments and electric motors.

The miner was observed cutting coal before this condition was addressed. The graveyard section foreman, Gaylon Atwood was present on the section while this condition existed.

Also present on the section were the (2) two day shift foremen, Shane Stoddard and Randy Defa. These accumulations were very obvious and very extensive.

The miner is supplied 950VAC and is capable of producing sparks during the normal cutting of coal.

Gibson testified that the conditions cited in the above order were indeed present at the time of his inspection on July 12, 1989. He observed that the miner was in the act of cutting coal when he observed the accumulations. Gibson opined that a spark from an electrical component or the cutter head itself with the amount of float coal dust present would act like "gunpowder" they were so explosive. Indeed the conditions were so obvious that, according to Gibson, Foreman Atwood admitted that "I can't argue about that -- it's obvious".

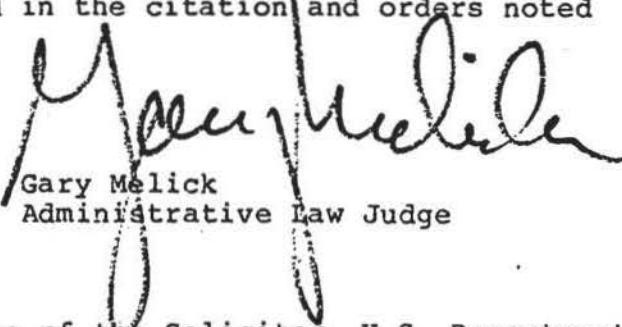
Gibson also took samples of the coal dust which passed through a No. 20 sieve and tagged and labeled it. He later mailed the sample to the MSHA Analysis Center and received in return a one-page analysis (Exhibit G-4) indicating that the material was 88 percent combustible. This credible evidence clearly supports a finding that the violation occurred and was of high gravity and "significant and substantial".

I also accept the credible findings of Inspector Gibson that the accumulations were obvious and readily observable to the section foreman working in the area. Under the circumstances I agree that the violation was the result of aggravated conduct constituting gross negligence and "unwarrantable failure".

Considering all of the criteria under section 110(i), including the significant history of similar violations at this mine, I consider the following civil penalties appropriate: Citation No. 3296377-\$950, Order No. 3411644 \$1,500, Order No. 3411646-\$900, Order No. 3411647-\$850, Order No. 3411648-\$900.

ORDER

Section 104(d)(1) Citation No. 3296377 as well as
Section 104(d)(1) Orders No. 3411644, 3411646, 3411647 and
3411648 are affirmed. C.W. Mining Company is hereby directed
to pay within 30 days of the date of this decision civil
penalties of \$950, \$1,500, \$900, \$850 and \$900, respectively
for the violations charged in the citation and orders noted
above.



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
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APR 6 1990

CONESVILLE COAL PREPARATION COMPANY, Contestant v.	:	CONTEST PROCEEDINGS
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 89-29-R Order No. 2950067; 12/5/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	Docket No. LAKE 89-30-R Citation No. 2950068; 12/5/88
CONESVILLE COAL PREPARATION COMPANY, Respondent	:	Docket No. LAKE 89-31-R Citation No. 2950069; 12/5/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	Docket No. LAKE 89-32-R Order No. 2950070; 12/5/88
CONESVILLE COAL PREPARATION COMPANY, Respondent	:	Conesville Coal Preparation Company Mine ID 33-03907
	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 89-75 A.C. No. 33-03907-03516
	:	Conesville Coal Preparation Company
	:	

DECISIONS

Appearances: David A. Laing, Esq., Porter, Wright, Morris & Arthur, Columbus, Ohio, for the Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the contestant (Conesville) pursuant to section 105(d)

of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of the captioned orders and citations issued by MSHA mine inspectors. The civil penalty proceeding concerns proposals for assessment of civil penalties filed by MSHA seeking civil penalty assessments against Conesville for three alleged violations noted in two of the contested citations and one of the orders. Hearings were held in Zanesville, Ohio, and the parties filed posthearing briefs which I have reviewed and considered.

Issues

The issues presented in these proceedings include the following: (1) whether Conesville violated the cited mandatory safety standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violation cited in the contested section 104(d)(1) citation and section 104(d)(2) order resulted from an unwarrantable failure by Conesville to comply with the cited standard; and (4) whether the condition or practice cited in the contested imminent danger order was in fact an imminent danger.

Assuming the violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to 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 my adjudication of these cases.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 110(a), 110(i), 104(d), 105(d), and 107(a) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 9-13):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
2. The Conesville Coal Preparation Company Mine I.D. 33-03907 is owned and operated by the Conesville Coal Preparation Company.
3. The Conesville Preparation Company is an operator as defined by § 3(d) of the Act.

4. The Conesville Coal Preparation Company, Mine I.D. 33-03907 is a mine as defined by § 3(h) of the Act.

5. The Conesville Coal Preparation Company and Mine I.D. 33-03907 are subject to the jurisdiction of this Court and the 1977 Mine Act.

6. The size of the proposed penalties, if any are assessed, will not affect the operator's ability to continue in business.

7. The Accident Report, (Exhibit M.X. - 30), fairly and accurately reflects the findings and conclusions of MSHA Inspectors Franklin Homko and Joseph Yudasz.

8. The reference made to an alleged violation of 30 C.F.R. § 48.13(a), in the last sentence of page 5 of the aforementioned accident report is modified to allege a violation of 30 C.F.R. § 48.31(a).

9. The first name of Mr. Lent referred to in the condition or practice stated in the section 104(d)(1) Order No. 2950070, is Richard, rather than Robert. Further, as a result of discovery, the parties agree that Norman Hicks and David Summers did in fact receive hazard training, and their names are deleted from the cited condition or practice.

10. The respective exhibits offered by the parties (C-1 through C-3, and MX-1 through MX-39) may be admitted as part of the record in these proceedings. Exhibits MX-35 and MX-38 are withdrawn by MSHA.

11. In view of the unavailability of Truck Driver Orville Parks, the testimony of Mr. Parks, transcribed from a tape made during the course of MSHA's accident investigation, is admitted as evidence in these proceedings (Joint Exhibit -1).

Discussion

The facts in these proceedings establish that at approximately 8:07 a.m., on Friday, December 2, 1988, a fatal haulage accident occurred at Conesville's preparation plant, resulting in the death of truck driver Dale A. Hina, a driver with 5 years 8 months experience, including 4 months experience transporting coal to the preparation plant from other mines. Mr. Hina, and another truck driver, Norman M. Fortney, had transported their loads of coal from a loading facility operated by the Crooksville

Coal Company, to the Conesville plant, an over-the-road distance of 60 miles. Mr. Hina and Mr. Fortney were operating trucks which were in tandem with 25-ton end-dump trailers. The trucks and coal contents were weighed at the Conesville preparation plant scalehouse and then driven to the raw coal pile unloading site. Mr. Fortney backed his truck near the toe of the raw coal pile and began dumping his load of coal onto the ground. Mr. Hina backed his truck next to Mr. Fortney's and began to dump his coal load from his trailer. As Mr. Fortney was dumping coal from the raised trailer of his truck, he moved the truck forward to allow the coal to flow freely from the trailer bed. A "sizable amount" of frozen coal which had remained adhered to the inside of the trailer bed at the right front part of the trailer apparently affected the stability of the raised trailer causing the truck and trailer to roll over onto its right side. The trailer landed directly on the cab of the truck that Mr. Hina was operating causing fatal crushing injuries to Mr. Hina. Mr. Fortney was not injured. According to MSHA's accident investigation report, prior to the accident, Mr. Fortney's truck was positioned approximately 10 feet to the left and 10 feet forward of Mr. Hina's truck.

The facts further show that the truck operated by Mr. Hina at the time of the accident was owned by Cox Farms Company, and that Mr. Hina was one of its employees. Mr. Fortney owned and operated the truck that he was driving at the time of the accident. Both trucks were leased or contracted to Ross Brothers, Inc., an independent contractor with MSHA I.D. No. V71. Ross Brothers Inc., had a contract with the Crooksville Coal Company to transport the coal loaded at the Crooksville facility to Conesville's preparation plant. Ross Brothers Inc., owned five trucks, and leased two trucks and drivers from Cox Farms, including the one operated by Mr. Hina, and leased or contracted the truck owned and operated by Mr. Fortney.

As a result of its accident investigation of December 2, 1988, MSHA concluded that the accident occurred because the frozen coal which remained in the raised trailer bed of Mr. Fortney's truck affected the stability of the trailer causing the truck and trailer to roll over on its right side. MSHA further concluded that the "practice" of dumping coal from a tandem truck and trailer without providing adequate side clearance between trucks contributed to the severity of the accident. MSHA also concluded that because of the failure by Conesville to insure that adequate clearance was provided for the trucks dumping coal at its preparation plant raw coal dumping location, Conesville violated mandatory safety standard 30 C.F.R. § 77.1600(c), and on December 5, 1988, MSHA Inspector Robert L. Grissett issued to Conesville contested Imminent Danger Order No. 2950067, citing a violation of section 77.1600(c), and in conjunction with that order he also issued contested section 104(a) Citation No. 2950068, with "S&S" findings citing the same

standard. He also issued contested section 104(d)(1) Citation No. 2950069, with "S&S" findings citing Conesville with an alleged violation of mandatory training standard 30 C.F.R. § 48.31(a), for failing to provide hazard training to Mr. Hina and Mr. Fortney, and section 104(d)(1) "S&S" Order No. 2950070 for failing to hazard train four other drivers. The orders and citations issued by Mr. Grissett state as follows:

Docket No. LAKE 89-29-R. Imminent Danger Order No. 2950067
(exhibit MX-2):

The mine operator did not insure that adequate side clearance was provided at the raw coal pile, dumping location. A coal truck leased under Ross Bros. Inc., contractor No. V71, overturned while dumping coal and the bed of the truck fell on the cab of another truck, leased under Ross Bros. Inc. contractor number V71, which caused fatal injuries to the driver of the parked truck. A bulldozer operator works in conjunction with the truck during the dumping process.

This is a violation of 30 C.F.R. § 77.1600(c) and a separate citation will be issued. The investigation revealed that another trailer had overturned at this dumping location on 2-26-88.

Docket No. LAKE 89-30-R. Section 104(a) "S&S" Citation
No. 2950068 (exhibit MX-3):

The mine operator did not insure that adequate side clearance was provided at the raw coal pile dumping location. A coal truck leased under Ross Bros. Inc. contractor No. V71, overturned while dumping coal and the bed of the truck fell on the cab of another truck, leased under Ross Bros. Inc., which caused fatal injuries to the driver of the parked truck. A bulldozer operator works in conjunction with the trucks during the dumping process.

This is the main factor in the imminent danger Order No. 2950067, dated 12-5-88, therefore no abatement time is given.

Docket No. LAKE 89-31-R. Section 104(d)(1) "S&S" Citation
No. 2950069 (exhibit MX-4):

Dale A. Hina and Norman H. Fortney, truck drivers contracted by Ross Bros. Inc., contractor I.D. No. V71, had not received hazard training prior to hauling coal onto this mine property. Fortney's truck, when dumping, overturned on Hin's truck, causing fatal injuries to Hina. The operator's hazard training under item 6

states to stay clear of all raised equipment. There were no entries in the hazard training log book to indicate that these truck drivers did receive hazard training.

Docket No. LAKE 89-32-R. Section 104(d)(1) "S&S" Order No. 2950070 (exhibit MX-5):

Hazard training was not provided to the following truck drivers who haul coal onto this coal mining property: Orville Parks, Richard Lent, Robert St. Clair, Jr., . . . and Harold Jacobs. These truck drivers either work for or are contracted by Ross Bros. Inc., contractor I.D. No. V71. There were no entries in the hazard training log book to indicate that these truck drivers did receive hazard training.

MSHA's Testimony and Evidence

Norman Fortney testified that he is currently employed by Landis Trucking, and that most of his adult occupation has been the driving of trucks (Tr. 19). He stated that he began delivering coal at the Conesville preparation plant in August, 1988, and that during the period from August to December 2, 1988, he made approximately 200 deliveries at that site, and he explained the procedures that he followed in delivering and dumping his coal loads (Tr. 21-23). He confirmed that prior to December 2, 1988, the scalemaster never told him how he wanted the coal dumped, and that there were no controls over how the trucks should be backed into the pile for dumping. He stated that the drivers themselves would keep their trucks apart and would dump where they thought it was safe to dump. There were no Conesville employees at the dumping location to tell the drivers where to dump (Tr. 24).

Mr. Fortney confirmed that he regularly observed other trucks dumping at the pile during his deliveries, and he explained what he observed as follows at (Tr. 25-26):

Q. All right. Generally, what sort of distances were kept between the trucks when they were dumping?

A. Really there wasn't any set pattern. If you could get backed in, and you thought it was safe to dump, you backed in. There was no -- as I say today, maybe backing in there, if they're busy, 10 or 12 feet apart. If they're -- if it would happen that you took a little extra time at the sampler, or something, and maybe one of the trucks got unloaded quicker, he'd be gone. So, there'd be more room then.

There really wasn't any set pattern of how far apart the trucks stayed other than the drivers tried to operate in a safe manner and dump their trucks.

Q. All right. During the 200 -- approximately 200 deliveries that you were involved in, was it -- was it usual to see trucks within 10 or 12 feet of each other when they were dumping?

A. Yes.

Mr. Fortney confirmed that he was familiar with hazard training, and he explained that "It's a program instituted by the operation---the wash plant operation that explains to us, the drivers that come in there, certain rules and regulations," including driving on the right side of the road and giving the right of way to heavy equipment (Tr. 26). He stated that during the time he was delivering coal to the Conesville property from August to December 2, 1988, no employee of Conesville ever gave him any hazard training. After examining Conesville's hazard training check lists, Mr. Fortney stated that he recognized them as the "verbal" hazard training which was explained to him "by the gentlemen that explained" it to him. He further stated that he had never seen these check lists during the prior occasions when he was delivering coal to the Conesville property (Tr. 28-30).

Mr. Fortney stated that during the period August through December 2, 1988, he had "heard" of more than one coal truck upsetting at the Conesville raw coal pile (Tr. 31). He explained the circumstances of the accident that he was involved in on December 2, 1988 (Tr. 31-35).

On cross-examination, Mr. Fortney stated that at the time of the accident he was leasing the truck and trailer which he owned to Ross Brothers Inc., and was paid by the ton for the coal which he delivered from the Crooksville Coal Company to the Conesville preparation plant. He confirmed that prior to the accident he received no training of any kind from Ross Brothers Inc. or the Crooksville Coal Company (Tr. 37). He confirmed that he has papers as a certified surface mine foreman from the State of Ohio, and was so certified at the time of the accident (Tr. 38).

Mr. Fortney confirmed that he delivered coal to the Conesville facility on an average of three loads a day, 3 days a week, and that Mr. Hina's delivery schedule was approximately the same as his (Tr. 39-40). Although he believed that there was "room for improvement" at the Conesville facility, he agreed with a prior statement that he made during the taking of his deposition that the Conesville coal facility "runs as smooth as any I've ever worked at" (Tr. 44).

Mr. Fortney stated that as of December 2, 1988, he was allowed to dump anywhere at Conesville's coal pile, and was never directed where to unload. He stated that dumping was left to the driver's discretion and that he dumped at a spot where he felt comfortable, and was not required to be within so many feet of another truck while dumping (Tr. 45). He confirmed that the drivers could communicate among themselves and with the scale-house by means of CB radios, and that if he did not feel comfortable at any dumping location he was free to move to another location, and that Conesville never told him that he could not do this (Tr. 45).

Mr. Fortney confirmed that he was aware of the hazard of a truck trailer tipping over, and was aware of the fact that frozen coal could cause a tipping hazard and that this was the reason why a truck driver may choose to line his trailer bed with anti-freeze or diesel fuel on cold days (Tr. 47). He stated that the actual backing up and raising of the coal load is the most crucial part of his delivery process, and that he is selective in where to dump his load. He confirmed that the dumping area at the time of the accident appeared to be normal, and he believed that he was safe and on firm and level ground at the location where he was dumping. He confirmed that he had not lined his trailer with any anti-freeze or diesel fuel at the time of the accident. He stated that since the accident, he no longer hauls coal (Tr. 48).

Mr. Fortney stated that at the time of the accident, he backed into the dumping location first, and Mr. Hina backed up after him. He stated that there was another truck to his left, approximately 40 to 50 feet away, and that the drivers try to leave that kind of distance between trucks "when the room was there." There were times when drivers were 40 to 50 feet from each other, and other times when they were not, and he tried to "find a level spot, and a safe spot to dump" (Tr. 49). He stated further that if there are four trucks dumping at the same time, there is no room to maintain a 40 to 50 foot distance between trucks at the pile in question (Tr. 50). He stated that he was not surprised when Mr. Hina backed in as close as he did to him because he could not see him across his truck, but that after the accident occurred he was surprised that Mr. Hina was so close, or 10 feet from his truck (Tr. 51).

Mr. Fortney confirmed that he received hazard training after the accident, but that it taught him nothing that he did not already know about hazards associated with dumping coal loads at the Conesville facility (Tr. 54). He confirmed that prior to December 2, 1988, he never asked anyone at the Conesville site to train him, and that he never told anyone there that he had not received hazard training (Tr. 54). No Conesville employee ever asked about or tested his knowledge of safe dumping procedures (Tr. 61).

Mr. Fortney stated that during all of his trips to the Conesville plant, he never knowingly dumped a load of coal when he felt it was not safe, and he believed that he was following safe dumping practices regardless of whether he was 15 or 50 feet from another truck. He confirmed that he never complained to MSHA about any unsafe dumping practices, but that he and other drivers would complain to the scalemaster if it rained, and the dumping area became muddy and not level. When this occurred, the scalemaster would instruct the dozer operators to correct the conditions (Tr. 64).

Mr. Fortney confirmed that he and other drivers have been as close as 10 feet to other trucks while dumping their coal loads, and had Mr. Hina arrived first to dump, he would have pulled in as close as Mr. Hina did to him. However, at the present time, drivers must stay 50 feet from other trucks because there are lanes marked off by traffic cones (Tr. 68). He believed that the Conesville hazard training check list concerns staying away from loaders with buckets in the air, or staying away from a moving dozer, rather than the trucks backing up and dumping (Tr. 77).

Robert St. Clair, Jr., truck driver, Ross Brothers Trucking Company, testified that he has worked for this company for 5 years and has delivered coal to the Conesville preparation plant on and off since it began operating 4 years ago. He stated that he hauled coal to the plant on December 2, 1988, but in view of the accident, he was directed to take his load to the power plant and did not dump it at the preparation plant raw coal pile.

Mr. St. Clair stated that he has made approximately 2,000 coal deliveries to the Conesville plant since he began driving for Ross Brothers and he described the procedure he followed in dumping his coal load. He confirmed that depending on the type of trailer he was driving, he would be required to leave his truck cab in order to activate the necessary controls to dump his load. He stated that prior to December 2, 1988, he had occasion to be out of his cab and on the ground while dumping his load.

Mr. St. Clair stated that when he started dumping coal at the Conesville raw coal pile no one from Conesville ever showed him how the coal was to be dumped at the pile. He confirmed that he knew the scalemaster at the preparation plant by his first name "Rick." He confirmed that he was aware of "hazard training" and explained that "It's where somebody tells me how to do my job on their property and then I sign a paper stating that I understand their training" (Tr. 87). He stated that no employee of Conesville ever gave him any hazard training prior to December 2, 1988, and in the 4 years that he has delivered coal to the property he never received any training. After examining copies of Conesville's hazard training check lists, (exhibits MX-33 and

MX-37), Mr. St. Clair stated that he had never seen them prior to December 2, 1988 (Tr. 88).

On cross-examination, Mr. St. Clair stated that his father formerly worked for Ross Brothers and trained him while he was growing up, and that "it comes natural" to him as part of his making a living as a truck driver. He stated that he never received any truck driver training from Ross Brothers, and received no hazard training with respect to delivering coal at any facility (Tr. 89). He stated that he hauled coal to the Conesville plant 3 times a day, 3 days a week since December 2, 1988, and that Ross Brothers has a 2-1/2 year contract to haul coal from the Crooksville Coal Company to the plant. He confirmed that he did not receive any training at the Crooksville Mine.

Mr. St. Clair stated that he can control the trailer tailgate from the cab of the truck which he is presently driving. He confirmed that in December, 1988, while in the employ of Ross Brothers he was aware of coal trailers tipping over and that he has been warned about this hazard. He stated that "its something you have to always be aware of." He believed that he always takes precautions while operating his truck and that he is "safety conscious." He stated that one needs to watch every load which is dumped, and that if he does not believe it is safe to dump a load he will not dump it.

Mr. St. Clair stated that he has never requested Conesville to train him, and he believed that many of the items on the company's hazard training checklist do not pertain to his work as a truck driver. He confirmed that MSHA has never inspected his truck, but that both he and Ross Brothers inspect the truck on a daily basis.

Mr. St. Clair stated that he never heard of any other trucks overturning at the Conesville coal pile during the years that he has delivered coal to the property. He confirmed that he never told anyone at Conesville that he had not been trained, and that no one at Conesville ever asked or tested him as to his knowledge concerning the safe operation of his truck or the dumping of his coal loads. He stated that "they leave me alone, just told me to go dump my load" (Tr. 99).

Richard Lent, truck driver, Ross Brothers Trucking Company, testified that he has 22 years of experience as a truck driver, and that he has delivered coal to the Conesville plant for approximately a year. He was scheduled to deliver coal to the plant on December 2, 1988, but was diverted to the power plant after the accident occurred.

Mr. Lent explained the procedure he followed in dumping his coal loads. He confirmed that depending on the type of trailer

he was operating on any given day, he would have to get out of his truck cab to activate the tailgate lever in order to facilitate the dumping of his load.

Mr. Lent stated that prior to December 2, 1988, no one from Conesville ever instructed him how to dump his coal load. He stated that "I just watched the other drivers, where they dumped theirs and that was it" (Tr. 106). He identified Conesville's scalemaster as "Rick" and confirmed that he has heard the term "hazard training." He explained that "it means what the company wants us to do inside their plant . . . dumping and stuff" (Tr. 106). He confirmed that prior to December 2, 1988, no employee of Conesville ever gave him any hazard training or ever asked or tested his knowledge as to how to safely operate his truck (Tr. 107). After identifying Conesville's hazard training check lists, Mr. Lent stated that he never saw them prior to December 2, 1988 (Tr. 106-107).

On cross-examination, Mr. Lent confirmed that he received no hazard training from Ross Brothers or the Crooksville Coal Company. He stated that he does inspect his truck and had to pass a test to work for Ross Brothers. He confirmed that he delivers coal to the Conesville plant 3 days a week, making 3 trips a day, and that he knows what to do while dumping his load by observing the other truck drivers.

Mr. Lent stated that he has always been alert and aware of the hazard concerning the overturning of a truck while dumping, and that if possible, he tries to dump his load after the other trucks have completed their dumping. He confirmed that he always puts fuel oil in his truck bed to prevent coal freezing and takes precautions while dumping.

Mr. Lent stated that prior to December 2, 1988, he had to get out of his truck cab to operate the tailgate levers and to observe the dumping of his load. He stated that he would also stand on the fuel tank between the truck cab and trailer bed, and that some of the new trucks used by Ross Brothers have all of the trailer controls inside of the truck cab. He stated further that during the period October, 1988, to December, 1988, he sometimes had to get out of his cab and walk to the rear of the truck to see if the tailgate was down (Tr. 108-119).

James R. Stull, truck driver, Bellaire Trucking Company, testified that he has 32 years of driving experience and has worked for Bellaire for 2 years. He stated that he has hauled coal for 18 years, and started hauling coal to the Conesville plant in October, 1987. He confirmed that he overturned a truck at the Conesville plant coal pile in February, 1988. The ground was not level, and as he backed up his truck to dump the load of coal, the right rear wheel sunk into the mud, and the truck overturned but no one was hurt. Mr. Stull stated that Conesville

never instructed him how to dump his coal on the pile, and there were no traffic lanes at the dump site for the trucks to follow while dumping their loads (Tr. 120-124).

On cross-examination, Mr. Stüll confirmed that he received no training at the Bellaire Company, but did receive hazard training at the Conesville plant. He stated that when his truck overturned, it fell for a distance of 30 feet but did not strike anything. He stated that the truck trailer telescope broke off after the truck tipped over (Tr. 125-127). In response to further questions, Mr. Stull stated that the training he received at the Conesville plant came after the fatal accident, and he explained the training that he received (Tr. 128-129).

Clyde O. Parks, electrician, Conesville Coal Preparation Company, stated that he has worked at the plant for 5 years and has 37 years of mining experience. He confirmed that he is a member of the UMWA, and except for a 13-month period, he has served as a member of the mine safety committee. He stated that the coal haulage truck drivers are not members of his union.

Mr. Parks stated that when another truck overturned at the plant coal pile on February 26, 1988, he participated in the union walkaround inspection at the site as a member of the safety committee. He stated the truck overturned after the right rear wheel dual tires hit a soft spot while dumping a load and caused the yoke to break at the point where the truck telescope fastens to the trailer.

Mr. Parks stated that Mr. Bill Lyons, Safety Director of Conesville Coal Company, accompanied him during the walkaround. As a result of the incident of February 26, 1988, measurements were taken of the distance covered by the truck which overturned and the safety committee expressed their concern about maintaining a safe distance between the trucks. The union held a communications meeting with Conesville's management and recommended that only three trucks be permitted to dump coal at any one time, no less than 30 feet apart. Mr. Parks stated that the company accepted the recommendations and limited the dumping to three trucks at a time, but it only did this for a period of 2 weeks (Tr. 129-140).

On cross-examination, Mr. Parks confirmed that he also served on the safety committee while previously employed by Peabody Coal Company. He stated that after a truck tipped over at the coal hopper at Peabody, MSHA took no further action.

Mr. Parks confirmed that the union has the authority to declare an imminent danger at the plant coal dumping piles, but that it has never exercised this right and has never advised MSHA of any imminent danger. He confirmed that he first spoke to Inspector Grissett about the instant case 2-weeks prior to the

hearing. He also confirmed that the Conesville Company has received safety awards, was cited by MSHA for having 600 days without a lost time accident, and that MSHA inspectors have advised him that the company runs a safe operation (Tr. 140-158).

MSHA Inspector Robert L. Grissett, confirmed that he and several other inspectors conducted an investigation of the accident in question on December 2, 1988, and that he issued a section 103(k) order that day (Tr. 164). He identified several photographs of the trucks which were involved in the accident, and explained what the investigating team found (Tr. 165-175). Mr. Grissett and the other inspectors returned to the mine on December 5, 1988, to continue their inquiry, including interviews with witnesses (Tr. 176). He reviewed the company training plan and records, and explained the coal dumping procedures. He confirmed that there were no designated lanes marked off for the trucks to use at the coal pile, and that once the load was weighed and sampled, the trucks were free to go to the dumping area.

Mr. Grissett stated that he learned about Conesville's training plan for contract truck drivers during an interview with scalemaster Rick Shuck. Mr. Shuck informed him that each truck had an identification number on a card on the windshield of the passenger side, and as each truck passed over the scales Mr. Shuck would log the number and then hazard train the driver. During subsequent truck trips, Mr. Shuck would refer to his log to insure that the number on the truck corresponded with the number in his log. However, if there were a change in drivers, he would have no way of knowing whether that particular individual was trained because the log would only reflect a truck number. Mr. Grissett stated that Mr. Shuck and superintendent Leppla acknowledged that this system presented a problem because "too many trucks were coming in" (Tr. 182). Mr. Grissett stated that he was particularly interested in items 5 and 6 of Conesville's training plan which advises persons to stay clear of all raised equipment and to watch for moving equipment (Tr. 183, exhibit MX-37).

Mr. Grissett confirmed that after the completion of the accident investigation he issued a section 107(a) imminent danger order and a section 104(d)(1) citation and order (Tr. 182). The imminent danger order was issued in conjunction with a section 104(a) citation which was issued for a violation of section 77.1600(c), for failure to maintain adequate and safe side clearance on raised equipment. He explained that Mr. Hina's truck was within 10 feet of Mr. Fortney's truck and there were no established guidelines as to the procedures for dumping, and there were no designated areas provided at the dump location for safe side clearances for the trucks. Based on his investigation, record review, and interviews, he concluded that these failures had been a "practice at the mine" (Tr. 185). He explained his

reason for issuing the imminent danger order as follows at (Tr. 184):

* * * * *

A. Well, you have to have a condition or practice that is so serious that you feel that an abatement time couldn't be given before a serious injury or accident could happen.

* * * * *

A. The practice--we had established that they had not provided adequate side clearance. And I know I had the area closed on a 103(K) order, but that was soon to be lifted as soon as the investigation was over, and there would be nothing to prevent them from continuing to operate the way they had prior to that.

Q. So why did you issue the imminent danger order?

A. To keep the area closed until management could devise a method to ensure adequate side clearance.

Mr. Grissett stated that he based his "high negligence" finding on the fact that there had been a prior truck tipping incident at the mine on February 26, 1988, as confirmed by the photographs produced by Conesville's Safety Director Bill Lyons (Tr. 186). He based his "S&S" finding on the fact that an accident resulting in a fatality had occurred (Tr. 187). He confirmed that he issued a citation for a violation of the training requirements of section 48.31(a), and that he reviewed the mine hazard training log and plan before doing so (Tr. 187). He also consulted MSHA's Part 48 training policy manual (exhibit MX-31), and discussed the citations and orders with his supervisor and the other MSHA inspectors who were with him on December 5, and that they all agreed with his enforcement actions (Tr. 189).

Mr. Grissett stated that he based his "high negligence" finding with respect to the training violation on Mr. Leppla's statement that he recognized that there was a problem with training the truck drivers, and the fact that Conesville had knowledge of the prior truck tipping incident and failed to do anything about its training. He stated that "I put all that together, and felt that it met the criteria for a (d)(1) citation" (Tr. 190). He also confirmed that he found the violation to be "S&S" because "we had an accident that resulted in a fatality" and "that's part of the criteria on S and S" (Tr. 190). With regard to his unwarrantable failure findings, Mr. Grissett stated as follows at (Tr. 190-192; 195-196):

A. Well, it has to be a violation of mandatory standard. It has to be S and S, or significant and substantial. It can't be imminent danger. And the operator has had to show aggravated conduct, which would constitute more than ordinary negligence.

Q. Okay. What do you understand aggravated conduct constituting more than ordinary negligence to mean?

A. That would mean that they had prior knowledge of a serious condition or act or area of the mine that could cause injury to someone, and failed to take appropriate steps to eliminate it or prevent a reoccurrence.

Q. Okay. And in your investigation, interviews, observations and record reviews, what findings did you make that led you to conclude that Conesville had, in fact, exhibited aggravated conduct constituting more than ordinary negligence with respect to their training?

A. That they recognized they had a breakdown in their system, or their system was just not -- not adequate to assure that everybody was getting hazard trained.

* * * * *

Q. All right. What findings did you make that led you to conclude that Conesville Coal had exhibited aggravated conduct constituting more than ordinary negligence with respect to their hazard training and their prior knowledge of the hazard training?

A. In the fact that they had -- that we had the accident in February 26th of '88 that was brought to their attention, that they had the breakdown in their hazard training system and was aware of that.

* * * * *

Q. With respect to Line 11 on your (D)(1) order, you marked high for negligence on this training violation. Why did you find that Conesville was highly negligent with respect to their training program?

A. Because they admitted that they had problems and were not sure how many truck drivers had received hazard training, and seemed to feel that it was just practically an impossible situation to -- to get everybody hazard trained because of the amount of trucks that come in.

Q. All right.

A. And it was actually the -- it was more the method they were using than anything else.

With regard to his "S&S" finding concerning the section 104(d)(2) order, Mr. Grissett stated as follows (Tr. 196-197):

Q. And how did it -- what findings did you make that it met the S and S criteria?

A. That hazard training in this case where you have truck drivers that's coming into an area, and can dump at will wherever they want to, I think the hazard training that addresses -- that they address in their hazard training program that they have addresses that area.

So, I feel the hazard training and the dumping of coal at the raw coal pile go together because that's all these gentlemen that come in there with those trucks do. They just come in, and dump coal and leave. So, they're only exposed to very few hazards. And one of the main ones is in the dumping of it.

Q. All right. And what hazards in the dumping area?

A. That they will upset, and that you have to keep it level, and you have to keep them apart to allow for these trucks to upset.

On cross-examination, Mr. Grissett confirmed that he had inspected the preparation plant in question at least 2 times a year for the past 3 years, including the raw coal dumping area, and that other inspectors have also inspected the facility. He confirmed that he has observed the dumping in progress during prior inspections before December 2, 1988, and that it was very likely that he inspected the facility during a regular inspection from September 20 to 28, 1988. He confirmed that prior to December 2, 1988, he never issued any imminent danger orders at the dumping location, and had never previously cited Conesville with a violation of section 77.1600(c) (Tr. 202-206).

Mr. Grissett confirmed that the accident investigation revealed that frozen coal which remained in the upper right-hand corner of Mr. Fortney's truck trailer bed caused his truck to tip over (Tr. 207). He confirmed that he based his imminent danger order on his belief that Conesville had a continuing violation of section 77.1600(c), that was creating an imminent danger because it did not insure that there was an adequate side clearance between trucks to ensure that a truck which tipped over would not come in contact with another truck (Tr. 209-211). He confirmed

that when he issued the order, he did not have in mind any specific adequate minimum distance between trucks, but that he did not believe that 10 feet was adequate. He now believes that an adequate distance would be "in the neighborhood of 40 or 50 feet" (Tr. 212). He defined the term "adequate" to mean "if it was raised it would not cause an injury to somebody if it fell over" (Tr. 213). He believed that the cited standard required Conesville to keep enough distance between the coal trucks dumping at the coal pile so that if one toppled over it could not hit another truck (Tr. 214).

Mr. Grissett confirmed that in order to abate Citation No. 2950068, Conesville was required to establish a system to ensure that trucks would not come in contact with each other in the event of another accident similar to the one which occurred in these proceedings, and that simply posting a sign would not be sufficient (Tr. 214). He confirmed that the use of the cones for truck spacing was suggested by Conesville, and that this was acceptable to MSHA. Another alternative would be to enlarge the dumping area to provide ample room between trucks while they are dumping (Tr. 218). He confirmed that a hazard always exists at the dumping areas where hoppers are located, but that Conesville always flagged those areas to alert the truckers of the hopper hazards (Tr. 221).

Mr. Grissett confirmed that prior to December 2, 1988, he issued a citation for a violation of section 77.1600(c), at another tipple raw coal pile because of an overhead high voltage line which could have been contacted by a truck raising its bed, but that he never issued any violation for trucks dumping too close together, and the Conesville case was his first experience of this kind (Tr. 223-224).

Mr. Grissett confirmed that although he did not investigate the prior tipping incident of February, 1988, it was his understanding that it was caused by a broken hydraulic hoist scope which caused the truck to tip, and it did not hit anything when it fell over (Tr. 225). He confirmed that during his investigation of the December 2, 1988, accident, he determined that the truck drivers with whom he had spoken were aware of the tipping hazards created by frozen coal, and that Mr. Fortney had not used any kind of anti-freeze on his truck that day (Tr. 227). He also confirmed that the drivers listed in Order No. 2950070, who either worked for or leased their trucks to Ross Brothers, had not been hazard trained (Tr. 228). He explained his understanding of the contractual arrangements between Conesville, Crooksville Coal Company, and Ross Brothers, and independent trucker Fortney, and Mr. Hina, an employee of Cox Farms (Tr. 225-229).

Mr. Grissett confirmed that although Ross Brothers has an MSHA I.D. Number V7-1, and is considered to be an independent

contractor subject to MSHA's jurisdiction, no citations or orders were issued to Ross Brothers or to Mr. Fortney (Tr. 230-231). He also confirmed that there are no MSHA requirements for a trucker to apply anti-freeze or diesel oil to their trucks to prevent coal freezing (Tr. 231).

Mr. Grissett stated that his investigation did not reveal whether or not Ross Brothers was providing hazard training to its drivers. He stated further that Ross Brothers was not required to give this training because "it would have to be to the people entering upon the mine property." Conceding that the drivers in question did enter mine property, Mr. Grissett stated that the training would have to be provided "by the operator that's invited the man in there" and that Ross Brothers "wouldn't know of the existing or potential hazards of that raw coal dump" (Tr. 233). He agreed that a trucking company such as Ross Brothers should be concerned about hazards to its drivers and possible damage to its equipment, but that "the way the law is," it is the mine operator's responsibility to train the drivers "once that truck enters the gate" (Tr. 233). He confirmed that the Crooksville Coal Company had not trained some of its drivers, and while he did not know whether any citations were issued to Crooksville, he believed that another MSHA inspector visited that site and that "the situation has been taken care of" (Tr. 234).

Mr. Grissett stated that the cited training standard section 48.31(a), requires hazard training for all individuals who come within the definition of "miner" pursuant to section 48.22(a)(2). He believed that Mr. Fortney, Mr. Hina, and the other cited truckers came within the definition of "delivery personnel" included in the definition of "miner" (Tr. 236). He determined from Mr. Fortney that he had been delivering coal to the preparation facility 3 times a day; 3 days a week, but did not determine how long Mr. Hina had been coming to the facility (Tr. 237). However, he did not disagree with the information in the accident investigation report that Mr. Hina had delivered coal to the facility for 4 months during the same daily intervals as Mr. Fortney (Tr. 238).

Mr. Grissett stated that Mr. Fortney and Mr. Hina would be exposed to the potential of a truck upsetting while dumping coal. They were also exposed to hazards from the hoppers, and while on foot they may be exposed to other truck and dozer traffic hazards. He confirmed that they were exposed to these hazards on a daily basis during each trip that they made to the raw coal pile. He explained that these individuals would not be classified as miners pursuant to the definition found in section 48.22(a)(1), because they were not employed at the mine, or contracted to work there for a period of 5 days, and "were just contracted to deliver a product to the mine" (Tr. 250). He confirmed that he followed MSHA's training policy guidelines when

he issued the citations, and consulted with MSHA's training and education specialist Jim Myers in this regard (Tr. 251).

Mr. Grissett confirmed that MSHA's policy manual provides an exception for truck drivers who remain in their vehicles while on mine property, and that they are not required to be hazard trained pursuant to section 48.31(a) (Tr. 253). After responding to further questions concerning the exception for persons who come to the mine property to pick up or deliver materials and supplies, Mr. Grissett disagreed that coal truck drivers that stayed in their vehicles need not be hazard trained (Tr. 255). He conceded that when he gave his prior deposition he stated that individuals who came to the mine property in a pickup or delivery truck and who did not leave their vehicles were not required to be hazard trained. He confirmed his belief that coal haulers who do not leave their vehicles are not required to be hazard trained by the mine operator, but if they do leave their vehicle, they are required to be trained with respect to the hazards that they are exposed to while out of their vehicles (Tr. 257).

Mr. Grissett explained his reasons for citing Mr. Fortney and Mr. Hina for lack of hazard training as follows at (Tr. 258-260):

Q. Okay. Now, you indicated that the reason you issued the citation with respect to Mr. Fortney and Mr. Hina as far as hazard training goes is because it was determined they were out of their vehicle; is that right?

A. Yes.

Q. Okay. So, if -- if you had determined they had stayed in their vehicles, that citation would not have been issued with respect to those two individuals; am I correct?

A. I'm not sure whether -- there was more thinking into that than that before I issued that citation. I know what I said in the deposition. I don't know. I recognize it there, and I must have said it, and I've reread it, and possibly -- apparently I did say it that way. And so, I'll have to go with it.

Q. So, to make sure I am not mischaracterizing your testimony, you do agree that your prior testimony on this issue is that coal haulers who remain in their vehicles need not be given hazard training, correct?

A. That's the way that it reads, yes.

Q. And that's the way you were interpreting 48.31(a), at least as of December 2nd, 1988?

A. Yes.

Q. And because Mr. Fortney and Mr. Hina, you ascertained were out of their vehicles, you deemed they needed hazard training?

A. Fall into that area, yeah.

Q. Fall into the area of?

A. Requiring hazard training.

Q. Okay. Specifically, did you know where Mr. Hina was when he was out of his vehicle on December 2nd? Did you determine where ---

A. I don't---

Q. ---where he was in particular that day?

A. No.

Q. Okay. How did you determine he was out of his vehicle?

A. I don't know whether we determined that or not. We determined he hadn't been hazard trained.

And, at (Tr. pgs. 263-264; 266, 267-268; 273-274):

THE WITNESS: I have gotten totally confused as to actually what I did that day like entering this policy into it, and I'm not too sure -- I know what the deposition says. I don't know -- I don't recall whether we was talking policy at that time or not when we was in Cleveland.

But I know that we enforce if a man comes to the mine on a regular basis and delivering a product such as this was -- this was a delivery of a product -- and is exposed to hazards while performing that, he has to be hazard trained.

Now, the policy -- and I know it gets -- it gets very confusing -- but we try to get to the meat of it and sometimes we have to stay away from that policy because its confusing.

All I did to refer to that policy is to make sure I was in the right area of addressing hazard training. I briefed through that, and I talked to Jim Myers; am I in the right direction here. And he said, yes.

But as far as enforcement, when we're talking delivery, when a man from Penn Ohio delivers towels to the mine, we don't require him to have hazard training. He generally pulls in the parking lot, and walks into the shop area or office area. * * *

* * * * *

A. The way I enforce it is that if they come there on a regular basis and are exposed to hazards, they have to be hazard trained with the exception of personnel who comes around the mine office or mine shop just in a delivery capacity such as a mailman.

* * * * *

THE WITNESS: Right, the policy. But I don't enforce the policy. That was my interpretation of the policy in the deposition.

BY MR. LAING:

Q. And you rely on the policy in making a decision whether to issue a citation or order?

A. No.

Q. You don't rely on the policy?

A. No, sir.

Q. Didn't you testify to Mr. Zohn that you do refer to the policy?

A. We refer to the policy because it's a guideline. I carry the policy in my vehicle. I've gotten in problems with the policy. It -- you cannot enforce it.

* * * * *

Q. Okay. Mr. Grissett, with respect to the order that you issued on the other Ross trucking drivers who didn't receive hazard training, did you make a determination that they were out of their truck, also, while at Conesville?

A. We made a determination they had not received hazard training.

Q. Okay. Was there any determination made as to whether they were out of their truck?

A. No.

Q. Okay.

A. There might have been on Orville Parks. That question may have been asked.

Mr. Grissett stated that item #6 of the Conesville hazard training plan applies to the possibility of a truck tipping over and that such an occurrence is not unique to the Conesville preparation plant. He confirmed that the truck drivers were aware of this hazard and that they are most concerned when they are dumping (Tr. 278). He confirmed that at the time of the accident Conesville had an approved hazard training plan in effect for truck drivers, that hazard training was part of the plan, and that many drivers had been trained (Tr. 278, 282). He confirmed that he issued the citation because he could find no evidence that the drivers identified in the citation were hazard trained (Tr. 281). He also confirmed that he had no problem with the hazard training "checklist" used to train the drivers, but that Conesville missed some drivers when it came to hazard training (Tr. 282). He stated that Mr. Leppla's statement concerning a "problem" with training concerned "knowing which ones are and which ones are not trained" (Tr. 284).

In response to further questions, Mr. Grissett confirmed that Conesville never raised any policy distinctions concerning training for truck drivers who did not leave their trucks, and that this issue was never raised by Conesville. He stated that "they were trying to get their truck drivers trained" (Tr. 290). He confirmed that he issued the two training violations because Conesville had a "flaw" in its hazard training program and had not in fact hazard trained some of the truck drivers (Tr. 290). He stated that when he referred to the MSHA policy discussed with Mr. Myers, he decided not to follow it because it did not address the situation and that he was enforcing the law and not the policy and it made no difference to him whether or not the drivers got out of their trucks while they were dumping coal (Tr. 291). When asked whether the policy contradicts section 48.31(a), Mr. Grissett responded as follows at (Tr. 292):

A. It didn't apply there where you have truck drivers whether they got out or not, even though we did establish that some of them got out. So, it really didn't apply to that because you -- they were exposed to -- they were exposed to hazards while in their vehicle.

So, we couldn't -- we just couldn't use that there. We had to -- we had to just go with what the law stated, that if they're on a regular delivery there, a regular basis, and are exposed to the hazards, then they have to be hazard trained.

Mr. Grisgett stated that since the "cone and lane" system has been in effect at the coal dumping location there have been two incidents of trucks upsetting without any injuries, and he believed they were caused by a wheel or a broken scope or pin (Tr. 303). He stated that the mine operator has the responsibility to foresee the possibility that at any given time a truck will upset at a coal dumping location and that it must insure that proper separation is maintained between the trucks that are dumping (Tr. 311).

Conesville's Testimony and Evidence

Randy B. Miller, testified that he is the administrative manager of the preparation plant, and that part of his duties include recordkeeping. He was aware of the prior truck tipping incident, and confirmed that the safety director showed him a picture of the truck and informed him that it turned over because of a mechanical problem involving a broken pin. He further confirmed that he attended meetings with the mine safety committee, but he could not recall the committee ever proposing that a three truck dumping cycle be used at the raw coal dumping pile (Tr. 325-327).

On cross-examination, Mr. Miller confirmed that he was also aware of a truck upsetting at the coal pile subsequent to the accident of December 2, 1988, and while there may have been other such incidents, he was not personally aware of them since these are matters which would be investigated by the safety director. He stated that he was at the meeting with the safety committee held on March 1, 1988, following the truck tipping incident in February, 1988, but he could find no "union safety write-up" or record of any discussion concerning the trucks. He also checked the minutes of similar meetings held from January through December, 1988, and found nothing in this regard (Tr. 331). He denied that Mr. Clyde Parks ever suggested to him that Conesville should implement a three truck dumping cycle at the coal pile, and he agreed that Mr. Parks would not necessarily discuss this with him and that it would more appropriately be brought up with the safety director (Tr. 333).

William Lyon, testified that he retired as the plant safety director, training instructor, and staff electrical engineer on June 1, 1989, and that he served in these capacities for Conesville from February, 1985, until his retirement. He confirmed that the plant opened in January, 1985, and he explained what is done there (Tr. 339-342). He stated that as of the

December 2, 1988, accident the plant had 50 employees. He confirmed that there were four signs posted at the raw coal dumping area at the time of the accident stating "Danger Open Hopper," and he identified exhibit MX-33, as the approved training plan for the plant as of the time of the accident. He stated that MSHA inspector and training specialist Jim Myer spoke with him in November, 1986, and informed him that he had to have an approved training plan, and that Mr. Myer volunteered to put a plan together for him. Mr. Myer prepared the plan, including the last page, which is the hazard training plan, presented it to him, and it was subsequently adopted by Conesville and approved by MSHA (Tr. 342-345).

Mr. Lyon identified exhibit G-3, as a copy of the plant hazard training logbook used for the coal haulers as of the time of the accident. The book contains a copy of the hazard training checklist, the names of the drivers, their truck numbers, the identification of the vendors, and the person who conducted the training (Tr. 326). He stated that Conesville began hazard training coal haulers in January, 1988, when MSHA informed him that he had to maintain a log of all hazard training, but that prior to this time MSHA inspectors advised him that coal truck drivers did not have to be hazard trained if they were not outside of their trucks (Tr. 346-347). Mr. Lyon confirmed that he made the notation "when outside of trucks & driving haul road" which appears at the top of the checklist, and that he underscored the critical checklist items that truck drivers should be aware of while outside of their trucks, and he believed that these items applied to truck drivers. He did not believe that item #6, which cautions persons to "stay clear of all raised equipment (dozer blades, front-end loader buckets, etc)" applied to truck drivers because they would not be next to that equipment (Tr. 348-349). He explained that he made the notation in question because truck drivers normally did not get out of their trucks, and if they did, they had to be aware of the underscored items on the checklist (Tr. 349).

Mr. Lyon stated that it was his understanding in 1988 from MSHA that hazard training was only required for coal haulers when they were outside of their cabs. He confirmed that no determinations were made as to which drivers got out of their trucks because "most" of them did not do so. However, since there were periodical truck breakdowns and a driver would have to make a phone call, all truck drivers were trained because they would have to get out of their trucks. Although it was his understanding that this training was not required, he made the decision to hazard train all coal haulers (Tr. 350).

Mr. Lyon stated that prior to the accident he reprimanded "quite a few" coal haulers for not following the hazard training checklist items, particularly with respect to the use of hard hats, and that MSHA inspectors, including Mr. Grissett, were

present when this was done. He confirmed that he organized the log book procedures, and that the drivers logged in the book were trained by the scale master Rick Shuck, under his direction. He stated that he also trained quite a few of the drivers, was present when Mr. Shuck trained them, and he explained how the training was given and the names entered into the log (Tr. 352-356).

Mr. Lyon stated that prior to the accident he was not aware of any problems with the system that he implemented for hazard training coal haulers, and he was not aware of any drivers coming to the mine property that were not being hazard trained (Tr. 356). He denied making any statements that Conesville was not able to keep up with the training (Tr. 357).

Mr. Lyon stated that Conesville had no involvement in determining who delivered coal to the preparation plant. He explained that Cravat Coal Company had a contract with the Conesville Power Plant, through Columbus Southern Power Company, to furnish coal which was washed at the Conesville plant, and that Cravat Coal contracted with the Crooksville Coal Company to ship some of its coal to the plant, and that Crooksville contracted with Ross Brothers, who in turn contracted with Cox Farms, to haul the coal to the plant (Tr. 358).

Mr. Lyon stated that at the time of the accident the raw coal dumping area was approximately 250 feet long, and he was not aware of any time when it was significantly less than that (Tr. 358). The only other prior tipping incident that he was aware of occurred on February 26, 1988, because of a broken pin on the jack used to raise the truck bed, and the truck did not hit anything and no one was injured. He denied making any statements that there were more truck tipping incidents prior to the December 2, 1988, accident (Tr. 359). He perceived no hazard from the incident which occurred in February, 1988, because "it was a mechanical problem with the truck." He recalled no recommendations from the mine safety committee as a result of that incident, and denied that Mr. Parks or anyone else from the safety committee ever approached him about implementing a three-truck dumping cycle (Tr. 360).

Mr. Lyon stated that Conesville did not file an MSHA accident report Form 7001, regarding the accident in question, and that the form was filed by Ross Brothers. He stated that the imminent danger order and citation for a violation of section 77.1600(c), were abated by providing three dumping lanes spaced 60 feet apart, and that this distance was determined by the State of Ohio Division of Mines who also investigated the accident, and that MSHA agreed with it (Tr. 361). He confirmed that in February, 1989, Conesville received a certificate from MSHA for 600 days without a lost time accident, and that it was signed by Inspector Myer and Inspector Grissett's supervisor Jack Cologie.

He also stated that other mine inspectors, including Mr. Grissett and Mr. Myer, have commented to him that "they enjoyed coming up to inspect our plant because we had such a safe operation" (Tr. 362). He confirmed that prior to the accident, other inspectors, including Mr. Grissett, inspected the coal dumping area, and that no citations or orders were ever issued for not providing adequate side clearance at the dumping pile (Tr. 362).

On cross-examination, Mr. Lyon confirmed that Conesville's hazard training plan, (exhibit MX-33), is representative of a plan that he was familiar with when he was trained at the Central Ohio Coal Company, and that MSHA adopted the plan. He stated that he made no independent research in putting the plan together, and relied on Mr. Myer (Tr. 366). He confirmed that when he decided to train all coal haulers, he made no distinctions between whether a driver got out of his truck or not and decided to hazard train all truck haulers delivering coal to the plant (Tr. 366). He confirmed that he did not call any of the coal haulage vendors listed in the hazard training log book to determine whether they had trained their drivers "because they had to be trained at each individual site" because "each mine is different than any other mine" and he felt some obligation to train the drivers at the mine site because "a truck could have an accident or a mechanical problem and the driver would have to be out on the ground" (Tr. 367-368). He confirmed that at the time of the accident, he had no specific knowledge that Ross Brothers was delivering coal to the plant, and he would have no reason to call them about any hazard training for their drivers (Tr. 368).

Mr. Lyon did not believe that the prior truck tipping incident presented any hazard or safety problems other than to the driver in the truck, and he stated that neither he or the safety committee saw a need to discuss it further, and even though the committee was aware of the incident, it was not discussed with him (Tr. 371). He confirmed that prior to the accident, there were no truck spacing controls in effect and it was left to each driver to determine the safe distance for backing up and dumping loads at the coal pile. He also confirmed that there were no physical barriers in place, or flagmen to direct traffic, but that signs were posted to keep personnel out of the coal pile because of the hoppers under the pile (Tr. 374). He confirmed that it was Mr. Shuck's responsibility to train the coal haulers, maintain the log, and to determine if there were new drivers who had not been hazard trained (Tr. 375).

Mr. Lyon stated that subsequent to the February, 1988, truck tipping incident, he did not find it necessary to emphasize item #6 of the hazard checklist, but that he and Mr. Shuck were told about it. He stated that when a new truck showed up at the site with a new driver, he would be trained. The contractor controlled the numbers on the truck, and he had no direct contact with the contractors to advise them of any responsibility to

inform him of any changes in drivers, and he believed that it was reasonable to assume that if there were any driver changes, he would be informed. He agreed that at least six drivers "got through the system and were not hazard trained," and that it was obvious that he was not told that some drivers were not hazard trained. He confirmed that the truck numbers were used to determine whether a driver had been trained, and that in the event a different driver were used on a truck which had a number indicating that another driver had been trained, he had no way of knowing that the new driver had in fact received training (Tr. 377). He conceded that while he had no control over which truck drivers the contractors were using, he was responsible for training the drivers that came to the site to dump at the coal pile (Tr. 378). He also confirmed that he had no reason to believe that Mr. Parks would be less than honest when he testified about a prior meeting when the trucks were discussed, but reiterated that he had no recollection of any such meeting (Tr. 378).

Mr. Lyon stated that it was his understanding of MSHA's training regulations that truck drivers delivering coal to the plant would not have to receive annual or task training under the definition of "miner" found in section 48.22(a)(1), but would have to be hazard trained under the definition found in section 48.22(a)(2). He confirmed that Mr. Leppla was not involved in any hazard training prior to the time of the accident. He also confirmed his understanding that each contractor truck driver had a different truck number and he was not aware that there could be more than two drivers with the same number (Tr. 392).

Mr. Lyon confirmed that for almost 2 years after the plant started in operation, until he was first informed by MSHA that he needed a training program, coal haulers were delivering coal to the plant but nothing was done to train them (Tr. 395). He confirmed that at the time of the tipping incident in February, 1988, it did not occur to him to address the matter of truck clearance, but that after the accident of December 2, 1988, "everyone then said we had better separate the trucks" (Tr. 397). He confirmed that he abated the unwarrantable failure violations concerning the untrained drivers by reviewing the checklist with them, and discussing each of the items listed, so that they were aware of any problems they could encounter while at the site (Tr. 398).

Richard T. Shuck, scalehouse operator, testified as to his duties, including controlling truck traffic at the dump site and conducting the hazard training of the drivers. He confirmed that coal is delivered to the plant 3 days a week and that this has been the normal practice during the 4 years that he has worked as the scalehouse operator. He estimated that there are 200 trucks a day delivering coal to the plant, and that there are 50 to 60 drivers engaged in this work. He described the procedures for the delivery and dumping of the coal, and stated that four trucks

are permitted to dump at the pile during each dumping cycle which he controls. He confirmed that these procedures were in effect at the time of the accident, and that he never received any complaints from the drivers about these procedures (Tr. 399-403). He stated that there are "peak hours" for dumping, and that there are many times when there are less than four trucks in the dumping area (Tr. 404).

Mr. Shuck confirmed that he was involved in the training of the coal haulers, and that beginning in 1988 Mr. Lyon instructed him to hazard train all drivers coming to the dump site, and that he trained them by reviewing the hazard checklist items with the drivers. Mr. Lyon also provided him with a spiral notebook which contained the list, and the drivers signed their names in the book after they were trained indicating that they understood the items on the list (Tr. 409, exhibit C-3). He confirmed that the names in the log book reflect the drivers who were trained during 1988 up until December 2, 1988. He did not believe that checklist item #6 pertained to coal haulers or to the possibility of a truck tipping over at the dump site (Tr. 410). He confirmed that he reviewed every listed item with the drivers, emphasizing those which were underscored. He confirmed that Mr. Lyon instructed him to train all drivers without exception (Tr. 411).

Mr. Shuck explained that each driver who was trained signed the log book and wrote in his truck number, and he determined who had been trained and not trained by the truck number that is placed on their "scale ticket." It was his understanding that the truck number stayed with the driver, and that prior to the accident he was not aware that different truckers were using the same number (Tr. 413). He was not aware that he had missed some of the drivers and never told anyone that he could not keep up with the training of the drivers. He stated that he first learned that some of the drivers had not been trained after the accident occurred, and that prior to that time he had trained approximately 80 drivers (Tr. 414). He believed that Mr. Hina had been hazard trained "because when I went through the list the truck number was next to what I thought was his name. I didn't know any different until after the accident. I thought that was the man's name" (Tr. 414). He learned after the accident that Ross Brothers was switching drivers on a given truck number (Tr. 415). He confirmed that he was aware of only one truck tipping over prior to the accident, and that it was his understanding that a broken scope pin caused it to tip over. He was not aware of any three truck dumping cycle which was implemented after this prior incident, and was aware of no recommendations in this regard by the safety committee (Tr. 416).

Mr. Shuck stated that approximately half of the drivers who haul coal to the plant stay in their trucks because they can raise and lower the truck bed from their cabs, and that prior to

the accident he saw no MSHA inspectors inspecting the haulage trucks, but has seen them do so after the accident (Tr. 416).

On cross-examination, Mr. Shuck confirmed that he never asked the truck drivers about their knowledge of the safe operation of their vehicles, and that since he stayed in the scale-house the trucks may have been inspected by MSHA prior to the accident without his knowledge (Tr. 418). He conceded that his job does not require him to attend union and company safety meetings, and that he would not have necessarily been present if any meetings were held to discuss limiting the number of trucks at the coal dumping site (Tr. 419). He explained his procedures for controlling the truck traffic at the dumping site. He confirmed that the hazard training program was controlled by the number on the truck which was displayed on the passenger side front window where he could see it. He also indicated that the majority of the drivers would inform him of their numbers over their C.B. radios, but they were still required to have a number in their window (Tr. 420-423). He would rely on his memory, visual recognition of the driver, or the log to determine which drivers were hazard trained. The drivers would call him on the C.B. radio if they did not have the training, and he would train them (Tr. 424). He conceded that if he saw the truck number and the contractor had used another driver without removing the number, he would have no way of knowing that there was a new driver, and that it was possible for a driver to use a number even though he had not been trained (Tr. 424-425). Other than making inquiries of the drivers as to whether they had been trained, he had no method for safeguarding against new drivers using other numbers (Tr. 425).

Mr. Shuck stated that there may be 30 or 40 trucks in line on any given day waiting to dump their loads, and while they are waiting he makes inquiries over the C.B. radio as to whether or not the drivers have received training. He confirmed that he still follows this same procedure, and that some drivers have lied to him about their training (Tr. 437). He identified a photograph of Mr. Fortney's truck with a placard on the windshield with the number 555, and although he could not recall seeing the number on the day of the accident, he stated that Mr. Fortney would have given him the number over the C.B. radio (Tr. 435). In response to a statement that Mr. Fortney obviously got by without being hazard trained, Mr. Shuck responded "more than one, but I honestly believed that I had every one of them" (Tr. 435). Mr. Shuck stated that driver Tom Clark, who had number 576 listed in the log, left it in his truck, and Mr. Hina drove the truck with Mr. Clark's number (Tr. 450).

Inspector Grissett was recalled and he confirmed that he had previously observed the dumping operations at the coal pile with Mr. Lyon but saw nothing wrong or hazardous. He also stated that he never observed Mr. Lyon reprimand any driver or employee while

he was present (Tr. 453). Mr. Grissett further confirmed that the first time he discussed the December 2, 1988, accident with Mr. Parks was within the past month, and he did not speak with him during his investigation or prior to issuing the citations and orders. He stated that he went to the mine within the past month to speak with Mr. Parks and some of the safety committee members in preparation for the hearing in these proceedings (Tr. 453-458). He confirmed that he is aware of no other citations ever being issued in his district citing an operator because coal trucks were too close together while dumping coal (Tr. 463).

James F. Myer was called in rebuttal by MSHA, and he confirmed that he is an education and training specialist and not an inspector, and that he is not authorized to issue citations or orders. He identified exhibit MX-33 as part of Conesville's training program but denied that he drafted it (Tr. 468). He explained that MSHA drafted a generic training plan for operators to use, and that Conesville's plan is the same as the MSHA generic plan. He confirmed that the last two pages of the plan deal with hazard training, and that Conesville had the option of developing its own plan or using the one developed by MSHA (Tr. 470). He believed that item #6 on the hazard checklist which states "stay clear of all raised equipment (dozer blades, front-end loader buckets, etc)," applies to trucks dumping coal and that drivers are required to stay at a clear enough distance so that if a truck tips over it will not strike another truck or driver. In his view "the statement is broad and it has an et. cetera in there which you can include a lot of things" (Tr. 478). When reminded that item #6 on the hazard checklist is not underscored or emphasized by Conesville because it does not believe that it applies to coal haulage drivers, Mr. Myers agreed that this may "possibly" be a difference of opinion (Tr. 479).

On cross-examination, Mr. Myer confirmed that he provided Mr. Lyon with an MSHA generic training program which is the same as the one which was approved for Conesville. He also confirmed that the hazard training checklist, with the 20 listed items, was part of the plan which he provided to Mr. Lyon, and when asked whether he suggested any modifications to the checklist, Mr. Myer stated "I told most people that this is what you have to do to comply with the regulations" (Tr. 480). He stated that Conesville had an approved hazard training program in effect at the time of the accident, and that the training citations were based on its failure to train certain drivers rather than any inadequate content of the training program (Tr. 489). He confirmed that Conesville was recently commended by MSHA for 600 work days without a lost time accident and that he signed the certificate and also indicated to Conesville at a recent training program that its preparation plant was one of the safest facilities in Ohio (Tr. 490).

Findings and Conclusions

Docket No. LAKE 89-30-R

Section 104(a) "S&S" Citation No. 2950068, December 5, 1988,
30 C.F.R. § 77.1600(c)

In this case, the inspector cited Conesville with an alleged violation of mandatory safety standard 30 C.F.R. § 77.1600(c), for failing to insure that adequate side clearances were provided between the trucks dumping coal at the cited raw coal dumping location. Section 77.1600(c), provides as follows:

(c) where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers.

The inspector's interpretation of section 77.1600(c), is that it required Conesville to "provide adequate and safe side clearance on raised equipment" (Tr. 185). He believed that Conesville was required to insure that adequate clearances are maintained between the trucks when they are dumping so that in the event one should tip over, it would not strike another truck (Tr. 218). He would require Conesville to increase the spacing between the trucks or to enlarge its dumping area so as to provide ample spacing between trucks (Tr. 218). He confirmed that he issued the violation because Conesville had no established dumping guidelines or procedures, and had no clearly defined designated dumping areas which would provide safe side clearances between the trucks (Tr. 185). MSHA has suggested that Conesville should have used designated dumping lanes marked off with traffic cones, or used a flagman or other employee to direct and control truck traffic at the dumping location.

It seems clear to me from the inspector's testimony that he believed a dumping hazard would exist only when trucks dumping coal were close enough that one truck could possibly tip over and come in contact with another truck. In the inspector's view an "adequate" spacing distance between trucks to prevent such an occurrence would be "in the neighborhood of 40 to 50 feet" (Tr. 212). Although the standard, on its face, only requires the posting of warnings where side or overhead clearances pose hazards to miners, the inspector indicated that the posting of a warning sign stating "warning, possible side clearance hazard if truck topples" would "not be adequate at all" to satisfy the requirements of the standard (Tr. 214).

With respect to the physical aspects of the cited dumping location, the inspector confirmed that in the absence of trucks,

there were no inherent side or overhead clearance hazards presented at the dumping facility (Tr. 221). Although he indicated that exposed coal hoppers would always present a hazard, he confirmed that the citation was not based on the existence of hoppers. He confirmed that Conesville had hopper warning signs posted at the dumping pile, and that in the event any of the hoppers are exposed, Conesville takes appropriate action by flagging the area so that the truck drivers can see them (Tr. 221).

The inspector stated that compared to the other mines which he inspects, which have much smaller dumping areas, Conesville's operation is unique in that large volumes of coal are dumped at the site, resulting in a high volume of truck traffic as compared to the other smaller dumping operations (Tr. 464-465). When asked what he would have done if he had observed a truck parked 15 feet from another truck which was dumping, the inspector indicated that he would talk to the drivers, and then decide what action to take (Tr. 463).

Although MSHA's standards for dumping facilities found in section 77.1608, contain several requirements to insure adequate protection at such locations, they do not include any information or requirements for maintaining any kind of spacing between trucks while they are dumping. The inspector confirmed that he discussed the citation with his supervisor, and after reviewing the standards applicable to dumping facilities, they found they did not apply and decided to cite section 77.1600, the general loading and haulage standards (Tr. 464-465). In this regard, when referring to the absence of any guidance in section 77.1600, the inspector commented "I do wish there were more regulations in that" (Tr. 466).

Conesville argues that the incongruity of MSHA's interpretation of the standard is underscored by the fact that the alleged hazard and violation is entirely dependent upon the location of the coal trucks utilizing the coal dumping area, and in essence presents a situation where there is a "moving" violation which occurs only when two coal trucks happen to be in such proximity (less than 40 or 50 feet apart according to the inspector) that one could come in contact with the other should it tip and fall during the dumping process. Under these circumstances, Conesville asserts that whether or not there is a violation of section 77.1600(c) could, and will, vary from day to day, hour to hour, or even minute to minute without any physical change in the dumping area.

Conesville argues that the plain language of section 77.1600(c), only requires that the purportedly hazardous clearance be "conspicuously marked" and that warning devices be installed "when necessary," and does not require Conesville to provide adequate and safe side clearance on raised equipment.

Further, in light of the fact that the inspector confirmed that a warning sign or device at the dumping area would not be enough to comply with section 77.1600(c), Conesville maintains that the inspector not only extended this standard to a factual scenario never envisioned by its drafters, but has also imposed on Conesville an affirmative duty that is clearly beyond any obligation imposed by the standard.

Conesville argues that the inspector's interpretation and application of section 77.1600(c), is an impermissible expansion of the plain meaning of the standard, and that the application of the standard to the facts presented fails to give fair warning that the allegedly violative conduct was prohibited. In support of its argument, Conesville cites Phelps Dodge Corp v. FMSHRC, 681 F.2d 1189, 1192 (9th Cir. 1982); Ideal Cement Co., 11 FMSHRC 1776, 1783-1784 (September 1989). Further, citing Diamond Roofing Co., Inc. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976); Ideal Cement Co., supra, 11 FMSHRC at 1783; and American Fed. of Govt. Employees v. FLRA, 593 F. Supp. 1203 n. 15 (D.D.C. 1984), Conesville further argues that a regulation which subjects a party to civil sanctions cannot be construed to mean what an agency intended but did not adequately express, and that a safety regulation must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

With regard to the deference to be accorded an agency's interpretation of a mandatory safety standard, Conesville asserts that the court is required to give effect to the actual words and objective meaning of the regulations and is not bound by the agency's "hidden intentions and idiosyncratic interpretations," and cites the Commission's decision in Western Fuels-Utah, Inc., 11 FMSHRC 278, 284 (March 1989), where the Commission stated as follows:

While the Secretary's interpretation of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulations. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945)). . . . The Mine Act does not contemplate that the Commission merely "rubber-stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.

MSHA takes the position that it has established that Conesville's failure to maintain adequate truck side clearances at the raw coal pile created a hazardous condition and constitutes a violation of section 77.1600(c). In support of this

conclusion, MSHA argues that the evidence clearly establishes that despite the fact that a truck had tipped over at the dumping location 10 months earlier, Conesville did not use designated dumping lanes, did not mark off the lanes with traffic cones, did not use a flagman or other employee to direct or control traffic, and did nothing to assure that trucks dumped with safe distances between them.

The record reflects that the citation issued by Inspector Grissett was the first of its kind that he or any other inspector in his district had ever issued for a violation of section 77.1600(c), for failure to insure adequate side clearance between trucks. The failure by an inspector to issue any citation during prior inspections does not estop him from issuing a citation during any subsequent inspections. See: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983); Emery Mining Corporation, 5 FMSHRC 1400 (August 1983), aff'd by the 10th Circuit Court of Appeals, 3 MSHC 1585. However, an inspector's issuance of a citation, such as the one in this case, is subject to scrutiny to determine whether or not, as argued by Conesville, the inspector's interpretation and application of the standard was unreasonable and beyond the scope and intent of the standard, and whether or not it imposed an affirmative duty on Conesville beyond that required by the plain meaning of the standard.

During a colloquy with counsel in the course of the hearing with respect to the regulatory or legislative intent of section 77.1600(c), MSHA's counsel stated that he could find nothing in the legislative history to shed any light on the meaning and intent of the standard, and he confirmed that he was unaware of any relevant MSHA policy guidelines concerning the interpretation and application of the standard (Tr. 216). In response to my inquiry as to whether or not truck tipping incidents of the kind which occurred in this case have been the subject of any MSHA "accident fatal-grams," the inspector indicated that accidents have been reported in situations where a truck driver has traveled over a hill while dumping his load (Tr. 217).

The inspector confirmed that he had previously issued a citation for a violation of section 77.1600(c), in a situation where he believed that there was a possibility that a dump truck would come in contact with a high voltage line when it raised its bed to dump its load (Tr. 222-223). In Valley Camp Coal Co., 7 FMSHRC 1197 (August 1985), I affirmed a violation of section 77.1600(c) after finding that the operator failed to conspicuously mark or install a warning device at a haulage roadway location where the roadway was reduced from 25 feet to 14 feet. I concluded that the narrowing of the roadway by nearly 11 feet presented a clearance hazard and that a warning sign or device should have posted to alert a driver of the clearance hazard. In

situations of this kind where there is a clearly definable side or overhead clearance hazard, such as a narrowed roadway, an overhead high voltage line in close proximity to a truck when its bed is raised, or an inherent truck over-travel hazard, such as an unprotected embankment or hill at a dumping location, I do not find it unreasonable to require an operator to post a sign or warning device warning truck drivers of the hazard. Indeed, the standard on its face requires no less, but I take note of the fact that it only requires the posting of such warning devices.

On the facts of this case, it seems clear to me that Conesville is not charged with a failure to post a warning sign or other device. As a matter of fact, the inspector clearly indicated that he would not accept a warning sign as compliance, even if it warned of the specific hazard of two trucks possibly colliding if one were to tip over while dumping. The inspector believed that the standard required Conesville to physically separate the trucks for a distance of 40 to 50 feet, to insure against any contact should one truck tip over, or to provide designated dumping lanes to insure that the trucks are far enough apart in the event of a tipping incident of the kind which occurred in this case. The inspector also suggested that the enlargement of the dumping area would have provided ample room between the trucks while they were dumping, and in its posthearing brief, MSHA suggested that Conesville should have provided a flagman or another employee to direct and control traffic when the trucks were dumping. Although I cannot conclude that all of these "suggestions" for compliance are unreasonable, the fact is that the plain wording of the standard does not require them. In my view, if MSHA believes that something more than the posting of warning signs is required in situations where side or overhead clearances at any dumping location present a hazard, it should promulgate a standard to clearly and directly address not only the perceived hazard, but also the duty imposed on the mine operator for compliance.

The record in this case reflects that Mr. Fortney's truck tipped over because of an imbalance caused by frozen coal which remained in the raised truck bed after the coal was dumped from the truck. Unlike other drivers who were aware of such a hazard and used anti-freeze or diesel fuel to line their truck beds, Mr. Fortney did not take such measures to guard against frozen coal in the truck bed of his truck. The record also reflects that the prior truck tipping incident occurred when the rear wheel sank into the mud and the truck tipped over. The incident was not reported because no one was injured. Some of the drivers who testified in this case alluded to the fact that they always seek out a level spot while dumping, particularly where the ground is wet and muddy, to avoid possible tipping accidents due to adverse ground conditions.

Although I find some merit in Conesville's argument that the standard is intended to apply in situations where the inherent physical characteristics of a dumping location present a reasonable likelihood of side clearance hazards, and that in the absence of any trucks, the inspector found no inherent hazards with the dumping location, the fact remains that potential tipping hazards do exist in the event a truck should experience a mechanical breakdown, or a driver fails to insure against frozen coal in his raised truck bed, or happens to back over uneven or soft or wet ground while dumping his load. Under these circumstances, I believe the standard is broad enough to cover trucks which may be dumping coal at a dumping location, and which are close enough to place them in jeopardy of being struck by a tipping truck if adequate side clearances are not maintained. However, I do not believe that the standard, as promulgated, requires, or imposes a duty on a mine operator, to do anything other than post a warning sign or other warning device. On the facts of this case, I agree with Conesville's position that the inspector's interpretation and application of section 77.1600(c), which he believed required it to do more than what was required by the clear wording of the standard, was clearly beyond any reasonable interpretation and application of the standard and was erroneous and arbitrary. Under the circumstances, I conclude and find that MSHA has failed to establish a violation, and the contested citation IS VACATED.

Docket No. LAKE 89-29-R

Imminent Danger Order No. 2950067, December 5, 1988

Inspector Grissett issued the imminent danger order after finding that Conesville "did not insure that adequate side clearance was provided at the raw coal pile dumping location." The order reflects that a coal truck leased to independent contractor Ross Brothers, Inc., overturned while dumping coal, and that the bed of the truck fell on the cab of another truck, also leased to Ross Brothers, Inc., and which was parked, causing fatal injuries to the driver in the parked truck. The inspector also noted that another truck had overturned at the same dumping location on February 26, 1988.

Conesville argues that since it did not violate section 77.1600(c), the imminent danger order based on the alleged violation is improper. In addition, Conesville asserts that prior to December 5, 1988, MSHA had never issued an imminent danger at the coal dumping area in question even though Inspector Grissett had previously inspected the facility, two times a year, including a regular inspection from September 20, 1988 to September 28, 1988, and confirmed that he never saw anything wrong or hazardous with the way the trucks were dumping.

Conesville concludes that any objective assessment of the alleged "condition" or "practice" precludes a determination that it could reasonably be expected to cause death or serious physical harm before it could be abated. Conesville maintains that the inspector believed an imminent danger existed not because of any physical hazard with respect to the dumping area, but only because Conesville did not require that trucks maintain a specific minimum side clearance between their respective vehicles. Conesville points out that the dumping area was an area 250 feet in width, that no more than four trucks were permitted to dump in that area at one time, and that on many occasions there were less than four trucks in the dumping area. In addition, one of the truck drivers, Norman Fortney, testified that the coal haulers typically tried to leave 40 to 50 feet between their trucks when dumping. Conesville also points out that although the mine safety committee had the right to declare the dumping area an "imminent danger," and to withdraw miners, it has never done so.

Conesville further points out that prior to December 2, 1988, there had been one incident in 4 years in which a truck tipped at the dumping area in question. This incident was due to an unforeseen mechanical malfunction of the vehicle, and it did not strike any other vehicle or result in any injuries. Further, the December 2, 1988, incident was due to frozen coal remaining in the bed of Mr. Fortney's trailer. However, this hazard was well known by coal haulers and precautions were generally taken to guard against such a hazard. Under the circumstances, Conesville asserts that the incident of December 2, 1988, was a freak accident precipitated by the fact that Mr. Fortney, unlike the other truck drivers who testified in these proceedings, did not use diesel fuel or anti-freeze for his trailer.

Conesville argues that the inspector's perception of an imminent danger was not based on any inherently dangerous condition or practice at the dumping pile, but only on a perceived hazard ultimately relating to two most unlikely events-mechanical malfunction and/or frozen coal-which would cause a coal truck to tip. Given the freak nature of the accident, the physical characteristics of the dumping area, and the precautions taken by the coal haulers to prevent tipping, Conesville concludes that the inspector's opinion should not be taken at face value and it does not indicate a condition or practice which could reasonably be expected to cause death or serious physical harm before it could be abated.

Citing Judge Morris' decision in Ideal Cement Co., 11 FMSHRC 1783 (September 1989), Conesville maintains that contrary to the inspector's interpretation of an imminent danger, the occurrence of a fatality is not synonymous with an imminent danger, and that

such an occurrence does not prove a violation of the cited standard. In the Ideal Cement Co. case, Judge Morris stated as follows:

A fatality in a case, in and of itself, does not by its mere occurrence prove a violation of the regulation, Lone Star Industries, Inc., 3 FMSHRC 2526, 2529, 2530 (1981); Texas Industries, Incorporated, 4 FMSHRC 352 (1982).

The law is clear that a safety regulation that imposes civil penalties for its violation must give an employer fair warning of the conduct it prohibits or requires and must further provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

MSHA takes the position that during his accident investigation, the inspector determined that Conesville "had a very haphazard system for the delivery and dumping of coal." MSHA asserts that after a truck had its coal load weighed at the scalehouse, the driver would then try to find an open spot at the coal pile to dump his load, and Conesville never controlled how the drivers spaced their trucks while dumping coal. MSHA points out that Conesville had no designated traffic lanes or traffic cones marking out lanes, and had no flagman or any employee directing traffic to control the spacing of trucks prior to the accident.

MSHA further points out that a prior tipping incident had occurred 10 months earlier on February 26, 1988, and that the pile was closed by a section 103(k) order issued by the inspector on December 2, 1988. In view of the fact that this order terminated when the accident investigation was completed on December 5, 1988, and Conesville could continue the condition or practice of dumping without any traffic controls in place, MSHA concludes that the inspector had no choice other than to issue an imminent danger order.

MSHA asserts that Conesville had permitted a dangerous practice to exist by allowing coal trucks to dump without taking any measures to assure adequate side clearance. The trucks were within 10 feet of each other, "a common practice," even though the extended trailer of one cab was 17 feet. Since Conesville showed no effort to correct the condition after the prior tipping incident, MSHA concludes that the inspector could not be reasonably assured that the condition would be abated before another serious accident occurred. Under the circumstances, MSHA further concludes that the inspector provided a cogent and compelling rationale for issuing the order, and the facts presented support and meet the legal standard for the issuance of the order.

Section 3(j) of the Mine Act, 30 U.S.C. § 802(j), defines an "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operation Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." In the Old Ben Corp. case, the court stated as follows at 523 F.2d at 31:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added).

The Commission stated as follows at 11 FMSHRC 2164:

In addition, R&P's focus on the relative likelihood of Coy being injured while under the moving belt ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

The fact that a section 103(k) order affectively closes the scene of an accident, or miners are withdrawn from the work site, does not affect the validity of an imminent danger order issued pursuant to section 107(a) of the Act. See: Itmann Coal Company, 1 FMSHRC 1573, 1577 (October 1979). Further, the validity of an imminent danger order is not dependent on whether or

not a violation of any mandatory safety standard has occurred. Conesville's arguments to the contrary are rejected. While it is true that the inspector believed that Conesville's "ongoing and continuing" violation of section 77.1600(c), created the imminent danger (Tr. 209), the thrust of MSHA's case is its contention that the absence of any established procedures instituted by Conesville to insure that truck drivers maintained safe distances between their trucks, coupled with the practice of drivers being permitted to dump their coal loads without any spacing controls to preclude one truck striking another truck if it were to overturn or tip over, presented an imminently dangerous situation at Conesville's dumping location.

MSHA's accident report in this case reflects that the trucks involved in the accident were 10 feet apart when Mr. Fortney's truck tipped over on top of the cab of Mr. Hina's truck. Mr. Fortney's truck was 30 feet long, and the truck bed was raised for a vertical distance of 17 feet at the location of the bed hoist at the time it tipped over. Inspector Grissett testified that during his prior inspection visits to the dumping location he never observed any trucks as close as 10 to 15 feet to each other and that they were always spaced further apart. He also confirmed that he never previously observed anything wrong or hazardous in the manner in which the trucks were dumping, and that if he did, he would have issued a violation (Tr. 453, 462). In my view, given the great number of trips made by truckers on any given day over a protracted period of time to the dumping location in question, the fact that the inspector found no hazardous conditions present during two prior inspection visits does not preclude a finding of imminent danger based on an otherwise established practice of drivers dumping their coal loads precariously close to each other.

Conesville's former safety director testified that prior to the accident there were no truck spacing controls in effect at the dumping location and each driver used his own discretion in determining the "safe" distances for backing up and dumping their loads. Truck drivers St. Clair and Lent testified that they received no hazard training from Conesville, and were never instructed as to the methods and procedures to follow while dumping their loads at the dumping location in question. The driver of the truck which tipped over and struck Mr. Hina's truck (Norman Fortney), testified that while there were occasions when he observed trucks spaced 40 to 50 feet apart while dumping, during a period of approximately 200 deliveries to the Conesville facility, the trucks were usually spaced 10 to 12 feet apart. Mr. Fortney confirmed that prior to the accident, there was no fixed truck spacing requirements while coal was being dumped, that he never received any dumping instructions from the scale-master, and that the drivers used their own discretion in determining a safe location to dump.

Conesville's scalemaster Shuck, who had never operated a coal truck or backed one up to a dumping location, testified that during peak dumping hours, 50 to 60 trucks a day come to the site to dump coal, and although only four trucks are allowed in the dumping area at any given time, and 30 or 40 were waiting in line, he did not continually monitor or visually observe the dumping process. He confirmed that once the drivers left the scalehouse, they were "basically on their own" while backing up and finding a place to dump their loads (Tr. 422, 436).

Although Conesville's witnesses believed that the prior truck tipping incident of February, 1988, was caused by a broken truck telescope pin, the driver of the truck, James Stull, testified that the truck tipped over when the right rear wheel sunk into the mud. He confirmed that the telescope broke after the truck tipped over, and that the truck fell for a distance of 30 feet. Mr. Stull testified that while he was hazard trained after the accident occurred, he had not previously been instructed by Conesville as to how he should dump his coal loads.

Although Conesville's assertions that mechanical truck malfunctions and frozen coal are "unlikely events" which would cause a truck to tip over may be true, the fact is that these are the types of hazards which are readily recognizable and known, and which have in fact occurred at Conesville's dumping location. Indeed, Inspector Grissett confirmed that even after abatement and the institution of the dumping lane system, there were two additional incidents of truck upsetting because of mechanical failures. Conesville's plant manager Miller testified that he was aware of another truck tipping incident after the accident in question. Given the fact that truck tipping incidents per se are not required to be reported to MSHA unless there is an injury, it is altogether possible that other such incidents have occurred and were not reported. As noted earlier, driver Stull confirmed that his truck tipped over because of adverse ground conditions and that he was "lucky" that another truck was not positioned to his right side when he tipped, and if it had "somebody would have got it" (Tr. 123). Mr. Stull testified that he had observed trucks closer than 10 to 12 feet of each other while dumping at the site, and that when his truck tipped over, it covered a distance of approximately 30 feet (Tr. 123, 126).

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that MSHA has established by a preponderance of the evidence that Conesville had no effective means or controls in place to insure that safe and adequate truck spacing distances were maintained while the trucks were permitted to dump their loads at its dumping location. I also conclude and find that Conesville's lack of truck spacing controls, and permitting the drivers to dump at their own discretion, without regard to the potential hazards presented in the event a truck tipped over, constituted an unsafe

and hazardous practice which exposed the drivers to the potential risk or serious injury at any time in the normal course of their work of dumping coal. I further conclude and find that in the absence of the imminent danger order, this practice would have continued and could reasonably have resulted in further serious or fatal injuries. Under the circumstances, I believe that the inspector acted reasonably in issuing the order and that his decision in this regard was justified. Accordingly, the contested imminent danger order IS AFFIRMED.

Docket No. LAKE 89-31-R. Section 104(d)(1) "S&S" Citation No. 2950069, December 5, 1988. 30 C.F.R. § 48.31(a).

Docket No. LAKE 89-32-R. Section 104(d)(1) "S&S" Order No. 2950070, December 5, 1988. 30 C.F.R. § 48.31(a).

In these cases, Conesville is charged with a failure to provide hazard training for the two contract coal truck drivers who were involved in the accident of December 2, 1988, as well as four additional contract drivers. The inspector issued the violations after determining that there were no entries in the hazard training log book maintained by Conesville at the mine to confirm that the cited drivers had received hazard training as required by section 48.31(a). The record reflects that the accident victim (Dale Hina) was an employee of Cox Farms, and had been contracted to Ross Brothers, Inc., to haul coal to the Conesville preparation plant, and that the other driver involved in the accident (Norman Fortney), was the owner of the truck which tipped over and that he had contracted his truck to Ross Brothers, Inc. to haul coal to the plant. The other four cited drivers were employees of Ross Brothers, Inc., and they too hauled coal to the plant.

The cited training standard section 48.31(a), provides as follows:

Operators shall provide to those miners, as defined in § 48.22(a)(2) (Definition of miner) of this subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:

- (1) Hazard recognition and avoidance;
- (2) Emergency and evacuation procedures;
- (3) Health and safety standards, safety rules and safe working procedures;
- (4) Self-rescue and respiratory devices; and,

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

MSHA's section 48.31, policy statements are found in its Administrative Manual 30 C.F.R. Part 48-Training and Retraining of Miners, July 1, 1985 (Exhibit M.X.-31), and they state as follows:

The exposure to mining hazards varies according to task. The greater the hazard exposure, the greater the need for training.

Hazard training should be:

1. Mine specific, so that persons are advised of the hazards they may encounter at a particular mine; and

2. Conducted each time a person enters a different mine.

Section 48.31 requires operators to give hazard training to persons who are exposed to mine hazards. For example, a person driving a vehicle onto mine property to pick up a load of material who remains in the vehicle at all times would ordinarily not be exposed to hazards peculiar to the mine, and consequently would not be required to receive training under Part 48.

* * * * *

Although the amount of required hazard training will vary, the following are examples of appropriate hazard training:

Pickup and Delivery Drivers

1. Persons coming onto mine sites to pick up mined materials or to deliver supplies and who remain inside their vehicles need not be given training. If they leave their vehicles they must be given hazard training.

The definition for miners who are required to be trained under 30 C.F.R. § 48.31(a) is set forth in 30 C.F.R. § 48.22(a)(2) which states as follows:

Miner means, for purposes of § 48.31 (Hazard training) of this Subpart B, any person working in a surface mine or surface areas of an underground mine

excluding persons covered under paragraph (a)(1) of this section and Subpart C of this part and supervisory personnel subject to MSHA approved state certification requirements. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine.
(Emphasis Added).

MSHA's section 48.22(a)(2), policy statements as found in the manual provides as follows:

For purposes of hazard training (Section 48.31) a "miner" is a person who is exposed to mine hazards for a short time (five or less consecutive working days) and who will not be exposed to these hazards on a regular basis. Regular exposure is a recognizable pattern of exposure on a recurring basis.

The required training should be commensurate with the expected exposure to hazards.

Conesville argues that it is not disputed that at the time of the accident of December 2, 1988, it had an MSHA approved training program in effect and that the citation and order were premised solely on its failure to hazard train the cited drivers, and not on any deficiencies in its hazard training program. In support of this conclusion, Conesville cites the testimony of Inspector Grissett who confirmed that Conesville had an approved hazard training program, that he found no problem with the training checklist that was used to hazard train the truck drivers, and that Conesville simply "missed some of the drivers when it came to hazard training" (Tr. 281-282).

Conesville asserts that in compliance with MSHA's instructions, it commenced the hazard training of all coal haulers in January, 1988, and as of December 2, 1988, had hazard trained more than 80 drivers.

Conesville admits that the names of the cited drivers were not in the log book which reflected the drivers who had been hazard trained in 1988. However, it contends that the citation and order for an alleged violation of section 48.31(a) were improper because (1) the cited individuals are not "miners" within the definition found in section 48.22(a)(2), (2) responsibility for the hazard training lies with Ross Brothers, Inc., and (3) Conesville was "providing" hazard training as required by section 48.31(a).

Conesville argues that the testimony of the inspector establishes that the cited coal haulers in question were regularly

exposed to mine hazards and accordingly fall within the definition of "miner" found in section 48.22(a)(1). Since they were exposed to mine hazards on a regular or recurring basis over an extended period of time, Conesville concludes that this distinguishes them from those individuals who are within the definition of "miner" as referenced in section 48.22(a)(2). Conesville suggests that MSHA's attempts to categorize these individuals with "office, scientific worker or occasional, short-term maintenance or service workers" pursuant to section 48.22(a)(2) is incongruous and inconsistent with its own policy statements which provides that for purposes of hazard training pursuant to section 48.31, a "miner" is a person "who is exposed to mine hazards for a short time (five or less consecutive working days) and who will not be exposed to these hazards on a regular basis."

Assuming that the cited individuals are found to be "miners" within the definition found in section 48.22(a)(2), Conesville argues that Ross Brothers, Inc., should be held accountable and should be sanctioned for any violation of section 48.31(a). Conesville points out that despite the fact that Conesville had no involvement in determining who delivers coal to its facility and had no contractual relationship with Ross Brothers, Inc., that coal is delivered to Conesville's preparation plant by a half dozen different vendors at the rate of approximately 200 trucks a day, and that approximately 50 to 60 different drivers deliver coal each day, the inspector placed the onus on Conesville, rather than the trucking companies, to hazard train each and every trucker entering the mine premises.

Conesville asserts that even though the inspector confirmed that Ross Brothers, Inc., is subject to MSHA jurisdiction while on mine property as an "independent contractor," he issued no citations or orders to Ross Brothers, Inc., despite their undisputed failure to provide hazard training to any of the cited coal haulers. Citing my decision in Harman Mining Corp., 3 FMSHRC 45 (January 1981), review denied (February 1981), Conesville asserts that rather than issuing withdrawal orders to mine operators for failure to hazard train trucking company employees, the more effective sanction, and one which should enhance safety and further support the underlying purpose of section 48.31(a), is to cite the trucking company itself that fails to provide hazard training to its employees or fails to take any affirmative steps to insure that its employees are in fact hazard trained.

Conesville argues that the more appropriate sanction would be to cite Ross Brothers, Inc., for failure to hazard train its employees or insure that they received the hazard training being provided by Conesville. Conesville suggests that such a result is necessitated by the fact that it provided hazard training to coal haulers and had in fact hazard trained more than 80 coal haulers in 1988. Requiring the trucking company to hazard train

or insure the training of its employees would enhance and promote safety at Conesville, particularly since 50 to 60 coal haulers deliver coal to that facility each day. Rather than holding Conesville strictly liable for any coal hauler that happens to avoid detection by Conesville (and thus avoids hazard training) an enforcement scheme directed at Ross Brothers, Inc., and other trucking companies delivering coal to Conesville more fairly addresses the issue from the standpoint of culpability and enhances the hazard training of all "miners."

Conesville further argues that assuming the cited coal haulers are "miners" and that it is responsible for satisfying the hazard training obligations set forth in section 48.31(a), it nonetheless provided the training required by section 48.31(a). Conesville points out that it had an MSHA-approved training program in place, including a hazard training program, and that MSHA's concern was not with the content of its training program, but, rather, that several individuals had not been hazard trained. Conesville further points out that even though MSHA had advised it that only those coal haulers exiting their vehicles need to be hazard trained, (Tr. 349-250), it undertook a program to train all coal haulers who entered its premises.

Conesville asserts that the fact that several employees employed or contracted by Ross Brothers, Inc., eluded hazard training that was made available by Conesville, does not establish a violation of section 48.31(a), and that MSHA has failed to prove that it failed to provide such training.

Finally, Conesville takes issue with the inspector's contention that the failure to hazard train the accident victim and to advise him to "stay clear of all raised equipment (dozer, blades, front-end loaders, etc.)" contributed to the accident. Conesville points out that the particular item from the hazard training checklist does not advise, and was likely never intended to advise, coal haulers to "stay clear" --i.e., a 40 to 50 foot clearance--of other coal trucks unloading coal. Conesville points out that scalemaster Shuck, the individual providing the training to most of the coal haulers, testified that this "checklist" which was provided by MSHA, does not apply to coal haulers, and that each coal hauler who testified unequivocally indicated their prior awareness of a tipping hazard associated with coal trucks.

Conesville also emphasizes the fact that the inspector testified at his deposition and at the hearing that coal haulers need only be trained as to hazards encountered while out of their trucks, and that there is no dispute that the accident victim was in the cab of his truck when it was struck by Mr. Fortney's trailer. Thus, Conesville concludes that there was no obligation to hazard train Mr. Hina with respect to this "hazard," and that any allegation of a causal nexus between the accident and an

alleged failure to hazard train Mr. Hina defies reality and is nothing more than an after-the-fact attempt to find blame and justify a clearly improper citation and order.

MSHA asserts that there is no dispute that the names of the cited six truck drivers were not listed in Conesville's training log book and that they were not hazard trained. MSHA argues that the controlling definitional regulation for those "miners" required to be hazard trained is found in section 48.22(a)(2), which sets forth a listing of workers to be hazard trained, including "delivery" workers. Since the six cited drivers were working at Conesville's surface facility by delivering coal to the raw coal pile, MSHA concludes that they met both the situs and the occupation requirements set forth in section 48.22(a)(2), and had to be hazard trained.

MSHA argues that Conesville's reliance on MSHA's policy is specious. With regard to Conesville's reliance on the policy distinction of whether drivers get out of their trucks while on mine property, MSHA points out that Conesville itself drew no such distinction and that its safety director confirmed that when Conesville started to hazard train in January 1988, it decided to train all truck drivers, regardless of whether they got out of their truck.

MSHA argues that the policy guideline itself does not relieve Conesville of the duty to hazard train drivers regardless of whether they got out of their trucks, and that three drivers testified that they had to get out of their trucks while dumping at the raw coal pile. MSHA points out that the policy states that "a person driving a vehicle onto mine property to pick up a load of material who remains in the vehicle at all times would ordinarily not be exposed to hazards peculiar to the mine, and consequently would not be required to receive training under Part 48." However, in the instant case, MSHA asserts that the truck drivers were exposed to the peculiar hazards at the coal pile even if they remained in their vehicle, and that the peculiar hazard was that of Conesville failing to maintain safe and adequate side clearance for the trucks dumping at the pile. Since Mr. Hina was fatally injured because of the failure to maintain an adequate side clearance between his truck and Mr. Fortney's truck, MSHA concludes that it did not matter whether Mr. Hina got out of his truck since he was subjected to the peculiar hazard of raised equipment, to wit, the trailer of Mr. Fortney's truck.

Finally, MSHA argues that MSHA's policy is not law and is not binding, and that the inspector's duty is to enforce the law, and not a guideline which is a general policy statement used for guidance, Brock v. Cathedral Bluffs Shale Oil Co., 4 MSHC 1033 at 1035, 1036 (D.C. Cir. 1986).

The definition of "miner" found in section 48.22(a)(1), for purposes of the comprehensive training requirements of sections 48.23 through 48.30, includes any person working in a surface mine who is regularly exposed to mine hazards. MSHA's policy manual guidelines with respect to persons who are regularly exposed to mine hazards adds the term "frequently" so that the definition reads "regularly or frequently exposed to mine hazards" (Policy Manual, pg. 13). The policy further states that "Regular exposure is a recognizable pattern of exposure on a recurring basis. Exposure to hazards for more than five consecutive days is frequent exposure" (Policy Manual, pg. 14). The policy further states that "If the individual . . . is infrequently or irregularly exposed to mine hazards, or is inconsequently exposed to mining hazards, then appropriate 48.11/48.31 hazard training is required."

Inspector Grissett testified that Mr. Hina and Mr. Fortney, the truckers who were involved in the accident, were exposed to mine hazards on a daily basis during each of their trips to the Conesville dumping location. He believed they were exposed to hazards from the coal hoppers at the dumping pile, and to hazards from other truck or bulldozer traffic at this location. He also believed that they were exposed to hazards regardless of whether they remained in their trucks while dumping coal. He confirmed that the other cited drivers who came to the facility to deliver their coal loads did so on a regular basis and were also regularly exposed to mine hazards.

The record in this case, including MSHA's posthearing proposed findings of fact, reflects that Mr. Fortney began delivering coal to the Conesville dumping site in August 1988, and that between August of 1988 to December 2, 1988, Mr. Fortney had made approximately 200 coal deliveries, and that during this time frame it was necessary for him to get out of his truck to trip his tailgate release. Mr. Fortney testified that he delivered coal to Conesville on an average of three loads a day, 3 days a week, and that Mr. Hina's delivery schedule was approximately the same as his (Tr. 39-40).

The record also reflects that truck driver St. Clair had delivered coal to Conesville for 4-1/2-years prior to December 2, 1988, made approximately 2,000 deliveries, and found it necessary on occasion to get out of his truck to facilitate the dumping of coal. Truck driver Lent had delivered coal to the dumping location for approximately 2-months prior to December 2, 1988, and he too found it necessary to get out of his truck to facilitate the dumping of coal. A statement taken from truck driver Orville Parks during the accident investigation (joint exhibit 1), reflects that he began delivering coal to Conesville in April, 1988, and that he made three trips a day, 3 days a week.

Conesville's scalehouse operator Shuck testified that coal is delivered to the dumping location in question 3 days a week, and that this has been a normal practice during the 4 years of his employment at Conesville. Mr. Shuck estimated that 200 trucks a day deliver coal to the site, and that approximately 50 to 60 contractor drivers are engaged in this work. MSHA's accident investigation report (exhibit M.X.-30), reflects that the preparation plant operated 3 days a week on Wednesday, Thursday, and Friday, and that each day approximately 7,000 tons of coal from other mines are transported to the facility for processing at the preparation plant.

In support of the imminent danger order issued by Inspector Grissett, MSHA argued that by allowing coal trucks to dump coal without taking any measures to assure adequate side clearances between the trucks, Conesville permitted a dangerous practice to exist, exposed all of the drivers who were at the dumping location to hazards, and that the practice would have continued unabated had the inspector not issued the order. The inspector confirmed his belief that Conesville's "ongoing and continuing violation of section 77.1600(c), created the imminent danger" (Tr. 209).

Notwithstanding all of this evidence, which I conclude and find clearly establishes regular and frequent exposure to potential mine hazards to the contract truck drivers who regularly, frequently, and routinely delivered coal to the Conesville facility approximately 3 times a day, 3 days a week, over a relatively long period of time, Inspector Grissett nonetheless concluded that these drivers were not "miners" pursuant to section 48.22(a)(1), because (1) they performed no contract work for a period of 5 days, (2) were not employed at the mine, and (3) "they were just contracted to deliver a product to the mine."

The fact that the drivers in question were contract employees and were not employed by Conesville is in my view of no consequence. They were in fact persons working in a surface mine while on mine property with coal trucks. Although it is true that the drivers may not have been present at the mine site more than 5 consecutive days, they were certainly there frequently and regularly, and were frequently and regularly exposed to mine hazards. In Kelly Trucking Company, 11 FMSHRC 2441 (December 1989), Judge Maurer affirmed a violation of training Section 48.25(a), where an untrained employee of a trucking company had performed work at a mine site for 3 or 4 days.

Inspector Grissett believed that independent trucking companies, such as Ross Brothers, Inc., who employed or contracted

the drivers working at the Conesville site, were not obliged to hazard train the drivers and that Conesville was responsible for this training since it is responsible for the safety of any person entering its mine. Inspector Grissett's reliance on the definition of a "miner" required to be hazard trained pursuant to section 48.31, is based on his belief that the contract truck drivers in question were "delivery" workers, a category included within the definition of section 48.22(a)(2), for miners who are required to be hazard trained. That section defines such a "miner" as "any person working in a surface mine," but it excludes persons covered under section 48.22(a)(1), and says nothing about any regular exposure to mine hazards. Thus, any person working in a surface mine who is regularly exposed to mine hazards would be required to receive the types of comprehensive training found in sections 48.25 through 48.28, rather than hazard training. MSHA takes the position that since the truck drivers in question were delivering coal to the Conesville site, they met the situs and occupation requirements for "delivery workers" found in section 48.22(a)(2), and therefore had to be hazard trained.

With regard to MSHA's reliance on the "delivery worker" included in the definition of a miner required to be hazard trained, I take note of the fact that MSHA's own explanatory policy guideline with respect to "pickup and delivery drivers" is directed at persons who come to the mine to pick up mined materials or deliver supplies. The evidence in this case does not reflect that any of the truckers in question were picking up any mined materials, nor were they delivering "supplies," as that word is commonly understood. In my view, if MSHA had intended coal haulers to be included in such a category it would have included the delivery of mined materials, as well as the pick up of mined materials, as part of its policy.

I also take note of MSHA's policy manual guidelines found in Volume III, Part 45, July 1, 1988, concerning independent contractors. Pages 9 and 10 of that policy includes a listing of the types of services or work performed by independent contractors at mine sites which would require them to have MSHA independent contractor ID numbers. One of the specific work activities (item #8, at page 10 of the policy), which is relevant to the work performed by the independent coal haulers who delivered coal to the Conesville plant, describes the work as follows: "Material handling within mine property; including haulage of coal, ore, refuse, etc., unless for the sole purpose of direct removal from or delivery to mine property." Although the evidence in these proceedings clearly establishes that the sole purpose of the work performed by the Ross Brothers, Inc., truckers in question while on Conesville's property was the delivery of coal to its property, Ross Brothers, Inc., had an MSHA ID number, even though this policy would seemingly not require it to obtain one. Although the parties do not address

this particular policy, I believe it illustrates the contradictions found in MSHA's policy statements which are intended to provide guidance to its inspectors, as well as to mine operators.

In a recent case concerning a violation of MSHA training standard 30 C.F.R. § 48.28, by an independent contractor where the definition of "miner" was in issue, MSHA relied on its policy manual and urged the judge to accept the policy definition of "maintenance" or "construction" work in support of its case.

See: Secretary of Labor v. Frank Irey Jr., Inc., 11 FMSHRC 990, 993 (June 1989). In Dacko Corporation, 10 FMSHRC 1259 (September 1988), a case involving an independent contractor charged with a violation of training section 48.25(a), for failing to train one of its employees performing work at a surface preparation plant, the inspector relied on MSHA's manual policy guidelines with respect to the distinction between construction maintenance and repair work, and the "miner" definitions found in section 48.22(a)(1).

In Lancashire Coal Company v. Secretary of Labor, Docket Nos. PENN 89-147-R, etc., decided by me on February 27, 1990, MSHA relied on its Part 45 Independent Contractor Program Policy Manual in support of its interpretation of the language found in the cited mandatory standard in issue in those proceedings, and indeed relied on, and cited its policy in rendering certain advisory opinions with respect to the application and interpretation of the standard. In the instant proceedings, MSHA argues that its policy manual is simply a guideline which is not binding on the inspector. MSHA cannot have it both ways. I find it basically unfair to allow MSHA to rely on a policy guideline and urge the judge to accept it as binding on the parties, when it supports its position, and in another case where the policy may contradict MSHA's position, to take the position that it is not controlling and is simply extraneous and non-binding.

The "policy question" case cited by MSHA, Secretary of Labor v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (August 1984), reversed and remanded by the Court of Appeals for the District of Columbia Circuit, July 29, 1986, 4 MSHC 1033 (D.C. Cir. 1986), concerned MSHA's general policy statements concerning its discretionary enforcement authority with respect to whether it should cite a production operator or an independent contractor for violations of its mandatory health and standards. The court found that the Commission improperly regarded MSHA's general enforcement policy as a binding regulation which it was required to strictly observe.

In the instant case, MSHA's policy statements with respect to the classes of people required to be hazard trained pursuant to section 48.31, do not concern the discretionary enforcement duties of an inspector. An inspector is obliged to issue a

citation or order if he finds a violation of any mandatory standard. However, when an inspector interprets or applies any standard, particularly when it results in the issuance of a citation or an order, I believe he should be bound by the policy interpretation with respect to the meaning and application of the standard. MSHA's policy statements are clearly intended to provide notice to a mine operator with respect to what is required for compliance, as well as guidance for an inspector to follow with regard to MSHA's intended meaning and application of the law. In King Knob Coal Company, 3 FMSHRC 1417 (June 1981), although the Commission rejected a mine operator's reliance on an explanation of the cited standard contained in an MSHA Interim Mine Inspection Manual, and held such manual commentary to be without legal effect, it noted as follows at 3 FMSHRC 1422-1423:

We emphasize that our decision prospectively obviates future confusion surrounding the meaning and scope of § 77.410. The decision will also alert the public to the need for using the Manual, and similar materials, with caution. We also express the hope that this opinion will encourage MSHA to use its Manual in a responsible manner. In our view, such materials should contain, at the least, a precautionary statement warning users of their informality and non-binding nature. As this case unfortunately demonstrates, less than careful dissemination of such materials can cause enforcement and compliance confusion and, at worst, can diminish the protection of the Act and implementing regulations.

Despite the Commission's admonition, MSHA's current policy manual contains no disclaimers or cautionary instructions, and simply states that it "is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." In any event, notwithstanding MSHA's policy statements, on the facts and evidence adduced in these proceedings, and after careful consideration of the arguments advanced by the parties, I conclude and find that the cited independent contractor truck drivers were not "delivery workers" within the definition of "miner" found in section 48.22(a)(2), and that they were excluded from the class of persons required to be hazard trained pursuant to section 48.31(a).

I further conclude and find that the inclusion of "delivery workers" and the other occasional and short-term classes of workers found in section 48.22(a)(2), is intended to reach and cover persons who may visit a mine site on an irregular or casual basis to deliver parts, supplies, or other mine-related or unrelated goods. These individuals would have a limited and rather short-term exposure to mine hazards, and there would be a need to hazard train them so that they are aware of potential

hazard exposure while on mine property. The cited drivers were performing work at the mine site on a routine, regular, and frequently scheduled basis, 3 times a day, 3 days a week, week after week, over a rather protracted period of time. During this period of time, they were regularly and frequently exposed to mine hazards while in and out of their trucks at the Conesville dumping location which they visited during each of their trips. Accordingly, I conclude and find that they fall within the definition of "miner" found in section 48.22(a)(1), and would be subject to the comprehensive training requirement found in sections 48.25 through 48.28. Under the circumstances, I further conclude and find that MSHA has failed to establish that Conesville violated the hazard training requirements found in section 48.31(a), and the contested citation and order ARE VACATED.

I take note of the fact that all of the cited truck drivers were either self-employed independent truckers, or directly employed by, or contracted to, the independent contractor Ross Brothers, Inc., who had an MSHA assigned I.D. No. V71. Independent contractors are "operators" subject to the Mine Act, as well as to MSHA's training requirements found in Part 48, Title 30, Code of Federal Regulations. Section 104(g) of the Act provides withdrawal sanctions directly against an independent contractor whose employees are not properly trained. In the instant proceedings, Inspector Grissett confirmed that no citations or orders were issued to any of the independent trucking concerns or mine operators who employed the drivers. The inspector made no determination as to whether or not Ross Brothers, Inc., had trained its employee or contractor drivers, and he confirmed that the contractor who employed the accident victim (Cox Farms), had not trained all of its drivers.

In Harman Mining Corporation, 3 FMSHRC 45 (January 1981), review denied, 3 FMSHRC (February 1981), I vacated a citation charging the mine operator with a violation of the training requirements of section 48.31, for failing to hazard train an employee of a railroad company who was performing work on mine property. In the course of that decision, I noted as follows at 3 FMSHRC 61, 62:

As I observed during the course of the hearing in this case, MSHA apparently has made no effort to enforce the training requirements provided for in the Act or in its mandatory regulatory training requirements directly against a railroad until the unfortunate accident which occurred in this case. Once the accident occurred, immediate focus was placed on the lack of training and the fact that there was no confirmation of the fact

that the railroad employee who met his demise was not trained to stay clear of an oncoming trip of loaded coal cars.

* * * * *

Since an independent contractor is in fact a mine operator under the Act, and since MSHA has indicated it will treat railroads such as the Norfolk & Western on an equal basis with other operators, then it seems to me that MSHA should hold all such railroads accountable on an equal footing with other mine operators and the railroad should be required to train its own employees or suffer the consequences of having its untrained personnel barred from mine property through the sanction of a withdrawal order served directly on the railroad company.

In Old Dominion Power Company, 6 FMSHRC 1886 (August 1984), the Commission affirmed a judge's decision finding an independent contractor liable for a violation which was issued following a fatal accident which occurred on the mine operator's property. The Commission stated as follows at 6 FMSHRC 1892:

We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id. Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that "the interest of miner safety and health will best be served by placing responsibility for compliance . . . upon each independent contractor." 45 Fed. Reg. 44494, 44495 (July 1, 1980).

In the instant case, the proximate cause of the truck tipping over was the failure by the truck driver to insure that his raised truck bed was free of frozen coal. Yet, Conesville's MSHA approved hazard training "checklist" makes absolutely no mention of this potential hazard, and contains no warnings to drivers alerting them to this potential hazard. Even though one driver previously tipped a truck over after backing into a muddy ground area, the approved checklist contains no warnings concerning such adverse ground conditions at dumping locations.

Although there are nine items in the checklist which are underscored and intended to be emphasized to coal haulers on mine property, item #6 which states "stay clear of all raised equipment (Dozer Blades, Front-end Loaderbuckets, etc.)" is not underscored. Indeed, scalemaster Shuck, the person responsible for training the drivers, and former safety director Lyon did not believe that this item even applied to truck drivers. MSHA's training specialist James Myer, the individual who provides Conesville with a generic checklist identical to the one adopted as its checklist, believed that item #6 was broad enough to include truck drivers under the reference to "etc" found in item #6. When reminded that item #6 is not even underscored, and that Conesville did not believe it applied to truck drivers, Mr. Myer commented that "may be a difference of opinion." In short, rather than requiring and approving a hazard training checklist that is clear, concise, and directed to potential hazards faced by truck drivers while dumping coal, the parties have mutually adopted a checklist which makes little practical sense for the drivers which it is intended to cover.

Truck driver Fortney, the individual involved in the accident, believed that checklist item #6 was limited to loaders and dozers and not to a truck backing up and dumping coal at the dumping location in question. Driver St. Clair believed that many of the items on the checklist did not apply to truckers who dumped at the site. Driver Stull, the individual who overturned a truck during a prior incident when he backed into soft ground confirmed that he may have signed and received a copy of the checklist after the accident of December 2, 1988, and although he indicated that he keeps the checklist in his truck, he did not know what it covered and stated that he forgot or could not recall what the checklist covered.

In addition to the lack of mutual understanding of the hazard training checklist, there was also confusion and misunderstanding as to whether or not drivers who stayed inside their trucks were required to be hazard trained. Relying on MSHA's policy statements, Conesville believed that drivers who stay in their vehicles are not required to be hazard trained. In his prehearing deposition, as well as his testimony during the hearing, Inspector Grissett initially conceded that drivers who do not leave their trucks need not be hazard trained. He later recanted and stated that he was confused by MSHA's policy statements. Although he confirmed that he made no determination as to whether or not any of the cited untrained drivers were out of their trucks while at the Conesville site, he nonetheless concluded that they had to be hazard trained.

In my view, requiring independent trucking companies who are in the business of regularly and frequently hauling coal for production operators to train their own drivers, and holding them accountable when they do not, would provide a more effective

means of avoiding the kinds of truck tipping incidents which are reflected by the record in these proceedings. The use of rather obscure hazard training checklists of the kind approved for and adopted for Conesville's dumping operations, rather than comprehensive training which would train drivers in such areas as hazard recognition and avoidance, safe operating procedures while hauling and dumping coal, review of accidents and causes of accidents, and accident prevention, does little to foster safety.

Although I enjoy the benefit of hindsight, I nonetheless believe that if truck driver Fortney had been trained and required to use anti-freeze or some other substance to prevent coal from freezing in his truck, and were trained to keep a safe distance from other trucks while dumping his coal load or raising his truck bed, the accident would not have occurred. While it is true that Conesville had control of the dumping location, it is also true that there are no mandatory safety standards requiring it to insure safe and adequate truck spacing. As noted earlier, section 77.1600(c), only requires the posting of a sign or warning at dumping locations where "side or overhead" clearances are hazardous.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. LAKE 89-29-R. Section 107(a) Imminent danger Order No. 2950067, December 5, 1988, IS AFFIRMED, and Conesville's contest IS DENIED.
2. Docket No. LAKE 89-30-R. Section 104(a) "S&S" Citation No. 2950086, December 5, 1988, citing an alleged violation of 30 C.F.R. § 77.1600(c), IS VACATED, and MSHA's proposed civil penalty assessment (Docket No. LAKE 89-75) IS DENIED AND DISMISSED.
3. Docket No. LAKE 89-31-R. Section 104(a) "S&S" Citation No. 2950069, December 5, 1988, citing an alleged violation of 30 C.F.R. § 48.31(a), IS VACATED, and MSHA's proposed civil penalty assessment (Docket No. LAKE 89-75) IS DENIED AND DISMISSED.
4. Docket No. LAKE 89-32-R. Section 104(d)(1) "S&S" Order No. 2950070, December 5, 1988, citing an

alleged violation of 30 C.F.R. § 48.31(a), IS VACATED,
and MSHA's proposed civil penalty assessment (Docket
No. LAKE 89-75) IS DENIED AND DISMISSED.

George A. Koutras
George A. Koutras
Administrative Law Judge

Distribution:

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 6 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 89-148
Petitioner : A.C. No. 05-03455-03565
v. : Southfield Mine
: :
ENERGY FUELS COAL, INC., :
Respondent : :
:

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
For Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown &
Tooley, Denver, Colorado,
For Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal for Penalty by Petitioner on April 21, 1989, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq.

At the commencement of the hearing on September 14, 1989, 1/ a settlement was concluded covering the three Citations (T. 7-9) and such was approved from the bench (T. 8). Pursuant to the agreement reached Respondent is to pay MSHA's administratively assessed penalties in full and Petitioner agrees to the deletion of the "significant and substantial" designation on two of the three Citations involved. My bench decision finding the parties' agreement reasonable and approving the settlement is here affirmed.

1/ This matter was consolidated for hearing with two other penalty dockets, WEST 89-149 and WEST 89-217.

ORDER

Citations numbered 2931307 and 2931309 are MODIFIED to delete the "significant and substantial" designations on the face thereof and are otherwise affirmed. Citation No. 29331310 is affirmed.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date of this Decision the total sum of \$227 (\$85 for Citation No. 2931307, \$68 for Citation No. 2931309 and \$74 for Citation No. 2931310) as and for the civil penalties agreed on and here assessed.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
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DENVER, CO 80204

APR 6 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 89-149
Petitioner	:	A.C. No. 05-03771-03515
v.	:	Raton Creek Mine No. 1
ENERGY FUELS COAL, INC.,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for the Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown
& Tooley, Denver, Colorado,
for the Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal for Penalty by Petitioner on April 24, 1989, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq.

During the hearing on September 14, 1989, 1/ the parties consummated a settlement covering two of the three Citations involved in this docket (T. 3, 4, 77). Pursuant to the agreement, Respondent is to pay Petitioner MSHA's administratively assessed penalties in full for the two Citations, Nos. 2874080 and 2931302, in the sums of \$68 and \$42, respectively, and Petitioner agrees to the deletion of the "significant and substantial" designations on the face of both. My bench decision approving the settlement is here affirmed and the penalties agreed to by the parties are here assessed.

Citation No. 2931301 remains for resolution.

1/ This matter was consolidated for hearing with two other penalty dockets, WEST 89-148 and WEST 89-217.

Citation No. 2931301.

This Section 104(a) Citation, issued on December 9, 1988, by MSHA Inspector Earl W. Griffith, charges Respondent with a violation of 30 C.F.R § 75.316, to wit:

"The supply haulage road from cross cut 2 + 40 to cross cut 7 + 30, on the first east section MMU-001-9 was not maintained in a damp or compact condition. Visibility for the Wagner scoop operator was very poor. IV Methane and dust control in the outby areas para. 2-page 14. Plan dated 7/11/1988."

30 C.F.R. § 75.316 provides:

"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 on or before June 28, 1970. 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 provision (Section IV, Paragraph 2, page 14) of the Ventilation System and Methane and Dust Control Plan (Ex. P-2, herein "Plan") charged to have been infacted states:

"All normal haulage roads including production haulage on the section and supply haulage from the section to the portals (surface) shall be maintained in a damp or compact condition to maintain the average concentration of respirable dust in the intake airways at or below 1.0mg/m³ of air."

Findings and Pertinent Testimony.

The purpose of the quoted provision is to control respirable dust and to keep it at a particular level (T. 47-48, 49-50, 55-56, 60-61).

The haulage road cited was the main escapeway and the main intake air course (intake airway) for the mine (T. 50).

Although Paragraph 2 of the Plan refers to a specific level at which the average concentration of respirable dust must be maintained, the Inspector took no measurements to determine the average concentration of respirable dust (T. 30-31).

Inspector Griffith gave this description of what he observed when the Citation was issued and his reasons for not taking measurements:

"Q. All right. Now will you tell us, please, what you observed in this area of the haulage road that you mentioned in your citation?

A. The scoop was coming into the section with section supplies. And I was on the inby side along with Andrew Franklin, the section foreman. I was conducting a triple A inspection at this time. And as the scoop approached us, a dust cloud had proceeded the scoop, and this has been the main intake for the section. The air and the dust was moving ahead of the scoop.

Q. Where were you in relation to the scoop when you first observed it on the road?

A. I was approximately two hundred feet inby the scoop.

Q. Does that mean that you saw the scoop coming toward you?

A. Yes ma'am.

Q. And what did you observe with regard to the dust that you mentioned?

A. Well, the dust -- this is a diesel scoop that has a tremendous exhaust on it. A lot of air is blown out and it was suspending the dust from the roadway, due to the roadway not being damp and compact. It was suspending the dust particles in the air. And due to the air current, it was blowing ahead of the operator.

- Q. All right. Can you describe for us, please, how much dust you saw?
- A. It was -- I can't say how much dust but it was enough dust that the visibility was impaired. My visibility from seeing the scoop was impaired, and I'm sure that the operator would have had a hard time seeing me." (T. 16-17)

X X X

X X X

X X X

- "Q. Okay. Now on page 14, paragraph 2, the portion of the vent plan that you just told us about, we talked about the supply haulage and the damp or compact conditions, there is -- the last part of that paragraph I don't believe we've talked about, and that refers to maintaining the average concentration of respirable dust at or below 1 milligram. When you wrote your citation did you refer to that part of the vent plan? Did you refer to the 1 milligram portion of that paragraph?

- A. No ma'am.

- Q. Why not?

- A. I didn't cite that. First of all, I was on a triple A inspection.

- Q. Okay.

- A. And we do not carry estimates unless we're doing a BAB type of inspection, which is a respirable dust, then we would be carrying those instruments to measure that.

- Q. Did you feel like you had to measure the concentration?

- A. No ma'am. I wrote the citations on the fact that the road wasn't kept damp or compacted and the dust that was airborne creating a visibility hazard as well as a dust hazard.

- Q. Okay. In your experience, Mr. Griffith, is it possible to see 1 milligram of respirable dust?

- A. Not in the air, no ma'am.

Q. Okay. What -- are you responsible for designating this citation as a significant and substantial violation?

A. Yes ma'am, I am.

Q. All right. What hazard, if any, did you see as being created by the condition of the haulage road on December 9th, 1988?

A. There were two areas that I was looking at. There was the visibility of the scoop operator, his visibility was limited due to the dust being suspended and the amount of intake air that was coming into -- by the haul road.

Q. Now, with regard to the visibility, would you tell us, please, given the visibility as you observed it on that day, what could happen?

A. Well, there were several things that could have happened. The operator could have accidentally run into a piece of equipment that was parked in a break through. He could also, if an individual had been on the haul way with his back turned to him, it is possible that he could have run into him.

It also limits his visibility as far as rough and ribbed conditions, that he might not be able to see them clearly and possibly cause him an accident in this way." (T. 21-22)

On cross-examination, the Inspector conceded that he was unable to testify that the average concentration of respirable dust on the date he issued the Citation was above or below the Plan requirement (T. 30-31). Thus, this critical aspect of his testimony appears as follows:

"Q. Did you make any measurement, at any place in the intake haulage way, to determine whether the average concentration of respirable dust in the intake airway was at or below 1 milligram per meter cubed of air?

A. No sir, I did not.

Q. You can't testify today whether the average concentration of respirable dust in the roadway on that date was above or below that concentration --

A. No sir, I cannot." (Tr. 30-31)

Discussion.

Paragraph (2) of the approved (T. 62, 69-70, 73) Ventilation Plan is unambiguous. Roadways must be kept sufficiently damp or compacted to assure that the intake airways contain no more than 1.0 mg/m³ of respirable dust.

The Petitioner interprets the language of paragraph (2) to mean that the stated standard of 1 mg/m³ of air is merely a statement of purpose as to why roads must be maintained damp and compact, so samples are not necessary to prove that a violation has occurred. This interpretation -- contrary to the plain language of paragraph (2) -- is rejected. One milligram of dust per m³ of air is the stated standard (T. 61, 62). Dampening and/or compacting the roads is the means to accomplish it. The Inspector conceded that without sampling he could not tell whether the roadway was sufficiently damp or compact (T. 30-31).

It is a cardinal principle of statutory and regulatory interpretation that words that are technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932). When the meaning of the language of a statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. Old Colony R. Co. v. Commissioner of Internal Revenue, supra; see Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986).

Using the 1.0 mg/m³ standard for haulage roads is reasonable and logical (T. 48, 50) since this is the respirable dust standard for all intake airways. 30 C.F.R. § 70.100(b) states that:

Each operator shall continuously maintain the average concentration of respirable dust within 200 feet outby the working faces of each section in the intake airways at or below 1.0 milligrams of respirable dust per cubic meter of air ...

If the respirable dust in the haulage road is less than 1.0 mg/m³, then the operator has satisfied the regulatory health standard. Conversely, if the respirable dust concentration is greater than 1.0 mg/m³ in the haulage ways, the operator has violated the standard and must further dampen or compact the roadway.

As Respondent contends, without the 1.0 mg/m³ standard to guide the operator and inspectors in determining how "damp" or "compact" the haulage roads must be, the Inspector could simply decide whether, in his opinion, a violation exists. The interpretation argued for by the Petitioner gives insufficient notice to the mine operator of the standard of conduct to which it is required to adhere and is contrary to the precise wording of the Plan. Respondent's interpretation follows the plain meaning of the standard and does not lead to an absurd result (T. 48, 50, 69-70, 73-74).

Conclusion.

The language of Section IV, paragraph 2, page 14 of the Plan is clear and unambiguous. It requires that certain roads be maintained in a damp or compact condition to maintain the average concentration of respirable dust in the intake airways at or below 1.0 mg/m³ of air. If a visibility or other standard was intended, Petitioner could have provided it as a condition to approval of the plan. The Petitioner has failed to prove the charge that the concentration of respirable dust in the haulage road exceeded the standard in the Plan.

ORDER

Citations numbered 2874080 and 2931302 are modified to delete the "Significant and Substantial" designations thereon.

Citation No. 2931301 is vacated.

Respondent, if it has not previously done so, shall pay the Secretary of Labor the sum of \$110.00 for the civil penalties above assessed.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204

APR 6 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : CIVIL PENALTY PROCEEDING
: Docket No. WEST 89-217
: A.C. No. 05-03771-03516
v. : Raton Creek Mine No. 1
ENERGY FUELS COAL, INC.,
Respondent :
: :
: :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown &
Tooley, Denver, Colorado,
for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal
for Penalty by Petitioner on June 12, 1989, pursuant to Sections
105 and 110 of the Federal Mine Safety and Health Amendments Act
of 1977, 30 U.S.C. Section 801 et seq.

At the outset of hearing on September 14, 1989 1/ the
parties announced their settlement of one of the four Citations
(T. 5, 6) and such was approved from the bench (T. 6). Pursuant
to the agreement, Respondent is to pay MSHA's administratively
assessed penalty of \$74 in full for Citation No. 2931286, and
Petitioner agrees to the modification of paragraph 10 D on the
face of the Citation to reflect that the "Number of Persons"
affected by the violation is "1" rather than "7". My bench
decision affirming this settlement is here affirmed.

Citations numbered 2873899, 2873900 and 2931204 remain for
resolution.

1/ This matter was consolidated for hearing with two other
penalty dockets, WEST 89-148 and WEST 89-149.

CITATIONS 2873899 and 2873900

MSHA seeks penalties of but \$20.00 each for these two citations.

These two related non—"Significant and Substantial" citations were issued when Respondent turned off the main fan at the subject mine on three separate weekends when it was idle and miners were not working in the mine. Maintenance was not being performed on these occasions (T. 45) which occurred on a total of 6 days in February, 1989. During the pertinent period, Respondent had 15 miners who were working during the week on one shift daily (T. 55). After receiving the Citations, Respondent kept the mine fans running at all times and in the following month (March, 1989) applied to MSHA for a variance from the standard (T. 36, 46, 55). While the subject mine had methane at a detectable level (T. 46), a lethal or toxic level had never been detected (T. 45). On the three weekends in question no miners were working (T. 45) and all power to the mine was shut off (T. 42).

Turning first to Citation 2873900, it alleges a violation of 30 C.F.R. 75.316 which requires mine operators to adopt a "ventilation system and methane and dust control plan" approved by the Secretary of Labor. Section 75.316 thus provides:

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 on or before June 28, 1970. 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 subject plan is Exhibit B attached to Court Exhibit 2 in the "Exhibits" File.

Once adopted and approved, such plans are enforceable as mandatory safety standards. Petitioner alleges that Respondent violated Paragraph II E (2) of the Plan, pertaining to "Main Fan Operation", which provides:

All main fan installations shall meet the criteria found in 30 C.F.R. § 75.300-2 and 30 C.F.R. § 75.300-3, unless a variance is granted by the (MSHA) District Manager." (Emphasis supplied)

The C.F.R. Section referred to in the adopted and approved Plan, 30 C.F.R. § 75.300-3(a), (the preface to which, 30 C.F.R. § 75.300-1, sets out the pertinent "criteria by which ... District Managers will be guided in approving main fan installation and operation ...") provides:

(a) All main fans should be kept in continuous operation except in the event of:

(1) Scheduled maintenance or adjustments on idle days when all men other than those performing evaluation or adjustments are withdrawn from the mine and the mine power is cut off.

(2) Uncontrolled stoppage or fan failure.

(3) Other stoppages, when written permission is obtained from an authorized representative of the Secretary.

(Emphasis supplied)

The second Citation, #2873899, alleges a violation of 30 C.F.R. § 75.300 2/ which requires the mechanical ventilation equipment to be inspected daily and for this inspection to be recorded daily. The safety director for Energy Fuels, Keith Hill, conceded that inspections were not performed when the main fan was not in operation (T. 46).

2/ 30 C.F.R. § 75.300 provides:

All coal mines shall be ventilated by mechanical ventilation equipment installed and operated in a manner approved by an authorized representative of the Secretary and such equipment shall be examined daily and a record shall be kept of such examination.

(Emphasis added)

Respondent contends, with respect to Citation No. 2873900, that the approved Plan does not require that the fans be kept in continuous operation. This of course directly contradicts the express language of 30 C.F.R. § 75.300-3(a) which provides that all "main fans should be kept in continuous operation" except for the three exceptions noted above.

Without citing authority therefor, Respondent contends that use of the word "should" rather than "shall" in the quoted provision indicates the standard is "advisory" rather than "mandatory."

There is, by virtue of a recent descent decision of the Mine Health and Safety Review Commission, Secretary of Labor v. Utah Power & Light Company, 11 FMSHRC 1926 (October, 1989) authority for the general proposition asserted by Respondent that use of the word "should" in a regulatory or statutory requirement normally indicates the non-mandatory nature of such a provision. Thus the Commission held:

"The Secretary's argument is undercut also by the use of the term "should" in the wording of the criteria, a term that normally signals the non-mandatory nature of a regulation. See generally, Jim Walter Resources, Inc., 3 FMSHRC 2488 (November 1981). The Commission has emphasized that when assessing the nature of a regulation the essential question is whether the standard as written imposes a mandatory duty upon operators. For instance, the Commission has found that even the inadvertent use of the word "should" instead of "shall" could be overcome as an indicia of a regulation's non-mandatory nature where the regulatory history of the standard made clear that the standard imposes a mandatory duty on mine operators. See Kennecott Minerals Co., Utah Copper Division, 7 FMSHRC 1328, 1332 (September 1985). The standard at issue, however, was neither proposed as mandatory nor promulgated with a mandatory designation. Compare Kennecott Minerals Co., supra. Rather, as the judge properly observed, the standard simply purports to set forth criteria by which MSHA's District Managers will be guided in approving escape-ways, without imposing a commensurate mandatory duty on mine operators to seek such approval. 10 FMSHRC at 23."

It is concluded, however, that Respondent's argument lacks merit. To be first noted is that plans addressing particular safety areas in mines, such as ventilation and roof control plans, are, once approved, mandatory inasmuch as violations of

such plans constitute violations of the Mine Act. Once adopted by the mine operator and approved by MSHA, the provisions of ventilation plans are enforceable as mandatory safety standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Utah Power and Light, supra.

In determining the nature of the standard here, if the question were confined to evaluating the language of the regulation (30 C.F.R. § 75.300-3) only, the Respondent's position would be tenable, since such regulation uses the word "should" and there is little else to go on in this record as to interpretation of the regulation. However, the standard consists of two parts, the Plan itself and the regulation it incorporates. The regulation is simply a subject of reference contained in Paragraph II E (2) of the subject Plan, and that Paragraph, upon which the minds of the parties to the Plan met (Respondent in adopting it and MSHA in approving it) provides a clearly mandate that all main fan installations "shall" meet the criteria found in 30 C.F.R. § 300-3, unless a variance is granted by MSHA. Here the use of the mandatory word "shall" in the Plan clearly overrides the word "should" in the referenced material and I conclude Respondent formulated and agreed to a regulatory requirement - to keep the fans in continuous operation - thus making the standard mandatory in nature. Significantly, Respondent, following the requirements of this standard after the violation in question and seeking to invoke one of its exceptions, sought permission (a variance) from MSHA and was refused (T. 18, 19, 35).

Respondent also contends that MSHA denial of such permission (a variance) for it to de-energize its fans during "off hours" was arbitrary. This argument is found irrelevant to the issues in this proceeding. To begin with, the two Citations in issue here were issued in February, 1989, and as Respondent points out it did not apply for permission (a variance) until after the Citations were issued, i.e. in March, 1989. Such permission was withheld. 3/ Further, under Paragraph II E (2) of the Plan the main fan installation shall meet the regulatory standard specified "unless a variance is granted ..." No variance was ever granted. It is thus concluded that Respondent's allegation of after-the-violation arbitrariness by MSHA is not germane to the issue of whether the violation charged did occur. (T. 34-36, 37, 53).

3/ There is no evidence that Respondent, after the variance was denied, ever filed a petition for modification of the standard with the Department of Labor. In any event, there is, contrary to Respondent's assertion, substantial persuasive evidence in this record that MSHA's denial of a variance was based on strong safety rationale and not arbitrary.

The violation charged in Citation No. 2873900 is thus found to have occurred. This violation was not designated by the issuing Inspector as being "Significant and Substantial", presumably since there was no indication that the hazard contemplated by the infraction was reasonably likely to have occurred. Nevertheless, the hazard posed by the violation could have resulted in serious consequences. Thus, William Knepp, an MSHA ventilation expert, testified:

Q. And during certain idle days when the mine is not producing, is there a need to have ventilation?

A. I think that the danger would be on the start-up, and dependent on how long the fan was down. Without the ventilation you could have buildup of methane or black damp"

(T. 21)

XXX

XXX

XXX

A. ... I think the real danger comes when mine examiners have to reenter the mines after the fans are restarted."

(T. 24)

Mr. Knepp also described the mine as being "low gassy" (T. 28); re-emphasized the concern for the welfare of the pre-shift examiner whose job, he said, is made "much more difficult and more hazardous after a fan has been shut off for several days" (T. 25); and described the risk involved to the examiner of "running into bad air, or high methane concentrations" (T. 32).

Having determined that a violation occurred by Respondent's failure to keep the fans running continuously (including over weekends) without a variance we now turn to Citation No. 2873899 which alleges a violation for Respondent's failure to examine such equipment on the weekends the fans were turned off.

Respondent admits (Brief, page 1) that the "record book does not contain entries for examinations on the indicated days for the reason that the fan was properly idle and daily examination of idle fans was not required by § 75.300." Respondent contends that William Knepp, the MSHA ventilation expert, testified "that when a fan is not running the requirement of 30 C.F.R. § 75.300-4(a) for daily examination of main fans does not apply (Brief, pgs. 1 and 2). In support of this representation, Respondent relies on a partial excerpt of Mr. Knepp's testimony (T. 22, lines 12-17), to wit:

"We just assume that the mandatory standard is no longer applicable if the fan is not running."

Taking this portion of testimony out of context somewhat misrepresentative since it fails to reveal that it occurred during a line of questions based on the hypothetical situation where a "variance" had been granted. Seen in toto, the testimony in this connection (adduced on cross-examination by Respondent's counsel), appears as follows:

- Q. Does the -- in the instances where you have granted variances and allowed the mine fans to be shut off, do you also require that the man power to the mine be shut off?
- A. Yes.
- Q. And in those instances, do you require that a daily examination of the ventilation equipment occur?
- A. No.
- Q. So when the mine fans are permissible shut off, you don't require an examination on a daily basis of those fans?
- A. Correct. That issue really isn't addressed. I guess we do it by -- we've never had a problem with it. We just assume that that mandatory standard is no longer applicable if the fan is not running."

(T. 22) (emphasis supplied)

I thus find no merit in Respondent's argument. It having been conceded that the daily examinations required by the regulation cited, 30 C.F.R. § 75.300, were not conducted or recorded and it further appearing that the fans were required to have been kept running on the days in question since no variance had been granted, the violation is found to have occurred as charged.

CITATION NO. 2931204

This Section 104(a) "Significant and Substantial" Citation was issued on January 25, 1989, by MSHA Inspector Melvin H. Shively, and alleges a violation of 30 C.F.R. § 75.316, to wit:

The operator was not complying with approved Ventilation Methane, Dust. Control Plan dated July 8, 1988, in that page 2, Item F Ventilating controls shall be of incombustible material.

At cross cut #3 of the primary intake, Electrical installation was being vented to the return through 12" inch P.U.C. Plastic pipe, through permanent stopping."

Item F, Page 2 of the ventilation plan (herein Plan) which MSHA alleges was violated, provides:

"All ventilating controls such as stoppings, overcasts, undercasts, doors, regulators, etc. shall be of substantial and incombustible construction to all possible and practical extent, installed in a workmanlike manner and maintained in the condition to serve the purpose for which they were intended."

Respondent used a PVC pipe 12 inches in diameter at Cross Cut No. 3 of the primary intake of the Raton Creek Mine to vent the electrical installation there through a permanent stopping into the return air course. (T. 59-62).

The PVC pipe in question was plastic and not made of an incombustible material (Stipulation No. 7, Court Ex. 1, T. 63, 64, 89, 108).

Respondent contends that the PVC pipe in question is not a "ventilating control" within the meaning of Item F, page 2 of the Plan since it does not fit generically into the types of such controls actually enumerated in Item F as examples of such controls since such examples are of "major" controls. Respondent also contends that the "Secretary" failed to prove that the PVC pipe was not "incombustible". ^{4/} Finally, Respondent alleges that since PVC pipe was in extensive use in underground mines when Item F of the Plan was approved by MSHA, that the Secretary should promulgate a rule under prescribed rulemaking procedures prohibiting use of PVC pipe rather than amending the regulatory standards by issuing a 104(a) citation ^{5/}

^{4/} This defense is rejected since the parties stipulated that the PVC pipe in question was not made of an incombustible material. Further, the record independently establishes combustibility (T. 70, 83, 84).

^{5/} This defense is rejected since it is concluded on the basis of this record that PVC pipe is combustible and that such is prohibited by the Plan for use in construction of ventilating controls. The salient question is whether the PVC pipe in question is such a control or part of such control.

According to MSHA Inspector Melvin H. Shively, the electrical installation was located in the primary air course "just outby" the ventilation control where the 12-inch plastic PVC pipe was located (T. 59). The PVC pipe ran approximately 65 feet from the permanent electrical installation to the return air course of the mine (T. 62, 83) and ran through the middle of the permanent stopping (T. 61, 62).

The purpose of the PVC pipe in question was to meet the mine operator's obligation (T. 59, 64, 65) under the mandatory standards (T. 109) to ventilate the permanent electrical installation directly (T. 111) to the return air course (should a fire in the electrical installation create smoke) by directing smoke to the return and thus avoid contamination of other areas of the mine (T. 59-60, 80, 83, 108-109).

The PVC pipe is a "very large piece of plastic pipe" established "inside or along with the other construction" of the stopping (ventilation control). According to the Inspector, it is established "right in the center of the stopping" and "is used to direct the currents that pass over" the electrical installation through to the air return. (T. 60, 61, 85, 96). The PVC pipe is not part of the "construction" or "integrity" of the stopping (T. 73, 74, 77, 78, 103). Nevertheless, should the PVC pipe burn or melt, the hole in the stopping would become enlarged, and "all the smoke that is built up" and "the fire" would enter to the other side of the stopping and contaminate two airways (T. 66-67, 103, 106). Thus, although not part of the actual "construction" of the stopping (T. 106) it appears that the PVC pipe once installed becomes part of the stopping (T. 61-63), 66, 74, 93, 106).

Inspector Shively explained the stopping/pipe mechanism in the following manner:

"Q. And your citation refers to this plastic pipe through permanent stopping. Please explain what you mean by that.

A. A permanent ventilation control is a device that is built out of incombustible material, blocks and such. It will be there permanently in that mine, or in that airway. And what it is, what it is set up for is to direct the currents through to the working section, and -- that is it, just to direct the air currents to the working section.

Q. Since I have never seen this particular mine, will you describe what a stopping looks like, and how that plastic pipe is related to it?

A. You have an opening between two entries, so now you have to establish some type of device to prevent that air flow from being mixed between the two. So you build a device with cinder blocks, concrete blocks out of noncombustible material.

XXX

XXX

XXX

Q. And does this plastic pipe go right through this stopping through the wall?

A. It was constructed right in the middle of it.

Q. Okay. So there is a hole in the stopping for the pipe to go through.

A. The stopping was built around the pipe.

(T. 61-62)

The subject PVC pipe was, when cited, an "overcast", again according to William P. Knepp, whose actual title was MSHA supervisory mining engineer in charge of ventilation (at pertinent times) and who was Staff Assistant to the District Manager at the time of hearing (T. 83, 86, 92). "Overcast" is defined as "an enclosed airway to permit one air current to pass over another one without interruption. They should be built of incombustible material such as concrete, tile, stone, or brick." A Dictionary of Mining, Mineral and Related Terms, (U.S. Department of the Interior, 1968).

On this subject, Mr. Knepp convincingly testified as follows:

"Yes, it definitely is. It is used as an overcast in this particular case. It overcasts the belt entry and takes the intake air that is passing over the electrical installation, overcasts the air in the bell entry into the return. So it is used as an overcast in this particular case." (T. 83).

XXX

XXX

XXX

"They were using it as an overcast, in this case. To take the air that passed over the electrical installation to comply

with the law. Which, I assume, they were in compliance with that part of the standard. They were taking the air and ventilating it directly into the return air current. So the PVC pipe acted as an overcast it would direct the air directly into the air current, or into the return air course." (T. 86).

Respondent's Safety Director, Keith Hill, conceded that there was no other ventilation control in place which would take air away from the electrical installation other than the PVC pipe (T. 109-110) and that the purpose of the PVC pipe was to "direct" the air (T. 106-110).

It is also clearly established in the record that metal pipe was a reasonable and viable alternative to the use of PVC pipe in the ventilation application under discussion (T. 81, 98-99, 107, 113-114, 116).

The hazard posed by the combustible PVC pipe was credibly described by the MSHA witness as follows:

"To begin with, if the condition exists, or happens, I should say if the condition happens, now we have got to direct the air currents out of the mine, and not to the area of the mine that the people are working in. And that is the intent there I think, that if the plastic pipe, if a condition did come about, that the plastic pipe would melt away or burn away, now we've contaminated possibly the primary escapeway, also the secondary escapeway for that mine, and the basic location of this electrical installation, being that it is only three breaks inby the main portal of the mine, we could have a smoked mine pretty bad." (T. 65)

It is concluded from the preponderance of the reliable evidence that if a fire occurred in the electrical installation, the PVC pipe would melt down and burn which in turn would open up a "hole through that stopping" which would result in the contamination of two escapeways (T. 65-67, 84, 85, 93). Such occurrence could cause fatalities to miners (T. 67-68, 86, 89, 95) from smoke inhalation.

In October or November, 1987, Inspector Shively discussed the subject of the combustibility of the PVC pipe with Mr. Keith Hill, indicating that all "areas that were being ventilated with plastic pipe ... needed to be changed and metal pipe put in place" (T. 70-71).

Ultimate Findings and Conclusions.

The approved ventilation control plan refers to and requires "incombustible construction" of overcasts and stoppings "to all possible and practical extent" (T. 63).

The combustible plastic PVC in question was a control (overcast) used for ventilating the mine and, as such, is a ventilating control within the reasonable meaning of Item F, at page 2 of the approved ventilation Plan. Further, the pipe was an integral part of the stopping in the area and such stopping is a ventilation control within the reasonable meaning of Item F, at page 2 of the Plan which requires again, that such controls be "of substantial and incombustible construction to all possible and practical extent."

The purpose of the PVC pipe was to meet Respondent's obligation to ventilate the permanent electrical installation to the return air course should a fire in the electrical installation create smoke by directing the smoke to the return - thus avoiding contamination of other areas of the mine.

Use of the PVC pipe, since it was not incombustible and it was a ventilation control, constituted a violation of the Plan and a resultant violation of 30 C.F.R. § 75. 316. ^{6/}

Penalty Assessment

General

The parties stipulated (Ct. Ex. 1; Ex. P-1; T.4) that Respondent is engaged in mining and selling of bituminous coal and is a large mine operator; that Respondent, with a history of 6 violations, proceeded in good faith to promptly abate the violations involved, and that the proposed penalties would not affect Respondent's ability to continue in business.

6/ As previously noted, once such a plan is approved and adopted its provisions are enforceable at the mine as mandatory standards. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir., 1976).

A. Citation Nos. 2873899 and 2873900

As to both violations involved, it is found that Respondent's explanation for its failure to adhere to the standards was extremely thin and that as a minimum the violations occurred as a result of its negligence. It is also concluded with respect to Citation No. 2873900, that in view of the danger created by it, it was quite serious in nature. Considering the other criteria involved, a penalty of \$50.00 is assessed for this violation. The violation described in Citation No. 2873899 is incidental to that in Citation No. 2873900 and involves nonfeasance in discharging an inspection and a record-keeping obligation. It is not found to be serious and the \$20 penalty sought by Petitioner is found appropriate and here assessed.

B. Citation No. 2931204

Respondent established that it did not install the PVC pipe but that such was in place in 1982 when it "bought" the mine (T. 108); that it had not received any prior directive or instructions from MSHA to discontinue use of the PVC pipe (T. 92, 96, 104-105); and that PVC pipe has in the past been in common use throughout the mine (T. 104-106). ^{7/} Based on these findings, and the generality of the inspector's testimony concerning prior notification to the mine operator, it is concluded that negligence was not involved in this violation. The violation is found to be moderately serious in view of the fact that there was the potential for making escapeways unsafe for travel and resultant fatalities. In consideration of all the above assessment factors a penalty of \$50.00 is found appropriate and here assessed.

^{7/} Although Respondent contended that it once (in 1985-1986) had MSHA "permission" to use PVC pipe for ventilation purposes due to the fact that such was shown in a drawing attached to a ventilation plan, it appeared that such drawing was not incorporated in the Respondent's current approved ventilation Plan (T. 104-112).

ORDER

Citation No. 2931286 is MODIFIED to amend Paragraph 10 D thereof to reflect that the "Number of Persons" affected by the violation is "1" rather than "7", and is otherwise AFFIRMED.

Citations numbered 2873899, 2873900 and 2931204 are AFFIRMED.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date of issuance of this decision the sum of \$ 194 representing the total civil penalties above assessed.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 9 1990

ROBERT SIMPSON, : - DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 83-155-D
: :
KENTA ENERGY, INC., :
and :
ROY DAN JACKSON, :
Respondents :
:

DECISION ON REMAND

Before: Judge Broderick

On September 29, 1989, the Commission remanded the case to me to determine whether attorney's fees are properly awardable under the Act for legal services on appeal, and, if so, to determine the amount of such fees; and to determine the amount of back pay and interest due Complainant since December 17, 1984.

On December 18, 1989, I issued a decision with respect to the attorney's fees claimed, and permitted discovery on the question of back pay. On March 19, 1990, Complainant submitted a statement of the back pay and interest due him from December 17, 1984 through March 31, 1990. Respondents have not replied to the statement.

Complainant's statement indicates that he has not been reinstated nor offered reinstatement by Kenta or Jackson. It further states that the subject mine ceased operating on approximately March 1, 1988, and that Complainant does not claim back pay beyond that date. Interest is claimed through March 31, 1990. Complainant worked for approximately 6 months in 1985 and was paid a total of \$7200. The statement shows interim offsetting earnings of \$3600 for each of the first two quarters of 1985. The statement claims that Complainant had no other earnings from October 1984 to March 1, 1988. I accept the representations in the statement and find them to be factual. I adopt the calculations contained in the statement.

Therefore, IT IS ORDERED that Respondents Kenta and Roy Dan Jackson shall pay to Complainant Robert Simpson the

following amounts, representing back pay and interest due Complainant since December 17, 1984, under the Commission decision issued May 11, 1989:

Interest on back pay previously awarded	20,442.16
Additional back pay	61,865.20
Additional interest	<u>25,675.34</u>

TOTAL \$107,962.70

This is a final order.

James A Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

APR 9 1990

METTIKI COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. YORK 89-19-R A. C. No. 3110337; 11/30/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. YORK 89-20-R A. C. No. 3110339; 11/30/88
	:	Mettiki General Prep Plant
	:	Mine ID 18-00671
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. YORK 89-42 A.C. No. 18-00671-03537
METTIKI COAL COMPANY, Respondent	:	Mettiki General Mine
	:	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA,
for the Secretary;
Susan Chetlin, Esq., Crowell and Mooring,
Washington, DC, for Mettiki Coal Company.

Before: Judge Fauver

Mettiki seeks to vacate an imminent danger order and two citations, and the Secretary of Labor seeks to affirm them, with civil penalties, under 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, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Mettiki Coal Company, through a subsidiary, owns and operates a coal preparation plant known as Mettiki General Preparation Plant.

2. On November 29, 1988, MSHA received a complaint that the No. 34 breaker, a disconnect switch that controls the power to the raw coal silo conveyor belt, had a defective lock out device. The complaint was that the breaker could be turned to the on position even when the lock out device was padlocked.

3. On November 30, 1988, MSHA Inspector Kerry George investigated the complaint. When he arrived the surface belts were idle for belt maintenance. Two miners were on top of the silo making repairs to the speed reducer for the No. 34 belt.

4. The No. 34 breaker was in the off position and tagged (with a danger tag warning not to turn on the circuit). Its lock out device was padlocked.

5. The two miners had pulled the emergency cord on the No. 34 belt before beginning repairs.

6. The miners were called down from the silo, and the surface electrician, Clarence Bowman, who was the electrical examiner for all surface breakers, was called to test the lock out device. Because of a sawed out cut in the lock out device, the breaker could be turned on despite the padlock. It was not difficult to turn the breaker on when padlocked. This defect was the result of poor installation of the breaker, and not a deliberate intention to defeat the lock out device.

7. Mr. Bowman had known of this defect in the lock out device from his first inspection of the breaker, within a few months of its installation two or three years before November 30, 1988. He was aware that the breaker could be turned on despite a padlock, but he did not consider this a safety problem. In his view, a danger tag was sufficient safety protection to prevent re-energizing a circuit. He inspected this breaker every month for over two years, but never reported the defective lock out device or removed the breaker from service in order to repair it.

8. Inspector George issued an imminent danger order withdrawing the No. 34 breaker from service. He also issued two citations. Citation No. 3110339 charges a violation of 30 C.F.R. § 77.507. Citation No. 3110340 charges a violation of 30 C.F.R. § 77.502.

9. After issuance of the above order and citations, the defective lock out device was replaced within an hour.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3110339

This citation charges a violation of 30 C.F.R. § 77.507, which provides:

All electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed.

A "switch" is defined by the Dictionary of Mining as "[a] mechanical device for opening and closing an electric circuit U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1111 (1968). The breaker for the No. 34 belt circuit is a disconnect switch that meets this definition.

A lock out device for a disconnect switch is an integral part of the switch, essential to control the switch when locking out is required by a safety regulation. It is therefore included in the scope of § 77.507. This interpretation is consistent with that of Congress as expressed in the legislative history. The Senate report on § 305(o) of the 1969 Act ^{1/} states:

This section requires that electric equipment be provided with switches or other safe control[s] so that the equipment can be safely started, stopped, and operated without danger of shock, fire, or faulty operation.

S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969) at 65, reprinted in House Comm. on Education and Labor, 91st Cong., 2d Sess., Legislative History of the Federal Coal Mine Health and Safety Act (1970 Comm. Print) at 65.

The lock out device on the No. 34 breaker was not safely installed in that it did not prevent turning the breaker on when it was padlocked. This was a safety hazard, in violation of § 77.507. The surface electrician, who was also the electrical examiner, was responsible for the safety of this equipment. He knew about the defect but did not repair it. His continued failure to replace the lock out device constituted gross negligence, in violation of § 77.507.

^{1/} Section 77.507 mirrors 30 C.F.R. § 75.512, an underground standard, which repeats the statutory language of 30 U.S.C. § 865(o).

Citation No. 3110340

This citation charges a violation of 30 C.F.R. § 77.502, which provides:

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating condition. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

Under § 77.502-2, the examinations must be conducted at least monthly.

Based on the previous holding, I find that the lock out device was an integral part of the disconnect switch and therefore was required to be inspected under § 77.502.

The lockout device was defective because it had been notched in such a way that the breaker could be reset even when padlocked. The intention apparently was not to defeat the locking device, but to accommodate a poor installation of the breaker. Mettiki's electrical examiner for surface facilities, Mr. Bowman, testified that it was poorly installed and it was the only one of some 300 breakers that had been installed this way. For years, he knew of this defect and the fact that it would permit the breaker to be reset despite a padlock. He did not report the defect because he regarded the tagging of a circuit as sufficient protection for safety purposes. Mr. Bowman was also the surface electrician. His testimony and demeanor on the stand indicated that he expected others to comply with his danger tags and would probably consider physical revenge against anyone who turned on a circuit that he had tagged. This is hardly the intent of the safety standard or a basis for allowing a defective lock out device. Mr. Bowman's attitude and failure to report the lock out defect and remove the breaker from service demonstrate gross negligence, in violation of § 77.502. Although Mettiki contends that its electrical examiner did not know that the defect permitted the breaker to be turned on despite a padlock, I find that he did have such knowledge but chose to ignore the defect in his numerous examinations of the No. 34 breaker.

Imputation of Negligence

Mettki contends that any negligence of the electrical examiner is not imputable to the company, citing decisions such as Southern Ohio Coal Co., 4 FMSHRC 1459 (1982). There the Commission held that, "where agents are negligent, that negligence may be imputed to the operator for penalty purposes"

but "where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." Id at 1464. However, Mettiki's electrical examiner was more than a rank-and-file employee. He was the operator's designated person to conduct electrical examinations of surface electrical equipment in order to protect the miners. In such capacity, it was his responsibility to certify the equipment to be safe or to report conditions requiring correction. For electrical safety examinations, he served more in the capacity of an agent of the operator than as a rank-and-file employee. His negligence is therefore imputable to the operator as to both citations. In light of his gross negligence, Citation No. 3110340 should be modified to cite "high negligence" instead of "moderate negligence"; the allegation of high negligence in Citation No. 3110339 is sustained by the evidence.

Order No. 3110337

Section 3(j) of the Act defines an imminent danger as:

The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The test of validity of an imminent danger order is whether a reasonable person given a qualified inspector's education and experience would conclude that the facts indicated an imminent danger. Freeman Coal Mining Co. v Interior Board of Mine Operations Appeals, 804 F. 2d 741 (7th Cir. 1974). See also C.D. Livingston, 8 FMSHRC 1006 (1986); and United States Steel, 4 FMSHRC 163 (1982).

The inspector issued an imminent danger order because of the defective lock out device and the fact that two miners were working on top of the silo at the time the belt circuit was supposedly locked out.

Respondent contends that it was not required to lock out the No. 34 breaker circuit because the miners were doing mechanical, rather the electrical work on the belt speed reducer. It contends that 30 C.F.R. § 77.404(c) applied and required only that the belt be turned off and blocked against motion. However, the record does not show that the belt was blocked against motion in compliance with this standard.

Apart from this, Mettiki argues that many independent actions would be required to cause injury due to the defective lock out device, and therefore there was no imminent danger.

These include: 1) ignoring the warning tag and padlock; 2) turning the breaker on; 3) reactivating the emergency pull cord on No. 34 belt; 4) starting the two outby belts in order to start No. 34 belt; and 5) ignoring the sirens that would sound before a belt is started. I agree that these circumstances indicate that the defective lock out device did not create an imminent danger. Also, they do not indicate a "significant and substantial" violation under the Commission's test in Mathies Coal Co., 6 FMSHRC 1 (1984), and similar cases.

However, the defective lock out device was still "potentially dangerous" within the meaning of 30 C.F.R. § 77.502, which requires that, "When a potentially dangerous condition is found on electrical equipment, such equipment shall be removed from service until such condition is corrected." The defective lock out device could have contributed to an accident in which a miner inadvertently or even intentionally reset the breaker under circumstances in which a reenergized circuit could cause injury to persons working on the belt or its electric circuit. "Potentially dangerous" conditions are not limited to the precise circumstances existing at the time of the citation, but include possible dangers that could cause injury to miners if the cited condition continued during day to day mining operations.

On review of the facts and the reasonableness of the inspector's enforcement action, I find that the § 107(a) order should be modified to be a § 104(b) order instead of a § 107(a) order.^{2/} Mettiki's failure, through its electrical examiner, to report the defective lock out device and remove the breaker from service until the defect was corrected constituted a violation of 30 C.F.R. § 77.502. Citation No. 3110340 is therefore sustained by the evidence. Because of this citation, the inspector could have issued a § 104(b) order withdrawing the breaker from service until the defective lock out device was corrected. Indeed, such an enforcement order is implied, because the regulation specifies that "potentially dangerous" equipment "shall be removed from service until such condition is corrected." Thus, no abatement time need be allowed in a citation for this type violation.

The operator contends the lock out defect should not be considered potentially dangerous because half of the 300 surface breakers had no lock out device and MSHA did not cite violations for them. This argument is not persuasive. First, all of the surface conveyor belt breakers at the plant had a lock out device, and No. 34 was the only defective one. It was thus recognized that a lock out device was feasible and required for

^{2/} A § 104(b) order would have the same effect in removing the defective equipment from service.

the conveyor belt circuits. Secondly, MSHA's manual presents a firm policy of enforcement of the lock out standard (§ 77.501), stating:

Disconnecting devices shall be locked out, where possible, and suitably tagged by persons who perform the work. Locking out is "possible" in almost all cases and can be accomplished in a practical manner. * * *

[Vol. V MSHA Program Policy Manual (July 1, 1988) p.62.]

The reasons for MSHA's failure to issue citations for the non-belt breakers that did not have a lock out device are not shown by this record. However, if the local MSHA district was lax in enforcing the lock out safety standard, despite the regulation and MSHA's own Program Policy Manual, such laxness is not probative regarding the potential danger of the defective lock out device on No. 34 breaker.

This leaves the question of gravity of the two violations for civil penalty purposes.

"Gravity of the violation," as used in § 110(i), is not tied to the question whether a violation is or is not "significant and substantial" within the meaning of § 110(d)(1). "Gravity," for civil penalty purposes, is the seriousness of a violation. This includes the importance of the safety or health standard, and the seriousness of the operator's conduct, in relation to the Act's purpose of deterring violations and fostering compliance with safety and health standards. Many types of safety or health violations are serious even though a single violation might not show a "reasonable likelihood" of causing serious injury or illness, or even fit into a probability-of-injury-or-illness mold. For example, some violations are serious because they demonstrate recidivism or an attitude of defiance by the operator. Others are serious because the safety and health standard involved is an important protection for the miners. Important safety or health standards are such that, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote or even slight. ^{3/} Other mine safety and health violations are serious because they may combine with other conditions to set the stage for a mine accident or disaster, even though individually, or in isolation, they do not appear to forecast injury or illness. Still others are serious because they involve a substantial possibility of causing injury or illness, if not a probability.

^{3/} For example, a stop-look-and-listen safety law for public service vehicles may be considered an important safety standard even though a particular instance of violation may not show a "reasonable likelihood" of colliding with a train.

I find the violations in these cases to be serious because (1) they involve a potentially dangerous condition, (2) the cited standards are an important protection for the miners, (3) and the operator's conduct should be deterred.

Considering Mettiki's gross negligence, through its electrical examiner, in violating § 77.502, and all the other criteria in § 110(i) of the Act, I find that a civil penalty of \$500 is appropriate for this violation.

Considering Mettiki's gross negligence, through its electrical examiner, in violating § 77.507, and all the other criteria in § 110(i) of the Act, I find that a civil penalty of \$500 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.
2. Mettiki Coal Company violated 30 C.F.R. § 77.502 on November 30, 1988.
3. Mettiki Coal Company violated 30 C.F.R. § 77.507 on November 30, 1988.
4. The Secretary of Labor failed to prove an imminent danger as alleged in Order No. 3110337. This order should be modified to be a § 104(b) order.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3110339 is MODIFIED to DELETE the allegation of a "Significant and Substantial" violation. As MODIFIED, it is AFFIRMED.
2. Citation No. 3110340 is MODIFIED to DELETE the allegation of a "Significant and Substantial" violation and to change the allegation of negligence from "Moderate" to "High." As MODIFIED, it is AFFIRMED.
3. Order No. 3110337 is MODIFIED to be a § 104(b) order instead of a § 107(a) order, deleting the allegation of an imminent danger and cross-referencing Citation No. 3110340. As MODIFIED, it is AFFIRMED.

4. Mettiki Coal Company shall pay the above civil penalties of \$1,000 within 30 days of the date of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 17 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-32
Petitioner	:	A.C. No. 15-02502-03556
v.	:	
	:	No. 18 Mine
SHAMROCK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Neville Smith, Esq., Smith & Smith,
Manchester, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the petition for 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 Shamrock Coal Company (Shamrock) with six violations of mandatory standards and proposing civil penalties of \$3,685 for the violations. The general issue before me is whether Shamrock violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the parties moved for approval of a settlement agreement with respect to five of the citations at issue and supplemented the motion post hearing. I have considered the documentation and representations submitted in support of the motion and find that the proposal meets the criteria under section 110(i) of the Act. Accordingly the motion is approved and an appropriate order will be incorporated in the final disposition of this proceeding.

The one citation remaining at issue, No. 3030499, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.202(b) and charges as follows:

The result of the investigation into the accident indicates, that as a minimum, the victim's head was extended inby the last row of permanent supports

into an area of unsupported roof at the time of the accident.

The cited standard provides in part that "[n]o person shall work or travel under unsupported roof ..." The citation accordingly fails to allege an essential element of the violation charged, i.e. that anyone was either working or traveling under unsupported roof. It is therefore facially deficient and must be vacated.^{1/} In any event the Secretary has failed to prove that the victim in this case was either traveling or working under unsupported roof.

The essential facts are not in dispute. More specifically it is not disputed that the victim, at the time he was struck by falling rock, was positioned at least partially inby permanent roof support. The dispute arises as to how the victim got into that position. The resolution of this dispute depends on the opinions of the experts witnesses and the reasonableness of their conclusions. The accident at issue is described in the MSHA investigation report as follows:

On Monday, May 15, 1989, at about 2:30 p.m., the 009 section crew, under the supervision of Carter D. Sams, section foreman, entered the mine and arrived on the section at about 3:00 p.m., Sams examined the section and assigned duties and work locations to crew members.

Normal operations continued without incidence [sic] until about 6:45 p.m., when the Joy CM 14 Continuous Miner that was loading coal in the left crosscut of the No. 3 entry (accident scene) became inoperative due to a malfunction in the right traction motor. A Joy 10 SC Shuttle Car was used to tow the continuous miner from the working place to the next line of crosscuts outby. Sams decided that the continuous miner could not be repaired in the remainder of the work shift and that he would take the production crew to the 008 spare section

^{1/} In a citation issued May 25, 1989, for the same factual circumstances (Citation No. 3030497, Operator's Exhibit 1) the Secretary had alleged that the victim was "performing work" inby the last row of permanent roof supports. That citation was however subsequently vacated by the Secretary based on a determination that the victim was not performing work inby supported roof at the time of the accident. (Operator's Exhibit 1). The Secretary then issued the facially deficient citation at bar.

to continue producing coal for the rest of the shift. At about 6:55 p.m., Sams instructed all crew members, except for the No. 2 roof-bolting crew who were installing roof bolts in the face of the No. 1 Entry and David W. Baker, section mechanic, who was performing maintenance work, to travel to the 008 section to continue producing coal. At about 7:00 p.m., Sams gave instructions to Lee Carson Sizemore and Timothy Chadwell roof-bolting machine operators and Lyle Goings, roof bolter helper, that when roof-bolting operations were completed in the No. 1 Entry, to travel to the No. 3 entry and bolt the left crosscut (accident scene). Sams then made a routine examination of each working place and walked to the 008 section.

Upon completion of the roof bolting operations in the face area of the No. 1 Entry, Sizemore and Chadwell attempted to take the No. 2 roof bolter to the No. 3 entry, but were blocked by the continuous miner. They decided to use the No. 1 roof-bolting machine, however, when they arrived at the machine, Baker was working on the panic switch (deenergization device). Sizemore and Chadwell obtained pry bars and proceeded to the left crosscut in the No. 3 entry to pry down some loose draw rock that was left in the place when the continuous miner malfunctioned. Under normal circumstances, at the end of the cut, prior to the continuous miner leaving the working place, all loose rock would have been cut down and removed.

Sizemore stated, that at the time of the accident he was standing between the first and second roof bolt on the last row of bolts and was prying on a piece of draw rock on the left side with his back turned to Chadwell. To the best of his knowledge, Chadwell was located between the second and third roof bolt and was attempting to take down a piece of draw rock that was caught on a strap at the last row of roof bolts. Sizemore heard rock fall and when he looked around, he saw Chadwell lying on the mine floor with a piece of rock laying on his chest and the right side of his face. Sizemore removed the rock and summoned help.

Baker and Goings, who were working on the continuous miner one crosscut outby the accident area, responded to his call. Upon their arrival to the scene of the accident, Baker examined Chadwell and determined that he was unconscious and nonresponsive. Realizing the seriousness of the

injuries, Baker proceeded to the mine phone and contacted the surface mine office and requested an ambulance and informed Owen Hensley, 2nd Shift Superintendent, that Chadwell had been seriously injured by a piece of falling rock. Baker then returned to the accident scene with first aid equipment. Sams overheard the phone conversation explaining the accident and immediately proceeded to the 009 section. Upon his arrival, he assisted in placing a bandage on Chadwell's head and securing him on the stretcher. Chadwell was then placed in a scoop bucket and transported to the end of the supply track where he was transferred onto a rail-mounted mantrip car. They left the 009 section at about 8:05p.m., at which time Chadwell was unconscious, but still had vital signs. They arrived on the surface with Chadwell at approximately 8:35 p.m., and placed him in the ambulance. The ambulance attendants examined Chadwell and finding no vital signs, they instructed Hensley to contact Dwayne Walker, Leslie County Coroner. The coroner arrived at the mine at about 9:30 p.m., at which time Chadwell was pronounced dead.

At hearing, MSHA Coal Mine Investigator Roy Parker testified that Chadwell was engaged in a lawful and indeed necessary procedure using a slate bar to pry loose rock from the roof and that it was not likely that Chadwell was prying rock directly over his head. Parker nevertheless concluded, based on the position of Chadwell's body after the accident, that Chadwell had been working with at least a portion of his head inby the last permanent roof support. While admitting that no one actually saw the accident, Parker nevertheless did not believe that Chadwell slipped and fell before being hit with falling rock. MSHA Investigator Maurice Mullins apparently also agreed with Parker's conclusion that the victim had been working beneath unsupported roof at least insofar as his head was inby the last permanent roof support.

While acknowledging that a portion of the victim's body was indeed inby permanent roof support at the time he was struck by the falling rock Shamrock maintains that based on the evidence it is more reasonable to conclude that Chadwell had slipped and fallen and that he was actually on the mine floor when he was struck by the falling rock. Indeed I agree that this is the most reasonable inference to be drawn from the evidence.

Lee Sizemore, the miner working with Chadwell, testified that just before the accident he observed that Chadwell was using the pry bar but from a position outby the last row of

permanent support. While Sizemore had his back turned to Chadwell at the time of the rock fall, he immediately turned and saw that Chadwell was lying with the rock on his chest with his legs up to his waist still remaining under the roof support.

According to Jeffrey Shell, a Shamrock Safety Coordinator who investigated the accident on May 16, 1989, the mine floor in the area of the accident was covered with loose material and the floor was higher on one side of the entry than the other i.e. it was sloped approximately 10 inches across the 18 foot-wide entry. Shell opined, based upon his extensive mining experience and knowledge of the activities of the deceased prior to the accident, that the deceased was most likely pushing at the loose roof rock from an outby position into the unsupported area. The evidence shows that the loose rock was being held by a roof support strap so according to Shell the victim most likely slipped from the outby position into the unsupported area and spun as he fell, landing on his back.

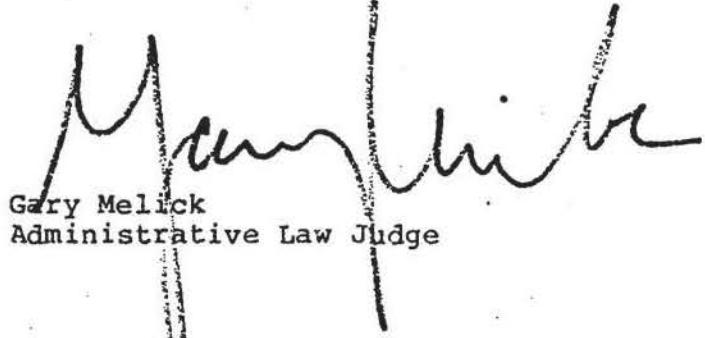
Ronald Turner, District Mine Inspector for the Kentucky Department of Mines and Minerals concurred with Shell. Turner also testified that MSHA Inspector Parker and MSHA Investigator Mullins had reached agreement during the accident investigation on May 16, 1989, that the deceased had indeed been working in the supported area trying to pry the rock loose before the accident.

Gordon Crutch, Shamrock's Safety Director and a former supervisory inspector and accident investigator for the Mining Enforcement and Safety Administration (MESA), the predecessor to MSHA, testified that he measured the slope in the accident area in October or November 1989 and found that the entry actually sloped 21° from one side of the entry to the other. Crutch also opined that the victim had been working under the supported roof area, slipped while trying to push the rock from the roof support strapping and was already prone at the time the rock fell inby the permanent support. Crutch said his opinion was reinforced by the nature of the deceased's chest and facial injuries. Crutch observed that from his experience investigating roof fall injuries, when a victim is directly beneath the falling rock the resulting injuries are usually to the neck and, as the miner is thrust to the mine floor, to the pelvis. No such injuries occurred in this case.

With this framework of evidence I find Shamrock's explanation to be the most persuasive. For this additional reason I find that there was no violation of the cited standard and the citation must accordingly be vacated.

ORDER

Citation No. 3030499 is hereby VACATED. Shamrock Coal Company is directed to pay the following civil penalties within 30 days of the date of this decision: Citation No. 3205380 - \$100, Citation No. 3205504 - \$153, Citation No. 3205506 - \$112, Citation No. 3205512 - \$112, Citation No. 3205516 - \$87.


Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 17 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 89-266
Petitioner	:	A. C. No. 36-04281-03667
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	

DECISION

Appearances: Thomas A. Brown, Jr., Esq., Office of the
Solicitor, U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
Walter J. Scheller, III, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

In this Civil Penalty Proceeding, the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. § 50.20(a). Subsequent to Notice, a hearing was held in Johnstown, Pennsylvania, on January 10, 1990. Robert G. Santee, Larry E. Swift, Donald Edwin Stevenson, Jr., Michael R. Kele cic, and Edward Yaniga testified for Petitioner. Louis Barletta, Jr., Mark Schultz, and Richard Werth testified for Respondent. At the hearing, Petitioner indicated that Citation No. 03098003 was vacated by the Petitioner. Subsequent to the hearing, Respondent filed a Brief on March 28, 1990. Petitioner filed Proposed Findings of Fact and a Brief on April 2, 1990.

Findings of Fact

Citation 3098001

On April 27, 1989, Donald Edwin Stevenson, Jr., was working the 12:01 a.m. shift as a general laborer, at Respondent's Dilworth Mine. At approximately 12:30 a.m., while crawling out

of a man trap that he had used to bring supplies to the area, he felt something pull in back of his right leg, and was unable to move it.^{1/}

Stevenson received assistance in exiting from the mine, and was taken by ambulance to a hospital, where he was given crutches and motrin. The following day, he was seen by A. J. Patterson, M.D., who gave him a prescription for a muscle relaxant and another medication for pain, and told him to stay home until the following Monday. Dr. Peterson diagnosed Stevenson as having "pulled popliteal tendon or muscle VS muscle strain soleus and gastrocnemius muscle right knee." (Government Exhibit 7). The following Friday, Stevenson started physical therapy, three times a week for 3 weeks, and on May 23, 1989, was released by Dr. Patterson for return to work on May 24, 1989. Stevenson returned to work on May 23. Respondent did not report Stevenson's injury to MSHA.

On July 12, 1989, Robert G. Santee, an MSHA Inspector, cited Respondent for a violation of 30 C.F.R. § 50.20 on the ground that the Operator had not completed and mailed Form 7000-1 to report Stevenson's injury.

On cross-examination, Respondent elicited from Stevenson that he has a history of injuries to his right knee, including days missed in November and December 1988. It also was elicited that on April 7, 1989, Stevenson missed work when he injured his right hip. With regard to the incident on April 27, 1989, Michael R. Kelecid, a laborer on Stevenson's shift on April 27, testified that when he helped Stevenson on April 27, the latter said he had hurt his knee. Mark Schultz, Respondent's safety supervisor, indicated that on May 2, when he asked Stevenson what happened to his knee, the latter indicated that he felt a sharp pain but had not twisted it. Richard Werth, Respondent's safety inspector, indicated that when he spoke to Stevenson on April 27, and asked him what happened, the latter indicated that he had not twisted his knee or done anything. Werth said that Stevenson indicated that he just experienced a burning sensation in his right knee when he was crawling out of the man trip.

Citation 03098002

On April 17, 1989, Edward Yaniga, a belt cleaner for Respondent, while working the afternoon shift, was using a long-handled shovel to clean under a belt. When he reached under the belt with the shovel to drag the coal towards him, he felt a

^{1/} Stevenson had originally testified that the incident occurred on April 17. However, he subsequently refreshed his recollection, and amended that date to April 27, which is the date contained in the Report of Personal Injury (Respondent's Exhibit 3), and the attending Physician's Statement of Disability (Government Exhibit 7). I therefore found that the incident occurred on April 27, 1989.

"pinch" from his neck to his right shoulder (Tr. 75). Yaniga was taken to an emergency room of a local hospital, and was seen by a physician, who diagnosed him as suffering from acute strain, and prescribed pain, medication. The following day Yaniga saw Dr. Patterson, who provided the same diagnosis, and prescribed a pain medication, percodan. He was off from work for a total of 5 weeks, during which time he underwent physical therapy for 45 minutes, 3 to 4 times a week.

II.

Discussion

Respondent argues that reports of the incidents to Stevenson and Yaniga were not required, as there was no causal nexus between the work environment and their injuries.

30 C.F.R. § 50.20(a), in essence, requires an operator to report to MSHA, by way of a Form 7000-1, all accidents and occupational injuries. 30 C.F.R. § 50.2(e) defines an "occupational injury" as follows:

"Occupational injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job."

In Secretary v. Freeman United Coal Mining Co., 6 FMSHRC 1577 (1984). The Commission held that the Operator therein had to comply with the reporting requirements of section 50.20(a), supra, and report an injury to a miner, who experienced back pain while putting on his work boots in the wash house of the Operator's mine. The Commission specifically rejected the Operator's argument that section 50.2(e), supra, which defines an occupational injury, contemplates that there must be a causal nexus between the miner's work and the injuries sustained. The Commission, at 1578-1579, supra, stated as follows:

In interpreting the term "occupational injury," as defined in section 50.2(e), we look first to the plain language of the regulation. Absent a clearly expressed legislative or regulatory intent to the contrary, that language ordinarily is conclusive. As noted above, section 50.2(e) defines an occupational injury as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." The term "injury" is not further defined. The ordinary

meaning of injury is: "an act that damages, harms, or hurts;" or "hurt, damage, or loss sustained."

Webster's Third New International Dictionary

(Unabridged) 1164 (1977). The remainder of the definition in section 50.2(e) refers only to the location where the injury occurred ("at a Mine"), and to the result of an injury ("medical treatment," "death," etc.). Thus, sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury--a hurt or damage to a miner--occurs at a mine and if it results in any of the specified serious consequences to the miner. These regulations do not require a showing of a causal nexus.

Nor does the regulatory history show any intent to require such a specific causal connection. In fact, just the opposite is true. 30 C.F.R. Part 50, in which sections 50.2(e) and 50.20(a) are contained, was originally promulgated by the Department of the Interior's Mining Enforcement and Safety Administration ("MESA," the predecessor agency to MSHA) under the authority of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1966) (repealed 1977) ("Metal Act"), and the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). Part 50 revised and consolidated previously separate reporting requirements under the Part 58 standards for metal and nonmetal mines and the Part 80 standards for coal mines. 42 Fed. Reg. 55568 (October 17, 1977). When promulgated by MESA, section 50.2(e) deleted the Parts 58 and 80 requirement that an occupational injury arise out of and/or in the course of work and added the present requirement that, to be reportable, an occupational injury need only occur at a mine. See 42 Fed. Reg. 65534. MESA's deletion of a more specific work-related criterion militates against our according such a construction to these regulations. See, e.g., U.S. v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967). We conclude that the above-noted regulatory history and the plain language of the section 50.2(e) definition of occupational injury control in construing the related reporting requirement of section 50.20(a).

I find that the above holding in the Freeman v. United Mining Coal Co., supra, case applies with equal force to the case before me.^{2/} Due to the precedent established by the Commission

^{2/} See also Secretary v. VP-J Mining Co., 12 FMSHRC _____ (March 1, 1990), wherein Judge Melick, in facts similar to the case at bar, held, citing Freeman, supra, that an Operator had to report an injury of a miner who suffered back pain after exiting a cage. Judge Melick ruled that this injury was within the scope of section 50.2(e), supra, as it was incurred while the miner was engaged in the act of working in the Operator's underground mine.

in Freeman, supra, I reject Respondent's arguments that section 50 and MSHA's program Information Bulletin No. 88-05 provides that an injury is reportable only if it is caused by something in the work environment. I also refuse to accept Respondent's argument which would require me, in essence, to reject the Commission's holding in Freeman, supra.

I thus conclude that the evidence establishes that the Respondent violated section 50.20(a). There was no negligence on Respondent's part in connection with the violations found herein, as Respondent's witnesses established that they had a good faith belief, although erroneous, that the injuries herein to Stevenson and Yaniga were not reportable. I conclude that a penalty of \$20, as assessed, is appropriate for each violation found herein which was cited in Citation 3095001 and 3098002.

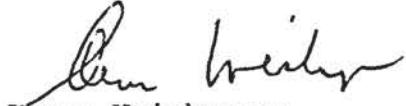
Citation No. 3098003

At the Hearing, Petitioner moved to vacate Citation No. 3098003. This Motion was not opposed by Respondent, and it is accordingly GRANTED.

ORDER

It is ORDERED that Respondent shall pay \$40, within 30 days of this Decision, as a civil penalty for the violations found herein.

It is further ORDERED that Citation No. 3098003 be DISMISSED.



Avram Weisberger
Administrative Law Judge

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APR 18 1990

METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. YORK 89-31-R Order No. 2944492; 2/21/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. YORK 89-32-R Order No. 2944493; 2/21/89
	:	Docket No. YORK 89-33-R Order No. 2944494; 2/21/89
	:	Mettiki Mine
	:	Mine ID 18-00621
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. YORK 89-52 A.C. No. 18-00621-03674
METTIKI COAL CORPORATION, Respondent	:	Docket No. YORK 89-56 A.C. No. 18-00621-03673
	:	Mettiki Mine

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring,
Washington, D.C., for the Contestant/Respondent.
James E. Culp, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia, Pennsylvania
for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act) to challenge the validity of three § 104(d)(2) orders issued to Mettiki on February 21, 1989, and for review of the civil penalties proposed by the Secretary of Labor for the related violations.

There is also an unrelated and uncontested Order No. 3115408, which the Secretary also included in Docket No. YORK 89-52. Order No. 3115408 was issued on March 1, 1989, pursuant to § 104(d)(2) of the Act for a violation of 30 C.F.R. § 75.313-1. A penalty of \$1000 was originally assessed. However, the parties now agree that this order should be modified to delete the special finding of unwarrantability and they have proposed by separate written motion that I approve their agreed settlement which reduces the civil penalty to \$150 for this particular violation.

Considering the representations submitted in the motion, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, the motion for approval of the settlement with regard to Order No. 3115408 is granted and the respondent will be ordered herein to pay the \$150 civil penalty.

Pursuant to notice, these cases were heard in Morgantown, West Virginia on August 1 and 2, 1989. Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. The Mettiki Mine is owned by contestant Mettiki Coal Corporation.
2. The Mettiki Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The undersigned Administrative Law Judge has jurisdiction over this proceeding pursuant to § 105 of the Act.
4. The subject orders, their termination, and modification were properly served by duly authorized representatives of the Secretary of Labor upon an agent of Mettiki on the dates, times, and places stated therein, and may be admitted into evidence for purposes of establishing their issuance without admitting the truthfulness or relevance of any statement therein.
5. Mettiki had 720 assessed violations in the 24-month period prior to the issuance of the subject orders.
6. There has been no "clean" inspection of the Mettiki Mine between the § 104(d)(2) orders at issue and the previous § 104(d) (1) order, No. 2701558, dated May 30, 1986.

7. The violations alleged, if proved, were abated in good faith.

8. If the violations are proven, the imposition of civil penalties based on the facts as required by Section 110(i) of the Act will not affect Mettiki's ability to continue in business.

9. Respondent's annual coal production is 1,987,594 tons at the Mettiki Mine.

I. Docket No. YORK 89-31-R; Order No. 2944492

Order No. 2944492, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.202(a)^{1/} and charges as follows:

The coal ribs of an area where persons were required to work and travel were not supported or otherwise controlled to protect persons from the hazards related to falls of the rib. A fatal rib fall accident has occurred in the No. 1 Entry of the 23 Butt Section, approximately thirty feet outby station No. B3109, where belt hangers were being bolted to the roof. Carl Johnson was the section foreman.

Mr. Neilson Blake, a mining engineer and roof control specialist employed by MSHA since 1980, issued the above order on February 21, 1989, following the investigation of a fatal rib fall accident which occurred on February 17, 1989. Delmas Martin, a Mettiki employee, was killed at approximately 8:20 that evening in the No. 1 entry of the 23 Butt Section of Mettiki's B Mine, between the No. 13 and No. 14 breaks.

The 23 Butt Section was originally developed in March of 1982 as a return air course for Mettiki's main mine. The original roof support in this section consisted of 6 foot resin roof bolts, installed 4 bolts to a row, with rows on four foot centers. This roof-bolting was supplemented by cribbing on 7-foot centers with about 3 feet of space between the rib and the edge of the crib nearest the rib. At the time of the accident, respondent was in the process of rehabilitating the No. 1 entry

^{1/} 30 C.F.R. § 75.202(a) provides as follows:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

for use as a headgate entry for a longwall panel. The immediate work being done was removing cribs as well as rib bolting while simultaneously installing belt hangers, and any necessary roof bolts. Just prior to the accident, two miners (Deimas Martin and Dave Holland) were installing belt hangers and another was using the horizontal drill on the back of the Fletcher dual head bolter to install rib bolts.

At the time of the accident, the cribs had been removed in the Nos. 1 and 2 Entries up to the No. 16 break. More specifically, the cribs between the Nos. 13 and 14 breaks, where Mr. Martin was killed, were removed two to four days before the accident.

This mine has a history of rib roll accidents, including an earlier fatality in 1984. The ribs in the 23 Butt Section consist of soft coal beneath 2 feet of cap rock. Mr. Biddle stipulated that the ribs are soft in this mine and that they have to be carefully watched and controlled. Due to the excessive height of the coal (8 to 10 feet) and the softness of the coal, the cap rock setting on top of the coal tends to crush the coal out, causing the rock and the coal rib to fall out into the entry. It is a known hazard in this mine. After the 1984 fatality, MSHA has required rib bolting in the mine and that has reduced the incidence of these rib rolls.

At the time of the accident, Deimas Martin was working with his section foreman, Carl Johnson and David Holland. Martin and Holland were installing belt hangers between the No. 13 and No. 14 crosscuts of the No. 1 Entry of the 23 Butt Section. They were working near the front of and on either side of the Fletcher dual head bolting machine operating the roof drills. Foreman Johnson was working at the rear of the machine, using the horizontal drill to install rib bolts. Approximately 30 seconds before the accident, Johnson walked from behind the roof bolter up the left side of the machine to talk to Martin, looking at the left rib as he passed between it and the machine. He noticed nothing hazardous about the rib, and Martin expressed no concern about it. He talked to Martin less than a minute and then returned to the rear of the machine again via the left side and began installing a bolt in the right-hand rib. At that instant, the left-hand rib collapsed, and Martin was covered up by the falling debris. Neither Johnson nor Holland heard any sounds or had any other warning that the rib was about to fall.

The investigation of the accident, conducted by Mr. Blake, revealed that the rock brow and coal rib that fell measured 41 feet in length. The newly exposed roof line, created by the

fallen cap rock ranged from a feather edge to 34 inches wide and the cap rock itself measured 18 to 27 inches thick. The specific piece of laminated rock and coal that struck Mr. Martin measured approximately 5 1/2 feet long, 2 1/2 feet wide and 1 1/2 feet thick.

Mr. Blake concluded that the accident and the resulting fatality occurred because an unsupported overhanging rock brow and coal rib was not properly evaluated and taken down or supported. He also opined that this brow would have been readily visible to a reasonable person.

Another of the Secretary's witnesses, Mr. Barry Ryan, also a mining engineer, and a field office supervisor for MSHA agreed with Blake's analysis. He participated in the investigation and also came to believe that a brow was present prior to the accident. Furthermore, he was also of the opinion that the brow should have been obvious to anyone in the area.

Their shared opinion is based largely, if not exclusively, on three factors. First, portions of two painted red lines were still visible on the coal rib near the accident site after the rock and rib fell. Before the accident, the ribs had vertical red lines painted approximately every five feet, marking locations where rib bolts would be installed. Those two remaining paint marks indicated to Blake and Ryan that that was where the original rib line was located. Prior to the fall or rib roll, the paint marks had extended all the way to the cap rock on the rib and after the fall the top if the paint marks were approximately one foot below the cap rock. Secondly, they also felt that there was insufficient coal present on the floor after the accident compared with the amount of fallen rock for the coal rib to have extended far enough into the entry to have obscured the vast majority of the rock brow. Thirdly, the large size of the fallen rock material was another factor which led them to conclude that an obvious overhanging brow had to have existed before the accident.

Mr. Blake also opined in his accident investigation report that "[m]atching the old roof line to the coal pillar indicates that an overhanging coal rib and/or brow was present."

There really is no dispute that a rib or brow fell on and killed Deimas Martin. Nor is it disputed that any reasonable person, knowledgeable about roof and rib control would recognize an overhanging brow as a hazardous condition and not work under it or permit work under it until it was removed, controlled or supported.

The issue squarely presented for decision then is whether or not an overhanging brow was present and observable prior to the accident.

The issue of liability for violations of the roof and rib control standards, more particularly, the standard's requirement that the roof and ribs be supported or controlled, is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Canon Coal Co., 9 FMSHRC 667,668 (April 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987). Cf. Ozark-Mahoney Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983). Put another way, were there any objective signs existant prior to the accident that would have or should have alerted a reasonably prudent person to the danger or even the existence of an overhanging brow? If there were, then that brow should have been taken down or supported and the failure to do so would constitute a violation of the cited standard.

The Secretary submits that there was an overhanging brow present before the accident which was readily observable. As support for this allegation, she offered the factual and ultimately the opinion testimony of Mr. Blake and Mr. Ryan. Blake and Ryan are both mining engineers and have extensive experience in underground coal mines. The Secretary urges that they be accepted as experts and I do acknowledge their expertise. Their theory, based on the factors I enumerated earlier in this opinion, is certainly a plausible one. However, the weakness in the Secretary's case besides the fact that she has the burden of proof lies in the fact that the acceptance of the Blake/Ryan theory requires the rejection of all the eyewitness, on-site testimony in the record.

Most significantly it would require me to outright reject as incredible the two most important percipient witnesses' testimony about the accident; the two men who were working with Delmas Martin at the time he was killed. David Holland, a miner with 10 year's experience at Mettiki was a co-worker of Martin's. He was working on the other side of the roof bolter with Martin at the time of the accident. Concerning the condition of the accident site the day before the accident Mr. Holland testified at Tr. 286:

Q. Do you recall whether there was a brow present along the left-hand side of the rib between 13 and 14 crosscut?

A. No.

Q. You do not recall, or there was no brow?

A. No brow.

As to the day of the accident he testified at Tr. 290-92:

Q. Did you examine the ribs between 13 and 14 crosscut before you started working beside them?

A. Yes.

Q. What method did you use?

A. Visual.

Q. Why did you examine the rib?

A. To make sure they was safe.

Q. Did you discover any hazard in the area where you were working?

A. No.

Q. Do you know if Mr. Martin examined the ribs beside him?

A. Yes.

Q. How do you know?

A. I seen him looking at it.

Q. How long before the accident occurred did you see that?

A. Five, ten minutes.

Q. Was there a brow on Mr. Martin's side?

A. No.

* * * * *

Q. Are you aware that after the accident there was a paint mark left on the rib on the left-hand side near the accident area?

A. Yes.

Q. And you say there was no brow; is that correct?

A. That is correct.

Q. If there was no brow, how can you explain the paint mark that was left on the rib after the rib fell?

A. Well, on those ribs the ribs is curved, and your top might -- well, the coal in the middle is real soft and it will kind of work out a little bit. All your rib lines go like this (indicating) to the bottom, and there was a good bit of coal underneath the rock. There wasn't no brow.

Q. Would you tell us what a brow is in your understanding of it?

A. Overhanging rock or coal.

Q. Was there any requirement that you know of from anyone dealing with brows? What do you do when there is a brow?

A. We pull it down; or if it is too big, we get a scoop and knock it down.

Q. Why?

A. So to be safe.

At the end of his direct testimony, I again questioned him regarding this important issue and he responded at Tr. 295:

JUDGE MAURER: Mr. Holland, in the five or ten minutes before this accident did you have an occasion to look at that left-hand side rib, the rib that fell in on Mr. Martin?

THE WITNESS: Yes, I did.

JUDGE MAURER: You didn't see anything untoward there whatsoever?

THE WITNESS: No, nothing. There was nothing.

Even more dramatic was the testimony of foreman Carl (Randy) Johnson. He has nineteen years of underground coal mining experience, eleven of those years with Mettiki. On the day of the accident, he was the section foreman of the crew of men, including Deimas Martin, who were doing rehabilitation work in the 23 Butt Section to establish a belt line for a longwall panel.

Johnson performed pre-shift and onshift examinations of the affected area on each of the two days immediately preceding the accident as well as the accident date itself and observed no hazardous rib conditions and detected no overhanging coal rib and/or brow.

Immediately before the fall, he himself was standing next to Delmas Martin. He described the incident in his testimony at Tr. 244-246:

Q. When was the last time you were along that rib before it fell, if you can recall?

A. The last time I was [along] that rib was approximately 30 seconds before it fell.

* * * * *

I was rib bolting, and I had walked up to the side to talk to Delmas.

* * * * *

Q. When you walked up to talk to Mr. Martin which way did you go?

A. I come from behind the roof bolter to the left side and come up to talk to him.

* * * * *

Q. At that time did he express any concern about the rib that you had just passed beside?

A. No, he did not.

Q. Did you notice anything about that rib that caused you any concern?

A. No, I did not.

Q. Did you look at that rib as you walked up there?

A. Yes, I did.

Q. Why did you look at the rib?

A. It is common practice to look at the ribs when you go in past the machines. You always look at the ribs.

Q. How long did you talk to Mr. Martin?

A. It was less than a minute.

Q. Then what happened?

A. I come back to the back end of the bolter.

* * * * *

[A]nd started installing the bolt on the right-hand rib.

* * * * *

I was drilling the hole when the roof come in.

As section foreman of this area, as well as the mine examiner, Randy Johnson would have been primarily responsible for detecting any overhanging brow that was there. I have heard his testimony, observed him at the trial and re-read the transcript of his testimony. I find it hard to believe that he would work and walk alongside that rib under an observable brow. He was standing right next to Martin talking to him less then a minute before the fall. I doubt very much he would have been doing so had he known there was an unsupported overhanging rock brow over his head.

He certainly had inspected this area many times in the days and hours, even minutes before the accident. Just as certainly, he knows what an overhanging rock brow looks like as well as the danger involved in working under or near such a thing. He also knows the only acceptable practice in such an instance is to either support the brow or take it down. I would say that his presence alongside Martin in the minute or minutes before the accident speaks louder than words. It says to me that he didn't know he was standing under a 41-foot long overhanging rock brow. If we give him the fact that he knows a brow when he sees one, it is a reasonable inference that if there was a brow there, it was not observable by visual means.

In support of the testimony of the two eyewitnesses, there is also the testimony of several other Mettiki employees who were in the accident area prior to the fall.

The mine foreman, Allen Rohrbaugh, testified that he spent an average of four hours per day in the No. 1 Entry of the 23 Butt Section during the week the accident occurred. He observed the rib conditions between the Nos. 13 and 14 crosscuts on the

day of the accident and saw no brow present or any other problem with the rib that fell.

Mr. Thomas, who was the foreman on the night shift in the 23 Butt Section on the day of the accident also testified. He had performed two onshift examinations and a preshift examination the night prior to the accident. These examinations included visual examination of the ribs between Nos. 13 and 14 crosscuts. He likewise observed no brow.

William D. Baumann conducted two onshift examinations and a preshift examination of the area between Nos. 13 and 14 crosscuts on the date of the accident. He testified there was no visible brow present.

Mr. Joseph E. Peck is and was at all times pertinent, Mettiki's Safety Coordinator. At the hearing, he produced and testified from his work notes that he accompanied MSHA Inspector Calvert through the No. 1 Entry of the 23 Butt Section on February 1, 7, 8, 9 and 15, of 1989, including the area between the Nos. 13 and 14 crosscuts. Like everyone else, Peck observed no overhanging brow or any other indication that the rib in that area may have been loose. Neither, apparently, did Inspector Calvert see any such conditions or presumably, he would have pointed it out. However, the Secretary correctly points out that any such observations or lack of observation must be evaluated from the standpoint that relatively large cribs were present in the area until either February 15th or 16th. The inspector, and for that matter, Mr. Peck, never saw the area between the time the cribs were removed and the accident occurred.

The Secretary has offered no direct evidence, such as eyewitness testimony, for example, that a visible brow existed prior to the accident. Instead, the Secretary relies entirely on the Blake/Ryan theory that an overhanging rock brow must have existed and most assuredly was visible prior to the accident. This theory and its supporting factors were discussed earlier in this decision and as I have said it is quite plausible but certainly not a scientific fact. Possibly it existed, was visible, and should have been observed and removed or supported, just as they theorize. However, there was a defense presented based on eyewitness testimony that contradicts the ultimate finding they made. Six Mettiki employees who repeatedly observed and examined the ribs in the accident area in the days and hours before the accident testified unequivocably that there was no brow or any other hazardous condition that would have put them on notice that there was a rock brow existant that needed to be supported or taken down. I can find no reason to discredit their testimony and therefore I conclude that the Secretary has failed to satisfy her burden of demonstrating that Mettiki should have

recognized the existence of a hazardous roof or rib condition and corrected it. Specifically, I find that Mettiki cannot be successfully charged with the knowledge that a hazardous condition existed prior to the accident. The Secretary's theory that a pre-accident visible brow existed is contradicted and outweighed by the unrebutted eyewitness testimony of the Mettiki witnesses, all of them experienced miners, who saw no such brow despite conducting numerous visual examinations of the ribs and roof in this Section.

I therefore conclude that the Secretary has failed to prove a violation of 30 C.F.R. § 75.202(a). Order No. 2944492 will accordingly be vacated.

II. Docket No. YORK 89-32-R; Order No. 2944493

Order No. 2944493, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.211(a) ^{2/} and charges as follows:

A proper examination of the coal ribs was not made before work was started on the 23 Butt Section. A fatal rib roll accident has occurred in the No. 1 Entry of the 23 Butt Section, approximately 30 feet outby station No. B3109 where belt hangers were being bolted to the roof. Carl Johnson was the section foreman.

The parties agree that a proper examination of the rib area would entail a visual evaluation of the rib over an extended area, looking for any hazardous conditions such as gapped or loose material or overhanging brows. They also agree that it is possible to make a proper examination and still have the rib fall out.

However, having said that, it appears to me that the only basis upon which this particular order was issued was the fact that there was a fall and a man was killed. That is plainly an insufficient basis upon which to prove the charged violation.

On the other side, Mettiki has demonstrated to my satisfaction that regular preshift and onshift visual examinations of the ribs in the accident area were conducted by certified and qualified personnel as more fully set out earlier in this decision.

2/ 30 C.F.R. § 75.211(a) provides as follows:

A visual examination of the roof, face and ribs shall be made immediately before any work is started in an area and thereafter as conditions warrant.

As I found in the earlier docket, the preponderance of the available evidence just does not support the Secretary's necessary premise that an obvious overhanging brow was present in the area.

Accordingly, Order No. 2944493 will likewise be vacated.

III. Docket No. YORK 89-33-R; Order No. 2944494

Order No. 2944494, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.220 (the roof control plan standard) and charges as follows:

The approved roof control plan is not being complied with on the 23 Butt Section. At numerous locations throughout the No. 1 Entry, rib bolts have been installed without the end of the board as close to the roof as possible as required by pages 15 and 16 of the approved roof control plan. The ends of the boards measured 20 inches to 30 inches from the roof line at several locations. At the accident site, the distance between the last two rib bolts measured 9.4 feet. The approved plan requires a six foot maximum spacing on rib bolts.

On February 1, 1989, prior to starting the rehabilitation work in the 23 Butt Section, Mettiki filed a Rehabilitation Plan with MSHA. MSHA approved the plan on February 3, 1989, and included it in Mettiki's previously-approved Roof Control Plan. The Rehabilitation Plan itself speaks to rib-bolting only in a perfunctory manner. It does not in and of itself explain with any particularity how this rib-bolting is to be done other than to articulate what the maximum spacing shall be in two different height areas. However, the Roof Control Plan, of which I find the Rehabilitation Plan is a part, requires rib bolts to be installed on six-foot maximum centers "as close to the roof as possible".

Mettiki argues that the Roof Control Plan clearly states that it applies only to areas developed after May 31, 1984; whereas the 23 Butt Section was developed between October 1981 and March 1982.

Nevertheless, I agree with the Secretary's argument that when a clear definition of exactly what work is required by a sub-part of a document is not included in that piece of the plan, the next logical step is to look to the entire document for direction. Therefore, I conclude that the rib bolts in the 23 Butt Section had to be installed on 6-foot maximum centers with rib boards placed "as close as possible to the roof".

Actually Mettiki came pretty close to doing that. They were in the process of installing rib bolts and boards in the No. 1 Entry of 23 Butt Section when the accident occurred. The rib bolts and boards outby the area of the accident were installed on five-foot centers. I think it is clear that their intention was to install all the bolts on five-foot centers. On the day of the accident, Martin and Holland had painted marks at 5-foot intervals along the ribs of the No. 1 Entry to mark the horizontal spacing for the rib bolts that were being installed as the rehabilitation work progressed up the entry. It was their practice, however, to simultaneously install belt hangers and rib bolts on ten-foot centers as the hanger installation progressed. Then, when the crew reached the next crosscut, they would come back and install an additional rib bolt between every two, resulting in a five-foot space between each bolt and board.

At the time the accident occurred, the last two rib bolts that had been installed along the left rib were spaced 9.4 feet apart. I believe the crew had intended to come back and install the missing bolt and board but the accident intervened. The subsequent accident investigation found them in that configuration and I find that to be a violation of the Roof Control Plan and the cited standard.

With regard to the placement of the rib boards, I also find that aspect of the installation to be a violation of the Roof Control Plan and the cited standard. I find credible the Mettiki testimony to the effect that the rib bolts themselves were installed as high as possible using a normally configured bolting machine with its rib drill at the maximum "up" angle, but they could simply have used longer boards.

There is no evidence that the location of the rib boards in the No. 1 Entry or the interval between the last two bolts caused the accident or in any way contributed to it. Nonetheless, for the reasons that follow, I find this to be a significant and substantial violation.

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 (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 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); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

The post-accident inspection turned up approximately thirty rib boards placed 20 to 30 inches below the roof and not touching the cap rock in a 1200 foot area in the No. 1 Entry. The purpose of installing these boards is to assist in controlling both the coal rib and the cap rock above it. The installation of the boards below the cap rock could allow the cap rock to roll out and possibly strike persons working or walking near the rib line. I am convinced that this would be a reasonably likely occurrence. If it occurred, and anyone was there, a serious injury or fatality would be very likely.

In Halfway, Incorporated, 8 FMSHRC 8, 13 (January 1986), the Commission upheld a significant and substantial finding

concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

[T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In view of the foregoing findings and conclusions, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard will therefore be affirmed.

The Secretary also submits that the violation was the result of an unwarrantable failure.

In several relatively recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission has 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." Emery 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.

The major reason the Secretary gives for the "unwarrantability" of this violation is that the cited condition had existed

for a two-week period and covered a substantial area that was regularly inspected. I don't think there is any doubt that Mettiki management saw the violative condition concerning the rib boards and knew of the practice of initially installing the rib bolts on 10-foot centers and then going back and filling in. The real problem is that they didn't recognize these situations as violations. The next question is should they have, and I conclude that they should have. But this is ordinary negligence, not aggravated conduct in my opinion. Reasonable persons I think could differ as to what exactly the Roof Control Plan requires with regard to rib-bolting. I found the Roof Control Plan requires Mettiki to install rib bolts and boards "as close to the roof as possible", but there is no explanation in the plan as to what exactly that means vis-a-vis the cap rock, which seems to be the sine qua non of the Secretary's complaint. Nor is there any specific requirement for installing the rib bolts in any particular order as long as they finally get installed on 6-foot maximum centers. The violation in the case at bar is that they didn't.

Accordingly, the inspector's unwarrantable failure finding will be vacated and the contested section 104(d)(2) order modified to a section 104(a) citation, with special significant and substantial findings.

For the reasons stated above, I conclude and find that the violation was serious and resulted from Mettiki's failure to exercise reasonable care to make sure it was complying with its Roof Control Plan. This amounts to ordinary negligence.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty of \$400 is reasonable and appropriate to the violation found.

ORDER

1. Section 104(d)(2) Order Nos. 2944492 and 2944493 are vacated and MSHA's related civil penalty proposals are rejected.
2. Section 104(d)(2) Order Nos. 2944494 and 3115408 are hereby modified to "S&S" section 104(a) citations and affirmed as such.
3. Mettiki Coal Corporation is ordered to pay the sum of \$550 within 30 days of the date of this decision as a civil penalty for the violations found herein.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 18 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 89-92-M
Petitioner	:	A.C. No. 20-00024-05514
v.	:	
	:	Monroe Stone Quarry
FRANCE STONE COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On April 16, 1990, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at \$12,000 and the parties propose to settle for \$12,000.

Two citations are involved in this docket, both growing out of a fatal accident on February 7, 1989. One charges a violation of 30 C.F.R. § 56.9301 because an adequate berm was not provided at the edge of a dumping area as a result of which a truck travelled over the edge of the stockpile 40 feet down to the quarry floor. This violation was assessed at \$10,000. The other citation charges a violation of 30 C.F.R. § 56.14131 because the truck driver was not wearing seat belts while transporting and dumping material at the stockpile.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$12,000 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 19, 1990

BETH ENERGY MINES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 89-277-R
	:	Citation No. 3088080; 9/7/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. PENN 89-278-R
	:	Citation No. 3088162; 9/7/89
	:	Livingston Portal
	:	Eighty Four Complex

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corporation, Pittsburgh, PA
for the Contestant;

Anita D. Eve, Esq., Office of the Solicitor,
Philadelphia, PA, for the Respondent.

Before: Judge Fauver

Beth Energy seeks to vacate two citations and the Secretary
seeks to affirm them, with civil penalties, 1/ under 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, reliable,
and probative evidence establishes the following Findings of Fact
and further findings in the Discussion below:

FINDINGS OF FACT

1. On June 13, 1984, MSHA Inspector Francis E. Weir
observed the following condition at Beth Energy Mine Inc.'s No.
84 Complex underground coal mine:

1/ At the hearing the parties stipulated that this record may be
used to assess civil penalties if violations are found, without
the necessity of filing a separate petition for assessment of
civil penalties.

A clear travelway of at least 24 inches wide was not provided on both sides of the belt conveyor in the longwall section MMU 031. Starting at the tipple and extending inby for approximately 400 ft. For the first 200 ft. the clearance changed from the left side back to right and management had the area fenced off and a crossunder had been provided. The second area was approximately 300 ft. inby the tipple was on the left side and the clearance was between 23 inches and 15 inches for approximately 10-15 feet in two different locations.

Pursuant to 30 C.F.R. §§ 75.1403 and 75.1403-5(g), the inspector issued Notice to Provide Safeguard No. 2395866, which stated:

This is a notice to provide safeguard that requires at least 24 inches of clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine.

2. On September 7, 1989, at the same mine, MSHA Inspector John Mull issued § 104(a) Citation Nos. 3088080 and 3088162, alleging violations of the safeguard notice issued by Inspector Weir. Citation No. 3088080 stated:

At least 24 inches of a clear travelway was not provided on both sides of the Number 4 belt, as the side not normally walked was obstructed with rib material, crib block and other material at numerous locations.

Citation No. 3088162 stated:

At least 24 inches of a clear travelway was not provided on both sides of the entire Number 3 belt, as the side not normally walked was obstructed with rib material, crib block and other material at numerous locations.

3. Belts 3 and 4 are main belts that travel uphill for about 3000 feet each. The belts are suspended from the mine roof. From the top of the belt to the mine roof there is a three to four foot clearance. The bottom belt is about 18 to 24 inches from the mine floor. The belts are 60 inches wide.

4. The obstructions noted in Citation No. 3088162 were 3 inches high in one location and 1 1/2 to 2 feet high in others. The obstructions noted in Citation No. 3088080 were as high as 3 feet.

5. The obstructions created hazards of tripping, slipping and falling, including falling against a moving belt.

6. Miners worked on the "tight" side of the belts to clean up spillage, to maintain the roof support system, to change belt rollers, and, in the event of an interruption of the ventilation system, to make repairs on the stopping line. Inspector Mull found evidence that someone had traveled the tight side of the belt in that there were legs for I-beams used for a roof support system in some of the material left along one of the cited belts.

7. Beth Energy has a policy that prohibits employees from working on the tight side of the belt when the belt is running unless another employee is stationed at the pull cord, on the wide side. When activated, the pull cord stops the movement of the belt conveyor, but not immediately. Depending on the weight of the load on the belt, the belt would travel another 5 to 15 feet. An employee would most likely work on the tight side of a moving belt to clean up spillage. In the event that an employee tripped or fell while the belt was running and became entangled in the belt, serious injuries, even death, could occur.

8. Citations Nos. 3088080 and 3088162 were abated over the course of 10 shifts, with two to four employees performing clean-up activities on each shift. The belts were running when this work was done; one employee stood on the wide side at the pull cord and another cleared loose coal, sloughage and other materials from the tight side.

9. Safeguard Notice No. 2395866 was one of many similar safeguard notices issued to mines in the Monroeville subdistrict in Region II of MSHA pursuant to 30 C.F.R. § 75.1403-5(g). These all tracked the language of that published criterion.

DISCUSSION WITH FURTHER FINDINGS

The principal issue is whether a notice to provide a safeguard issued under 30 C.F.R. §§ 75.1403 and 75.1403-5(g) is valid where (1) it tracks a criterion promulgated in the regulation, and (2) it addresses a safety hazard of a general rather than a mine-specific nature.

An inspector's authority to issue safeguard notices, which become mandatory safety standards for the mine, is found in 30 C.F.R. § 75.1403, which repeats § 314(b) of the Act. It provides:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative

of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

Respondent contends that the original safeguard is invalid because it addresses a general rather than a mine-specific hazard.

In Southern Ohio Coal Co., 10 FMSHRC 963 (1988), the Commission discussed the issue of the general application of safeguards but did not rule on the specific issue whether a notice to provide safeguard may be issued for a hazard of a general rather than a mine-specific nature. It discussed the subject as follows:

The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power--authority to issue standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard.

These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him.

They do not, however, resolve the important issue raised here for the first time--whether a notice to provide safeguard can properly be issued to address a transportation hazard of a general rather than mine-specific nature. The United States Court of Appeals for the District of Columbia Circuit, in the context of the Mine Act's provision for mine-specific ventilation plans, has recognized that proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans. In Zeigler Coal Co., supra, the court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. § 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).

Whether, as the judge believed, a similar type of challenge may be made to a safeguard notice is a question of significant import under the Mine Act. Given the manner in which this important question was raised and addressed in the present case, and the nature of the evidence in this record, it is a question that we do not resolve at this time. [10 FMSHRC at 966-7.]

Section 101 of the Act establishes rulemaking procedures for the promulgation of mandatory safety or health standards. The Secretary must comply with the formal notice and comment rulemaking procedures of the Administrative Procedure Act. As part of the history of administrative law, Congress recognized that substantive standards are likely to be fairer and sounder if they are subject to comment by an interested public, and if the enforcement agency is required to explain its regulatory choices. See generally 1 K. Davis, Administrative Law Treatise §§ 6.12-6.33 (1978). In short, standards established by formal rulemaking are preferred because they are less likely to be arbitrary. See Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 402-03 (D.C. Cir. 1976) ("most important aspect [of agency authority to promulgate mandatory standards] is the requirement of consultation with knowledgeable representatives of . . . industry

[among others]" which was intended to address concern that "freely exercised power of amendment [of mandatory standards] might result in an unpredictable and capricious administration of the statute").

Congress recognized, however, that conditions vary substantially from mine to mine, and that neither it nor the agency could anticipate every hazard that might arise in a mine. Accordingly, Congress developed several mechanisms in the Act to establish standards on a mine to mine basis without formal rulemaking: (1) Petitions to the Secretary for modification of the application of a mandatory standard; (2) mine plans (approved by the Secretary) tailored to the conditions of each mine; and (3) safeguard notices issued by inspectors under § 314(b) of the Act (repeated as 30 C.F.R. § 75.1403), limited to the transportation of men and materials in underground mines.

In Ziegler Coal, supra, the Court observed that a "significant restriction on the Secretary's power to use the ventilation plan as a vehicle for avoiding more stringent requirements [the rulemaking process] arises from the plan provisions' obvious purpose to deal with unique conditions peculiar to each mine." 536 F.2d at 407. Analyzing the relationship between a ventilation plan under Section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and the mandatory standards relating to ventilation, the Court further noted that "the plan idea was conceived for a quite narrow purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines" [Id. emphasis added.] The Court further stated:

[A]n operator might contest an action seeking to compel adoption of a plan, on the ground that it contained terms relating not to the particular circumstances of his mine, but rather imposed requirements of a general nature which should more properly have been formulated as a mandatory standard under the provision of § 101 For insofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application. [Id. emphasis added.]

Several Commission judges (including this judge) applied the Ziegler rationale in holding safeguards to be invalid because they were not mine-specific but addressed hazards of a general nature.

However, after those decisions, in United Mine Workers of America v. Dole, 870 F.2d 662, 672 (D.C. Cir. 1989), the Court clarified its previous Zielger holding by stating that:

We read this caution in Zeigler to say only that the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by so doing she circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act.

Zeigler did not purport to ignore the considerable authority of the Secretary to determine what "should more properly have been formulated as a mandatory standard under the provisions of § 101," id., and to determine what is "subject matter which could have been readily dealt with in mandatory standards of universal application," id.

As so clarified, the Zeigler decision is "a warning that the Secretary should utilize mandatory standards [by formal rule-making] for requirements of universal application," but it does not preclude the Secretary from "requiring that generally-applicable plan approval criteria or their equivalents be incorporated into mine plans" (870 F.2d at 672). The Court's reasoning for the latter conclusion has particular significance here.

In the UMWA case, the union challenged new regulations on ground that they provided less protection than existing safety standards. Under the Act, the Secretary is authorized to replace existing mandatory health and safety standards only if the new standards provide at least the same level of protection to miners as the old ones. A key issue was whether the Secretary's published roof control criteria for approving roof plans were "mandatory health or safety standards" as that term is used in Section 101(a)(9) of the Act, since only mandatory standards are included within the "no-less protection" directive of the Act.

The Court first noted that the specific contents of a roof control plan are determined through consultation between the mine operator and the district manager of MSHA, and that, to guide this process, MSHA had promulgated criteria to be met in all plans. District managers of MSHA were explicitly prohibited from approving plans that did not provide the same level of protection as the promulgated criteria. 870 F.2d at 667-668. The Court held that the general criteria promulgated by the Secretary for roof control plans met the notice and comment requirements of rulemaking and were in fact mandatory standards under § 101(a)(9), so as to invoke the no-less protection rule. Thus, roof control plans could be approved by MSHA only if they either conformed to the criteria or "provide[d] no less than the same measure of protection to the miners" as the criteria. 870 F.2d at 670. The Court concluded that the general criteria already existing with respect to roof control constituted a mandatory standard laying down a required level of protection for miners that had to be met by all plans. In so holding, the Court

concluded that the decisions in Zeigler and Carbon County Coal Co. did not stand for the proposition that the Secretary was prohibited from setting general criteria as mandatory standards for approval of mine operators' plans.

As clarified by the UMWA decision, Zeigler's warning applies only to plan requirements that are not based upon promulgated plan criteria. 2/ To the extent, therefore, that the Zeigler analysis is applicable to safeguard cases, its application is limited to safeguards that are not based upon criteria promulgated under Section 101.

In 30 C.F.R. §§ 75.1403-2 through 75.1403-11, the Secretary has promulgated criteria as guidelines to MSHA inspectors in issuing safeguards pursuant to Section 314(b) of the Act and 30 C.F.R. § 75.1403. The criteria were the subject of notice and comment rulemaking under Section 101 of the Act. See 35 Fed. Reg. 12, 911, et seq. (August 14, 1970) (Notice of Proposed Rulemaking); 35 Fed. Reg. 17, 890, et seq. (November 20, 1970) (Final Rule). Like the roof control plan criteria discussed by the court in UMWA, operators had the opportunity to participate in that rulemaking and since promulgation of the criteria they have been on notice of the conduct expected of them. Unlike other mandatory standards, the roof control criteria in UMWA did not become enforceable until they were included in a roof control plan. Similarly, the safeguard criteria are not enforceable until an operator has been issued a safeguard notice that includes a particular criterion. Use of a promulgated safeguard criterion in safeguard notices is therefore not a circumvention of Section 101 rulemaking procedures.

Section 75.140-3-5(g) is one of those criteria and it states that a clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. The inspector cited and tracked this criterion in issuing Notice to Provide Safeguard No. 2395866.

The Secretary relies on the UMWA case in contending that a safeguard that is based on one of the criteria in 30 C.F.R. §§ 75.1403-2 through 75.1403-11 is valid even though it addresses a general rather than a mine-specific hazard. Before the Court decided the UMWA case, its earlier Zeigler decision and references to Zeigler it by the Commission and a number of Commission judges (including this judge) would not have indicated support for this position. However, the UMWA decision illuminates this area of the law and supports the Secretary's position. As mentioned, the Court found that the Secretary's

2/ Both Zeigler and Carbon County involved ventilation plan provisions of general applicability which were not based upon published criteria and, therefore, did not meet rulemaking requirements. See 870 F.2d at 671-72.

"roof plan approval criteria were promulgated according to notice and comment procedures" and that "the criteria regulations . . . themselves constituted a mandatory standard laying down a required level of protection for miners that had to be met by all plans" (870 F.2d at 670 and 671). By analogy, I find that the Secretary's published criteria for safeguard notices were promulgated according to the notice and comment procedures of § 101(a) and therefore may be used as safeguards even though they are applied at many mines and are not mine-specific. Similarly, the Commission's distinction between promulgated safety standards (by rulemaking) and safeguards issued by an inspector, holding that safeguards are subject to a strict construction rule,^{3/} is not applicable to safeguards that are based upon a published criterion, in light of the UMWA decision.

In summary, I hold that if an inspector's safeguard notice is based on a published criterion (in 30 C.F.R. §§ 75.1403-2 through 75.1403-11), using the same or substantially the same language as the criterion, then (1) the safeguard is valid even if the hazard is of a general rather than a mine-specific nature, and (2) the safeguard is not subject to the strict construction rule announced by the Commission in Southern Ohio Coal Co., supra, but should be interpreted in the same manner as any other promulgated safety standard.

Applying these holdings to the instant cases, I find that the original safeguard notice is valid because it cited and tracked a published criterion, i.e. 30 C.F.R. § 75.1403-5(g). Therefore, it is subject to a "reasonable notice" rule of interpretation, the same as applied to any published safety standard, and not the strict rule of construction announced in Southern Ohio Coal Co. Under the applicable rule, the question is whether the language of the safeguard (safety standard) gives

^{3/} In Southern Ohio Coal Co., 7 FMSHRC 503 (1985), the Commission held that, "in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required." Id. at 512. It based this holding on "the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary and those applicable to 'safeguard notices' issued by [her] inspector." Id. Applying this principle of narrow construction, it held that a safeguard notice that referred to "fallen rock and cement blocks at three locations," and required 24 inches of clear travelway on both sides of a belt conveyor, was not sufficient notice to support a later citation based on water accumulations for a depth of 10 inches from rib to rib, causing slipping and stumbling hazards in the travelway. However, that decision was before the Court's UMWA decision, supra, and would not logically apply to published criteria that met the rulemaking requirements.

reasonable notice to the operator of the conduct required. This inquiry is limited to the language of the safeguard, and does not depend on the context of the original safeguard notice. I find that the language of the safeguard at issue, to provide a "clear walkway," gives reasonable notice to the operator to maintain a walkway that is clear, i.e. open and free of obstructions, for the minimum width specified on both sides of a conveyor belt installed after March 30, 1970. The evidence of substantial obstructions in the tight walkway of each belt amply sustains the two citations.

Beth Energy argues that the Secretary is estopped from relitigating the issue whether safeguards may be issued without regard to mine-specific conditions. It states that this issue was litigated between the parties in Beth Energy Mines, Inc., 11 FMSHRC 942 (Judge Mellick, 1989). However, that case did not involve § 75.1403-5(g). Also, it appears to have been decided without the benefit of the UMWA decision, and does not consider the Court's clarification of its Zeigler decision. I therefore reject the estoppel argument.

The operator contends that the cited violations should not be found to be "significant and substantial," citing Commission decisions such as Mathies Coal Co., 6 FMSHRC 1 (1981), which hold that an S & S violation is one that presents a reasonable likelihood that the hazard will result in a reasonably serious injury. In light of the extent and height of the obstructions in the tight walkway of each belt, I find that the violations presented a reasonable likelihood of causing a serious injury. The risks included slipping, tripping, and falling and, in some cases, falling against a moving belt. The practice of stationing a miner on the wide side of the belt, near the belt pull cord, did not reduce the violation below an S & S degree, because in an emergency a serious injury or even death could result despite having the cord pulled. First, the miner on the wide side would have to observe the accident and then pull the emergency cord. The time spent in these reflexes could easily be too late to prevent serious injury or a fatality. Secondly, even if the miner pulled the cord immediately, the belt would travel some distance and its added motion (5 to 15 feet) could cause serious injury or even death if the victim were entangled in a roller.

Finally, the operator contends that the two citations are duplicative. It argues that, since the two belts had originally been one belt and the violative conditions are essentially the same, only one violation should have been cited.

Each belt was 3,000 feet long and the belts were separately designated by the operator. I find the conditions were sufficiently separate in distance and in identity of the equipment to justify two citations. Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$150 for each violation is appropriate.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.
2. Notice of Safeguard No. 2395866 is valid.
3. The operator violated 30 C.F.R. §§ 75.1403 and 75.1403-5(g) as alleged in Citation No. 3088080.
4. The operator violated 30 C.F.R. §§ 75.1403 and 75.1403-5(g) as alleged in Citation No. 3088162.

ORDER

WHEREFORE IT IS ORDERED that:

1. Notice of Safeguard No. 2395866, Citation No. 3088080 and Citation No. 3088162 are AFFIRMED.
2. The above contest proceedings are DISMISSED.
3. Beth Energy Mines, Inc., shall pay the above civil penalties of \$300 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 20 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 89-143
Petitioner	:	A.C. No. 36-00845-03501
v.	:	
BULK TRANSPORTATION SERVICES,	:	Cambria Slope
INC.,	:	
Respondent	:	

DECISION

Appearances: James Culp, Nanci Hoover, Esqs., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Thomas E. Weiers, Jr., Esq., Rich, Fluke, Tishman
& Rich, Pittsburgh, Pennsylvania, 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), seeking a civil penalty assessment in the amount of \$54, for an alleged violation of mandatory safety standard 30 C.F.R. § 77.807-3. The respondent filed a timely answer denying the alleged violation, and a hearing was held in Indiana, Pennsylvania. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented are (1) whether the respondent is an independent contractor and the proper party responsible for the alleged violation; (2) the appropriate civil penalty that should

be assessed against the respondent for the alleged violation based upon the criteria found in section 110(i) of the Act; and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and discussed 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. Sections 110(a) and (i) of the 1977 Act, 30 U.S.C. § 820(a) and (d).
3. MSHA's Independent Contractor regulations, Part 45, Title 30, Code of Federal Regulations.
4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Petitioner's unopposed oral motion made at the hearing to amend its pleadings to reflect an alleged violation of mandatory safety standard 30 C.F.R. § 77.807-3, rather than 30 C.F.R. § 77.807-2, was granted (Tr. 10).

Stipulations

The parties stipulated to the following (Tr. 10-13):

1. A true and correct copy of the contested citation was properly served on the respondent by a duly authorized representative of the Secretary of Labor, and the citation and termination may be admitted for the purpose of establishing their issuance, and not for the truthfulness of the statements asserted therein.
2. For the purposes of the size of the respondent's business, the parties agree that the respondent company does not have any annual coal production.
3. The respondent's history of prior violations consists of "zero violations" during the 24-month period preceding the issuance of the contested citation.
4. A civil penalty assessment for the alleged violation, if established, will not adversely affect the respondent's ability to continue in business.
5. At the time of the alleged violation, the respondent was under contract with the Beth Energy Mines Incorporated to haul coal from its Cambria Coal

Preparation Plant to sites designated by Beth Energy
Mines Incorporated.

6. The respondent subcontracted with one James R. Krumenaker, an independent trucker, to haul coal pursuant to its contract with Beth Energy Mines Incorporated, in accordance with a motor vehicle leasing agreement which is included as respondent's exhibit R-2.

7. The respondent registered with the Beth Energy Mines Incorporated, the production operator, the information required by MSHA regulation 30 C.F.R. § 45.4,

8. The coal being hauled by trucker James R. Krumenaker was being placed into the stream of Interstate Commerce, and it was being hauled from the Cambria Mine to the Pennsylvania Electric (Penelec) Power Plant at Homer City, Pennsylvania.

9. The parties further stipulated to the admissibility of exhibits P-1 and P-2, and R-1 through R-4 (Tr. 19).

Discussion

The undisputed and stipulated facts establish that on or about January 4, 1989, MSHA Inspector Nevin J. Davis went to the Cambria Coal Preparation Plant mine site owned and operated by Beth Energy Mines Incorporated in response to information which he had received that the mine fan and power were out of commission because something had come in contact with an overhead high-voltage powerline. After arriving at the site, the inspector found that a coal haulage truck being operated by Mr. James Krumenaker, whose truck was leased to the respondent, had come in contact with the power wire. Mr. Krumenaker had raised the bed of his truck to get rid of some snow and ice while he was parked under the power wire waiting for the truck to be loaded with coal. Although the truck was damaged when the bed contacted the wire, Mr. Krumenaker jumped from the truck after it contacted the wire and he was not injured. Since there were no injuries, the incident was not a "reportable accident" and it was not reported to MSHA.

The facts further show that at the time of the incident, the respondent had a contract with Beth Energy Mines to haul coal from the Cambria Preparation Plant to various locations designated by Beth Energy Mines. Mr. Krumenaker's load was scheduled to be delivered to the Pennsylvania Electric (Penelec) Power Plant at Homer City, Pennsylvania. The respondent, owned no trucks of its own, but had lease agreements with several independent coal haulers, including Mr. Krumenaker, to haul coal for

Beth Energy from the Cambria Preparation Plant to customers designated by Beth Energy. After completing his inquiry of the incident, Inspector Davis issued section 104(a) "S&S" Citation No. 2889508, to the respondent citing an alleged violation of mandatory safety standard 77.807-2. As noted earlier, the citation was amended to charge an alleged violation of section 77.807-3. The cited condition or practices states as follows:

A coal truck being operated by an independent contractor for Bulk Transportation Services, Inc., (PUC # A101351CCMC154209) came into direct contact with an overhead energized high voltage transmission line (46KV) in and around the immediate area of the Penelec Substation. This truck was stopped directly under this high voltage transmission cable when the truck bed was inadvertently raised in the upwards position for the purpose of removing snow and ice from the inside of the truck bed and came directly into contact with the high voltage transmission cable. No injuries occurred at this time, however, several of the truck tires were destroyed.

MSHA's Testimony and Evidence

MSHA Inspector Nevin J. Davis confirmed that he issued the citation in question, and he explained that he was informed that the mine fan and power were out of commission because something had come in contact with a high-voltage powerline and shorted out the power. Mr. Davis stated that he determined that a haulage truck operated by James Krumenaker came into contact with the powerline after Mr. Krumenaker raised the truck bed to get rid of some snow and ice while parked under the powerline.

Mr. Davis stated that the truck was on the property to pick up and haul coal from the mine to another site. He confirmed that he cited the respondent with the violation because it was the only independent contractor who was on the list maintained by the mine operator Beth Energy Mining Company pursuant to 30 C.F.R. § 45.4. Mr. Davis explained further that the truck had a decal on it identifying the respondent as the truck operator and he assumed that the driver, Mr. Krumenaker, was employed by the respondent. He confirmed that Mr. Krumenaker was not listed as an independent contractor performing services at the mine.

Mr. Davis stated that he made a gravity finding of "highly likely," and considered the violation to be S&S, because he believed that the driver could have suffered fatal injuries by the truck coming in contact with the high-voltage line. He stated that the contact blew out eight of the truck's tires and that the driver was very upset.

Mr. Davis stated that he based his low negligence finding on the fact that the driver may not have been aware of the fact that he had stopped his truck under the high-voltage line. He stated that the incident occurred at 4:45 a.m. and that the visibility was poor. Mr. Davis confirmed that the high-voltage line was located at an appropriate height above the truck, and that the height and location of the line did not violate any MSHA standard.

Mr. Davis stated that the truck driver told him that he had raised the truck bed to remove snow and ice before loading the truck. Mr. Davis confirmed that the respondent had a contract with Beth Energy to haul coal and that it made no difference to him whether or not the respondent had a sub-contract with anyone else. He also confirmed that the driver informed him that he had no haulage contract with Beth Energy (Tr. 20-28).

On cross-examination, Mr. Davis confirmed that although Mr. Krumenaker did not indicate that he was an employee of the respondent, he assumed that he was because of the respondent's sign on the truck. Mr. Davis stated that he is authorized to issue a citation to an independent contractor for a violation even though the contractor may not be designated as an independent contractor on the mine operator's records.

Mr. Davis confirmed that the violation was abated by David Gould, Beth Energy's plant foreman, and that Mr. Gould instructed Mr. Krumenaker to be aware of the high-voltage line. Mr. Davis further confirmed that if the powerline was not located at the proper height, he would have issued a citation to Beth Energy.

Mr. Davis stated that the State of Pennsylvania PUC number must be displayed when the coal haulage truck is hauling coal. He confirmed that he served the citation on the respondent because he determined that the truck driver was hauling coal off the mine property which was owned and operated by Beth Energy (Tr. 29-33). He confirmed that even if Mr. Krumenaker were not an employee of the respondent, it would have made no difference to him because he relied on the fact that Mr. Krumenaker was hauling coal for the respondent (Tr. 34).

Mr. Davis confirmed that the driver was parked in his empty truck while waiting to load and raised his truck bed to free it of ice and snow which may have presented a tipping hazard and did not realize that he was under the overhead powerline. Since the driver jumped out of the vehicle when it contacted the wire, he was not injured, and the incident was not considered to be a reportable accident (Tr. 40). He confirmed that he spoke with the driver who informed him that he did not know that the wires were overhead (Tr. 41).

Mr. Davis stated that the sign on the truck was a wooden board which were standard on all of the respondent's trucks, and since it contained the respondent's name, he assumed that the truck belonged to the respondent. He did not ask the driver whether he worked for the respondent, and simply assumed that he did because of the sign (Tr. 43). If the driver had told him that he was an independent contractor, he would "probably" have issued a citation to him and a citation to Beth Energy for not listing the driver on its records as an independent contractor (Tr. 43).

Mr. Davis confirmed that Beth Energy did not have a sign warning drivers about low overhead clearances. He did not cite Beth Energy because it was difficult for Beth Energy to control a driver's raising of his bed, and Beth Energy usually instructed people "about raising beds and stuff like that" (Tr. 44). He confirmed that the location of the power wire met MSHA's minimum over head clearance distance requirements under section 77.807-2. He described the truck as a regular triaxle coal haulage truck with a "telescopic" boom jack for raising the bed (Tr. 46-47).

Mr. Davis confirmed that he spoke with the respondent after issuing the citation and explained what he had done, and that the respondent took the position that it was not responsible for the violation. Mr. Davis then suggested that the respondent seek a conference with MSHA's district manager, but it did not prevail on its position that the citation should not have been served on the respondent (Tr. 51).

Mr. Davis identified exhibits R-3 and R-4, as copies of two prior citations he issued on January 29, 1987, to Beth Energy at the Cambria Preparation Plant for violations of section 77.1710(d) and 77.1608(c) when he observed that a truck driver was not wearing a suitable hard hat while at the dumping silo, and that the driver was exposed to a hazard while in an area where coal dumping operations were taking place. He confirmed that the citations were subsequently modified after Beth Energy protested during an MSHA conference, and the modifications reflect that they were reissued to Bulk. Mr. Davis confirmed that Bulk was subsequently absolved of any responsibility for the citations, but he could not recall who they were reissued to (Tr. 53). Respondent's counsel explained that after convincing MSHA during a conference that the cited conditions were caused by another independent contractor MSHA advised Bulk that they would be reissued to that contractor and they are not included as part of Bulk's violation history (Tr. 54-55). Inspector Davis confirmed that this was the case, and he indicated that the citations were issued by MSHA "orally" to the other unidentified independent contractor (Tr. 56-57).

In response to a bench question as to the distinctions between the prior enforcement actions where MSHA absolved the

respondent from any responsibility for the two prior violations, and the instant case, Mr. Davis responded "the only way I can answer that is that at that time that was MSHA policy, I guess. It was taken out of my hands and turned over to my supervisor and he handled it" (Tr. 58). A copy of the MSHA district manager's comments concerning the conference held with the respondent concerning the contested citation states as follows (exhibit P-3):

The following citation was conferred and the information provided by the operator did not justify any change. Mr. Merlo stated that he has over 70 independent drivers who haul under his PUC number and contract with Beth Energy Mines, Inc. He also informed me that he pays the drivers for what they haul, however, in his opinion they are not his employees and if the citation would have been issued to one of his people there would be no problem. At this point in the conference Mr. Merlo produced a contract that is held between his company and all independent drivers which holds all drivers responsible for fines and penalties arising out of the use of their equipment. A review of the contract between Mr. Merlo and his independent drivers and a discussion with Beth Energy Mines Inc., revealed that the Independent Contractor Register required under Part 45.4 is on file with the production operator listing Bulk Transportation Services, Inc., as the contractor. Therefore the citation stands as issued.

Inspector Davis confirmed that he has never cited a construction subcontractor, and that pursuant to MSHA policy, if there are contractors and subcontractors present "I would think we cite the contractor" (Tr. 68).

Respondent's Testimony and Evidence

Charles J. Merlo, Jr. confirmed that he is the owner and president of the respondent company. He stated that including himself, the company has a total of three employees, and he identified the other two employees as a dispatcher and a book-keeper. He further confirmed that the company owns no trucks and has no truck drivers on its payroll.

Mr. Merlo stated that the company has been granted authority by the Pennsylvania Public Utilities Commission to haul coal within a 45-mile radius, and in certain designated counties. He stated that he acts as a broker to haul coal for the Beth Energy Mining Company, a subsidiary of the Bethlehem Steel Corporation, and he identified a copy of a contract that he has with Beth Energy (exhibit R-1). He confirmed that he uses the services of independent haulage truck owner/operators or other trucking

companies to haul the coal for Beth Energy, and that these individuals are subcontractors authorized by the contract.

Mr. Merlo explained the procedure followed by his subcontractors to haul the coal from the Beth Energy plant, and he confirmed that the trucking companies or truck owners call his dispatcher to ascertain the available coal which needs to be hauled and these subcontractors are free to accept or reject any particular coal hauling job.

Mr. Merlo stated that he does not control the work of the subcontractor coal haulers, does not supply them with any work rules, and is not responsible for their hazard training. He believed that the hazard training for the haulage drivers is provided by Beth Energy at the mine site.

Mr. Merlo identified exhibit R-2 as a copy of his leasing contract with Mr. Krumenaker, and he confirmed that Mr. Krumenaker owns his own truck and is responsible for maintaining it, and for all insurance, social security, and workmen's compensation coverage. He confirmed that Mr. Krumenaker is also responsible for the payment of all fines for traffic and over-weight violations, and that the expenses incurred in connection with the damage to the truck in question were paid by Mr. Krumenaker or his insurance carrier.

Mr. Merlo stated that Mr. Krumenaker was compensated for his services once a month, and that he paid him a fixed sum for each ton of coal he hauled and delivered. The amount of coal hauled and delivered by Mr. Krumenaker was computed by invoices submitted to the respondent by Mr. Krumenaker, and the coal tonnage was determined by the weight scales at the Pennsylvania Electric Company (Penelec) facility where the coal was delivered.

Mr. Merlo stated that the only control he exercises over his subcontractors concerns where the coal is to be picked up and where it is to be delivered. He explained that the subcontractor haulage truck owner/operator will call the respondent's dispatcher to ascertain where to pick up and deliver a particular amount of coal, and that the truckers then pick up and deliver the coal and bill the respondent for payment based on the coal tonnage weighed at Penelec when it is delivered.

Mr. Merlo stated that he has no employees located at the Beth Energy mine site, and he believed that there was nothing he could have done to prevent the incident in question. He confirmed that Beth Energy has notified him by letter in the past about haulage truck drivers speeding or not wearing hard hats, and that he has simply passed this information on to the truck drivers concerned.

Mr. Merlo stated that his company does not perform any regular services at the mine site, and does not perform the actual coal hauling services. This is done by contract with the subcontractor coal haulers. Respondent's counsel stated that Mr. Merlo is a trucking broker who makes sure that "coal gets moved to point A or B and arranges for people to do it" and is not involved in the selling of the coal (Tr. 79). Mr. Merlo confirmed that he has had the contract with Beth Energy since 1985 or 1986, has no supervisors at the mine site, and performs no construction work there. The trucks are loaded at the mine site for transportation from the mine, and they do not haul coal to the mine. He confirmed that some of the owner/operator truck contractors which he uses also work for other trucking carriers, and that some of these truckers have refused to haul coal for him when they can do better with other carriers, and that there is constant change, and truckers "come and go" (Tr. 85).

Mr. Merlo confirmed that he does not provide his trucking contractors with any safety rules because they are contractually responsible for these matters. He has no training responsibilities for the drivers and believes that they are hazard trained at the mine site (Tr. 86). Mr. Krumenaker has never been employed by him, and he exercises no day-to-day control over him other than to tell him where the coal is to be picked up and delivered, and to make sure that he is insured (Tr. 90). He confirmed that the citation was abated by Beth Energy by instructing Mr. Krumenaker. He also confirmed that he has never been previously cited by MSHA for any violations other than the prior two citations issued by Mr. Davis which were subsequently found not to be his responsibility (Tr. 92).

Mr. Merlo identified copies of the two prior citations issued by Inspector Davis to a truck driver employed by the Shaffer Trucking Company, one of his subcontractors. Mr. Merlo stated that the citations were issued when the driver was observed on his truck bed at a dumping point on the mine site without wearing a hard hat. He stated that the citations were initially served on Beth Energy, but were subsequently modified at a conference to show the respondent as the responsible party. Mr. Merlo stated that when he protested this to MSHA, the citations were again modified and served on Shaffer Trucking Company. Mr. Merlo confirmed that this was done orally, and he believed that Shaffer Trucking paid the civil penalty assessments attributed to its employee truck driver. Mr. Merlo stated that he sees no distinction between the instant case and the past citations served on Shaffer Trucking, and he believed that the contested citation in this case should have been served on Mr. Krumenaker as the contractor in control of his truck, and the individual whose actions resulted in the violation (Tr. 93-96).

On cross-examination, Mr. Merlo stated that he had no knowledge that Mr. Krumenaker had any agreement with Beth Energy to

haul coal. He confirmed that Beth Energy contacts him and informs him how many coal loads are available, and that it is in his interest to make sure that the coal is hauled by the truckers who may call in for the jobs (Tr. 103). The truckers are required by state law to display his company identification decals when they are operating on his behalf. The agreement that he has with Mr. Krumenaker is the same agreement that he has with the 70 to 100 truckers which he uses, more than half of whom are owner/operators (Tr. 109). He confirmed that he leases Mr. Krumenaker and his truck, and he cannot let anyone else drive it since Mr. Krumenaker owns it and controls who drives it (Tr. 116).

Inspector Davis was recalled by the Court, and he confirmed that the prior two citations which he issued were issued because of two violations by one single truck driver in the employ of Shaffer Trucking Company. Mr. Davis stated that he initially served the violation on Beth Energy Mines because it had someone at the coal silo area in question supervising the loading and should have observed the violations (Tr. 128-130). He believed that Shaffer Trucking had its own MSHA ID number, and was readily identifiable, but that Mr. Krumenaker in this case did not have any number identifying him as an independent contractor, and he had no knowledge that Mr. Krumenaker was in fact an independent contractor (Tr. 132). When asked whether it made any sense from an enforcement point of view not to cite Mr. Krumenaker simply because he had no assigned ID number of record, Mr. Davis responded "with independent contractors, its tough. That's why we try to get back to that 45.4 to try and hold it for some reasonable justification or responsibility by that history" (Tr. 133). He confirmed that MSHA's regulation does not say anything about subcontractors (Tr. 134). Respondent's counsel confirmed that when the two prior citations were transferred from Beth Energy to the respondent, the respondent did not have an MSHA ID number, but subsequently obtained one (Tr. 139).

Petitioner's Arguments

MSHA asserts that Bulk was an independent contractor for Beth Energy, was registered as such by Beth Energy in accordance with 30 C.F.R. § 45.4, and was also identified as an independent contractor in the agreement it had with Beth Energy. MSHA points out that Bulk was performing a service at Beth Energy's mine in that it was the contractor who picked up and delivered coal to Beth Energy's customers, it was the exclusive carrier for coal delivered to the Penelec power station, and it hauled coal for Beth Energy at least 4 or 5 days a week. Under these circumstances, MSHA concludes that in order to be consistent with the expansive definition of "operator" found in the Act, and as noted by the Commission in Otis Elevator Company, 11 FMSHRC 1896, 1901-1902 (October 1989), bulk must be considered an operator under the Act.

MSHA argues that Bulk used subcontractor truck drivers who operated under its PUC authority to haul the coal from Beth Energy, and that these drivers, who typically varied from week to week, provided "a constant flow of truck drivers in and out . . . working for Bulk." The lease agreement between Bulk and its subcontractors provided for periodic vehicle inspections by Bulk, and the agreement between Beth Energy and Bulk provided that Bulk would "also inspect each motor vehicle after loading in order to assure the safe movement of the load and vehicle in compliance with any law, regulations or requirement relating to the transportation performed under this Agreement." In addition, MSHA points out that it was Beth Energy's practice to send a letter to Bulk detailing any problems that had been noted with Bulk drivers, so that Bulk could notify the drivers themselves. MSHA concludes that contrary to Bulk's position, it is clear that it had the power to exercise control over its subcontractor drivers, and indeed exercised such control.

With regard to the prior citations issued by MSHA in 1987, which were initially issued to Beth Energy, and subsequently issued to Bulk, and then vacated and modified to cite Bulk's subcontractor, MSHA cites several estoppel decisions and takes the position that its prior actions in this regard does not estop it from citing Bulk for the violation in this case. MSHA concludes that who it may or may not have previously cited is not dispositive of the issue presented in this case, which is whether or not MSHA correctly cited Bulk. MSHA takes the position that it has retained wide enforcement discretion with regard to its ability to cite either the production operator, the independent contractor, or both, and that unless it has abused its discretion, its decision on whom to cite should stand. Consolidation Coal Company, 11 FMSHRC 1439, 1443 (August 1989) (citing Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986)).

MSHA maintains that it has not abused its discretion by citing Bulk for the violation. In support of this conclusion, MSHA asserts that Bulk is responsible for supplying truck drivers who are willing to pick up and deliver coal, and that the drivers are not paid by Beth Energy, do not report for work to Beth Energy, and cannot be hired or fired by Beth Energy. MSHA points out that because of the constant flux of drivers in and out, only Bulk would have records of who picked up coal on any given day. Further, Bulk has, in the past, instructed its drivers to wear hard hats, at Beth Energy's request, and that Bulk can choose to hire or not to hire any driver that applies for work. Under these circumstances, MSHA concludes that Bulk clearly exercises authority over these drivers in a way that Beth Energy cannot, and that Bulk's attempt to disregard its responsibilities under the Act merely because its truck drivers are contractors and not its employees cannot stand.

MSHA argues that Bulk is fulfilling an integral role in the mine extraction process and cannot insulate itself from its responsibilities created from this role by contractual agreement with Beth Energy. In view of the fact that Bulk has reserved for itself the power to inspect the trucks and has the ability to inform all truck drivers of any information it feels is pertinent to the job, MSHA concludes that holding Bulk responsible for the actions of the truck drivers is logical. MSHA believes that between Beth Energy and Bulk, Bulk is the entity most able to exercise control over the drivers, and that between Bulk and the drivers, Bulk has the continuing association with the mine, and the opportunity to be aware of the specific problems that may exist there. Accordingly, MSHA concludes that its policy decision to hold Bulk liable for the cited violation is based on sound reasoning and does not constitute an abuse of its discretion.

With regard to the alleged violation of 30 C.F.R. § 77.807-3, MSHA takes the position that the truck which was operated by Bulk's contractor, Mr. Krumenaker, was a piece of equipment that was being operated on the surface of the mine, and that Mr. Krumenaker was required to pass under the energized high-voltage line in order to pick up and deliver the coal. MSHA points out that since Mr. Krumenaker had raised his truck bed, the clearance between the truck and the overhead powerline was less than that required by the standard. Further, since Mr. Krumenaker's raised truck bed contacted the energized power-wire, MSHA concludes that Bulk failed to take any precautions to deal with or prevent accidents of this kind, and violated the cited standard.

With regard to the inspector's "significant and substantial" violation finding, MSHA asserts that the inspector's uncontradicted testimony establishes that the violation was significant and substantial and that it is the type of violation which presents a high possibility for a fatal accident. Contact with an energized powerline could result in the electrocution of anyone operating or standing near the piece of equipment that makes contact if that person should touch the truck and the ground at the same time. Although the incident in question did not result in any injury to the driver, the tires were blown out on the truck, indicating the seriousness of the hazard. Citing Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981), MSHA concludes that the "significant and substantial" violation test established by that case has been met, and that the inspector's finding should be affirmed.

Respondent's Arguments

The facts show that Bulk had an agreement with Beth Energy to arrange for transportation of coal from Beth Energy's Cambria

Mine to the Pennsylvania Electric Power Plant, as well as to other sites designated by Beth Energy. Bulk asserts that it is a broker of coal transportation services and as such cannot be deemed an "operator" under the Act and liable for civil penalties. In support of its argument, Bulk points out that it discharges its contractual obligation to Beth Energy by engaging subcontractor carriers and independent owner/drivers to transport the coal which is loaded by Beth Energy personnel at the mine. Bulk further points out that other than the owner of the company, it only employs a dispatcher to find drivers to haul the available coal for each day, and a bookkeeper to arrange for payment of the amounts invoiced by the subcontractors and to insure proper payment from Beth Energy. Bulk maintains that it does not operate any portion of the mine, performs no construction work, and does not supervise any employees at the site. Since its subcontractor truckers are loaded by Beth Energy, and the drivers do not normally get out of their trucks when picking up coal until immediately before they reach the highway to cover their loads with a tarp, Bulk asserts that there are no activities for it to supervise or oversee at the site which could arguably make it a production operator.

Conceding the fact that the definition of "operator" was expanded by the 1977 Mine Act to include independent contractors performing services or construction at a mine site, Bulk nonetheless argues that the expanded definition is not so widely encompassing and cannot be read to include any person or entity which may have any connection, contractual or otherwise, with a mine owner, particularly when such a person or entity does not maintain a presence on the mine site. Bulk concludes that such a construction of the statute would cause any entity with a contract to perform any service with a mine owner, whether or not it related to the extraction process or mine construction, subject to civil penalties. Bulk further concludes that it is apparent from the legislative history of the Act that only independent contractors actually performing services at the mine site, such as construction or extraction related work, are to be included as "operators" with the same statutory compliance obligations as mine owners or mine production operators.

Bulk maintains that its relationship with its independent owner/drivers and other trucking companies is a bona fide arms-length contractual relationship which is customary in the transportation business and one which was not intended to avoid liability under the Act. Bulk asserts that its subcontractor truckers are not its employees or agents, and since they are either "persons" or "firms" that "contract to perform services at a mine" and actually work at the mine site to pick up coal and haul it to its destination, they, and not Bulk, are the independent contractors under the Act's regulations.

Bulk points out that the owner/drivers own and maintain their own vehicles and are generally engaged in occupations and provide services apart from their work with Bulk inasmuch as they regularly refuse to take loads offered because of more lucrative work they have been given. There is a written contract which details the rights the parties have with respect to each other (Tr. 87). There is no contractual requirement that the subcontractors must accept every load offered. There is also no training provided by Bulk because the subcontractors are already "permitted" operators. The carrier subcontractors are not paid by the hour, the mile, by salary, or in any other manner, except by the actual tonnage hauled and only on a monthly basis after submitting invoices. The subcontractors, such as Mr. Krumenaker, pay their own fines and all costs and expenses incident to the operation of their vehicles. Under all of these circumstances, Bulk concludes that it is not the independent contractor performing services at the mine site and is not subject to civil penalties under the Act.

Assuming arquendo that it is subject to the jurisdiction of the Act as an "operator," Bulk submits that MSHA abused its discretion by citing it for the violation incurred by its independent subcontractor James Krumenaker, the owner and operator of the truck which contacted the over powerline in question, because the Act requires that the proper party "operator" responsible for the violation be held liable. Bulk maintains that the proper party "operator" is Mr. Krumenaker.

In support of its conclusion that Mr. Krumenaker is the proper party to be charged with the violation, Bulk asserts that there is no dispute that the acts of Mr. Krumenaker were the cause of the issuance of the citation to Bulk. Bulk relies on the testimony of Inspector Davis who confirmed that the citation was issued because Mr. Krumenaker's truck came in contact with the high-voltage line, and he assumed that Mr. Krumenaker was employed by Bulk. Bulk points out that Inspector Davis admitted that he did not question Mr. Krumenaker to determine whether the truck was in fact owned by Bulk or whether Mr. Krumenaker was an employee of Bulk. Bulk also points out that the inspector cited Bulk because it was listed on Beth Energy's register as an independent contractor pursuant to MSHA's requirements in 30 C.F.R. § 45.4, and Mr. Krumenaker was not.

Bulk asserts that there is no evidence that it had any presence on the mine site at the time of the violation, that it did not contribute to the conditions which caused the violation by Mr. Krumenaker, and that it could not have anticipated or prevented the violation. Bulk cites the testimony of Mr. Merlo that there was nothing Bulk could have done to either prevent or minimize the chances of Mr. Krumenaker raising his truck bed at 5:00 a.m., while waiting in line for coal and coming in contact with the high voltage wire. Under these circumstances, Bulk

concludes that MSHA abused its discretion by citing Bulk instead of Mr. Krumenaker, the "operator" with direct control over the hazard, and the operator who is in the best position to abate the hazard.

Citing Phillips Uranium Corporation, 4 FMSHRC 549 (April 1982), Affinity Mining Company, 2 IBMA 57, 80 I.D. 229 (1973), Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), and Old Dominion Power Company, 6 FMSHRC 1886 (August 1984), Bulk asserts that in this case MSHA has reverted to its previously discredited policy of citing, for administrative convenience purposes, an entity (Bulk) merely in contractual privity with the person causing a violation rather than the actual violator (Mr. Krumenaker) in a situation where the cited party (Bulk) did not contribute or have control over the circumstances of the violation. Recognizing the fact that MSHA has retained wide enforcement discretion in choosing which of two or more operators it will cite for a violation, Bulk nonetheless believes that this discretion is not unlimited and must be exercised rationally and consistently with the intent and purposes of the Act. Although it is clear that Bulk did not own the truck or employ the driver, it was cited simply because the inspector assumed that the driver was an employee of Bulk and operated a truck owned by Bulk and because Bulk was listed on the mine operator's registry as an independent contractor. Under these circumstances, Bulk concludes that MSHA ignored both the status of the violating party and the circumstances of the violation and cited Bulk purely for administrative convenience because it was listed as an independent contractor.

Bulk argues further that MSHA abused its enforcement discretion by failing to consistently enforce the Act and regulations inasmuch as it has in the past vacated citations issued to Bulk in its capacity as a coal carrier broker when it was found that Bulk's independent subcontractors actually caused the violations. In support of this argument Bulk relies on the record in this case which establishes that in 1987, two separate citations were originally issued to Beth Energy by MSHA for violations concerning a driver employed by one of Bulk's subcontractors, Shaffer Trucking. Beth Energy, at an MSHA manager's conference, convinced the district manager that Bulk, as the party with whom it contracted for the coal haulage service, was the proper party against whom the citations should issue. The citations were modified and issued to Bulk. Bulk then contested the issuance of the modified citations at a district manager's conference and claimed that the citations should issue to Bulk's independent subcontractor, Shaffer Trucking, because it employed the driver and owned the truck involved in the violations, and not Bulk. The district manager, then called Mr. Merlo and informed him that the citations would be vacated as to Bulk. The citation were later issued to Shaffer Trucking. Inspector Davis, who issued

the violations in 1987, confirmed that the two citations previously issued to Bulk were vacated and modified to charge Bulk's subcontractor with the violations.

In this case, after receiving the citation issued by Inspector Davis, Bulk again requested a conference with MSHA and raised the identical defense it raised in connection with the other citations issued in 1987. However, contrary to the district manager's decision in 1987, MSHA refused to either vacate the citation issued to Bulk, or to reissue it to Mr. Krumenaker. The district manager relied on the fact that Bulk was listed as the independent contractor on a register maintained by Beth Energy pursuant to 30 C.F.R. § 45.4. Bulk maintains that the 1987 citations are identical in terms of who the responsible party for the violations should be. When asked to distinguish the facts presented in this case and MSHA's prior actions in vacating the citations issued to Bulk and reissuing them to its subcontractors, Inspector Davis could not distinguish these actions except that there may have been a "mistake" in the handling of the 1987 citations; or MSHA's policy may have changed; or the MSHA supervisor just "handled it." Bulk takes the position that none of these reasons justify the disparate and inconsistent handling of the contested citation in this case.

Bulk argues that MSHA properly vacated the 1987 citations because the purposes of the Act are best effectuated by "citing the party with immediate control over the working conditions." Bulk believes that MSHA has shown no connection between the acts of its subcontractor, Mr. Krumenaker, except to say that Bulk is the entity listed on Beth Energy's independent contractor register. Bulk submits that MSHA's refusal to vacate the violation is unsupportable and is a blatant reversal of its prior decisions concerning the citation of Bulk when its acts do not contribute to the violations of another operator. Bulk concludes that the purposes of the Act are not furthered by inconsistent and unpredictable MSHA enforcement decisions such as those made in connection with violations found to have been caused by Bulk's independent subcontractors. For these reasons, even if Bulk is found to be an operator subject to civil penalty assessments, it believes that the citation issued in this case should be vacated and that MSHA should be compelled to act consistent with its prior decisions concerning violations by Bulk's subcontractors.

Bulk acknowledges that owners or production operators of a mine can be held strictly liable for the violations of their independent contractors. However, Bulk asserts that there is no basis under the Act to hold it vicariously liable for any independent acts of its subcontractors, and that MSHA is erroneously attempting to hold Bulk to the same strict liability standards imposed by the Act upon "owners" of a mine or "production operators." Bulk points out that it is undisputed that it is not a production operator or owner of a mine, and does not operate any

portion of a mine or supervise any personnel at any mine site. Therefore, Bulk concludes that the basis of its alleged strict liability cannot then be because it is a production operator or owner inasmuch as it does not control or own the Beth Energy mine.

Bulk asserts that MSHA apparently believes that Bulk, by virtue of its subcontractor relationship with a person or entity performing services at a mine, is strictly liable for its subcontractors' violations even if it did not contribute to the occurrence of the violation. In support of this conclusion, Bulk points out that it was cited because it was listed as the contractor on Beth Energy's register, and that during the hearing, MSHA's counsel stated that any person with a contract with the production operator and who is registered as a contractor pursuant to MSHA's regulations is strictly liable for its subcontractor's violations. Bulk concludes that MSHA's position is not supported by the Act or the controlling regulations and cases.

Assuming that MSHA may legally equate Bulk with a production operator and hold it strictly liable for its subcontractors' violations, Bulk maintains that MSHA has clearly abused its discretion when it issued the citation contrary to the provisions of MSHA's General Enforcement Policy for Independent Contractors contained in its Program Policy Manual (exhibit E to Bulk's posthearing brief).

Bulk asserts that MSHA's enforcement policy guidelines do not support citing only bulk and not its subcontractor, Mr. Krumenaker, if Bulk's liability is the same as that of the "production operator." Consequently, since it is not a production owner, Bulk concludes that it cannot be held strictly liable for its subcontractor's violations. Even if it were held to such a standard, Bulk further concludes that citing Bulk is not supported by MSHA's own policy concerning independent contractors, and that Mr. Krumenaker should have been cited because:

1. There was no testimony from either the Secretary or Bulk remotely indicating that Bulk in any manner contributed to Mr. Krumenaker's violation when he raised his truck bed and inadvertently made contact with the high voltage wires.
2. Bulk did not contribute to the continued existence, if any, of the violation.
3. No Bulk employees were subject to the hazard and only the subcontractor himself was in immediate danger.

4. There was no testimony indicating that Bulk had any control over the condition that needed abatement; namely, that the subcontractor in the future exercise more caution and care while driving his truck near similar hazards.

With regard to the removable sticker reciting Bulk's public authority numbers, which was on Mr. Krumenaker's truck, Bulk asserts that it is regulated by the Pennsylvania Public Utility Commission (PUC) and is only authorized to haul coal in certain defined areas, and its independent contractors must operate within Bulk's PUC authority and display on the truck Bulk's PUC numbers so that PUC may enforce its territorial authorizations. Bulk points out that when the truckers are not hauling under its PUC authority, the stickers are removed, and the fact that they indicate that independent contractors may be hauling under Bulk's PUC authority does not mean that the contractors hold themselves out as Bulk's employees or agents or that they should be viewed in any other way than as independent contractors operating as required by Pennsylvania law under the proper carrier's authority.

Finally, Bulk argues that there is no evidence that its negligence in any way contributed to Mr. Krumenaker's violation. Bulk concedes that it cannot completely shield itself from statutory liability by using independent contractors, and if it uses subcontractors that it knows or should know have a proclivity to violate safety rules or operate their trucks illegally or in an unsafe condition, it may contribute to a violation and properly be held accountable. However, in this case, Bulk maintains that it was not negligent in subcontracting coal loads to Mr. Krumenaker, and that the Act does not require it to personally supervise its independent contractors to such an extent that it insures that the isolated incident such as the one involving Mr. Krumenaker does not occur. Bulk concludes that any negligence concerning the violation should exclusively be attributable to Mr. Krumenaker.

Findings and Conclusions

The Jurisdictional Issue

Bulk takes the position that it is not an "operator" under the Act, has no employees present at the mine site, and is simply a coal haulage broker who has a customary and normal bona fide arms-length contractual relationship with its independent carrier/drivers and other trucking companies whose services it utilizes to fulfill its obligation to haul coal pursuant to an agreement with the production mine operator. MSHA takes the position that Bulk was an independent contractor for the mine operator and was identified as such pursuant to MSHA's independent contractor regulations, as well as in its agreement with the

mine operator. MSHA further points out that Bulk was performing a service at the mine in that it was the exclusive contractor who picked up and delivered the coal to at least one of the mine operator's customers, and also picked up and delivered coal to other customers.

Section 4 of the Act provides as follows: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14: Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." (Emphasis added).

MSHA's Independent Contractor regulations, which provide certain requirements and procedures for contractors to obtain MSHA identification numbers, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c): "'Independent Contractor' means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *"

The addition of the phrase "any independent contractor performing services or construction at such mine" as part of the 1977 amendments to the Coal Act was intended "to settle any uncertainty that arose under the Coal Act, i.e., whether certain contractors are 'operators' within the meaning of the Act," and "to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979). Accord, Phillips Uranium Corp., 4 FMSHRC 549, 552 (April 1982).

The legislative history of the Mine Act clearly shows that the goal of Congress, in expanding the definition of "operator" to include "independent contractors," was to broaden the enforcement power of the Secretary so as to reach not only owners and lessees but a wide range of independent contractors as well. In explaining this amendment, the key Senate report on the bill enacted into the Mine Act referred not only to those independent contractors involved in mine construction but also to those "engaged in the extraction process." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978) ("Legis. Hist."). Similarly, the Conference Report referred to independent contractors "performing services or construction" and "who may have continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. 1315.

The thrust of Bulk's jurisdictional argument is its assertion that it is not a mine production operator or owner, has no employees at the mine site, performs no construction work at the mine site, and is engaged in no activities at the mine site requiring any supervision on its part. Bulk maintains that the only independent contractor "operators" performing services at the mine site are its trucking subcontractors and owner drivers, and not Bulk, and that Bulk is simply a transportation "broker" who merely brokers coal hauling jobs to these "independent contractor" entities. In support of these conclusions, Bulk's focus is on whether or not there is an employer/employee relationship between Bulk and the independent contractor and subcontractor truckers whose services it uses to haul coal, and whether or not Bulk exercises any supervision or other control over these independent coal haulers. Bulk concludes that no such relationship exists, and that it is not an independent contractor performing services at the mine.

In Otis Elevator Company, (Otis I), 11 FMSHRC 1896 (October 1989), and Otis Elevator Company, (Otis II), 11 FMSHRC 1918 (October 1989), the Commission affirmed the decisions of Judge Fauver and Judge Maurer holding that an elevator service company that inspected, serviced, and maintained a mine elevator under a contract with the mine operator was an independent contractor "operator" subject to the Act and to MSHA's enforcement jurisdiction. The Commission affirmed the Judges' findings that Otis had a continuing, regular, and substantial presence at the mine site performing services on an elevator which was a key facility and essential ingredient involved in the coal extraction process. In making its determination, the Commission relied on the expanded definition of "operator" found in the Act, and examined the independent contractor's proximity to the extraction process and the extent of its presence at the mine to determine whether the

independent contractor was an operator under the Act. This same analysis is relevant and appropriate in this case.

The evidence in this case establishes that Bulk is a Delaware Corporation engaged in the business of providing coal transportation services to Bethlehem Steel Corporation's Beth Energy Division. Bulk has stipulated that at the time of the alleged violation, it had a contract with Beth Energy to haul coal from its Cambria Slope Preparation Plant to sites designated by Beth Energy, and that the coal hauled by Mr. Krumenaker on that day was being placed into the stream of interstate commerce. Bulk also stipulated that it was registered as an independent contractor of Beth Energy pursuant to MSHA's regulations found in Part 45, Title 30, Code of Federal Regulations, and pursuant to Bulk's contract with Beth Energy, Bulk was at all times considered an independent contractor and not the agent or representative of Beth Energy (Contract, Article VII, Section 7.1, Exhibit R-1).

Bulk's contract with Beth Energy commenced on October 1, 1986, and will terminate on December 31, 1991, unless further extended for an additional 3 years, at the option of Beth Energy. Pursuant to two additional agreements noted in the contract under "Scope of Work," Bulk was designated to pick up, deliver, and unload all of the coal from Beth Energy to Penelec. One agreement provides for deliveries of approximately 30,000 tons of raw coal monthly to Penelec, and the second agreement provides for deliveries of approximately 20,000 tons of clean coal monthly to Penelec. Bulk was obligated to deliver and unload any additional increased quantities of coal in accordance with delivery schedules established by Beth Energy.

Although it is true that Bulk does not own any of the coal haulage trucks, and that the drivers are not employed by Bulk, the fact remains that Bulk provides and performs services for the mine operator Beth Energy at the mine, albeit through the use of subcontractor and owner/operator truck drivers. Under the terms of the contract, Bulk was obligated to pick up the coal at the mine site and have it delivered and unloaded at the customer destinations designated by Beth Energy. The coal is loaded by Beth Energy's miners. Although Bulk chose to use subcontractors to transport and deliver the coal, with Beth Energy's blessings, Bulk was nonetheless legally obligated for the performance of the services called for under the contract. Beth Energy had no direct dealing with the subcontractors, and it looked to Bulk to provide its coal transportation needs. Given the large volumes of coal required to be transported by Bulk, and the fact that Bulk had the exclusive right to transport all of Beth Energy's coal to Penelec, I conclude and find that bulk was performing an essential service for Beth Energy which was closely related to the mine extraction process and was indeed an essential ingredient of that process. Beth Energy is obviously in the

business of marketing its coal, and without the means for transporting it to its customers through the services provided by Bulk, it would not remain in business very long.

As noted earlier, Bulk's contract to provide transportation services for Beth Energy's coal was for a 5-year period, subject to renewal at Beth Energy's option. The contract included two agreements for the transportation of coal on a regular monthly basis. Although the subcontractors used by Bulk had the option of accepting or declining to make themselves available to Bulk to transport Beth Energy's coal, any subcontractors utilized by Bulk to provide the services to Beth Energy, were legally operating under Bulk's state public utility approval. Bulk's owner Charles Merlo testified that he had "a constant flow of truck drivers" working for Bulk when it provided its transportation services to Beth Energy (Tr. 85), and I find no evidence that Bulk's services to Beth Energy were ever interrupted by Bulk's inability to retain subcontractor or owner/operated trucks to transport and deliver coal. Mr. Merlo confirmed that coal is hauled from the mine on an average of 4 to 5 days a week, and that there are occasions when it is hauled 6 days a week (Tr. 107). Under all of these circumstances, I conclude and find that Bulk had a continuous presence at the Beth Energy Mine.

In view of the foregoing findings and conclusions, I conclude and find that at all times relevant to this proceeding, Bulk was an independent contractor subject to the Act and to MSHA's enforcement jurisdiction, and Bulk's arguments to the contrary are rejected.

Fact of Violation

Bulk is charged with a violation of mandatory safety standard 30 C.F.R. § 77.807-3, which states as follows:

When any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than that specified in section 77.807-2 for booms and masts, such powerlines shall be deenergized or other precautions shall be taken. (Emphasis added).

MSHA takes the position that the truck operated by Mr. Krumenaker was a piece of equipment that was being operated on the surface of the mine, and that Mr. Krumenaker was required to pass under the energized high-voltage line in order to pick up and deliver the coal. MSHA points out that since Mr. Krumenaker had raised his truck bed, the clearance between the truck and the overhead powerline at that point in time was less than that required by the standard. Further, since Mr. Krumenaker's raised truck bed contacted the energized powerwire, MSHA concludes that

Bulk failed to take any precautions to deal with or prevent accidents of this kind.

Although the inspector found that the high-voltage line in question was located at an appropriate height above the truck, and that the height and location of the line did not violate any mandatory standard, the fact remains that by raising his truck bed while parked directly below the line, Mr. Krumenaker caused the clearance between the raised boom or mast of his truck and the line to be less than that stated in section 77.807-2. In such a situation, the standard required that the line be deenergized or other precautions taken to avoid contact with the line. Since this was obviously not done, I conclude and find that a violation of section 77.807-3, has been established.

Estoppel Issue

Bulk takes the position that MSHA's inconsistent and unpredictable enforcement decisions with respect to the prior vacation of two citations issued to Bulk in 1987, and its subsequent refusal to vacate the citation issued in this case, justifies the dismissal of this action. As correctly stated by MSHA, the argument advanced by Bulk is essentially one of equitable estoppel. In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (June 1981), the Commission rejected the doctrine of equitable estoppel, but 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 any civil penalty assessment. The Commission stated in relevant part as follows at 1421-1422:

[T]his restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.

Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty (as the judge did here).

See also: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983). In Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Court of Appeals for the Tenth Circuit, in affirming the Commission's decision at 5 FMSHRC 1400 (August 1983), stated as follows at 3 MSHC 1588:

As this court has observed, "courts invoke the doctrine of estoppel against the government with great reluctance" Application of the doctrine is justified only where "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation" Equitable estoppel "may not be used to contradict a clear Congressional mandate," . . . as undoubtedly would be the case were we to apply it here

This case presents a rather unique factual situation in that the production mine operator, Beth Energy, had a contract with its independent contractor Bulk which required Bulk to transport clean and raw coal from the Beth Energy mine site. Beth Energy paid Bulk for this service. Since Bulk did not own or operate any trucks, and with the approval of Beth Energy, Bulk utilized the services of subcontractor trucking companies or independent truck owner/operators such as Mr. Krumenaker to perform its contractual coal transportation obligations to Beth Energy. Bulk paid its subcontractors for their services. In this scenario, there are conceivably three separate entities who may be considered culpable "operators" subject to the Act, and accountable for the violation in question, namely, Beth Energy, Bulk, and Mr. Krumenaker. The issue as framed by Bulk is whether or not MSHA's decision to proceed only against Bulk for the alleged violation, rather than against the production operator, or Bulk's subcontractor driver/owner Krumenaker, was made for reasons consistent with the purposes of the 1977 Mine Act.

In Phillips Uranium Corporation, 4 FMSHRC 549 (April 1982), the Commission reiterated that the inclusion of independent contractors as "operators" subject to the Act clearly reflected Congress' desire to subject contractors to direct enforcement of the Act, and that MSHA's independent contractor regulations reflect that the interest of miner safety and health will be best served by placing responsibility for compliance on each independent contractor.

There is no evidence that Mr. Krumenaker or any of the other unidentified subcontractors who may have been used by Bulk to transport coal from the Beth Energy mine site had MSHA independent contractor ID numbers. The only entity identified and registered as an independent contractor pursuant to MSHA's regulations at 30 C.F.R. § 45.4, was Bulk. I find no evidentiary support for Bulk's conclusion that the 70 to 100 subcontractor truck operators used by Bulk to perform its contract obligations with Beth Energy are in fact independent contractors pursuant to the Act and MSHA's regulations. Although one may or may not assume that they are, absent any facts or evidence as to the extent of their presence at the mine site, and absent any further

information with respect to the factors that one must consider to make such a determination, I cannot conclude that each and every subcontractor conceivably used by Bulk to transport coal on any given day is an independent contractor subject to the Act.

The lease agreement between Bulk and Mr. Krumenaker was for 1 year, and it provides for the lease of Mr. Krumenaker's truck by Bulk for the "transportation of property." Under the terms of the lease, Bulk and Mr. Krumenaker had an independent contractor relationship which was not intended to create an employee-employer relationship. In short, Mr. Krumenaker was an independent contractor leasing his truck, and himself as the driver, to Bulk. Mr. Krumenaker had no contract with Beth Energy to perform any services at the mine. As a matter of fact, his lease agreement with Bulk does not mention the haulage of coal or any particular commodity, and Bulk was free to contract with anyone of its choosing to transport any "property," including the services of Mr. Krumenaker and his truck under their lease agreement. The respondent's owner, Mr. Merlo, confirmed that his lease agreement with Mr. Krumenaker is typical of leases that he has with 70 to 100 trucking concerns, more than half of whom are owner/operators.

With regard to Mr. Krumenaker, aside from the fact that he was at the mine site to pick up a load of coal on the day his truck contacted the overhead power wire, there is no evidence to establish the frequency or extent of his presence at the mine site, or the frequency of his exposure to potential mine hazards. Although the lease agreement between Bulk and Mr. Krumenaker was for 1 year, and it was executed on November 3, 1988, 2-months prior to the issuance of the violation on January 4, 1988, there is no evidence or testimony as to how often bulk utilized the service of Mr. Krumenaker to haul coal from the Beth Energy site, or how often Mr. Krumenaker may have been there prior to the incident in question. The evidence establishes that there was a constant change of subcontractors, that they "come and go," and that the variety of subcontractors used by Bulk to perform its contract with Beth Energy often worked for other truck carriers, and they had the option of working or not working for Bulk. When they did work for Bulk, the services they provided were to Bulk and not to Beth Energy. Under all of these circumstances, although the record may support a reasonable conclusion that Mr. Krumenaker was a subcontractor or independent contractor performing work for Bulk on the day he contacted the overhead power line, I cannot conclude that it establishes that he was subject to the Act as an independent contractor performing services for Beth Energy, or that he was otherwise within the reach of MSHA's enforcement jurisdiction.

The record reflects that MSHA's decision to vacate the prior citations issued to Bulk was made orally, and there is no documentation detailing MSHA's rationale in taking this action.

Although the respondent's assumption that the vacation of the citations was based on MSHA's finding that Bulk did not cause the violations may be reasonable, the fact remains that shortly after the citations were vacated, Bulk applied for and received its own independent contractor ID number (Tr. 140). When Inspector Davis issued the citation and cited Bulk in the instant case, he did so because Bulk was the only readily identifiable contractor with an assigned MSHA ID number of record, and he assumed from Bulk's decal on the truck operated by Mr. Kruenenaker, that he was an employee of Bulk. MSHA's subsequent refusal to vacate the citation was based on the fact that Bulk was registered as the independent contractor of Beth Energy (exhibit P-3).

Bulk's assertion that it exercised no control over its subcontractor drivers is not well taken. The record in this case reflects that the decision to hire or not hire any subcontractor truck driver was within the sole discretion of Bulk, and that Bulk paid the drivers for their services. Further, as pointed out by MSHA, the lease agreement between Bulk and its subcontractors provided for periodic inspections by Bulk of the subcontractors vehicles, and the agreement between Beth Energy and Bulk provided for Bulk's inspection of each vehicle after loading at the mine site in order to assure safe movement of the load and vehicle. Notwithstanding Mr. Merlo's testimony that Beth Energy has never required Bulk to have anyone present at the mine site, since the trucks were loaded at the site, Bulk was obligated under its contract to inspect the trucks after loading in order to assure that any coal loads are transported safely from the site.

Mr. Merlo confirmed that Beth Energy has had occasion to bring to Bulk's attention the fact that a contract driver may be speeding or not wearing his hard hat, and that this would be done by "a letter outlining the way we want our truckers to conduct themselves" (Tr. 91). Bulk in turn would communicate Beth Energy's safety concerns to the drivers by including any such letters in the drivers pay vouchers. Mr. Merlo further confirmed that he could refuse to use the services of any truckers who may have bad traffic records, and that he would not hire any truckers who may be cited by MSHA for safety violations (Tr. 103). Under all of these circumstances, I conclude and find that Bulk did in fact exercise/control over its subcontractor drivers, and that it may be held accountable and liable for violations of MSHA's standards, on an equal footing with the production mine operator and any other independent contractor or subcontractor found subject to the Act.

The question of whether to cite the mine operator or an independent contractor for a violation of a mandatory safety or health standard is within MSHA's enforcement discretion, and unless MSHA abuses its discretion, its decision should be affirmed. As the Commission note in Consolidation Coal Company,

11 FMSHRC 1439, 1443, (August 1989), and the cases cited therein "[C]ourt precedent makes clear that the Secretary has retained wide enforcement discretion and that courts have traditionally not interfered with the exercise of that discretion."

It is true that the circumstances concerning MSHA's decision to vacate the citations issued to Bulk in 1987, and to serve them on one of Bulk's subcontractors, were no different than the circumstances under which the contested citation was issued to Bulk in this case. It is also true that MSHA's refusal to vacate the citation was contrary and inconsistent with its prior vacation of the citations. However, I cannot conclude that MSHA acted arbitrarily and capriciously by refusing to vacate the contested citation. The oral decision by an MSHA supervisor to vacate the prior citations 2-years prior to the issuance of the contested citation in this case did not estop Inspector Davis from issuing the citation and citing Bulk on January 4, 1989, on the basis of the information then available to him. Since the evidence does not establish that Mr. Krumenaker was in fact an independent contractor subject to MSHA's enforcement jurisdiction, and since the inspector determined that Beth Energy did not violate the cited standard, I conclude and find that citing Bulk for the violation in question in this case was reasonable and proper, and Bulk's arguments to the contrary are rejected.

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); Youghioqheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Although Mr. Krumenaker was not injured when his raised truck bed contacted the energized high-voltage line, the contact with the 46,000 volt line caused eight of the tires on his truck to "blow out" (Tr. 27). Inspector Davis believed that in the event Mr. Krumenaker had grounded himself by touching the truck or ground at the time contact was made with the power line, it would have been reasonably likely that he would have suffered fatal injuries (Tr. 26). I believe that Mr. Krumenaker was fortunate and lucky that he was not seriously injured or fatally electrocuted when his truck came in contact with the high-voltage line in question. Under the circumstances, I conclude and find that the violation was significant and substantial, and the inspector's unrebutted and credible finding in this regard IS AFFIRMED.

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

Based on the stipulations by the parties, I conclude and find that the respondent is a small independent contractor subject to the Act, and that the payment of the civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

The record reflects that the respondent has no prior history of assessed violations, and I have taken this into account in

assessing a civil penalty for the violation which I have affirmed in this case.

Negligence

Mr. Krumenaker was not called as a witness and he did not testify in this case. As previously noted, there is no evidence or testimony as to whether or not this was his first trip to the mine, or whether he had been there before and was familiar with the site. The inspector's testimony that Mr. Krumenaker may not have known that he was parked under the high-voltage line suggests that he either did not realize he was parked under the line because it was dark, or because this was his first visit to the mine site and he was not familiar with the location of the overhead line. In either case, I do not find it unreasonable to expect a truck driver to get out of his truck and look around for possible overhead obstructions or other potential hazards before raising his truck bed to clear it of frozen coal. In the instant case, I believe that Mr. Krumenaker was in a better position than Bulk to avoid contact with the overhead powerline. Of course, if it could be shown that Bulk was familiar with the mine site and was aware of the potential hazard resulting from a truck with its raised truck bed coming in contact with the overhead line, then Bulk would be negligent. However, I find no such evidence in this case, and I cannot conclude that Bulk could have reasonably anticipated or prevented the violation.

With regard to Beth Energy's negligence culpability, although the evidence establishes that the height and location of the high-voltage line complied with MSHA's standards, the inspector confirmed that Beth Energy had posted no warning signs, and it would appear that the area was not lighted so as to enable a truck driver to see the overhead line when it was dark. Although the inspector believed that it was difficult for Beth Energy to control a driver's raising of his truck bed, and that Beth Energy "usually" instructed people about raising their truck beds, he was not certain that this was the case, and there is no evidence or testimony to reflect that Beth Energy ever issued any warnings to Bulk or any of the drivers who came to its property to pick up coal.

Assuming that Beth Energy installed and maintained the high-voltage line in question, and given the fact that it had control of the area where the trucks were expected to travel while picking up and loading coal, including the location where Mr. Krumenaker was parked at the time his truck contacted the line, I believe that Beth Energy knew or should have known that a driver stopped or parked under the high-voltage line might raise his truck bed and come in contact with the line. Under the circumstances, I believe that Beth Energy was obliged to either increase the height of its line to take into account the extended height of a raised truck bed, or at least post a warning sign or

provided overhead lighting for the line so that a driver is made aware of the potential hazard.

In view of the foregoing, I conclude and find that the violation did not result from Bulk's negligence. However, the fact that it was not negligent does not absolve Bulk from liability and may not serve as a defense to the violation. As previously noted, I have found and concluded that as an independent contractor subject to the Act, Bulk was properly charged with the violation in question, and the fact that MSHA did not also cite Mr. Krumenaker, the driver, or Beth Energy, the mine operator, was not arbitrary or capricious, and was within MSHA's enforcement discretion.

Gravity

For the reasons stated in my "S&S" findings, I conclude and find that the violation in question was serious.

Good Faith Compliance

The inspector confirmed that the violation was abated by Beth Energy's plant foreman by instructing Mr. Krumenaker to be aware of the high-voltage line, and a copy of the citation reflects that it was terminated on the same morning that it was issued. I conclude and find that the violation was promptly abated in good faith.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that in the absence of any negligence on the respondent's part, a reduction in the initial proposed civil penalty assessment of \$54 is warranted in this case. Accordingly, I assess a civil penalty in the amount of \$25, against the respondent.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$25, for the violation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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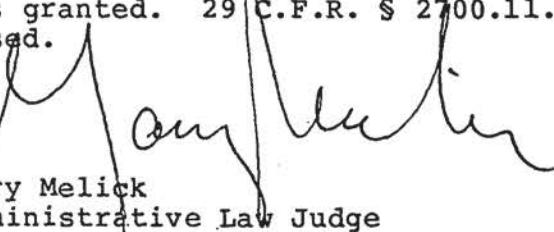
APR 24 1990

UNITED MINE WORKERS OF	:	DISCRIMINATION PROCEEDING
AMERICA (UMWA),	:	
ON BEHALF OF	:	Docket No. LAKE 86-15-D
STEVEN R. MAPLE,	:	Docket No. LAKE 86-16-D
THOMAS D. HEWLETT,	:	
DALE KING,	:	Sunny Hill Mine
Complainants	:	
v.	:	Docket No. KENT 86-26-D
PEABODY COAL COMPANY,	:	
Respondent	:	Alston No. 4 Underground

ORDER OF DISMISSAL

Before: Judge Melick

Complainant UMWA requests approval to withdraw its Complaints in the captioned cases. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. These cases are therefore dismissed.


Gary Melick
Administrative Law Judge

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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DENVER, CO 80204

APR 26 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-220
Petitioner : A.C. No. 42-01697-03581
v. : Bear Canyon No. 1
C.W. MINING COMPANY, :
Respondent :

DECISION

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

Before Judge Morris:

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, ("MSHA") charges respondent, C. W. Mining Company ("C.W.") with violating eleven safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.*, (the "Act"). All of the orders herein were issued under Section 104(d) of the Act.

After notice to the parties a hearing on the merits commenced on June 7, 1989, in Salt Lake City, Utah.

The parties filed post-trial briefs.

The parties stipulated as follows:

Stipulation

1. C. W. Mining Company is engaged in mining coal in the United States, and its mining operations affect interstate commerce.

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

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

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

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of C. W. Mining Company on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The proposed penalty will not affect C. W. Mining Company's ability to continue business.

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

9. C. W. Mining Company is a small operator with 285,550 tons of production in 1987.

10. 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.

Order No. 3227202

This order alleged respondent violated 30 C.F.R.
§ 75.1404. 1/

The order reads as follows:

The approved escapeway plan dated June 11, 1987 was not being complied with. The designated escapeway in the belt entry from the tailpiece for 4 feet 6 inches in length toward the surface has a walkway width of 24 inches. The approved plan states that 32 inches shall be maintained in width from the belt tailpiece to the surface. This condition existed in the main north section, Hiawatha seam (lower seam).

1/ The cited regulation provides:

§ 75.1704 Escapeways

[Statutory Provisions]

Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

Order No. 3044314

This order alleges respondent violated 30 C.F.R.
§ 75.400. ^{2/}

The order reads as follows:

Accumulations of loose coal and coal fines were allowed to accumulate in the active workings in the lower seam section in the following amounts and at the following locations.

(1) Loose coal and coal fines 24 inches high, 9 feet long and 6 feet wide at the tail roller for the section belt. The tail roller and bottom belt were running in the accumulations. This was on the walkway side of the feeder. Measurements on the off walkway side showed the accumulations of loose coal and coal fines to be up to 36 inches high and 14 feet long.

(2) Accumulation of loose coal and coal fines on the outby side of the stopping which the belt runs through - 26 inches deep, 5 feet long and 5 feet wide.

(3) Accumulations of loose coal and coal fines in front of the feeder breaker.

2/ The cited regulation provides:

§ 75.400 Accumulation of combustible materials.

[Statutory Provision]

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

Order No. 3075922

This order alleges respondent violation 30 C.F.R.
§ 75.400. 3/

The order reads as follows:

Accumulations of loose coal and coal fines and float coal dust were found to exist on the Marietta Continuous Mining Machine in the lower seam. The machine has loose coal and coal fines on and around the electrical compartments and float coal dust from 0 - $\frac{1}{2}$ of an inch deep. Section Foreman was standing at the machine.

Citation No. 3227145

This citation alleges respondent violated 30 C.F.R.
§ 75.512 4/

The order reads as follows:

The weekly examination requirement had not been made on all electrical equipment in the lower seam section. The last recorded date of an examination was 1-15-88 as recorded in the approved book for such purpose.

Reference the following citations and orders:
3227149, 3227153, 3227155, 3227157.

3/ The regulation is set forth in connection with the previous order.

4/ The cited regulation provides:

§ 75.512 Electric equipment; examination, testing and maintenance.

[Statutory Provision]

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Order No. 3227149

This order alleges respondent violated 30 C.F.R.
§ 75.601-1. 5/

The order reads as follows:

Short circuit protection was being provided for the 6 AWG trailing cable supplying 480 VAC #1 Roof Bolter being used on the Lower Seam working section.

The cable was plugged into a 100 amp circuit breaker with a trip range of 150-480 amps set on hi. The maximum allowable equals 300 amps. The cable was plugged in and energized. Refer to citations and orders 3044314, 3227145.

5/ The cited regulation provides:

§ 75.601-1 Short circuit protection; ratings and settings of circuit breakers.

Circuit breakers providing short circuit protection for trailing cables shall be set so as not to exceed the maximum allowable instantaneous settings specified in this section; however, higher settings may be permitted by an authorized representative of the Secretary when he has determined that special applications are justified.

Conductor size AWG or MGM	Maximum allowable circuit breaker instantaneous settings (amperes)
14	50
12	75
10	150
8	200
6	300
4	500
3	600
2	800
1	1,000
1/0	1,250
2/0	1,500
3/0	2,000
4/0	2,500
250	2,500
300	2,500
350	2,500
400	2,500
450	2,500
500	2,500

Order No. 3227153

This order alleges respondent violated 30 C.F.R.
§ 75.512. 6/

The order reads as follows:

The 1000 KVA transformer being used in the Lower Seam working section was not being maintained in safe operating condition.

The following conditions existed:

- 1) 2 top covers were not secured, one cover was located over the 7200 VAC side of the transformer.
- 2) Cover over the top of the 7200 VAC side was bent.
- 3) The disconnecting handle for the blade switch was missing.
- 4) The lid switches were inoperatively wired.
- 5) The leads from the 995 VAC bus bar to the 995 circuit breaker had some of the stranded wires cut out.

Refer to citation and order 3044314, 3227145.

Order No. 3227155

This order alleges respondent violated 30 C.F.R.
§ 75.512. 7/

The order reads as follows:

The heat lamp being used in the kitchen on the Lower Seam Working Section was not being properly maintained. The lamp is supplied 480 VAC.

The following conditions existed:

- 1) The bottom cover plates on the ends of the heater were missing, exposing the energized connection points for the elements.
- 2) The back of the lamp had a screw missing, exposing the internal connecting wiring. Persons may come in close proximity to these connections, approximately 8 inches on each end of the lamp when placing food on the bottom shelf to warm.

6/ The regulation is set forth at Order No. 3327145, supra.

7/ This regulation is set forth at Order No. 3227145, supra.

Order No. 3227161

This order alleges respondent violated 30 C.F.R.
§ 75.1704-2(d). 8/

The order reads as follows:

A map showing the section escapeway and main
escapeway from the Hiawatha Seam section was
not provided in the section for the miners.

Order No. 3227162

The order alleges respondent violated 30 C.F.R.
§ 75.303(a). 9/

An inadequate pre-shift examination was conducted for
the 9 p.m. shift 01/28/88. The afternoon shift foreman,
Max Hanson, made the pre-shift for the oncoming shift.
He reported to the oncoming shift foreman, Ken Defa, that
the No. 1 and 2 Entries faces need to be bolted. It was
not recorded as required or signed nor countersigned by
the responsible qualified persons. Refer to citations
Nos. 3044314, 3075922, 3227163, 3227164.

8/ The cited regulation provides:

(d) A map of the mine, showing the main escape system
shall be posted at a location where all miners can acquaint
themselves with the main escape system. A map showing the
designated escapeways from the working section to the main
escape system, shall be posted in each working section, in
order that the miners in the section can acquaint themselves
with the designated escapeways from the section to the main
escape system. All maps shall be kept up to date, and any
changes in routes of travel, location of doors, or direction
of air-flow shall be promptly shown on the maps when the
changes are made and shall be promptly brought to the attention
of all miners.

9/ The cited regulation provides:

[Statutory Provisions]

(a) Within 3 hours immediately preceding the beginning of
any shift, and before any miner in such shift enters the
active workings of a coal mine, certified persons designated
by the operator of the mine shall examine such workings and
any other underground area of the mine designated by the
Secretary or his authorized representative. Each such examiner
shall examine every working section in such workings

(Continued on page 9)

Order No. 3227163

This order alleges respondent violated 30 C.F.R.
§ 75.400. 10/

9/ (Continued)

and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuous at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

10/ This regulation was cited in connection with Order No. 3044314, supra.

The order reads as follows:

Combustible hydraulic oil, cardboard boxes had been allowed to accumulate in the return (immediate) entry in the Hiawatha seam section for 3 crosscuts inby the bottom of the rock slope. There was 11 5-gallon cans (full of hydraulic oil), 29 cardboard boxes with roof bolt resin, 4 cardboard boxes containing fire hose and 1 box containing pipe fittings, 18 empty 5-gallon hydraulic cans open and dripping remaining oil on 5 empty cardboard resin boxes on loose coal on floor, and 3 empties next to the off-standard shuttle car dripping remaining on loose coal floor.

Order No. 3227166

This order alleges respondent violated 30 C.F.R.
§ 75.400. 11/

The order reads as follows:

The rubber tired Lee Norse Model TA 1-29/431 26-2777A, SN 20691 was not being maintained in safe operating condition. Accumulations of coal fines, loose coal soaked with hydraulic oil and grease had been allowed to accumulate on the main controller belt, the lighting ballast box, main motors and conduits. There was float coal dust present also.

Witnesses

Robert L. Huggins, John H. Turner, Donald E. Gibson, and Fred L. Marietti, testified for the Secretary. Kenneth Defa, Nathan Atwood and Bill W. Stoddard testified for respondent.

The Secretary's initial witness testified as to Order No. 3227202. Other witnesses testified as to their knowledge of the facts relating to other orders.

In view of the broad scope of the evidence it is appropriate to set forth all of the evidence and then consider the contentions of the parties.

11/ The regulation was cited in connection with Order No. 3044314, supra.

Summary of the Evidence

ROBERT L. HUGGINS, a Federal Coal Mine Inspector, is a person experienced in mining.

On February 11, 1988, he inspected the Bear Creek Canyon underground coal mine. The inspection was initiated as a result of a 103(g) complaint. During the inspection Mr. Huggins was accompanied by his supervisor, Mr. William Ponceroff and by company representative Ken Defa. The order involved here was issued in the area called the pit mouth where the belt extends to the outside. At this point the tailpiece and the feeder are just barely underground (Tr. 12-15).

The Bear Canyon Mine is an underground coal mine and employs 20 to 40 miners. On this particular day the miners were scattered throughout the lower seam section but no coal was being produced (Tr. 16-17).

In June 1987 the company had asked for relief because the company could not maintain its escapeway at a width of five feet by six feet. As a result of that request Mr. Huggins investigated. After the inspection it was agreed that the company would install two or three steps off the catwalk. They would also make a path like a walkway so the miners could get down (Tr. 18). These things were done and the escapeway was approved. The escapeway referred to in Exhibit P-2 is the same escapeway mentioned in Order 3227202. The purpose of the memo was to advise the District Manager that a man on a stretcher could escape the mine with no problems. In June 1987 the width of the escapeway was 32 inches in width and about 12 feet in length (Tr. 17-20).

When Inspector Huggins conducted his inspection in June 1987 he measured the escapeway to be 32 inches. It is the inspector's contention that from the time of his inspection in June until the date he issued his citation in February 1988 the escapeway had been narrowed by the company installing roof support steel beams and timber. These changed conditions blocked the escapeway since the average measurements dropped to 24 inches (Tr. 23, 24, 41).

The inspector personally could go through the escapeway but because of restricted turns a stretcher could not have been carried through it (Tr. 23, 24, 25, 38, 41).

The company's other escapeway went out to the return, up the slope to the upper seam, and out. These two escapeways were separated by a cinder block wall (Tr. 38). If a person had a

problem getting through there they could simply back up 50 feet and go out the other escapeway.

The inspector believed the violation was S&S. This route was the only escape route out of the mine as the other entry had not been driven. Any injured miner would have to be left behind (Tr. 25, 26). The inspector believed that it was reasonably likely that any injury could be fatal (Tr. 26). He also designated this violation as an unwarrantable failure and referred to the tracking system in the MSHA office when he wrote this particular order. The (d) sequence was in effect; this fact is recorded in the office (Tr. 27, 28, Ex. P-5). If there had been an inspection to take the mine off of the (d) sequence, the inspector would have been informed of it. The mine must have a complete inspection before the (d) series can be dropped (Tr. 28).

He designated this order as an unwarrantable failure because this particular area has to be pre-shifted. In addition, the memorandums back and forth between the company and Denver (MSHA District Manager), states that if there is any change the situation has to be re-evaluated. No doubt the company installed the steel beams.

Inspector Huggins agrees the escapeway "was probably 15 to 20 feet underground and maybe 4½ to 5 feet in length" (Tr. 33).

Exhibits P-2, P-3, and P-4 contain evidence relating to the June 1987 approval of the escapeway.

JOHN R. TURNER, an MSHA underground coal mine inspector, has been so employed for 11½ years. He is experienced in mining and has held various jobs in the coal mining industry (Tr. 43-45).

He has inspected C.W. once or twice a year for the past 10 years. The company was previously called Co-op Mining. Management has not changed over the last 10 years; however, the working personnel has changed drastically (Tr. 45-46).

On January 29, 1988, the inspector went to the Bear Canyon No. 1 Mine. He went to the mine at the direction of his supervisor who advised him Inspector Ted Farmer was having severe back pains and needed relief at the mine. The assignment was made by Fred Marietti, his supervisor. At the time, Inspector Farmer was an underground coal mine inspector working out of the Orangeville office. He served in the same capacity as the witness. Mr. Farmer has not been in the Orangeville office for approximately a year. The day before the witness went to Bear Canyon on January 28, he and Mr. Farmer were inspecting a different mine in Salina, Utah. Later that night, Mr. Farmer received a call to go to the mine.

The inspection team from MSHA consisted of Messrs. Farmer, Marietti, and Gibson. Mr. Gibson, at the time, was a trainee. The three men went to the mine on the evening of the 28th. It was at 7 a.m. that he was told to relieve Mr. Farmer because of his back pain. He arrived at the mine at about 8 a.m. and he saw Farmer who was then preparing to go home. Mr. Farmer left after he arrived. He then went underground to meet Messrs. Gibson and Marietti and to continue Mr. Farmer's part of the inspection.

He met Nathan Atwood, maintenance foreman for C.W., and located the other inspectors near the continuous mining machine. The mining machine was dismantled; it was very black in this area.

He then proceeded out the return entry and met some workers. They said the inspectors were outside. He was then in the return entry where it connected with the slope. He went back up the slope following the same pattern he had used to come down. When he first saw Messrs. Gibson and Marietti, they were writing citations and orders outside the mine. Mr. Turner's name appears as a signature on some of the orders, but he was not familiar with every one of the conditions listed in the orders (Tr. 46, 54); but the signature of the witness appears on some of the orders. Mr. Marietti asked the witness to sign these orders. Mr. Marietti did not sign them himself. Some of Mr. Turner's signatures appear on some of those orders. Mr. Marietti's card was in Arlington because of the supervisory situation. Mr. Gibson did not have an AR card at the time (Tr. 54-55).

The witness did not observe the condition noted in connection with Citation 3227145 (Tr. 55, 56). Mr. Gibson or Mr. Marietti observed the condition.

The inspector signed but did not observe the conditions described in the following orders: 3227149, 3227153, 3227155, 3227161, 3227162, 3227202 (Tr. 55-59).

In connection with Order No. 3227163, Inspector Turner walked through the area on his way up to the return slope. He observed cardboard boxes containing a fire hose, 18 empty five-gallon oil cans (open and dripping). This condition was in the connector entry to the return up the slope. This was a return entry (Tr. 59, 60).

Inspector Turner believed the above accumulations violation was S&S because there was a violation of the regulation. The hazard could cause injury to the workers underground. Scoops and electrical equipment could cause an ignition. A fire could quickly spread (Tr. 59, 60).

Mr. Turner did not observe the condition described in Order Nos. 3227153 or 3227166 (Tr. 58, 59, 61); however, he saw the conditions described in Order No. 3227163 (Tr. 59).

The witness observed the conditions described in Order No. 3044314. He had not measured the loose coal and accumulations because Inspectors Marietti and Gibson had already noted these conditions. Based on his observation, he considered the loose coal and fines violated the regulation (Tr. 61). The violation was also S&S. This particular order was signed by Inspector Farmer (Tr. 61, 62).

Concerning Order No. 3075922, the witness did not measure the float coal dust; but he observed the dust and the blackness of the area. The "zero to quarter inch" description came from Mr. Gibson or Mr. Marietti. Mr. Turner considered this violation to be S&S (Tr. 62).

Most of the signatures on the orders are based on what the witness was told by other inspectors including Mr. Marietti, a supervisor. MSHA supervisors do not routinely sign orders or citations. It is part of the training for trainees that they write the body of the citations, which will be signed by a certified AR (Tr. 63). The AR Number must appear in the body of the order (Tr. 64).

Before he became a supervisor, Mr. Marietti was an underground coal mine electrical inspector (Tr. 64). When Mr. Turner signed these citations and orders, he had to believe these conditions existed. You could observe these conditions by walking through which he did when he was looking for Inspectors Marietti and Gibson. The orders he did not see he believes existed because he knew Mr. Marietti and his background as a competent electrical underground coal mine inspector (Tr. 65).

Mr. Turner agrees that the inspection began about midnight.

He signed the orders and citations because Mr. Marietti asked him to, also his boss Mr. Ponceroff said he should sign orders and citations that were issued. He was to take Mr. Farmer's part in the inspection (Tr. 65, 67).

Mr. Turner talked to Mr. Farmer about 15 minutes that morning (Tr. 68). It is not normal procedure to return the documents to the office and have Mr. Farmer sign them (Tr. 68).

Mr. Turner observed the condition of the accumulation of fines and coal dust on the miner and also saw the accumulation

of boxes and oil cans and other things (Tr. 68-69). The area of the mine in which the cans and oil were located was not well rock-dusted; it was damp and it was in the return entry. He judged the accumulations in the area did not accumulate within a shift or a day but took a longer period of time (Tr. 70).

Some of the cardboard boxes were empty (Tr. 71). It is not a violation to have oil underground to meet the needs of one shift as long as it is in proper containers and there is no spillage (Tr. 71). The mine was damp but Mr. Turner did not remember the cardboard boxes lying in water (Tr. 70).

Concerning Order No. 3044314: the loose coal and fines had accumulated but the witness did not take the measurements but merely observed them as he walked through (Tr. 72-73). The accumulations were dry and the area was not well rock-dusted. However, he did not take a rock-dust sample as required by 30 C.F.R. 75.403 (Tr. 73).

Regarding accumulations on the miner, it would be better stated if the accumulations were described as a film. With reference to float coal dust, one-quarter of an inch is a very small piece of coal. Mr. Turner observed the float coal dust on the machine (Tr. 74).

Mr. Turner did not approach Mr. Farmer to ask him to sign some amendments to the violations (Tr. 75).

Mr. Farmer lives approximately two blocks from the Orangeville office (Tr. 76). Mr. Farmer could have been subpoenaed to come to the hearing to testify (Tr. 76). When the witness met Mr. Marietti and Mr. Farmer these orders had not been written. Mr. Gibson was also present (Tr. 77).

The orders were written the morning and afternoon of the inspection. Mr. Gibson wrote some, Mr. Marietta wrote some, and the witness wrote some (Tr. 78).

Inspector Gibson wrote No. 3227155, 3227153, 3227149, and 3227145 (Tr. 79). The witness did not know what Mr. Marietti wrote. The remaining orders and citations were written by Mr. Farmer (Tr. 80). Mr. Turner signed all the citations and orders at one time; they were dated January 29, 1988 (Tr. 80).

Witness Turner wrote Order No. 3075922 but no others (Tr. 80-81).

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Forty to 45 citations or orders were written that morning or afternoon and Mr. Turner signed all 40 or 45 of them (Tr. 81-82).

The witness signed most of them. He did not feel it was necessary to go back into the mine and review all 40 or 45 citations that had been written that day (Tr. 82).

Of the 40 to 45 violations that had been issued, approximately 20 have been dismissed (Tr. 83).

DONALD EUGENE GIBSON is an electrical inspector employed by MSHA for two years (Tr. 84). On January 29, 1988, he was a trainee coal mine inspector with a specialty in electrical work. His AR card was issued February 28, 1988. While he was a trainee he traveled with Mr. Marietti. The witness did not sign any citations while he was in training status but he would write such citations. They in turn would be signed by other coal mine inspectors (Tr. 84-87).

He inspected the company January 28th and 29th of 1988 with Fred Marietti and Ted Farmer (Tr. 87). Mr. Farmer no longer works for MSHA (Tr. 88).

This inspection came about due to a formal 103(g) complaint filed with the field office supervisor. A 103(g) complaint is a complaint from a miner or a representative of the miners if standards are being violated (Tr. 88).

The complaint had indicated that production was being performed on the graveyard shift. This is the reason the inspectors arrived at the mine at approximately midnight (Tr. 89). They found that coal was being produced. They reviewed the mine books and found that a pre-shift of the lower seam had not been performed. In addition, the electrical book was not up-to-date.

Inspectors routinely write citations as they see the violations (Tr. 91). They also looked for someone in charge (Tr. 91). It is a matter of the inspector's preference whether to write a violation underground or to write it on the surface. In any event, he serves the operator if he sees a violation (Tr. 91-92).

They came to an entry where the continuous mining machine was backing out of a place that was very dusty and there was a lot of coal dust in suspension. A silhouette of the mining machine and the miners was present. The witness then walked up behind Kenny Defa, who was the mine foreman in charge at that time (Tr. 92).

Mr. Marietti told Mr. Defa they were conducting an inspection and he presented Mr. Defa with a copy of the 103(g) complaint. The copy does not have the complainant's name on it (Tr. 93). There were no line curtains up and there was no ventilation. The atmosphere in the mine was very warm. Everything was very black and coal dust was in suspension (Tr. 93).

Mr. Farmer said he could not get his anemometer to turn so they took a smoke-cloud test. There was no movement but suddenly there was ventilation because it got very cold in the mine; the temperature changed drastically. One of the items on the 103(g) complaint referred to ventilation (Tr. 94).

Order No. 3227145 is a (d)(1) citation. Mr. Gibson observed this condition, which is listed in the citation. This was one of the books that they examined before going underground.

The last date of the recorded examination was January 15, 1988. The regulation requires that examinations be made once a week, that is, once in a calendar week (Tr. 95). The last entry in the examination book was January 15, 1988 (Tr. 96). More than seven days had elapsed between the 15th and the time he saw the book. That would be 14 days that had elapsed (Tr. 96).

The inspectors wrote some 40 or 50 violations and orders during the course of the 29th until 6 or 7 o'clock that evening, that is, from midnight on the 29th until 6 p.m. on the 29th (Tr. 97). Many of these were electrical violations (Tr. 97-98). There was no record in the book of any weekly examinations. A qualified person who is usually an electrician conducts a weekly examination of electrical equipment (Tr. 98).

He observed the short-circuit protection set forth in connection with Citation 3227149 (Tr. 98-99). A qualified person could see this.

The conditions in Order No. 3227149 and No. 3227153 should have been observed by a qualified electrician. The top covers were bent down and a disconnecting candle for the blade switch was missing. These are obvious conditions.

In addition to the weekly examination cited in Order No. 3227145, the area was also subject to a pre-shift examination (Tr. 100).

Order No. 3227155: An entry should have been recorded in the examination book relating to the heat lamp used in the kitchen. Five orders were issued on this one heat lamp. Problems with the heat lamp were grounding and monitoring, and the short-breaker was set too high (Tr. 100-101).

These items should have been seen on the weekly exam by a qualified person (Tr. 100, 101).

The qualified persons performing the examinations should have been Nathan Atwood, maintenance chief; Cyril Jackson, electrician; Ken Defa; and finally Owen (last name unknown) (Tr. 101). Mr. Atwood was not present when the inspectors arrived (Tr. 101-102).

Witness Gibson considered Order No. 3227145 to be S&S. It was highly likely that injuries could happen due to the lack of a weekly examination (and correction) involving the electrical equipment (Tr. 102, 104). There could be openings in explosion-proof compartments, headlight deficiencies, motor, fan motor, and conveyor motor cables could be damaged. These are arc sources (Tr. 102-103).

Voltage at 480 A.C. could produce arcs that could ignite methane or the coal dust mixture in the air or other mixtures (Tr. 103).

This could cause an electrical shock hazard to the miners. A weekly examination is done to prevent those kinds of hazards (Tr. 103). If various electrical conditions were not examined and corrected, the possibility of a mine fire could exist (Tr. 104).

On January 29, 1988, there was quite a bit of float coal dust in the mine (Tr. 104-105). Such dust would ignite more quickly than solid coal or coal accumulations (Tr. 105).

Mr. Gibson's handwriting appears on Order No. 3227145 (Tr. 105).

This was an unwarrantable failure because management knew that the equipment had not been examined. It was highly probable that an injury could result, the seriousness of which could be fatal.

Based on his review of the book, the weekly examination had been performed January 15, but none since that time (Tr. 106). There were qualified people present who could conduct such an examination (Tr. 106).

Witness Gibson wrote Order No. 3227149. He observed the conditions noted in the body of the order. They were producing coal when the inspectors arrived (Tr. 107).

In this order (No. 3227149) Mr. Gibson said there was a trailing cable through the roof bolter (Tr. 108). The trailing cable went to the section transformer about 300 feet out back. The maximum length from the roof bolter to the transformer would be 500 feet (Tr. 108).

The energized cable was a No. 6 AWG. It was plugged into a 100 AMP circuit breaker with a trip range of 150 to 480 AMPS. That means there should be a short circuit between phases or phase to ground (Tr. 109).

If two phases short out then it is going to start the arcing or welding process. It will generate 1400 to 1700 degrees and burns can be caused by the arcing. Ignition can result.

This reading was set on 480 and it should have been set on 300 AMPS. Section 75.601-1 requires a setting of 300. This cable was lying on the mine floor in coal accumulations and coal dust (Tr. 110). Higher settings can be obtained but must be authorized by an AR of the Secretary after testing evaluation (Tr. 111). This was not done. The hazard involved here is causing the cable to heat; this could cause a fire.

Excessive heat could cause a mine fire, and a loose connection is always a heat spot. The witness has seen splices in trailing cables. They could blow apart, melt the installation off, and expose energized parts (Tr. 111).

A fire hazard could cause smoke inhalation, burns, and heart attacks (Tr. 112). There is a possibility of a shock hazard if the short circuit is set too high. A qualified electrician normally sets the short circuit protection (Tr. 113).

The inspector designated this violation as unwarrantable. This should have been checked by a qualified person. While 180 is not high, a person would be dealing with the effects of short circuit and, in view of that factor, it is extremely high (Tr. 114-115).

Order No. 3227153 was written by Inspector Gibson who observed the conditions listed in the order. The transformer was in one crosscut inby the feeder breaker on the lower seam. The feeder breaker was for the section. It is a 7200 volt primary and steps down to 480 volts. It is also stepped down to 995 volts AC, which would power the equipment being used in the section. The step down is to 480 and 995 volts (Tr. 115).

Order No. 3227153 deals with the maintenance of the equipment; there were two top covers on the transformer, one of which was located over the connection point for the 7200 volt incoming power and was not secured. The top cover lid was not secured to the transformer (Tr. 116).

The purpose of the cover lid is to keep people from contacting exposed energized components inside the transformer box and to keep out foreign material. If someone lifted the cover lid when the transformer was energized, foreign material could fall in there causing an arc. A person could contact them and be burned with an entrance and exit wound (Tr. 117-118). The cover lids are subject to a weekly electrical examination (Tr. 118-119); they are also subject to 30 C.F.R. § 75.900 which requires high voltage testing on a monthly basis.

This is an area required to be preshifted. The employees were also producing coal in this section (Tr. 119).

The second condition involved the top cover of the 7200 volt side. It was bent in a downward fashion close to the bus bars that went through the transformer. There was no air space for this cover vent (Tr. 119-120).

The copper bus bars were two inches wide and probably range from four to five, maybe six feet in length (Tr. 120).

The lid was bent close to the high voltage cable (Tr. 121). The thickness of the metal is usually about an eighth of an inch. Inspector Gibson did not see anything that could have bent the top cover (Tr. 122). The hazard created by this condition is that the cover could be resting against high voltage cable, that is, one of the leads from the high voltage side (Tr. 122).

In this mine the disconnecting switch was 800 to 1000 feet away. It is possible the vent cover could cause a shock hazard. This could energize the transformer.

The next condition was that the disconnecting handle for the blade switch was missing (Tr. 123). This is a small lever on a light switch which can disconnect if it is necessary to do repair work on the 480 or 995 volt side of the transformer. Internal arcing could be caused if there is no handle to disconnect. You can observe the disconnecting handle as you approach the transformer (Tr. 124).

The absence of a handle should have been noted in a weekly electrical examination. This particular item could have been overlooked by the pre-shift exam (Tr. 125).

The fourth condition involved an inoperatively wired lid switch. A lid switch is a small toggle switch installed on the high voltage side of the transformers to activate the pilot switch that would de-energize the transformer if the lid is open (Tr. 126).

This would prevent someone from being in contact when the lid is open. In other words, someone had wired this so that the safety device, a switch, would not operate (Tr. 127). This condition should be detected on a weekly examination (Tr. 128).

The final condition involved leads where the breaker had a part of the wires cut out to facilitate a connection (Tr. 129).

Cutting away part of the cable decreased the diameter of the cable and also decreased its current carrying capacity. This could cause an internal heat problem in the transformer. This is a potential fire hazard and it would be like a loose connection. Each of the conditions Mr. Gibson listed creates a hazard which is reasonably likely to result in an injury. In each case the injury could be serious (Tr. 130).

The order was an unwarrantable failure of the operator to comply. It was unwarrantable because the transformer had deteriorated and it is unwarrantable not to maintain the equipment to prevent a safety or health hazard (Tr. 131).

The bent and unsecured top covers would be items a person could see when he walked by the transformer. There were trip-and-fall hazards around the transformer in the nature of trailing cables, boxes, and loose coal (Tr. 133).

Mr. Gibson wrote Order No. 3227155 and observed the condition noted in the order (Tr. 133-134). The kitchen was two crosscuts inby the feeder breaker in the lower seam working section and one crosscut above the section transformer. The first-aid equipment is stored there and also SCSR equipment. It is a congregation point for the working crew (Tr. 134).

The heat lamp was 36 to 42 inches long and about 10 to 12 inches wide and 4 to 5 inches high. It was hanging from the ceiling of the mine roof. There was wire mesh where food could

be warmed. It was 4 to 5 inches from the lamp to the rack. The heat lamp was supplied by 480 volts AC. The lamp had filaments similar to mercury vapor industrial light three-eighths of an inch in diameter (Tr. 135).

On January 29, 1988, there was some food wrapped in aluminum foil lying on the lamp. The regulation was not being maintained because the bottom cover plates on the ends of the heater were missing exposing energized connection points for the elements (Tr. 136).

A copper pigtail was hanging down below the heat lamp. The copper wire was energized. If a person would contact it, he would receive a shock and could be burned. Persons placing their food on the bottom rack could contact the wire (Tr. 137).

Mr. Gibson designated this as an S&S because of the shock hazard and accessibility to the pigtails.

An additional condition involved the back of the lamp which had a screw missing, exposing the internal connecting wiring. The junction box on top of the heat lamp brought in the 480 volt power supply. The missing screw left all of the wiring exposed. Wires were energized (Tr. 138). If persons contacted them in the bare places they would receive a shock (Tr. 138-139).

There was a rickety table under the heat lamp. The lamp extended down 10 to 12 inches from the mine roof. If a person were six feet tall, he would be standing approximately level with the extended cord (Tr. 139).

Men in the working section, including the foreman, used the kitchen. The area should be pre-shifted (Tr. 140). The violation was unwarrantable because energized points were present. The section foreman is required to make on-shift examinations (Tr. 140-141).

The exposed wires were obvious to anyone who walked in the room.

The ground conductor was not securely fastened to the heat lamp and the short circuit protection did not comply with the law (Tr. 141).

Regarding Order No. 3227161: On January 29, 1988, during the inspection, Inspector Gibson could not find a map showing the designated escape routes from the coal mine. He did not see any map of the section. Normally it would be in the kitchen area (Tr. 144). He did not see any map underground. The workers did

not know whether there was a mine map underground. The map is also required to have some markings on it which would show two distinct and separate escapeways (Tr. 145).

This order was non-S&S. The miners knew the escape route. The purpose of 1704(2)(d) is for the miners to familiarize themselves should any changes occur in the route (Tr. 146).

This violation was unwarrantable because the law is very plain and there were foremen or supervisors in the working section (Tr. 127).

The mine foreman in charge is usually responsible and would be held accountable. Management was cited on two previous occasions for the failure to provide a map (Tr. 148).

Regarding Order No. 3227162: Inspector Gibson observed the condition as described in the order. He found no evidence that the pre-shift had been recorded in the book (Tr. 149). Mr. Defa told him that Mr. Hanson did the pre-shift examination. Inspector Gibson did not see anything to indicate that Mr. Hanson had entered the examination in the book. It had been reported to Mr. Defa that two entry faces needed to be bolted but nothing else (Tr. 150).

There were accumulations of coal, coal fines, and coal particulates in and around the belt tailpiece. The feeder breaker condition should have been recorded. Accumulations also existed in the return entry. Oil cans and the hydraulic oil were stored in the coal accumulations. Also there was a non-permissible pump in the return entry which was being used. The sideboard on one of the shuttle cars stuck out about 18 inches from the main frame (Tr. 152).

The steel peg was sticking out in the area where the miner's helper would stand while the mining machine cut coal. These were all obvious hazards. They could cause serious to fatal injuries to miners (Tr. 152). This citation was written by Mr. Marietti. Mr. Gibson observed the described conditions. The results of the pre-shift were not recorded as required. The purpose of pre-shift is to alert the oncoming shift to hazardous conditions in the section and those things that need some type of corrective action (Tr. 153).

The oncoming foreman reviews pre-shift examination to alert him of hazardous conditions and he signs the book. Failure to note conditions found in pre-shift could probably result in injury, depending on the conditions observed (Tr. 154).

Based on the inspector's observation of January 29, 1988, there were conditions not listed in the book that would create a hazard to miners going underground (Tr. 154-155). The conditions could cause serious injury. A pre-shift is required three hours before anyone enters the area. Hanson, a foreman, did the pre-shift examination in this case (Tr. 155).

This violation was unwarrantable because it violates the standard and there is a measure of safety involved. It is likely that a serious accident could result.

Management should be aware of conducting and recording a preshift (Tr. 156).

Order No. 3227163 involves coal and combustible accumulations located in an active working section. A part of the accumulation was around the corner where a shuttle car was parked; but basically, it was in the lower seam working section (Tr. 157).

There was some rock mixed in with the accumulations and Mr. Gibson helped count the containers. There were 11 five-gallon cans of hydraulic oil; 20 cardboard boxes with roof bolt resin; 4 cardboard boxes containing fire hoses, one box containing pipe fittings; 18 empty five-gallon hydraulic cans open and dripping oil on 5 empty cardboard resin boxes; loose coal on the floor; and 3 empty oil cans dripping oil on the loose coal on the floor.

Hydraulic oil and cardboard boxes are combustible (Tr. 158-159). The shift could use more than 11 five-gallon cans in one shift if they had some type of hydraulic failure. Also oil leaks in equipment could also cause loss of additional fluid. The accumulations did not appear to have occurred during one shift (Tr. 159).

This was not an oil station and there was no fire protection. Another source of electricity was the non-permissible pump cited in the area. This was a source of ignition. (Tr. 160). It looked like a K-Mart submersible 110 house pump (Tr. 161).

Accumulation of combustible materials, if continued unabated, is likely to cause an injury. The source of energy or the pump and the shuttle car could cause a fire. Oil could add to the intensity of a fire. There were coal fines in the area which would require less sparking to ignite than they would if they were a mere solid piece of coal.

This area is subject to a pre-shift exam and this violation was unwarrantable because of the amounts involved there (Tr. 162). It could not happen in a normal work shift but was more likely to occur over two or three shifts. There should have been several pre-shifts during that period and there should have been a weekly examination where it should have been noted. This accumulation was obvious and open. The foreman and mine management would have to pass through on a daily basis (Tr. 163-164). In two previous years the company has been cited for 30 violations of this regulation (Tr. 165).

Regarding Order No. 3227166: Inspector Gibson observed the conditions cited in the order. The Lee Nourse model is a roof bolter that was being used on the lower seam working section. Marietti was with him when he observed the roof bolter. This is the roof bolter that had the trailing cable also cited for having a high setting (Tr. 165).

This order was written by Mr. Marietti. Present were coal fines, loose coal soaked with hydraulic oil, grease that accumulated in the main controller box, the lighting ballast box, the pump motor, and conduits. There was also float coal dust present (Tr. 166).

Tools were used to take covers off but that is not done routinely. Usually they have the cooperation of the mine operator to do it for the inspectors. While checking this piece of equipment there were no miners present as they had left the mine (Tr. 167).

The float coal dust had settled on top of the roof bolter and mixed with other accumulations that were present under the shields and under various compartments in the roof bolt machine. A piece of the equipment looked black. The No. 1 and No. 2 entry faces had not been bolted as reported by Mr. Hanson to Mr. Defa. When they got there, they were going to start bolting (Tr. 167-168).

This roof bolting equipment would be walked by the pre-shifter (Tr. 168-169).

The equipment was where a foreman or management would walk by on that particular day. If these accumulations were allowed to continue, it was reasonably likely that an accident or an injury would occur (Tr. 169).

There could be a fire. Float coal dust is an ignition source and could ignite. Roof bolters, if they have a faulty trailing cable, could emit sparks. The trailing cable on this roof bolter had inadequate short circuit protection (Tr. 170).

A fire hazard would result (Tr. 170-171). An injury on this trailing cable would reasonably likely be fatal due to a fire.

This violation is unwarrantable. The amount of accumulations the inspectors observed was more than would occur during a normal work day. In the opinion of the witness it would take more than three shifts to acquire a similar amount (Tr. 171).

Order No. 3044314 is a violation for accumulation of combustible materials. This accumulation was in an active working section, the lower seam section, where the inspection was taking place (Tr. 172).

Inspector Gibson assisted Ted Farmer in taking the measurements. The order indicates accumulations at seven different locations: No. 1 accumulation was loose coal and coal fines 24 inches high and 9 feet long, 6 feet wide at the tail roller for the section belt. This was on the walkway side of the feeder. Measurements on the off-walkway side showed accumulations of loose coal and coal fines to be 36 inches high and 14 feet long. These are large accumulations (Tr. 172-173).

The belt itself was running in the accumulations. Loose coal and coal fines are combustible and there were two sources of ignition where the belt would be fractionable and the second source would be the feeder breaker set at an angle off the belt tail piece or tail roller. Electrical motors are there and there are two electrical motors on this particular machine (Tr. 174).

With the accumulations observed around the tail roller, which was in the intake air (Tr. 175), there could be a fire. Also there were bearings on the tail roller itself which were greased. This would be a third point of ignition. Coal fines are usually ignited because they are a fine grade of coal.

The condition described in No. 1 (tail roller), if continued unabated, would reasonably result in an injury or death due to smoke inhalation.

The second accumulation was at the first topping out by the box check (Tr. 176). This was a large accumulation. Again, the hazard was that the belt might catch fire. It is likely than an injury or fatality could occur from smoke inhalation.

The third item of the order was a large accumulation. This was on the back of the feeder where the shuttle cars were stopping and where they dump into the feeder. If the coal is dumped too fast from the shuttle car, a pile-up of coal occurs (Tr. 177-178). With regard to this hazard, the witnesses' testimony is the same as it was with regard to locations No. 1 and No. 2.

Location No. 4 is at the crosscut in a piggy-back spot where the kitchen is located. It covers an area 70 feet long, 6 feet wide, and up to 10 inches deep. This was quite a bit of an accumulation (Tr. 179).

Basically, two shuttle cars dumped into one and a lot of spillage occurs here. In this instance the shuttle car closest to the working face had been loaded with coal by the continuous mining machine (Tr. 180). A substantial amount of spillage occurred.

The kitchen was located inby the section transformer and there are various sources of ignition in the area such as shuttle-car cables, mining machine cable and roof bolter cable. (Tr. 181)

Dumping from one shuttle car to another creates a lot of dust (Tr. 181-182)

On the shuttle car that was closest to the feeder breaker, MSHA issued an order for a violation of § 75.503 for not being maintained in a permissible manner in that the front wheel was missing from this particular shuttle car. Damaged pieces in the cable would arc against this metal as it passed around it (Tr. 182).

At the anchor point of the off-standard shuttle car, which was on the other side of the entry at the piggy-back spot, one of the shuttle cars was anchored with a piece of 3/8 inch chain (Tr. 182-183). It did not have a brake source, a rubber tire, or anything like that to help take up the shock load. The chain was coiled around the trailing cable. The car would go back and forth in somewhat of a jerking motion. The inspectors observed that the trailing cable was being damaged. They didn't see any torn cable with exposed energized parts, but they saw the potential for exposing some energized portions of the cable (Tr. 183).

At location No. 5 there were loose coal and coal fines. This was a large accumulation. The same testimony applies as to the other locations.

At location No. 6 behind the line, curtain accumulations existed for a distance of 150 feet up to 18 inches wide and 18 inches deep. This was a large accumulation.

At location No. 7 and at the feeder breaker itself, the combustible oil had soaked into the coal. The feeder breaker has two electrical motors on it. (Tr. 183-185). The feeder

breaker was on the conveyor belt tailpiece airway. In seven of the locations cited, there were miners and foremen in the area. These locations are also subject to a pre-shift examination. These accumulations were obvious (Tr. 186). On-shift examination should alert someone to the hazards created by these accumulations. The next available shift is advised by reading the pre-shift examination. Miners were three hours into their shift when the inspectors arrived for inspection on the 29th. Three hours of production would have been enough time to have accumulated the amount of coal at the piggy-back spot (Tr. 187-188).

The accumulation around the feeder breaker would have taken longer than three hours. It could have occurred during the three-hour period (Item 3). The No. 1 and No. 2 could have taken a little longer than a three hour-period. If it had taken longer it should have been there during the shift prior to the inspectors' arrival.

Regarding unwarrantable failure: The section foreman would have walked around this area during the shift when the inspectors arrived (Tr. 188-189).

Concerning Order No. 3044314: The locations in the order would have been subject to an on-shift examination. They should have been seen in such an examination. These were serious accumulations that could create serious hazards.

Order No. 3075922 alleges a violation of \$ 75.400 for accumulations (Tr. 189-190).

These accumulations were found to exist on the Marietta continuous mining machine on the lower seam. Loose coal and coal fines are combustible. This was electrical equipment. This piece of equipment was very black. The machine was generating the coal dust. Continuous mining machines have sprays to keep down the dust and a few sprays may have been operating (Tr. 190-191).

The accumulations of loose coal and fines were under the shields around the electrical compartments in the electrical motors.

The measurements that the witness took and that Mr. Turner talked about called the film at 0 to a quarter or more in depth. A foreman was standing beside the mining machine while it was in operation. The witness could barely see the machine when he first approached it; when the dust settled down he could see it (Tr. 191).

FRED L. MARIETTI, a coal mine inspector in the Orangeville, Utah office, has been employed by MSHA for 11 years. He has been working in coal mines since 1973 and was experienced in mining and specialized training. He is a qualified electrician under 30 CFR in Utah; he also has fire boss papers.

Mr. Marietti accompanied Messrs. Gibson and Farmer on the inspection of January 28-29, 1988. At that time, he was in a supervisory capacity and was assigned to lead this team.

Messrs. Farmer, Gibson, and the witness arrived at approximately 11:45 p.m. on January 28. They chose that time because the 103(g) complaint said coal was being produced on the graveyard shift. When they arrived, they checked the books on the surface, one of which was for the weekly electrical exam (Tr. 289-308).

Inspector Marietti observed the conditions described in Order No. 3227145. Mr. Marietti heard Mr. Gibson testify and he agreed with him as to the conditions.

In view of the number of electrical infractions, they concluded that there had not been an examination, and if there had been one, it had been inadequate. The order was S&S. Given the conditions, it was reasonably likely that a serious accident could occur. Mr. Marietti agreed that the order was a (d)(1) citation. Messrs. Atwood and Defa should have noted the violations. Mr. Defa was present when they arrived. The miner was running when they arrived. When they entered, Mr. Marietti observed a considerable amount of float coal dust suspended in the air. When it is suspended, coal dust can cause an explosion. He observed the silhouette of the miner and Mr. Defa. The air seemed stagnant. He told Mr. Defa why they were there (Tr. 307).

Messrs. Gibson and Farmer proceeded to use chemical smoke to determine air velocity quantity. They followed Mr. Defa out, and as they did, the air seemed to change (Tr. 304-308).

The opening or closing of the curtain and the portal would change the air in the mine immediately. Mr. Marietti wrote the body of some of the citations but his signature does not appear on any of the orders. He did not sign because it is a standard practice that a supervisor accompanying inspectors does not sign violations (Tr. 210). Mr. Turner signed the citations.

Order No. 3227149 (short circuit protection). Mr. Marietti wrote this order and viewed the conditions listed in it. He agreed with Mr. Gibson's testimony. The short circuit should have been set on 300 instead of 480. This was an S&S violation.

If a fire occurs, miners can be overcome by carbon monoxide and fatalities and burns can occur. Burns can cause death. This violation is noted in the order as due to an unwarrantable failure. From past inspections Mr. Marietti issued numerous citations of a similar nature. It is apparent they were negligent in making this examination. It should have been seen by management. The electrician is supposed to make these changes. Mr. Defa, the qualified electrician, was near the trailing cable (Tr. 312-314).

Order No. 3227153 (transformer): Mr. Marietti observed these five conditions. He agreed with Mr. Gibson's characterization. These conditions created a hazard. Persons could get into the transformer and work on the secondary side without having an open visual disconnect. Hazards are for fire and shock. He considered this to be an unwarrantable failure because the area needs to be examined at pre-shift and on-shift. The lid was visible and it should have been maintained in the manner designed by the manufacturer. There is a possibility that the transformers could be hit by a roof fall.

Unwarrantable failure also existed here, due to the number of electrical violations, as well as to the operator's negligence in maintaining the electrical equipment (Tr. 315-318).

Order No. 3227155 (heat lamp): Mr. Marietti agreed with Mr. Gibson on the characterization of the conditions. He saw the bottom cover plates and the screw missing. The condition of the heat lamp created a hazard. Miners could contact energized parts which would constitute a serious shock hazard.

Miners could contact conductors called pigtails. The violation was unwarrantable because section foremen enter this area. He believed the company was lax and negligent.

Seven people were affected. Other items contributed to the problem of the heat lamp. The same were described by Mr. Marietti. All of these things contributed to his determination that this was an unwarrantable violation (Tr. 319-322).

Order No. 3227161 (mine map not posted): Mr. Marietti did not see the map posted, nor did he see any kind of map. He considered this to be unwarrantable because management is responsible to see that a map is placed in a section. Mr. Defa said he didn't know where the mine map was located (Tr. 322, 323).

In the last six or seven years, mine management has been fairly consistent, that is, it had the same managers. Management personnel were Messrs. Defa, Nathan, and Kenny. Occasionally they changed job titles.

Order No. 3227162: Mr. Marietti agreed with Mr. Gibson's characterization. He talked to Mr. Defa regarding pre-shift exams. Mr. Defa said Mac Hanson made the pre-shift examination. He did not consider the report to be adequate. The citations issued here indicate obvious things that a pre-shift examiner would see. During the inspection, Mr. Marietti saw items that should have been pre-shifted. He believed the inadequate pre-shift was an S&S violation. The items that were missed created a hazard to the miners in the area. Such hazards could cause serious injury. Unwarrantable failure existed because it was made by the agent of the operator.

Mr. Marietti wrote this order. The failure to record part of the order was deleted. He didn't know what happened to the citation written by Mr. Farmer, that is, he didn't know what happened to Exhibit R-1 (Tr. 325-331).

Order No. 3227163: Mr. Marietti wrote this order. He observed the conditions with Mr. Gibson, with whom he agreed. The accumulations were in two crosscuts about 100 feet apart. They said they hadn't done any roof bolting so he assumed the resin was from a previous shift. It is not possible to have used that much hydraulic oil in one shift. These accumulations contribute to a fire hazard. An operator should not leave oil cans dripping on the floor. This appeared to be an oil storage area. This violation was unwarrantable because the area had to be pre-shifted for each shift and the section foreman should have walked by the area (Tr. 322-333).

Order No. 3227166: This order refers to accumulations and to the roof bolting machine. Mr. Marietti wrote this order. He agreed with Mr. Gibson in regard to the conditions listed in this order. The violation was S&S. A fire hazard was created. Float coal dust would contribute to the propagation of an explosion. A roof bolting machine is a source of ignition. The violation was unwarrantable because the equipment was parked in the face and the area would have to be pre-shifted. Regulation 303(a) says that if a pre-shifter observes a hazardous condition, it is to be noted in the book and the condition corrected (Tr. 334, 335).

Order No. 3044314: This order was written by Mr. Farmer. The witness agreed with Mr. Gibson's testimony that each of these seven areas was a hazard. The intake air did not pass over the tailpiece of the feeder. Conditions 4, 5, 6, and 7 of the order were found in the intake air. When it is located in intake air, coal is more apt to burn and propagate a fire. The violation of Order No. 3044314 was an unwarrantable failure because the foreman would have passed these points three times so it should have been obvious to him.

Order No. 3075922: This order was written by John Turner, who observed the conditions. This was the mining machine he described as being in a silhouette. The mining machine, the cables, the bits, and the lack of sprays contributed to the serious hazard (Tr. 338-340). This was a fire and explosion hazard, as well as an unwarrantable violation, because the section foreman was standing right there. These things the company was cited for were obvious and displayed a negligent attitude (Tr. 341-342). When he saw the float coal dust in the air when he first walked underground, he was fearful that an explosion might occur (Tr. 338-342).

C.W.'s EVIDENCE

KENNY DEFA has been employed by Co-op or C.W. for a little over 20 years. He has performed almost all of the duties in the mine over that period. On January 28 and 29 of 1988, he was superintendent and in charge of a mining crew producing coal. He is certified.

The MSHA inspection team consisting of Messrs. Farmer, Marietti and Gibson arrived close to midnight. Mr. Defa met the three men about 70 feet from the face area. At this point they could not see the operation going on at the face (Tr. 391, 392).

The group was around the corner. There was a curtain between them and the face. They walked back toward the mining machine after Mr. Defa told them they were going to inspect the section. Mr. Defa instructed the men to go home because he had been informed the company would not be mining any more coal. The only time the mining machine was operating was when it was trimming out of the face area. The miners were not cutting coal because the buggy had not arrived from the last trip.

The air current was normal at about 9,000 CFM. In the face area there was probably a normal amount of accumulations that you get in a mining shift. They were in the second production shift since a maintenance shift. There were some coal accumulations. The entire mine was extremely wet due to ground water.

To Mr. Defa's knowledge, they were keeping the ribs in the area rock dusted. Also the ventilation was being kept up and the trailing cables were out of the way of the buggies.

No one on the shift stopped or short circuited the flow of air. He did not notice any abrupt change in the air flow after the inspectors arrived.

Going in the direction the buggies had to travel it was approximately 600 feet from the belt line. This was longer than the buggies could travel so they would transfer from buggy to buggy about the half-way point. The second buggy would dump the coal on the belt. The general clean-up would have been done when they were not producing. The B-bag area, where the transfer was made from buggy to buggy, would be cleaned up several times a shift. If the area is not cleaned regularly, the buggies get stuck in it.

The previous clean-up would have been on the day shift between 6 and 3 o'clock the preceding day. Mr. Defa didn't recall if it was done on his shift. It would have to be cleaned up after about every 30 yards of coal had been moved (Tr. 393-397).

Mr. Farmer took a rock dust sample approximately 20 feet on the return side of the miner. This would show an extreme amount of combustibility because any coal dust would drift into the return. They never heard the results of the test.

The witness was not traveling with Mr. Marietti nor with Mr. Gibson because he understood Mr. Farmer was the qualified inspector.

Mr. Farmer said he was leaving because he wasn't feeling well. He was also disgusted with the way the inspection was being conducted, and the way Mr. Defa's personnel were being treated.

On several occasions Mr. Marietta called Mr. Defa a liar, a potential murderer with no regard for human safety. The witness didn't recall Mr. Gibson making any statements. Mr. Defa did not consider the condition in the face area to be dangerous. His son was running the continuous miner and Bill Stoddard's son was in the mine. The witness is conscientious and concerned with the safety of people.

C.W. has a safe mine and takes reasonably good care of it. He would not run a production shift without ventilation. The curtain the inspector was talking about is one used on occasion when the mine was idle. The weather was very cold. They did block off a portion of the air when the mine was idle.

If the witness had wanted to shut the air off he would have simply closed some regulated doors instead of using a curtain (Tr. 398-402).

Order No. 3227202: Mr. Huggins was inspector on June 1987. Actually they carried Mr. Defa through this fairly narrow escapeway in about ten seconds on a stretcher to demonstrate possibility. Mr. Defa didn't recall the exact width of the escapeway. No one said the escapeway had to be maintained at 32 inches. It had to be approximately 4½ feet long. He did not remember having to be turned. From June of 1987 until February 11, 1988, there were no changes made in the escapeway. Mr. Huggins said a stretcher carrying a man would not go through the area but the company did it once and they could do it again. It was fairly tight, but we made it. He was familiar with all of the construction in the mine during that period. From the date the test was made in June until February 1988, the escapeway had not been narrowed in the least degree. He would know about it if it had been (Tr. 403-407).

The examination was done weekly. It had been done on schedule for close to two years.

Mr. Atwood confirmed to Mr. Defa that he had made the inspection but he had forgotten to write it in the book. For the last two years it has been recorded on schedule. Co-op and C.W. did not receive any violations for not doing that for over the last two years. Also, no danger exists from not recording the weekly electrical examination (Tr. 407-408).

Order No. 3227149 (short circuit protection and trailing cable): Mr. Defa was with MSHA when they pointed out this violation. When it was pointed out he turned the dial back to the legal limits with a screwdriver. Mr. Marietti watched him do that. Anyone with a screwdriver can do it. There is no difficulty with the equipment tripping out. The trailing cable was cold. This is rock roof and it was wet in the 20 feet around the transformer.

Mr. Defa could not see any hazard. It was not likely the cable would have ignited anything in the area even if it overheated. The floor is also rock. The company does not, as a matter of practice, set circuit breaker protection higher than it should be. This circuit breaker had been in the mine as long as the transformer, about a year. The equipment is checked weekly by an examiner.

Mr. Defa questioned most of the men on his crew regarding the setting on the device and no one knew anything about it.

Mr. Defa questioned most of the men on his crew regarding the setting on the device and no one knew anything about it. It would have been easy for an ex-employee to have changed it. This was accessible to anyone in the mine (Tr. 409-412).

Order No. 3227153 (transformer covers): There are two bolts that secure each top cover; there was one bolt missing out of each of the two covers. One side still had a bolt in it. It was not difficult to remove the bolts. Mr. Defa didn't know why anyone would want to remove two bolts. The only changes made are the breakers or plugs in the transformer; otherwise no changes or alterations are made. He could not see any hazard in the bent cover. The hazard was if the plate were to come in contact with the live energized parts. There was at least a three-inch clearance from any parts inside the transformer.

There was about a two and one-half inch clearance between the bus bars and the inside of the transformer. The distance between the vent cover and the contact point was greater than the distance between the internal parts to the cover. The covers weigh close to 100 pounds. A person could not lift the cover without removing the remaining bolt that was securing it. Other than a qualified electrician, no one has attempted to get inside the covers. The only reason to get inside the covers would be if someone wanted to kill himself.

The transformer lacking a disconnect handle: Mr. Defa did not know how long the equipment had been without a disconnect handle but other inspectors had examined the transformer previously. C.W. had not received any prior notices for such a violation. This connect handle is used to de-energize the transformer in case some maintenance work needs to be done on it.

In the event of an emergency there is a red button by the handle which will disengage the power. It is faster and safer to push the button. The electricians carry a handle in their vehicles. Mr. Defa believed it is the same for all transformers. The electrician who would handle this matter would be John Tucker or Nathan Atwood. Mr. Marietti pointed out that one of the lid switches was corroded inside and malfunctioning. When the lid was lifted the switch did not open. The lid switch had been rewired to accomplish some sort of a short circuit.

C.W. has other transformers in the mine that do not have the lid switches. There is no difference between a transformer that has no lid switch and one with a lid switch that does not work. Mr. Defa was not aware of any regulation that requires a transformer to have a lid switch.

This machine has a 995 volt lead which goes to the bus bar and supplies power to the continuous mining machine. Someone cut four or five strands off the end of the wire where the ring tongue connected to the bus bar. This was a 4/0 cable which is slightly bigger than the witness's thumb.

The witness is experienced in helping electricians but is not certified as such. He has never had any problems from over-heating or shock hazards with this transformer (Tr. 413-421).

Order No. 3227155 (heat lamp): Mr. Defa was present when this violation was pointed out. Two covers, which measured approximately 2 x 3 inches, were missing. The actual contact point where one could touch any energized screws would not be larger than the size of a quarter of an inch screw head.

Mr. Defa saw no pigtails and he didn't believe they were there. It would not be likely for someone to reach into this quarter-inch area and be burned.

The only reason to take the cover off would be to change an element. During weekly electrical examinations this equipment would definitely be checked, but he doubted if a pre-shifter would look at such a small unusual thing. There was a missing screw, which allowed one part of the heat lamp to sag from the other.

The witness observed the wires they claim were exposed, but the insulation was in good shape; there was no danger in allowing one section to hang down to expose the insulated wires. A person could not get shocked by this condition, so it was not a serious danger.

The wires running to both ends of the heat lamp were insulated because the lamp gets hot. There would be no danger in the fact that a screw was missing allowing one section to hang down exposing the insulated wires. No shock was possible if someone touched the wires. Missing covers are not a serious danger because it would be extremely hard for a man to make contact with these wires (Tr. 422-425).

Order No. 3227161 (failure to have a mine map): Mr. Defa did not think this was a big deal because one could see the escapeways from the underground portion of the mine. The secondary escapeway is four and one-half feet long, while the primary escapeway in the intake is two or three feet longer. Inspector Farmer said he wouldn't write a citation; Mr. Marietti disagreed.

Abatement occurred when the oncoming shift took a map underground and posted it in the kitchen. These miners were all experienced. Every six weeks the miners travel one of the escapeways and the next six weeks the other escapeway. CW has fire drills every 90 days to review the procedure.

If a person is at the very back of either of these escapeways, he can see the surface from both. The miners were not questioned if they knew how to get out of the mine. Inspector Farmer expressed aggravation that this citation was written. No danger was involved in the situation (Tr. 427-428).

Order No. 3227162 (pre-shift exam): At the time, Mr. Defa was both superintendent and shift foreman responsible for the pre-shift exam. The man responsible for the pre-shift was Max Hanson, the foreman on the preceding shift. Mr. Hanson had done the pre-shift and he was on his way out when Mr. Farmer came into the mine. He told Mr. Defa the first right and first left entries had not been bolted as was needed. He was to then go outside and write it in the book. When the inspectors arrived, they informed the witness there was no pre-shift in the book.

Mr. Hanson did not write it in the book. During the inspection they found Mr. Hanson's time, date and initials in the face area and Mr. Defa pointed this out to Mr. Farmer, who then entered this pre-shift in the appropriate book. The entry was made after midnight. Mr. Farmer wrote the violation because the proper entry was not in the book.

Other than two areas that needed to be roof bolted, there was nothing the pre-shift examiners should have entered in the book. Inspector Farmer and Mr. Defa did a complete new pre-shift examination. Other than the accumulation and the guard missing on the feeder breaker, Mr. Farmer did not point out anything else that needed correction. He didn't refer to any other notices of violation. Mr. Farmer abated the violation by saying the pre-shift had apparently been done adequately because he was there and it had been recorded. Mr. Defa did not see any danger in the way Mr. Hanson had recorded it, nor any danger in not recording the results in the book. They took care of these conditions (Tr. 429-432).

Order No. 3227163 (accumulations): The witness was present when the inspectors pointed out the combustible materials in a small area. Also, this was a new mine in this seam with only two entries into it. They were in the process of trying to mine a new intake portal out. They were cramped for storage area and had only one ingoing roadway. As noted, there was some roof bolt resin stored in the area as well as fire hose, pipe fittings, and also the oil storage.

Trash was also brought out of the face area to a collecting point at the end of the shift. One problem was there was no roadway into the area and everything outbound had to be carried to the surface by hand. The accumulations had been carried to the surface on the previous shift.

There were 11 five-gallon cans full of hydraulic oil stacked with the rest of the supplies. There were also two pallets of rock dust and a fire valve. The storage of the oil was temporary because the company usually kept what they would use through 24 hours, two production shifts. In addition to the 11 five-gallon hydraulic cans, full cans were stored in their original containers. The 24 cardboard boxes of roof bolts used underground were in their original boxes.

The four boxes of fire hose were in their original containers. Mr. Defa did not recall seeing any cans dripping oil but this coal mine is extremely wet. These cans were used at the first of the witness's shift when he came on. The continuous miner was low on oil and one of the buggies had to have oil added. All of the empties had been consumed in his shift. The five empty cardboard boxes had contained roof bolt resin. A good portion had been used during his shift.

The boxes being dripped on were definitely wet, due to the water in the mine. If Mr. Defa told Mr. Marietti the shift had not roof bolted during the shift, he (Defa) lied, because the roof had been bolted. They were on a 20-foot cycle. They were three hours into his shift and had 40 buggies of coal, so they would have had to have mined at least three faces of coal. There was no danger of fire from accumulations because there was no way to ignite a fire due to the wet conditions. This area was also rock dusted. There was no other danger at all (Tr. 433-438).

Order No. 3227166 (accumulations on the roof bolter): The witness had seen the roof bolter but was not aware of this item until the next day. Mr. Farmer did not claim it had to be cleaned off. It is hard to mine coal and not get a film of accumulations. The continuous miner generates a certain amount of coal dust so one of the main purposes of the return entries is to provide an exit for the accumulated dust and methane. C.W.'s maintenance program requires that all electrical equipment be cleaned off and washed with water during the two maintenance shift. In the last ten years, there may have been an occasion when it was not done. This violation notice was not proper because the equipment was cleaned at the last maintenance shift. Mr. Farmer didn't think there were many accumulations on the roof bolter. In fact, there was water dripping on the bolter so any accumulations would have been extremely wet. Inspector Farmer walked by it and did not say anything.

Mr. Hanson had also written his time, date, and initials on the cab of the roof-bolting machine. It was believed that Mr. Atwood, who was in charge of maintenance, would have seen the equipment. Mr. Defa called Mr. Stoddard, the president of the company, to look at things because he did not agree with the accusations being made (Tr. 438-443).

Order No. 3044314 (loose coal and fines): The conditions were seen by Inspector Farmer and the witness. The tail roller protrudes into the mine exactly 4½ feet. The violation could not have been for 14 feet, because the belt extends only a total of 4½ feet into the mine. The only thing they could decide was that a lump of coal had been caught in the hopper. Normally C.W.'s maintenance program would have cleaned the belt on the maintenance shift, especially at the transfer points.

Mr. Defa did not walk by this particular point on this shift. In the previous shift, 24 hours earlier, the same problem existed and they cleaned it up. He believed the pre-shift or on-shift book states these things. The pre-shift examiner did not tell Mr. Defa there was a problem. These accumulations could have occurred within five minutes, if something were caught in the hopper.

The next area divided loose coal and fines on the outby side of the stopping through which the belt runs 26 inches deep, 5 feet long, and 5 feet wide (Tr. 445). In this outby area it would be on the same belt just out from the stopping and continuing to the surface. Mr. Defa helped the inspector make the measurements and wrote them down, so they are believed to be accurate. Mr. Gibson was not present when the measurements were taken.

The cause of accumulations: There was a small pile on one side of the stopping and another on the other side. There was a limited amount of clearance where the belt traveled through the stopping. This accumulation could be the result of an oversized lump of coal being wedged between the belt and the stopping. It could happen in five or ten minutes. Based on his experience in a mine, it could have happened in a short time during his shift.

Area No. 3 (accumulations of loose coal and fines in front of the feeder breaker 28 to 15 inches deep for 35 feet long and 20 feet wide): This area is a big mud hole. The water was approximately six to eight inches deep. The loose coal was definitely saturated with water and ice, mostly ice. On occasion they would clean it up during a production shift. Mr. Defa was not sure when it would have been cleaned up but it would have been on the day maintenance shift. It was not cleaned on his shift (Tr. 449).

Area No. 4 (the crosscut at the piggyback spot distance of 70 feet long X 6 feet wide, and up to 10 inches deep): This is the area where one shuttle car was dumping into the back of the other shuttle car. Spillage always occurs. At the far end away from the transfer points he doubts if the depth was more than an inch. He had cleaned it out again when the inspectors came in; this would have been done for the second time on his shift. They were about three hours into Mr. Defa's shift.

Clearance for the buggies is about nine inches. If there is a 10-inch accumulation, it must be cleaned up. The coal was wet. The area may not have been rock-dusted, but there was rock dust on both sides of the ribs (Tr. 443-450).

Order No. 3044314 (accumulation of loose coal and coal fines in the left room outby the last open crosscut): This area was just in from the piggyback area. There was actually a water hole the width of the entry. The accumulations were in the water. However, the ribs were well rock dusted but the floor was covered with water. With the company's maintenance program in this area, it would be cleaned on the maintenance shift. There was no fire danger from this accumulation.

There was an accumulation of loose coal and fines in the light room behind the line curtain; actually, this was in the immediate return. Normally, the continuous mining machine leaves a small windrow along the rib line. The left side is easier to keep clean than the right side. The ventilation curtain prevents access. As a result, the maintenance shift cleans up this area. There was wet rock dust thrown behind the curtain at the time the company was mining. This was outby the line curtain for approximately 24 inches. The line curtain is fireproof. There was no danger of combustion.

No. 7 (accumulation of oil and oil-soaked coal): This was on the feeder breaker machine. Inspector Farmer pointed out to Mr. Defa that there was gauge broken off and was leaking oil. It had been broken off a long time, maybe during five or six loads of coal. The witness judged the gauge had been broken off within the previous hour. This occurred after the shift began and after the pre-shift exam. If this had not been pointed out to the inspector, the feeder breaker would have run out of oil before too long. If not, the maintenance shift would have seen the problem.

There is no way this could have been avoided. There is no danger of fire in this area because it is extremely wet. However, this is a fire outlet and there are two extinguishers and 250 pounds of rock dust at the location.

On the feeder breaker itself there is a fire suppression system plus the belt that has its own system.

Two of the areas, that is, the water hole and the piggyback area, were in the intake. The area behind the line brattice would be in the return. The remainder of the areas under discussion would be in the neutral air which is fed directly into a return about 30 feet from the tailpiece. It had two panels that are lowered approximately 12 inches, which would leave a hole of 24 by 12 inches. If any air did happen to come through that way, it would bleed into the return. The regulator that bleeds off this area into the return was operable.

None of these violations constitute unwarrantable failure. Farmer went over each area to observe the wet condition (Tr. 444-459).

Order No. 3075922 (accumulation on the mining machine): Mr. Defa was not present when the inspectors checked the mining machine. The witness was with Inspector Farmer at the time. Mr. Farmer and he walked into the area while they were doing the pre-shift examination and the other inspectors mentioned the amount of accumulations present. Mr. Defa pointed out that there definitely was rock dust in the accumulations, which he estimated to be about 50 percent. That was one of the times Mr. Defa was called a liar. Inspector Marietti stated he didn't feel Mr. Defa was concerned about the safety of the miners since he had let such conditions exist. Inspector Farmer made no comments. Inspector Farmer did not feel that the continuous miner warranted a notice of violation.

In Mr. Defa's opinion, a notice of violation should not have been issued because there was no potential danger here. With an accumulation of 0 to $\frac{1}{4}$ inch, a great deal of rock dust presents no hazard. However, if the entire machine is covered with $\frac{1}{4}$ inch of coal float dust and no rock dust then there is a potential hazard.

The cleanup program on a continuous miner machine was the same as on the roof bolter, that is, it would be washed on the maintenance shift. This would occur directly after my shift.

An employee filed the complaint in this case because he bragged about it to several people at the mine. He had been terminated two days before the inspection (Tr. 459-463).

Concerning the heat lamp violation: In the kitchen area there was a metal table 2 feet wide and 6 feet long. Mr. Defa looked at the area during the inspection and immediately afterwards. There was nothing on the shelf below the heat lamp. In addition, there was nothing in the aluminum foil.

After an inspection Mr. Farmer left because he didn't agree with the way Mr. Defa was being treated.

During an inspection, it is normal procedure to go along with the inspector. Inspector Marietti has always been very thorough; there isn't too much he misses. In this case, he did not attempt to take any rock samples or combustible content samples. Mr. Farmer, however, did take such a sample (Tr. 463-465).

Rock dust is normally white and has a gray tint. Someone looking at a continuous mining machine could not tell if it was rock dust mixed with the coal (Tr. 467). Mr. Defa arrived at the mine about 9 o'clock on January 28, 1988, and looked at the pre-shift book. There had not been a pre-shift. When Mr. Defa went into the mine, he passed Mr. Hanson on the way out (Tr. 468).

He believed there were six men working that night in the working section. He was in the area about three hours before the inspectors arrived. During the three hours he was in the section but not directly at the miner. He traveled the mine (Tr. 469).

There was one condition Mr. Defa considered hazardous from 9 to 12 p.m., which was the accumulations in the piggyback area of spillage, so they cleaned it up shortly after the shift started. He was returning to the area to check it again when the inspectors arrived. The piggyback area is the one referred to in Order No. 3044314 (Tr. 470).

The accumulations Mr. Defa saw with Mr. Farmer were excessive but were not a danger because of the wetness of these areas. He would say they were not excessive under the circumstances. Any accumulations left over at the end of Mr. Defa's shift would be cleaned up by the maintenance shift (Tr. 472-473).

Inspector Farmer did not believe the escapeway map was a violation. Inspectors Gibson and Marietti had a different opinion than Mr. Farmer.

Mr. Farmer wrote Order No. 3044314. He designated it as "S&S" and unwarrantable. He disagreed with that characterization (Tr. 474).

During the three-hour period from 9 to 12 p.m., they had used the roof bolting machine. The operator was Robert Shumway. The operator had bolted in three places and had put in approximately 70 bolts. He also bolted places indicated by Mr. Hanson in his pre-shift (Tr. 475). He remembered Mr. Hanson telling him about the roof bolts but did not recall his telling him about anything else found on the pre-shift.

He observed some accumulation on the roof bolting machine and was sure there was a significant amount of accumulations (Tr. 476).

He recalls looking at the roof bolter during the inspection and he found Mr. Hanson's initials, time, and date on the machine. There may have been a skiff, that is a film, on the machine. It wouldn't have gotten your hands dirty if you touched it (Tr. 477). He did not dispute that there were 18 empty five-gallon hydraulic cans in that area (Tr. 477). They used at least 18 five-gallon cans during the first three hours of the shift. The empty cardboard boxes contained resin from roof bolting activity (Tr. 477).

He didn't believe the accumulation of oil and empty cans or cardboard boxes were a hazard or a danger because the area was wet. There was no possible way for a fire to ignite. There was a great amount of oil there and the cans do not hold a lot of oil. All of the cans in the area were empty. The full ones were stacked up off to the side. There was a small 110 pump in the area. Mr. Defa removed it at the inspector's request (Tr. 478, 479).

The purpose of the pump was to pump water but it was not a permissible pump. This area was right on the edge of the rock slope that returned to the upper seam.

It is the responsibility of the pre-shift examiner to make a pre-shift. Since January 1988 that would be Mac Hanson, who was a shift foreman (Tr. 480).

The operator is responsible for a mine map to be posted. Mr. Defa would be the one responsible on his shift (Tr. 481).

In 1972 Mr. Defa took a position as foreman. He received violations for the map not being up-to-date. There was an occasion when they received a violation because the engineer had not certified it as required every six months. The purpose of the map is to show the escapeways. It is not too important in this section because it would be hard to show on the map 2½ feet on a scale of 200 feet to an inch (Tr. 482, 483).

This escapeway changed after the company completed its intake entry, otherwise the escapeways remain pretty much the same (Tr. 483, 484). In this mine the intake is the one escapeway and the return is the other escapeway. The miners receive new miner training plus weekly safety meetings and regular fire drills; they also travel these escapeways every six weeks. New miner training includes training in the escapeways and what to do in case of an accident or a hazard. Several years ago Mr. Marietti withdrew miners for not being trained (Tr. 484).

Concerning the heat lamp: Mr. Defa did not see any hazard about its condition, nor did he see any danger to anyone being shocked or injured, but he did not dispute that there was a violation of a mandatory standard. He disputed the severity of the violation as an unwarrantable failure.

The kitchen or heat lamp is located where most men go to eat lunch during their shift (Tr. 485).

The transformer was installed three years ago. When you push the red button on the transformer you can hear it turn off (Tr. 486). There is a safety device which shuts off the fuel. If an electrician works on a piece of equipment, he has to get a handle (Tr. 487). The company has not made any changes on the transformer since it was acquired (Tr. 488).

Anyone could change the instantaneous setting but he was never told it was done by an ex-employee. Mr. Defa is not a certified electrician. A qualified person must change any instantaneous trip (Tr. 489). For the instantaneous trip, Mr. Defa disputed that it is unwarrantable (Tr. 490).

Messrs. Atwood and Tucker did the weekly electrical examinations; they recorded it for every single week except the one when the inspector appeared. The last date in the book was January 15, which this was two weeks earlier (Tr. 491).

Mr. Stoddard is one of the owners of C.W. His son and nephew work at the mine. Mr. Defa's son and nephew also work at the mine (Tr. 495).

Mr. Defa is the safety director at C.W. and has been for eight or nine years. He does not own an interest in the mine (Tr. 496).

There were 30 employees employed at the mine at the time of the inspection.

NATHAN ATWOOD, a certified electrician experienced in mining, has been employed by C.W. since November 1971. He also serves as the shift foreman (Tr. 506-508).

Mr. Atwood started doing the weekly electrical examinations the week following the 15th. John Tucker was the previous examiner. Mr. Atwood agrees he did not record the examination on the 22d. He was new and forgot to do it. There was no danger to anyone in not recording the inspection (Tr. 506-511).

Concerning the instantaneous setting set at 480 degrees rather than at 300 degrees: The witness was responsible to see that this trip was properly set. Mr. Atwood could not find out who could have set the trip incorrectly. He would have found and corrected this condition the morning of the MSHA inspection (Tr. 511-515).

Order No. 3227153 (transformer): Mr. Atwood is responsible for abating the violations as cited. This condition was pointed out by Mr. Marietti or one of the shift people.

When they were working on this transformer, Messrs. Marietti and Gibson were present. He removed the cover. There was one bolt in each cover. He agreed that two bolts were missing. You had to remove one bolt to remove a cover. The cover weighs about 100 pounds. That day he did not locate the missing bolts. The previous week the bolts were in the covers. He knows of no reason why anyone would remove them. He did not remove them.

The cover was noticeably bent. After the power was off, he measured the distance from the energized part in the transformer to the nearest part. The distance was at least three inches. There was a greater distance than between the bus bars. This cover was made of heavy metal and not easily bent. No one could push the cover closer to the energized parts.

Mr. Atwood did not consider the missing bolts a dangerous situation because a bolt still secured the lid. It had to be removed before the plate could be lifted off. After examining the bad cover it was apparent there was no danger.

Concerning the disconnecting handle for the plate switch: Mr. Atwood keeps a handle that fits into the transformer in his vehicle. There is no danger to anyone because of a missing handle since there is a red emergency button that cuts the power. It is considerably easier to push the button than to turn the switch off. No one on his shift would use a handle to visually disconnect the transformer. The handle he used is kept in his tool box or in his vehicle. There is no danger if that handle is not on the handle sprocket.

The witness does not recall the transformer ever having a handle attached to it. The inspectors had viewed it when they went through the mine. No one ever said there should be a handle on it.

Concerning lid switches: When the witness lifted the covers, he was able to examine the lid switches. They were hooked up. He removed the switch, pulled it apart, and showed Mr. Marietti the corrosion inside the switch. The equipment was properly wired, and he pointed that out to Mr. Marietti. They discussed the corrosion in the switch. No one would ever take the cover off when the power was on. The transformer hums. If the cover were taken off, the transformer would disconnect the power and lock it out. By not having a safety switch operating, the witness could foresee no danger to anyone. There were other transformers in the mine that do not have switches on the lids. They operate in the same manner as this transformer.

Mr. Atwood is familiar with the leads from the 995-VAC bus bar. The wires which were 4/0 had been cut but not changed by any personnel of C.W. The power from the transformer operates the continuous miner which requires a smaller 2/0 wire. The wires that were there would be in excess of the carrying capacity of a 2/0 wire even in cut condition. The cut wires presented no danger.

This should not have been an unwarrantable violation (Tr. 511-524).

Order No. 3227155 (heat lamp): Mr. Atwood abated the heat lamp violation when he first observed the condition the day of the inspection. He had inspected this at his last electrical the previous week. At that time he noticed the covers were there and the screw was not missing. A screw may not have been taken out, but may have fallen out because these heat lamps are of poor design and vibrate. He would not have noticed this in a pre-shift exam because the heat lamp gives off a bright light. Normally, the missing covers on the ends would not be seen, but the witness examined this at the weekly electrical exam. He turned on the heat lamp to make the examination.

A missing screw, however, presents no danger. Some wires had been dropped down but they were insulated with good quality insulation. No one could have been shocked or burned by contacting the wires.

The elements in the heat lamp and the screw connecting the elements recess about $\frac{1}{2}$ inch into a porcelain part. This would be difficult to reach. If someone did that their fingers would

get hot from the heat off of the lamp. A person would purposely have to put a finger through there. No one would accidentally touch the elements when warming food.

The danger of the covers was not serious. The wires were insulated and a person would not purposely want to touch the end. Mr. Atwood could not explain why the covers had been removed (Tr. 524-528).

Order No. 3227163 (combustible material): Mr. Atwood observed the condition before it was changed. The accumulations looked normal. This is the normal amount of garbage from a shift. The area of the accumulations was very wet. The water came from the floor and the roof. The area had been rock dusted.

There was a fire valve a pillar away or about 85 feet. The transformer was 92 to 150 feet away. There were two extinguishers at the transformer. There were two ballasts of rock dust in paper bags. The witness felt this should not have been a violation nor should it be unwarrantable (Tr. 529-531).

Order No. 3227166 (roof bolter): The electrician observed the roof bolting machine that day. It was cleaned on his shift. When he looked at it there was about a shift's worth of dust on the machine, which is acceptable.

Mr. Atwood did not take any measurements. The area was wet as were the accumulations. The machine accumulations were made up of rock dust rather than coal dust. There was no danger and this should not have been a violation nor should it have been unwarrantable. The trailing cables trip did not affect the roof-bolting machine. The machine has a separate circuit breaker (Tr. 531-533).

Order No. 3075922 (accumulations of loose coal and coal fines on continuous miner): Mr. Atwood observed this condition. It appeared there was a normal amount of coal dust and rock dust on the machine. The rock dust was obvious and the coal was wet. The mining machine was cleaned during his shift. The accumulations were not significantly different from any other maintenance shift. These machines are stopped during a maintenance shift.

Mr. Defa is a very safety-conscious foreman. The accumulations on the miner were non-serious; no danger of combustion existed (Tr. 534-536).

Order No. 3227202 (escapeway): Mr. Atwood has been in and out of the mine on a regular basis since June 1987. There has been no new construction or any changes in the escapeway from

June 1987 through January 1988. No new pillars or supports had been installed (Tr. 536-537).

Mr. Atwood went through the escapeway on January 28th to look at the belt at the processing plant. He was also sure he went through the escapeway around February 11, 1988 (Tr. 537-538). The escapeway was the same on February 11, 1988, as it was in June 1987. He disagrees with Mr. Huggins' testimony. There was one continuous miner in the lower seam in January 1988. He did not remember any sprays missing from the machine on January 29. He believes wet coal can ignite (Tr. 538).

Some stockpiles outside a mine can catch fire. He has usually seen rock dust on the miner and the roof bolter. On the miner he ran his fingers through the quarter-inch to zero and it was obvious there was rock dust mixed with coal. He would guess it was 50 percent rock dust (Tr. 539). On the roof bolting machine he saw coal dust mixed with hydraulic oil in a normal amount (Tr. 540). The normal amount he saw was not particularly heavy for those two shifts (Tr. 540-541).

On January 1988 each shift carried out its own garbage. If an excessive amount was there the men would make more than one trip (Tr. 541-542).

Order No. 3227163 (oil and cardboard boxes): This condition was normal for one shift. C.W. normally stores rock dust in an area that is wet. The heat lamp is not supposed to be left unattended (Tr. 543). Anyone can turn on the heat lamp. He examined the lamp during the weekly examination as noted on January 22, 1988. He noticed the cover plates were on at that time (Tr. 544). Somehow they were missing at the time of the last inspection. It was not recorded in the book somewhere that the plates were missing on the heat lamp (Tr. 545). The condition inside an enclosure was not seen because it was behind the cover (Tr. 545-546).

Order No. 3227153: The law requires bolts on the covers (Tr. 546). In his electrical inspection on January 22, he noted the dented cover but did not feel it needed to be corrected.

Order No. 3227149: Prior to January 29, the trip device had been tested to determine if it tripped properly. The test indicated proper tripping (Tr. 548). Mr. Marietti is a fairly good inspector and in the past he has helped the witness with electrical training.

The continuous mining machine will hold over 100 gallons of hydraulic oil and it is not unusual to add 18 to 30 gallons during one shift (Tr. 550).

The two shuttle cars, the feeder breaker, and roof bolter also use hydraulic oil (Tr. 551). Normally shuttle cars would take five gallons per car and the same amount for the feeder breaker. This whole section was wet (Tr. 551).

In this area of Emery County, Mr. Marietti was notorious for writing a citation when another inspector would not do so (Tr. 552).

Mr. Atwood did not know what the cans were used for (Tr. 553). Eighteen cans would hold 90 gallons of oil (Tr. 553).

BILL WEAVER STODDARD, President of C.W. Mining Company, is a person experienced in mining for over 42 years. He has assisted or gone with MSHA personnel on many inspections in the past. He received his foreman's papers in 1960.

On January 29, 1988, Mr. Defa called him and requested that he come to the mine. Mr. Stoddard arrived between 8:30 and 9 o'clock. Mr. Stoddard did not see Mr. Farmer as he apparently had gone home.

Mr. Stoddard was there when Mr. Turner arrived. Mr. Defa was not too happy about how the inspection was going and the way he was being treated. He stated he had been called a liar, a potential murderer, and that he wasn't qualified to hold the positions he had. When those statements were made, Mr. Marietti and Mr. Gibson were outside.

Each of the inspectors wrote some of the violations. They complained about Mr. Gibson's or Mr. Marietti's writing one and then having Mr. Turner sign it. He did not consider this to be fair. Mr. Turner had not observed the violations in his 20-minute trip through the mine.

He went underground to see the conditions for himself - to see if it was as bad as claimed, as he didn't want his mine to be in bad shape. Mr. Stoddard was alone when he went underground.

Order No. 3227202 (escapeway): Mr. Stoddard submitted the letter to MSHA requesting a variance. Before submitting the letter, he had an MSHA inspector assist him in running a test to see if it could be traveled safely. Mr. Turner was the inspector. He indicated a variance could be obtained if a stretcher could be carried through the area; it apparently passed the test.

Mr. Holgate, in Denver, told the witness that he would get a letter from the Orangeville office to verify this. When the test was made, Inspector Huggins sent his letter and Mr. Stoddard replied.

The witness did not see Inspector Huggins' letter. Mr. Stoddard did not know the width of the escapeway.

At the time of the first test until February 1988, the escapeway had not been changed in any manner nor had any roof supports or wall supports been added (Tr. 560-563).

Mr. Stoddard observed the 1000 KVA transformer and saw its bent cover. This condition did not pose any danger. Mr. Stoddard at one time was a certified electrician. He saw nothing serious about the switch on the lid, cutting of the wires, and the missing handle. They did not pose any danger to anybody. The bolts missing from the cover plates would be a technical violation.

He didn't see any danger in connection with the heat lamp before it was repaired. There was no danger in the covers not being on or a screw being missing. Mr. Stoddard agrees that it was a technical violation because the covers were off.

Mr. Stoddard did not consider the heat lamp to be an unwarrantable failure (Tr. 563-565).

There was some rock dust on the ribs.

Order No. 3227163 (combustible material where various materials were stored): Mr. Stoddard observed this condition, which appeared to have the normal amount of refuse but it did not constitute any danger. This area was excessively wet. The area had been rock dusted and the ribs were wet as well as the rock dust. The roof was dripping. The standard practice at C.W. is that if there is garbage in one area, it is removed with each shift. The roof bolting machine was under normal conditions for two shifts and other inspectors have seen this condition and have not written a violation. There was no danger as the accumulations were wet. In fact, water was running out of several roof bolt holes (Tr. 565-568).

Order No. 3044314 (accumulations of coal and fines around the tailpiece of the belt and the feeder breaker): Mr. Stoddard looked at this area and these accumulations had probably occurred during the shift. There was no indication they had been carried over from a previous shift. Water running out of the port hole would freeze, but the water had not been there long enough to freeze.

Mr. Stoddard was familiar with the piggyback situation and also observed the continuous mining machine. He was accompanied by Mr. Atwood. It was obvious there was a lot of rock dust

and float dust on the miner. Mr. Stoddard did not see any accumulations greater than a quarter of an inch. There were no fines and any lumps of coal there were very wet. The area appeared to be rock dusted. The accumulation there could have accumulated in a three-hour period and no danger was involved for the personnel underground.

After looking through the area underground, Mr. Stoddard did not think the condition was abnormal; it was, in fact, normal.

In Mr. Stoddard's opinion, Mr. Defa is a good foreman. There have never been any problems with his safety tactics. After hearing the testimony in this case, Mr. Stoddard would have no hesitancy about having his boy continue to work on Mr. Defa's shift.

Since this inspection, the witness talked to Mr. Farmer about the conditions that existed in the mine. Two weeks ago Mr. Farmer said that no one had talked to him about the hearing. He said the inspection had been conducted in a very unprofessional manner. He thought Gestapo tactics had been used. Mr. Farmer also indicated he was still employed by MSHA.

He also stated he didn't like the way Mr. Defa was treated when he was called a liar, a potential murderer, and not qualified to be superintendent (Tr. 568-574).

Mr. Farmer also mentioned the weekly electrical inspection. He stated that the inspection had been made, only not recorded, and he felt this was not an unwarrantable violation. Mr. Farmer was also upset about the map not being in the kitchen. The escapeway was only 4½ feet long. Miners could drive their shuttle car to the feeder breaker and see daylight outside each time. Mr. Farmer didn't feel the failure to have a map was serious.

Mr. Stoddard was critical of the fact the Secretary had not brought in all of the inspectors who issued citations in this case.

The entries in this mine are about 600 feet from the surface. It would take Mr. Turner about 20 minutes to walk in and back out. Mr. Stoddard did not know of any complete inspection with a mine this size that would take as long as this particular inspection.

At this inspection MSHA appeared to pull every cover and check everything (Tr. 574-577).

In cross-examination, Mr. Stoddard stated that Mr. Farmer didn't say he was terminated but said that he was "fighting with them" and was in litigation. Mr. Farmer was in the process of getting his job back and getting light duty (Tr. 579).

Order No. 3044314 (accumulations): Mr. Stoddard saw nothing that would have been caught in the feeder to cause a spill of this magnitude (Tr. 582).

The witness considers a violation to be unwarrantable if it is excessively dangerous (Tr. 582-583).

He did not know the width of the escapeway in June of 1987 but its width was the same in February 1988. He also didn't know what the measurements were. Other than as a President, he has no financial interest in C.W.. He is paid a salary and does not know who owns the company (Tr. 584-585). Mr. Stoddard is not involved in any other business but has been doing consulting work in Price, Utah (Tr. 586).

FRED L. MARIETTI recalled (Tr. 587).

He saw Mr. Stoddard about 8:30 to 9 a.m. at the continuous miner. He went to the roof bolter and cited it. Mr. Stoddard then accompanied the witness out of the mine (Tr. 588).

Since January of 1988 he has discussed the violations with Mr. Stoddard at the office of C.W. Inspector Huggins was also present (Tr. 589). Mr. Stoddard said with these violations they (MSHA) "caught us with our pants down." He was also glad they vacated them because he didn't think it was right that Inspector Turner had signed them and he would have contested them anyway.

This conversation about "pants down" was two or three days and maybe in the first week after the orders were issued (Tr. 591).

BILL W. STODDARD recalled:

Mr. Stoddard does not recall the conversation with Mr. Marietti where he admitted the violations occurred. He didn't think he ever told the inspectors C.W. got caught with their "pants down."

CONTENTIONS AND DISCUSSION

I.

C.W. contends that Citations/Orders Nos. 3227145, 3227149, 3227153, 3227155, 3227161, 3227162, and 3227166 should be vacated, as they were not properly issued.

In support of its position C.W. relies on certain statutory provisions, namely,

30 U.S.C. § 814(a), which provides:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator, and

30 U.S.C. § 815(d)(1) which provides:

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 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 chapter.

Further, C.W., citing 30 U.S.C. 814(d)(1), asserts the authorized representative must "find" a violation exists and said inspector must further "find" S&S and unwarrantable failure.

The evidence on this issue indicates Inspector Farmer left the mine because he was not feeling well. Inspector John R. Turner was directed to replace him. Mr. Turner did a quick walk-through of the mine but observed none of the conditions giving rise to the above-cited orders. However, Mr. Turner issued the orders based on what Mr. Marietti or Mr. Gibson told him. He signed the orders at the direction of his supervisor.

C.W.'s position is contrary to established Commission precedent. The Commission has ruled that an inspector may sign a citation even where his supervisor made the determination that a violation existed. Peabody Coal Company v. Mine Workers, 1 FMSHRC 1785 (1979). The Commission has further determined that an inspector need not view a violation in order to write a citation. Instead, an inspector need only believe that a violation has occurred prior to issuing a citation. Arch Mineral Corporation, 5 FMSHRC 468 (1983).

In support of its position C.W. relies on Pennsylvania Glass and Sand Corporation, 1 FMSHRC 1191 (1979). The cited case is not controlling. Witnesses Marietti and Gibson observed all violative conditions and testified extensively as to the conditions they observed.

II.

C.W. further states that Citations/Orders 3227202, 3227163, and 3075922 should be vacated because the Secretary did not meet her burden of proof.

It is necessary to individually consider these factual situations as to these three orders.

Order No. 3227202: This order concerning an escapeway involves a credibility issue between the parties.

Inspector Huggins testified that in June 1987 the escapeway was 32 inches wide. When he returned in February 1988 additional structures, timbers, etc., has reduced the average width to 24 inches. On the other hand, witnesses Defa, Atwood, and Stoddard indicated the escapeway had not changed from when it was approved in June 1987.

I credit C.W.'s evidence. Messrs. Defa, Atwood and Stoddard all indicated no changes had been made in the escapeway. These witnesses working in this small mine on a daily basis would be knowledgeable as to any changes in the escapeway.

On the other hand, Inspector Huggins had not been in the mine since the escapeway was approved. In addition, he relied, in part, on an MSHA memorandum. The memorandum refers to a width of 32 inches but such evidence is not persuasive. The document was never circulated to any C.W. personnel. As a result, its evidentiary value is highly questionable.

For the foregoing reasons, Order No. 3227202 should be vacated.

Order No. 3044314 (accumulations): The accumulations described in connection with this order are a dangerous hazard to the miners. C.W.'s defense that the condition accumulated during a single shift cannot prevail. The regulation provides that accumulations shall be "cleared up and not permitted to accumulate in active workings." This was not done.

Order No. 3044314 should be affirmed.

Order No. 3075922: This order alleged accumulations on the continuous miner. On the credibility issues, I credit C.W.'s evidence. The operator's witnesses testified that most of the accumulations were rock dust and not coal dust. One would expect a continuous miner to acquire some accumulations as a result of the mining process itself.

On the other hand, the Secretary's evidence indicates the accumulations were "from 0 to $\frac{1}{2}$ inch deep." While the expression of "0 to $\frac{1}{2}$ inch" may be a shorthand used by inspectors, "zero" is still "zero." Such a formula can easily equal "no" or "minimal" accumulations.

Order No. 3075922 should be vacated.

Order No. 3227162 (pre-shift examination not recorded): At the beginning of the inspection Messrs. Marietti and Gibson entered the mine together. Mr. Defa, the C.W. foreman, accompanied Mr. Farmer, who, he understood, was doing the inspection.

Mr. Farmer was underground for six or seven hours and he generally observed the same conditions as Messrs. Marietti and Gibson. Before Mr. Farmer left, he issued Citation No. 3044311 (Exhibit R-1). Mr. Farmer's citation was dated January 29, 1988, at 0005 hours. He terminated the citation at 0310 the same day. Mr. Marietti was unaware that Mr. Farmer had written Citation No. 3044311.

It appears from the uncontroverted evidence that Citation No. 3044311 (Exhibit R-1) and Order No. 3227162 involved the same factual situation. The citation and order are duplicative.

For this reason, Order No. 3227162 should be vacated.

III.

C.W.'s final contentions attack the Secretary's findings of S&S as to certain orders as well as her findings of unwarrantability as to all of the orders. C.W.'s further position that

only nominal penalties should be assessed requires an assessment of appropriate penalties where a violation has occurred.

The civil law is well established as to S&S, unwarrantable failure and penalty criteria.

SIGNIFICANT AND SUBSTANTIAL

The Commission has indicated that a violation is properly designated as being of a significant and substantial nature if, based on 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, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), aff'd, 824 F.2d 1071 (D.C. Cir. 1987). The Commission has further explained that the following formulation is necessary to support a significant and substantial finding:

- (1) The underlying violation of a mandatory health standard;
- (2) a discrete health hazard -- a measure of danger to health contributed to by the violation;
- (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and
- (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

UNWARRANTABLE FAILURE

The issue of unwarrantable failure can at times be illusive. Accordingly, it is appropriate to review some of the major cases on the subject.

In Emery Mining Corporation, 9 FMSHRC 1997 (1987) the Commission concluded that the statutory term of unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." In Emery four roof bolts had popped on a bearing plate. Further, this violation had existed for at least a week in an area where the operator's safety personnel should have known of the condition. In viewing the factual situation, the Commission stated that the popped bearing plate was a matter involving only ordinary negligence. As a result, in Emery the Commission vacated the finding of unwarrantable failure and modified the section 104(d)(1) order to a 104(a) citation.

In Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, issued the same day as Emery, the Commission upheld two unwarrantable failure findings. Specifically, the operator had been cited for a violation of its roof control plan (30 C.F.R. § 75.200). Three days before the contested violation, a similar order had been issued. Pre-shift examinations had been conducted but violative conditions had not been reported. The Commission concluded as follows: "Given the prior violation of section 75.200 in the same area ... only days before the violation at issue occurred and the extent of the violative condition, we find that Y & O's conduct in relation to the violation was more than ordinary negligence and ... resulted from Youghiogheny & Ohio's unwarrantable failure."

In Youghiogheny & Ohio the Commission further upheld an unwarrantable failure regarding a "hole through" violation. Specifically, the Commission observed that "even if the 'hole through' was accidental, the roof control plan clearly prohibits cutting through into areas of unsupported roof and the section foreman is responsible for compliance with the plan," 9 FMSHRC at 2011.

In Rushton Mining Company, 10 FMSHRC 249 (1988), the Commission reversed the judge's conclusion that the company's failure to detect the broken wires was due to its inadequate procedure for examining the rope. The procedures followed by the operator were extensive and they are recited in the decision. In short, the Commission found no aggravated conduct within the meaning of Emery.

In Quinland Coals, Inc., 10 FMSHRC 705 (1988), the Commission upheld an unwarrantable failure violation of a roof control plan. After reviewing the underlying facts the Commission concluded that "(g)iven the extensive and obvious nature of the condition, the history of similar roof conditions and [the operator's] admitted knowledge of the conditions, we find that [the operator's] failure to adequately support the roof was the result of more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from ... unwarrantable failure," 10 FMSHRC at 709.

In Helen Mining Company, 10 FMSHRC 1672 (1988), the Commission determined the operator's failure to comply was not due to the operator's unwarrantable conduct. In finding a lack of such evidence the Commission relied on evidence involving the design and function of the operator's shield system. Other factors supporting the operator included a lack of previous MSHA citations relating to the forepole pads of the shields. Further, even after the roof control plan was revised forepole pads were

not required by MSHA. Finally, the operator reasonably believed that if cribbing was installed the miners involved in the installation would be placed at considerable risk.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties:

- (1) The size of the business and the appropriateness of the penalty to the size;
- (2) The effect on the operator's ability to continue in business;
- (3) The operator's history of previous violations;
- (4) Whether the operator was negligent;
- (5) The gravity of the violations;
- (6) Whether good faith was demonstrated in attempting to achieve prompt abatement of the violations.

The stipulation of the parties is self-explanatory and it resolves paragraphs 1, 2, and 8.

C.W.'s prior history is unfavorable, especially when its small size is considered. In the two years ending January 28, 1988, C.W. was assessed 264 violations, paid 181 violations and penalties of \$25,710. (Exhibit P-1 contains C.W.'s prior history.)

ADDITIONAL FINDINGS AND SUMMARY

Order No. 3227202 (escapeway): This order should be vacated.

Order No. 3044314 (accumulations of loose coal and coal fines): The clearly excessive accumulations described here establish conditions that could cause serious problems. A fire or explosion could quickly propagate throughout the mine.

Where an operator in the mining process causes a condition that is violative of a mandatory regulation and fails to remedy said condition, then said actions, unless excused, are unwarrantable within the meaning of the Mine Act. A similar situation also involving coal accumulations occurred in Utah Power and Light Company, 11 FMSHRC 710 (April, 1989) (pending before the Commission on review).

Concerning a civil penalty: C.W. was negligent in permitting these accumulations to develop during the mining process. The situation as it developed should have been apparent to C.W. supervisors.

The gravity was high since accumulations of this type could quickly propagate a mine fire.

Considering the statutory criteria, a civil penalty of \$1,000 is proper..

Order No. 3075922 (accumulations of "0 to $\frac{1}{4}$ inch"): This order should be vacated.

Order No. 3227145 (failure to record weekly electrical examination): This technical violation should be affirmed.

I credit the uncontroverted testimony of CW's electrician that this was his first week making electrical inspections and he forgot to record his findings.

In view of the foregoing factual scenario, I consider the negligence of CW's electrician to be low. Further, the gravity of this particular recording violation is likewise low.

A civil penalty of \$250 is appropriate.

Order No. 3227149 (short circuit protection): It is uncontroverted that the short circuit trip protection was improperly set. This order should be affirmed.

This was not an unwarrantable violation. I credit CW's uncontroverted evidence that the equipment had been checked shortly before it was observed by the MSHA inspector. In short, the evidence fails to show any "aggravated conduct" as required by Emery, supra. Accordingly, the allegations of unwarrantable failure should be stricken.

Concerning the assessment for a civil penalty: This was an open and obvious condition; it should readily have been observed. Accordingly, the operator was negligent.

I consider the gravity to have been high. The energized cable could have been subject to excessive energy without trip protection.

A civil penalty of \$500 is appropriate.

Order No. 322753 (1000 KVA transformer): This order should be affirmed as the parties essentially agree on the underlying facts as to the condition of the equipment.

The initial three items (unsecured cover, bent cover, absent disconnecting handle) are minor violations of § 75.512.

These three conditions are not S&S since the evidence fails to establish paragraph (3) and (4) of the Mathies formula.

The three initial conditions are likewise not unwarrantable failures to comply as no aggravated conduct has been established as required by Emery.

Allegations of S&S and unwarrantable failure should be stricken.

The two remaining items of the inoperatively wired lid switches and stranded wires cut from the leads present a more hazardous situation. These two items are S&S as they meet all the criteria required in Mathies. However, I credit the evidence that C.W. did not itself improperly interfere with the wiring. In view of this, no aggravated conduct appears in the record.

The operator was negligent in that the violative conditions should have been observed and corrected.

The gravity as to the initial three items was minimal but high as to incorrect wiring.

On balance, civil penalty of \$400 is appropriate.

Order No. 3227155 (heat lamp in kitchen): C.W. acknowledges this violation occurred as the cover was missing and a screw had dropped out. However, C.W. argues the violation was non-serious.

I conclude that no unwarrantable failure exists as to the heat lamp. Even though a condition violates a regulation, it is not unwarrantable unless some aggravated conduct is established. I find none in this record and the allegations of unwarrantability should be stricken.

The violative conditions themselves were, however, open and obvious. They should have been remedied. Accordingly, the operator was negligent.

I consider the gravity to be high. In this regard I necessarily credit MSHA's evidence of the severity of the hazard. In addition, miners would, on a daily basis, be in close proximity to this heat lamp.

A civil penalty of \$400 is appropriate.

Order No. 3227161 (map showing escapeway not provided). It is agreed that no map was provided. The defense focuses on the issue that the miners all knew the escapeway routes and the escapeways themselves were side by side. C.W. cannot choose the regulations it is willing to accept or reject. This order should be affirmed.

This violation, however, is not S&S within the doctrine of Mathies since paragraphs (3) and (4) have not been established.

I further conclude the violation was not unwarrantable even though C.W. had previous citations for this regulation. "Aggravated conduct" as defined by Emery requires more than mere prior citations for the same condition.

The file reflects that the operator was negligent inasmuch as the requirements of § 75.1704(2)(d) are well known to miners.

I consider the gravity to be low particularly due to the relatively short escapeway. The uncontroverted evidence establishes that miners in the coal seam could see outside the mine.

A civil penalty of \$100 is appropriate.

Order No. 3227162 (pre-shift examination not recorded): This order should be vacated.

Order No. 3227163 (combustible materials allowed to accumulate): This order should be affirmed.

The gravamen of this violation involves 18 empty hydraulic cans dripping oil on boxes and loose coal.

These several ignition sources presented a genuine mine hazard. The defense that these accumulations occurred on a single shift cannot prevail. The regulation seeks to prevent situations where combustibles accumulate in active workings.

In active working ignition sources such as trailing cables, continuous miner bits and electrical equipment are always at hand. The violative conditions cannot be deemed to be unwarrantable since no aggravated conduct is established in the record. Accordingly, allegations of unwarrantable failure should be stricken.

In assessing a civil penalty, I conclude the operator was negligent since he knew of the violation conditions.

The gravity is high, since oil and cardboard boxes can cause a mine fire.

A civil penalty of \$1000 is appropriate.

Order No. 3227166 (accumulations of coal fines at various locations): This order should be affirmed. The presence of the described accumulations on the main controller belt, the ballast box, main motors, and conduits presented a definite danger.

I credit Inspector Marietti that these accumulations were black and excessive.

While C.W. claimed the mine and equipment were wet, I conclude that accumulations of float coal dust, coal fines, loose coal soaked with hydraulic oil and grease are items that should not be permitted in a coal mine. If such accumulations occur, a violation of § 75.400 exists.

The record fails to establish unwarrantable failure, since no aggravated conduct, as required by Emery supra, has been shown.

In assessing a civil penalty: C.W. was negligent since these conditions could have been readily observed.

The gravity is high. As noted above, these accumulations can be an invitation to a mine fire and a resulting disaster.

A civil penalty of \$700 is appropriate.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Order No. 3227202: Vacated.
2. Order No. 3044314: Affirmed, and a civil penalty of \$1000 is assessed.
3. Order No. 3075922: Vacated.

4. Citation No. 3227145: Allegations of unwarrantable failure are stricken.

The citation, as modified, is affirmed and a civil penalty of \$250 is assessed.

5. Order No. 3227149: Allegations of unwarranted failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$500 is assessed.

6. Order No. 3227153: Allegations of S&S are stricken as to paragraphs 1, 2, and 3.

Allegations of unwarrantable failure as to the entire order are stricken.

The citation, as modified, is affirmed and a civil penalty of \$400 is assessed.

7. Order No. 3227155: Allegations of unwarrantable failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$400 is assessed.

8. Order No. 3227161: Allegations of S&S and unwarrantable failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$100 is assessed.

9. Order No. 3227162: This order is vacated.

10. Order No. 3227163: Allegations of unwarrantable failure are stricken.

The order, as modified, is affirmed and a penalty of \$1000 is assessed.

11. Order No. 3227166: The allegations of unwarrantable failure are stricken.

The order, as modified, is affirmed and a civil penalty of \$700 is assessed.



John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 26 1990

BEAVER CREEK COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 88-105-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 3227047; 1/6/88
	:	Docket No. WEST 88-162-R
	:	Citation No. 3224925;
	:	Trail Mountain Mine No. 9
	:	Mine ID No. 42-01211
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 88-265
	:	A.C. No. 42-01211-03543
v.	:	Docket No. WEST 88-282
BEAVER CREEK COAL COMPANY, Respondent	:	A.C. No. 42-01211-03545
	:	Trail Mountain Mine No. 9

DECISION

Appearances: Charles W. Newcom, Esq., Sherman & Howard,
and David M. Arnolds, Esq., Thomas F. Linn, Esq.,
Beaver Creek Coal Company, Denver, Colorado
for Contestant/Respondent;
Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner/Respondent.

Before: Judge Cetti

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by the Contestant Beaver Creek pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the captioned citations issued by MSHA. The civil penalty proceedings concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Beaver Creek for the alleged violations stated in the citations. After notice to the parties the matters came on for hearing before me at Salt Lake City, Utah. Oral and documentary evidence was introduced, post-hearing briefs were filed, and the matters were submitted for decision. I have considered the oral arguments made on the record during the hearings in my adjudication of these matters and the post-hearing briefs filed by the parties.

Stipulation

The parties stipulated as follows:

1. Beaver Creek Coal Company is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.
2. Beaver Creek Coal Company is the owner and operator of Trail Mountain No. 9 Mine, MSHA I.D. No. 42-01211.
3. Beaver Creek Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ et seq. ("the Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted thereto.
6. The exhibits to be offered by Beaver Creek Coal Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The proposed penalties will not affect Beaver Creek Coal Company's ability to continue business.
8. The operator demonstrated good faith in abating the violation.
9. Beaver Creek Coal Company is a large mine operator with 408,452 tons of production in 1987.
10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the three months prior to the date of the citation.

Citation No. 3227046

Inspector Donald Gibson, during his inspection of the Beaver Creek Trail Mountain Mine No. 9, issued Citation No. 3227046 which charges a violation of safety regulation

30 C.F.R. § 75.523-2(c), which provides as follows:

Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause de-energization of the motors of the self-propelled electric face equipment.

The citation alleges that one of the roof bolters being used "had a defective actuating bar" and went on to state that the "actuating bar for its off-side operator would not de-energize the tramming motors unless extreme pressure was exerted against the bar."

It is undisputed that the actuating bar did operate, without obstruction; the dispute is limited to the amount of force necessary to activate the bar.

The inspectors did not use any pressure gauge or any other measuring device to prove that the actuating bar required more than 15 pounds of force to be activated. They only manually pushed the bar and relied on their opinion based upon their experience without measuring whether or not the force required exceeded 15 pounds.

In view of the fact that the cited regulation is clear and specific in specifying not more than "15 pounds of force" and no measurement of the force needed to activate the bar was made, the evidence presented is insufficient to establish the contested violation of 30 C.F.R. § 75.523-2(c). The citation is therefore vacated and the proposed penalty set aside. Contest proceeding Docket No. WEST 88-105-R is granted.

Citation 3227047

This citation charges Beaver Creek with a violation of 30 C.F.R. § 75.503 which provides in pertinent part:

Permissible electric face equipment:

Maintenance.

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

The citation alleges that Beaver Creek had two (2) violative conditions on the continuous miner as follows:

The Joy 12 CM Miner 12G-2917A-30, Ser. #2820 being used on the 6th West Section was not being maintained in permissible condition.

The following conditions were found and observed:

(1) the main controller cover lid had an opening in excess of .005 inch between the lid and cover plane joint, (2) the trailing cable entrance box packing gland was not properly packed, the trailing cable could be pulled out of the gland approximately $\frac{1}{2}$ inch.

When the continuous miner was first observed by the MSHA inspector about 7:30 a.m., it was locked out and down for repairs. Beaver Creek electrician Gary Sitterud and maintenance supervisor Gay Curtis were making repairs to the miner's lighting system. Sitterud had been working on the miner before the inspectors arrived and continued after they left.

When Sitterud arrived at the job site at the commencement of the 6:30 a.m. shift, the first thing he did was put his lock on the miner's power cable even though it had already been locked out earlier by another mechanic, Jack Fielder.

Sitterud, in troubleshooting the lighting system, found that a lighting transformer had burned up. He changed the transformer and re-energized the miner to determine if the lighting problem was corrected. He never started the miner at any relevant time. When re-energized, the miner twice blew a fuse. Sitterud then removed some covers from behind the main controller to search for additional problems. He discovered an accumulation of coal and also located the miner's lighting problem. He sent the mechanic, Fielder, to obtain the necessary parts. Sitterud remained at the miner, cleaning the coal accumulation.

A short while later, Maintenance Supervisor Curtis met Sitterud at the miner. Sitterud informed Curtis of the coal accumulation and asked Curtis if he should proceed to make a complete in-house permissibility inspection of the machine. Curtis said, "Yes, check the whole machine out." Beaver Creek presented evidence that it routinely performs such a permissibility inspection of any electrical system that had undergone repairs before it is returned to service.

Shortly thereafter Inspector Gibson approached Sitterud and Curtis. Curtis asked Gibson if he was going to conduct the MSHA permissibility inspection while the miner was down or wait until the miner had been repaired. Gibson replied that he would probably conduct the inspection then, but walked away. Sitterud continued cleaning the coal accumulation. Thereafter, Fielder returned with the necessary parts and began repairs.

Approximately one to two hours later, Gibson returned and inspected the miner although neither the repairs to the miner nor the in-house permissibility check was completed.

When Curtis asked Gibson how he could cite a violation on a machine that "is locked out, tagged out and out of service," Gibson replied that Beaver Creek had an "intent to use" the machine and that he was "not going to argue" with him. When Curtis asked the same question a second time at a different location he was given the same answer.

I am satisfied from the evidence presented that due to lack of clarity in communication, the MSHA inspector made his inspection of the continuous miner at a time when it was locked out for repairs and an in-house permissibility check.

It is undisputed that the inspection of the continuous miner was made at a time when the miner was locked out and down for repairs. The communication between Beaver Creek personnel and the inspector was ambiguous. This ambiguity led to a misunderstanding which resulted in Inspector Gibson making an inspection of the continuous coal miner before Beaver Creek completed the repairs and made its in-house permissibility check.

I credit the testimony of Sitterud and Curtis. I find that the ambiguity in Beaver Creek's communication to the inspector caused a misunderstanding and an assumption by Inspector Gibson that Beaver Creek had completed all of the work they intended to do while the machine was locked and tagged out for repairs. This resulted in Inspector Gibson's making his inspection of the miner at a time when Beaver Creek had not completed the work and its in-house permissibility check which they intended to complete before putting the miner back in service. I am satisfied from the testimony that a full in-house permissibility check would have been done by Beaver Creek and any needed corrections would have been made before the miner was put back into service. Under the rationale expressed in Ziegler Coal Company, 7 FMSHRC 452 (March 27, 1985), which was cited by both parties, the citation is vacated.

In Zeigler Coal Company, supra, an inspector examined a shuttle car which was locked out and undergoing repairs. The mechanic making the repairs planned to check the entire car for permissibility prior to placing the car back in service. Nonetheless, the inspector made the inspection, found the car was not in permissible condition and issued the citation. The Administrative Law Judge vacated the citation. The mechanic should have had the opportunity to check the car for violations of permissibility standards before the citation was issued. (See also, Plateau Mining Company, 1 MSHC 1100, 1101 (Nov. 7, 1973); Zeigler Coal Company, 1 MSHC 1189, 1191 (Sept. 26, 1974).

Citation No. 3227047 is vacated and its related \$147.00 proposed penalty set aside.

Citation No. 3044356

This citation alleges a 104(a), S&S, violation of 30 C.F.R. § 75.200. At the hearing the Secretary moved to vacate this citation. In support of its motion, the Secretary advised that there was insufficient evidence to prove the violation. I accept the representations of the parties. Citation No. 3044356 is vacated.

Citation No. 3227048

This citation alleges a 104(a), S&S, violation of 30 C.F.R. § 77.504. At the hearing the parties reached an agreement on all issues related to this citation. Beaver Creek agreed to withdraw its contest of this citation and pay the full amount of the Secretary's initial penalty assessment.

Civil Penalty Docket No. WEST 88-282 and
and Contest Proceeding Docket No. WEST 88-162-R

Citation No. 3224925

This citation, as amended at the hearing, alleges a significant and substantial violation of 30 C.F.R. § 75.305 as follows:

The 6th West seals were not examined during the seven days prior to 3-9-88. Because of a bad roof the areas outby the seals is [sic] unsafe.

It is uncontested that at the time the citation was issued that the 6th West seals were not inspected because the area that had to be traveled to inspect the seals had been "dangered off" and was unsafe to travel.

The inspector never physically inspected the seals. He determined that Beaver Creek had not conducted an examination of the seals by checking Beaver Creek's records.

There were a total of ten seals constructed in 6th West, some of which were built December 21, 1987, and the rest of which were built on January 1, 1988. The seals were constructed of 8-inch by 8-inch by 48-inch wooden crib block, running from top to bottom and rib to rib. The seals were well constructed and expected to last for the life of the area. The inspector acknowledged that the seals would bear weight well and would be difficult to breach.

The seals were checked until approximately the last week of February 1988. At that time the timbers in the walkway leading to the seals were starting to give way and that the top showed signs of cracking. Mine Manager Meadors inspected the area and decided for safety reasons that no Beaver Creek employee should proceed beyond seal 5 to inspect seals 6 through 10. Although all the seals were intact, about a half-a-dozen timbers had already broken in the area beyond the fifth seal. Since the area had already been mined out, and there was a danger of roof falls, Beaver Creek "dangered off" the area at that time. A week or two thereafter Beaver Creek dangered off the area from the third seal inby and installed breaker rows, because the intersections were deteriorating and the timbers were breaking up.

The preponderance of the evidence established that at the time the citation was issued, Beaver Creek was not performing any work in 6th West. Inspector Jones considered that the nearest mining was "a significant distance" away and estimated that distance to be 1,000 feet. Beaver Creek presented evidence that the nearest mining was in 5th West.

Beaver Creek had monitored, and continued to monitor, the air in the area of the seals pursuant to a bleeder system approved by MSHA. (See Joint Ex. 19; Joint Ex. 22; and Joint Ex. 24). The bleeder system draws off methane and keeps the gob, or waste coal left behind, ventilated. If the integrity of any of the seals were breached, this would show up in the monitoring of the bleeder system. There was nothing in the bleeder system to indicate any breach of the seals, and Inspector Jones testified he had never known such a breach to occur at Beaver Creek.

30 C.F.R. § 75.305 provides in relevant part:

In addition to the preshift and the daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane and for compliance with the mandatory health or safety standards, shall be made at least once a week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit abandoned areas.

(emphasis added)

30 C.F.R. § 75.2(h) defines "abandoned areas" as: "sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D of the Part 75."

It is undisputed that safety consideration did not permit travel through the "dangered off" area that would have to be traveled to inspect the 6 West seals. The Secretary argues that if this area were an abandoned area, the inspector would not have issued the Citation because of the undisputed fact that safety considerations did not permit the inspection of the 6 West seals.

It was MSHA's position that Beaver Creek could and should have adequately supported the roof in that area so that the 6 West seals could be safely inspected. Beaver Creek, on the other hand, presents credible evidence that the roof had been supported and improved to the extent that it could not be improved anymore.

The Secretary argued that the area in question was not an abandoned area because it was not completely sealed off. The Secretary's position was that only an area that has been completely sealed off is an abandoned area.

Within the context of the cited regulation this definition of an abandoned area is not logical in view of the wording of the cited regulation. It cannot be accepted as the meaning of the term "abandoned area" as that term is used in this regulation. The regulation clearly requires inspections of abandoned areas under certain circumstances, i.e., where "safety considerations permit." There is merit in Beaver Creek's contention that if MSHA's definition of abandoned area were adopted, an operator could never inspect an abandoned area -- unless the seals were unsealed.

I find that the preponderance of the evidence presented established that the area in question was an "abandoned area" within the meaning of that term as used in the cited standard and that safety considerations did not permit travel into that area for inspection of the 6 West seals. Citation No. 3224925 is vacated. Contest proceeding WEST 88-162-R and Civil Penalty proceeding WEST 88-282 are dismissed.

ORDER

Based on the above finding of fact and conclusion of law,
IT IS ORDERED:

1. Citation No. 3227048 is affirmed and a penalty of \$91.00 is assessed for this violation.

2. In accordance with the Secretary's motion, Citation No. 3044356 is vacated.

3. Citation Nos. 3227046 and 3227047 are vacated. Contest Proceedings Docket No. WEST 88-105-R is granted.

4. Citation No. 3224925 is vacated. Contest Proceeding Docket No. WEST 88-162-R is granted and Civil Penalty Docket No. WEST 88-282 is dismissed.

5. Respondent Beaver Creek shall within 30 days of the date of this decision pay a civil penalty of \$91.00 for the violation of Citation No. 3227048. Upon payment, Civil Penalty Proceeding Docket No. WEST 88-265 is dismissed.

August F. Cetti
August F. Cetti
Administrative Law Judge

Distribution:

David M. Arnolds, Esq., Thomas F. Linn, Esq., Beaver Creek Coal Company, 555 17th Street, 20th Floor, Denver, CO 80202 (Certified Mail)

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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

APR 27 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 90-12-M
Petitioner : A.C. No. 09-00265-05510
v. :
: Junction City Mine
BROWN BROTHERS SAND COMPANY, :
Respondent :

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
Petitioner;
Mr. Carl Brown, Brown Brothers Sand Company,
Howard, Georgia for Respondent.

Before: Judge Melick

This case is before me upon the petition for 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 Brown
Brothers Sand Company (Brown Brothers) with one violation of
the regulatory standard at 30 C.F.R. § 56.14130(g) and
proposing civil penalties of \$20 for the violation. The
general issue before me is whether Brown Brothers violated
the cited regulatory standard and, if so, the appropriate
civil penalty to be assessed in accordance with
Section 110(i) of the Act.

Citation No. 2856364 issued July 27, 1989 pursuant to
Section 104(a) of the Act alleges a violation the mandatory
standard at 30 C.F.R. § 56.14130(g) and charges that "the
loader operator was not wearing his seat belt while operating
his loader". The cited standard provides in relevant part
that "seat belts shall be worn by the equipment operator".

The testimony of Inspector Albert Moats of the
Department of Labor's Federal Mine Safety and Health
Administration (MSHA) is not disputed in essential respects.
According to Moats upon his inspection of the Brown Brothers
Junction City Georgia operation on July 27, 1989, he observed
a worker operating a front-end loader without his seat belt

on. Moats testified that upon reporting to the mine office he then informed company President Carl Brown of this observation. Upon returning to the office several hours later Moats again saw the worker operating the loader without his seat belt on. Moats thereupon issue the citation at bar. He later terminated the citation after the loader was parked and he advised the operator of the necessity to wear his seat belt. Moats concluded that the violation was not serious because the loader was operating in a level area. He considered it unlikely that it would strike any other equipment or roll over. There is no contradictory evidence and I am therefore constrained to accept the testimony of Inspector Moats in this regard. Since Mr. Carl Brown was notified that one of his employee's was operating the front-end-loader without a seat belt and after several hours had still not corrected the condition, it is clear that Respondent is chargeable with negligence.

Counsel for the Government observed in closing argument that the son and grandson of Mr. Carl Brown actually run the subject business and have demonstrated that they are generally responsible supervisors. In addition counsel observed that no other seat belt violations have been observed at the subject mine. Accordingly it appears that Mr. Carl Brown's adamant position at hearing that he does not and will not require his employees to wear seat belts is his own personal and aberrant viewpoint not followed by the operating management. Government counsel further observed that in light of Mr. Brown's statements at hearing, MSHA would certainly be on notice in the future. Under the circumstances and considering the criteria under Section 110(i) of the Act, I accept the Secretary's proposed civil penalty of \$20.

ORDER

Citation No. 2856364 is affirmed and Brown Brothers Sand Company is hereby directed to pay a civil penalty of \$20 for the violation therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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Mr. Carl Brown, Brown Brothers Sand Company, P.O. Box 22, Howard, GA 31039 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 30 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 89-186
Petitioner : A.C. No. 15-13428-03508
v. : Lanham No. 1 Mine
LANHAM COAL CO., INC., :
Respondent :

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary);
Flem Gordon, Esq., Gordon and Gordon, Owensboro,
Kentucky, for Lanham Coal Co., Inc. (Lanham).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 77.1710(g) because a contractor-truck driver was working in an elevated area where there was a danger of falling, and was not wearing a safety belt and line. Pursuant to notice, the case was heard in Owensboro, Kentucky, on January 17, 1990. Gazi Bokkin and James Harold Utley testified for the Secretary. Tony Lanham testified for Respondent. The record was kept open for the submission of additional evidence, namely a copy of the death certificate of Claude J. Daugherty and a deposition of Willard Keith, M.D. These documents were received on February 12 and March 26, 1990. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Lanham was the owner and operator of a surface coal mine in Daviess County, Kentucky, known as the Lanham No. 1 Mine.

2. In 1988, the subject mine produced 197,826 tons of coal. It is a mine of moderate size.

3. In the 24 months prior to the alleged violation involved herein, Lanham had 17 paid violations, none of which involved 30 C.F.R. § 77.1710(g). This history is not such that a penalty otherwise appropriate should be increased because of it.

4. A penalty for the alleged violation will not affect Lanham's ability to continue in business.

5. Lanham had a contract with Caney Creek Trucking Company (Caney) to haul coal from the mine to Lanham's coal dock at the river approximately 14 miles from the mine.

6. Caney was owned by Claude Daugherty. Daugherty drove one of the trucks and had other employee coal truck drivers. Caney had 7 or 8 trucks. Six, 7 or 8 were operated each day hauling coal for Lanham. Caney hauled under contract with Lanham for approximately two and one half years as of December 29, 1988. Lanham paid Caney by the ton for its services in hauling the coal.

7. It was Lanham's practice to call Daugherty at night and tell him how much coal would be loaded the next day. The coal was loaded by a Lanham end loader into each truck. The truck driver indicated how much coal he wished to carry. The driver then covered the coal with a tarp and drove it to Lanham's dock. The truck was weighed and the coal dumped on the ground. Later it was loaded into a hopper and taken to a barge on the river. The truck was weighed empty and returned to the mine for another load.

8. Neither Caney nor Claude Daugherty had an MSHA Mine I.D. Number in December 1988.

9. Lanham operated end loaders, dozers and scrapers. It did not have any coal trucks.

10. Lanham did not furnish any equipment to Caney and did not control the manner in which Caney performed its services.

11. Prior to December 29, 1988, Caney's truck drivers, after the coal was loaded, tarped their trucks in a parking area off the main haul road but on mine property.

12. On December 29, 1988, Claude Daugherty drove his truck to Lanham's mine, had it loaded with coal at the pit, drove to the top of the ramp and stopped there to cover the load with his tarp. During this procedure, he fell from the truck approximately 10 feet to the ground. Daugherty was not secured by a belt or line while tarping the truck.

13. Daugherty was taken to the Owensboro-Daviess County Hospital and transferred two weeks later to the Norton Hospital in Louisville, Kentucky. He sustained fractures of the right hip, a dislocated right shoulder, and an apparent vascular injury to the spinal cord.

14. Daugherty died in the hospital on January 22, 1989, of septic shock following renal failure.

15. Following Daugherty's death, Lanham reported the injury to MSHA and an investigation was commenced.

16. On January 23, 1989, coal mine inspector Gazi Bokkin issued a citation for a violation of 30 C.F.R. § 77.1710(g) because the contractor-driver was working in an elevated area where there was a danger of falling and was not wearing a safety belt or line.

17. The citation was terminated on February 14, 1989, when a reinspection disclosed that coal trucks were "not being tarped on mine property." The loaded trucks drove off the mine property before the drivers secured the tarps.

18. Daugherty had chronic pancreatitis and an enlarged liver, neither of which was related to the fall.

19. The evidence does not establish that the fall from the truck on December 29, 1988, caused Daugherty's death on January 22, 1989.

20. The inspector had never previously cited Lanham, Caney or any other mine operator or trucking contractor for a violation involving a similar factual situation. He had previously inspected the Lanham facility and had seen trucks being tarped.

21. None of Lanham's employees normally worked in the area where the trucks were tarped.

22. Inspector Bokkin in 20 years as an inspector and 22 years as a miner had never observed coal trucks provided with belts or lines for the person putting a tarp on or removing it from a loaded coal truck. Bokkin did not know that the practice cited was a violation prior to issuing the citation involved in this case.

23. The citation was issued to Lanham rather than Caney because at the time Caney did not have an I.D. number.

24. MSHA has never issued any instructions or bulletins regarding the duty of a mine to provide safety belts and lines for use while tarping trucks.

REGULATION

30 C.F.R. § 77.1710(g) provides in part as follows:

§ 77.1710

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, . . .

ISSUES

1. Whether a mine operator is responsible under the Mine Act for violations of safety standards by its independent contractors on mine property?
2. If so, whether the evidence establishes a violation of the standard as charged?
3. If so, what is the appropriate penalty considering the statutory criteria?

CONCLUSIONS OF LAW

I. JURISDICTION

Lanham is subject to the provisions of the Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding. A production operator may generally be cited for violations of mandatory safety standards by independent contractors. The Secretary has discretion in such cases "to cite production operators as (s)he [sees] fit." Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986). The case cited by Lanham, Secretary v. Jim Walter Resources, Inc., 7 FMSHRC 1099 (1985) was based on the Review Commission decision in Cathedral Bluffs which was reversed by the Court of Appeals. See also Secretary v. Consolidation Coal Company, 11 FMSHRC 1439 (1989). I see no reason to conclude that the Secretary abused her discretion in

this case when she cited Lanham for the violation committed by Caney.

II. VIOLATION

A coal truck driver who fastens a tarp over a load of coal in his truck while standing on the load of coal is in danger of falling. In the case before me he did in fact fall. Since he was not wearing a safety belt or line, a violation of the standard has been established.

III. GRAVITY

The testimony establishes that the driver tarping his load is ten feet or more from the ground. A fall from that height can result in a serious injury. The fall which resulted here did cause a hip fracture and a shoulder dislocation. Even though the death of the driver was not shown to have been caused by the fall, the violation was serious.

IV. NEGLIGENCE

Until MSHA was notified of the contractor truck driver's death, neither Lanham nor the inspector considered the standard applicable to the tarping of trucks. The inspector never observed safety belts or lines used in such situations in more than 40 years of mining experience. MSHA had no standards or guidelines concerning this practice. Lanham had no specific notice that the practice violated the standard. It would be absurd under these circumstances to conclude that the violation resulted from Lanham's negligence. I conclude that it did not.

V. PENALTY

Lanham is a moderately sized operator. It had 17 paid violations in the 24 months prior to the issuance of the citation involved herein. It abated the violation promptly in a manner satisfactory to MSHA. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of \$250 is appropriate for the violation.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

1. Citation 3297324 is AFFIRMED.

2. Respondent Lanham Coal Company shall within 30 days of the date of this decision pay the sum of \$250 for the violation found herein.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 30 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-102-DM
ON BEHALF OF	:	
GILBERT WISDOM,	:	MD 88-60
Complainant	:	
v.	:	State Road 520 Plant
	:	
F & W MINES, INC.,	:	
Respondent	:	

DECISION

Appearances: Glenn M. Embree, Esq., U.S. Department of Labor,
Office of the Solicitor, Atlanta, Georgia, for the
Complainant;
James E. Foster, Esq., Foster & Kelly, Orlando,
Florida, for the Respondent.

Before: Judge Maurer

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (Secretary) on behalf of the affected miner, Gilbert Wisdom, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), hereinafter referred to as the "Act".

On May 1, 1989, a Discrimination Complaint was filed with the Commission alleging that Mr. Wisdom was unlawfully discriminated against and discharged by respondent on April 4, 1988, for engaging in an activity protected by section 105(c)(1) of the Act. More particularly, the Complaint alleges that Wisdom's discharge on April 4, 1988, was the direct result of his refusal to perform work (operate a machine) which he believed to be unsafe.

Pursuant to notice, a hearing on the merits was held in this matter on August 17, 1989, in Orlando, Florida. Post-hearing proposed findings and conclusions were filed by the Secretary on October 18, 1989, and by the Respondent on November 15, 1989. Subsequently and pursuant to motion which was granted, the Secretary filed a response to the Respondent's proposed findings and conclusions on March 30, 1990. I have considered these submissions along with the entire record in making this decision.

Findings of Fact

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. Respondent, F & W Mines, Inc., (F & W) is a Florida corporation engaged in the open pit mining of shell. This shell is sold primarily as a road base material in a geographically limited area, primarily due to the cost of transportation. However, it was used in portions of Florida State Road No. 434. Furthermore, some of the equipment and supplies used in the respondent's mining operation were manufactured and purchased outside the state of Florida.

I will deal with it later in this decision, but suffice it to say for now that I am not going to have any trouble finding this operation to be a "mine" within the meaning of the Act, nor deciding the interstate commerce issue in favor of federal jurisdiction.

2. Until his termination on April 4, 1988, Gilbert Wisdom's primary duties were to operate F & W's Koehring 866 backhoe, excavating shell.

3. The Koehring 866 backhoe is a very large, tracked machine approximately 14 feet wide and 25 feet long, with an arm or bucket that extends 25 to 30 feet and has a capacity of approximately four yards of material. This machine was used to excavate shell by traversing it back and forth in parallel fashion along the edge of the pit previously created by the last pass. The depth of these excavations ranged from 3 feet to a maximum of 15 feet with an average excavation depth of four to five feet.

4. For approximately three or four months prior to his termination, complainant had had some problem operating the equipment because of the "brakes". According to the company mechanic, however, the problem was with the tracking system, not the brakes. In any event, whatever the precise cause, the crux of the complainant's work refusal is contained in his testimony at Tr. 74-75:

Q. Now, as you were moving the machine down the rows, what use did you have to make of the brakes in the operation of the piece of equipment?

A. Well, to keep it from pulling you into the pit, you had so much power with your boom. If you had no

power to lock the machine, it would just pull you over into the pit. It would move the machine.

Q. Now, was one brake just not operating?

A. One brake was hanging up at first, and it was stretching the drive chain out, and it broke. They ordered a new drive chain. When they were putting it on, to keep them from having to buy another chain and stretching it out, they released the brakes totally, so there would be no more problem with chains stretching out and such, or pulling me sideways. Then I would have an equal pull or an equal lack of pull.

* * * * *

Q. Both sides were released. Now, once both sides were released, what problems would that cause in terms of the operation of the backhoe?

A. Well, it slowed production. They told me to either turn the machine perpendicular to my cut -- and I tried that, and it did work when you were digging straight ahead of you. But when you turned toward your -- 45 to 90 degrees, it would still pull you towards the pit. So, that didn't work.

I talked to the mechanic. He said, "Try digging mounds in front of you." It would also pull it, either up on top of the mound or pull it through the mound. That didn't work well either.

Q. So, after that did there come a time when the brakes were tightened back up?

A. No, sir.

Q. So, from that point on, you continued to operate it without brakes?

A. Yes, sir.

Q. Now, for approximately how long did you operate this piece of equipment without brakes?

A. I guess three or four months -- three months.

5. Over this period of time the problem with the backhoe became progressively worse and basically one side of the

backhoe's braking and/or tracking system wasn't locking while the other side was. The result was that the backhoe was being pulled toward the pit and complainant feared that he might be pulled into the pit.

6. In response to his complaints, management told him that parts to fix the tracking system were on order and that the company was contemplating trading the machine for a new one or shutting it down and refurbishing it. He had the impression they were just putting him off.

7. Four or five days prior to April 4, 1988, the backhoe also developed a leak in an air diaphragm that controlled the swing arm. The air diaphragm was designed to act as a buffer to control the stopping of the swing arm. With a hole in it, it caused the swing arm to be slower to react because it was losing air pressure to the swing control. The response is slower between the operator and the swing arm and the swing arm itself moves slower. This loss of control or mushiness of the control caused the complainant to twice hit the side of a truck he was loading with the machine. This could obviously present a hazard to others in the vicinity.

8. Complainant has had a long medical history of having migraine headaches. The stress of operating this machine in the condition it was in exacerbated his headaches and also caused panic attacks and high blood pressure. His doctor advised him to change his situation at work or do whatever else it took to bring his blood pressure under control and alleviate his headaches.

9. On April 4, 1988, the Complainant told his immediate supervisor that he believed the equipment was unsafe to operate in the condition it was in and that it constituted a hazard to his health and safety and the safety of others and he refused to operate it. He was therefore fired after refusing to reconsider his action.

DISCUSSION WITH FURTHER FINDINGS

Respondent maintains that although this backhoe was not in perfect condition it was not unsafe to operate. Respondent points out that the other employees of F & W who operated it did not think it was unsafe, and the complainant himself operated it in this imperfect condition for three to four months without incident.

The superintendent, Carlton Prevatt, has known the complainant for twenty years and is a close personal friend of his older brother, who is coincidentally a former owner of F & W. Mr. Prevatt testified and I believe him that he would not have

permitted the complainant to operate a piece of mine equipment which he (Prevatt) believed to be unsafe. He knew the machine was "tired", but did not think it to be unsafe.

This was also generally the testimony from the company mechanic who knew exactly what was wrong with the equipment and understood what the effect of the malfunctioning equipment would be on its operation. He also operated the equipment himself, allegedly without incident or difficulty.

Mr. Baxter, who was the one who actually ordered the complainant to start up the backhoe and start digging and also was the one who fired the complainant when he refused to do so testified. He was shocked at the complainant's refusal. He thought he was joking at first, but he refused a second time. Baxter himself had operated this equipment during this same period of time and likewise did not think it to be unsafe.

Unfortunately for respondent in this case, refusal to work cases turn on the miner's belief that a hazard exists, so long as that belief is held in good faith and is a reasonable one.

Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982).

Generally, in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511, (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's

Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magna Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra at 810.

Thus, the principal question for decision here is did Gilbert Wisdom reasonably and in good faith believe that he was going to be required to operate a piece of equipment which was deleterious to his health or safety.

If a miner refuses to work only after an operator has failed or refused to respond to a reasonable complaint regarding an unsafe work condition, it is not likely that the miner has acted in bad faith. Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989).

Good faith must be viewed from the miner's perspective. Pratt, supra at 1533. In this case, it is generally acknowledged that the equipment was in the condition the complainant says it was in. Furthermore, I have found that the complainant on numerous occasions did complain to his supervisor as well as the company's mechanic concerning the way the backhoe handled, if not specifically stating that it was unsafe, per se. Adjustments were made, parts were ordered, but no real attempt to fix the machine ever materialized. I therefore find that in his mind, at least, there was an honest belief that a hazard existed, which he could no longer cope with.

The other part of the question for decision is whether his belief that a hazard existed was a reasonable one under the circumstances. One must remember that objective evidence of an actual hazard is not required.

Respondent's starting position in this case is that the backhoe was "tired"; there were some maintenance and handling problems with it. It maybe even was frustrating or a nuisance to operate, but it was not unsafe. Although not expressed per se, my impression of respondent's next line of argument is that even if the machine was a little unsafe, where's the harm? "Complainant did not have a reasonable fear of injury or death". Resp. Brief at 11. No harm-no foul! But this is not the test. Just about any conceivable "hazard" will do so long as the complainant holds a good faith, reasonable belief in its existence. Complainant is not required to be in fear of serious bodily injury or violent death. Much less has been held to be sufficient.

I would agree that the record is devoid of any objective evidence that the complainant's continued operation of the backhoe would have subjected him to any greater hazard than the particular stress-related disorders to which he was predisposed or perhaps a hard jolt if the machine did get pulled down into the pit, which it never did. However, that is not determinative. Neither is the fact that ostensibly nobody else saw any problem with operating the backhoe just the way it was. What is important is if the complainant himself reasonably and in good faith believed that the continued operation of the backhoe was hazardous to his health (mental or physical).

There is a Commission decision which has many similarities to this case. In my opinion, it is on point and directs a favorable decision for the complainant in this case by analogy.

Secretary ex rel. Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (1984) involved a miner's work refusal. It also involved a malfunctioning piece of equipment. That operation involved drying sand in a large natural gas-fired dryer. The dryer had an electric spark plug that ignited the pilot light, when it worked. When it didn't, the pilot was ignited manually, by holding a piece of burning paper to it. Cooley had been directed to ignite the pilot manually on over thirty prior occasions and had always done so, although he complained throughout this period to his foreman and his fellow workers that this was unsafe.

The last time Cooley manually lit the pilot, he singed the hair on the knuckles of his right hand and he resolved that he would not light the pilot manually again. Later that same day,

he was called upon to manually light the pilot. He refused. He reasoned that if that were the proper way to light the pilot, the dryer would have been supplied with "a carton of matches and a bale of paper". His supervisor, like our Mr. Baxter, again ordered him to perform the task. He again refused and he was fired.

As in our case, the other employees who worked with the dryer, didn't see any problem with manually lighting the pilot and did so themselves routinely.

On these facts, the Commission found that Cooley had a good faith, reasonable belief that a hazard existed and found that his work refusal was protected. No greater hazard than singed knuckle hair was ever identified.

Wisdom basically followed the same track as Cooley. He reluctantly went along for a time operating the malfunctioning equipment, but complaining constantly to supervisors and fellow workers. The piece of equipment in both cases was not operating as it was designed to; it was being jerry-rigged to keep it going. Finally, one day Cooley singed his knuckle hair and Wisdom began to have stress-related problems and both resolved that they would not operate the equipment again, despite the fact that none of their fellow employees had a problem doing what they perceived to be unsafe. Subsequently, they both refused to operate the equipment for basically the same reason, as near as I can tell, and both were fired.

Good faith belief and reasonable belief in the hazards of the workplace are largely credibility issues and subjectively, I find the complainant herein to be a credible witness. As I found earlier in this opinion, there were difficulties in operating this backhoe and the tension caused by having to fight the machine could very well be the cause of his migraine headaches and panic attacks. He thinks so and testified to that effect. Respondent has not refuted this testimony.

I also believe the witnesses who testified that operating this backhoe was not unsafe were sincere. For them, it was not a problem. They could cope with the trackage problems and the difficulty with the swing arm. The more objective case that this was an unsafe piece of equipment is definitely harder to make, but then there is no requirement that the reasonableness of Wisdom's belief be verified objectively. See Robinette, 3 FMSHRC at 811-12.

Turning belatedly to the issues concerning jurisdiction, such as whether this operation is a mine and the interstate commerce question, I conclude that the shell is a mineral and its

extraction is mining within the meaning of the Act. I further conclude that the respondent's mining activity affects commerce within the meaning of the Act, and ultimately I find the respondent to be subject to the jurisdiction of the 1977 Mine Act.

The definition of "coal or other mine" found in § 3(h)(1) of the 1977 Mine Act is as follows:

"[C]oal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

[I]t is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. & ADMIN. NEWS 3401, 3414.

As a remedial statute, the Act has been given broad interpretation and has been found to apply to a broad spectrum of activities, including prospecting, assessing value of ore bodies and quarrying in one's backyard. Marshall v. Wait, 628 F.2d 1255, 1258 (9th Cir. 1980) (backyard rock quarry is within the definition of a mine); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (sand and gravel preparation plant is a "mine" within the meaning of the Act); Secretary of Labor v. Cyprus Industrial Minerals Corporation, 3 FMSHRC 1 (January 1981), aff'd by the Ninth

Circuit Court of Appeals, December 28, 1981, Cyprus Industrial Minerals v. FMSHRC and Donovan, 2 MSHC 1554 (digging of a tunnel to assess the value of talc deposits within the definition of a "mine").

Respondent's geologist testified that the shell excavated by F & W Mines is not a mineral within the generally accepted definition of that term as used by geologists. He also testified that sand, gravel and limestone were not minerals as those terms are used by geologists.

A mineral is defined in general terms as "any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil." Black's Law Dictionary, Rev. 4th Ed. (1968).

For our purposes, this general definition is precise enough. Moreover, sand, gravel and limestone have previously been held to be minerals within the meaning of the Act, notwithstanding that they also do not fit precisely within that term as used by geologists.

Therefore, I specifically find and conclude that respondent's excavation of shell materials by open pit extraction is "mining" within the meaning of the Act.

Article I, Section 8, Clause 3, of the Constitution gives Congress the power to "regulate commerce ... among the several States." The U.S. Supreme Court has a long history of upholding Federal regulation of ostensibly local activity on the theory that such activity may have some affect on interstate commerce. Local activities, regardless of their size and their appearance as purely intrastate, may in fact affect interstate commerce if the activity falls within a class of regulated activity. See: Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (1975). In Perez v. United States 402 U.S. 146, 155 (1971), the court held that where a class of activities is regulated and that class is within the reach of Federal power, the courts have no power to exclude "as trivial" individual instances of the regulated activity.

Perez, supra, held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

Mining is among those classes of activities which are covered by the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa., 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act, and court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979).

A state highway department operating an intrastate open pit limestone mine, the product of which is crushed, broken and used to maintain county roads was held to be subject to the Act. Ogle County Highway Department, 1 FMSHRC 205 (January 1981).

A crushed stone mine operation was held to be subject to the Act because the sales of rock products, as well as the use of equipment manufactured out of state, affected commerce within the meaning of the Act's jurisdictional language. Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982).

The cited cases support my conclusion that respondent's extraction and processing of the shell material clearly affects commerce within the meaning of the Act.

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.
2. The discharge of Wisdom by respondent on April 4, 1988 violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

ORDER

It is ORDERED that:

1. Complainant shall file a detailed statement within fifteen (15) days of this Decision, indicating the specific relief requested. The statement shall be served on the respondent who shall have fifteen (15) days from the date service is attempted to reply thereto.
2. This Decision is not final until a further Order is issued with respect to complainant's relief. In the event that a contested issue of fact arises as to the proper type or quantum of damages due the complainant, a hearing on that issue or issues

will be required, and it will be held at 10:00 a.m., on Friday, June 1, 1990, in Orlando, Florida. The specific courtroom in which it will be held will be designated, if necessary, at a later date.

As an optional method of compliance with this order, the parties may submit a joint proposed order for relief. Respondent's stipulation of the terms of a relief order will not prejudice its rights to seek review of this decision.



Roy J. Maurer
Administrative Law Judge

Distribution:

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James E. Foster, Esq., Foster & Kelly, 20 North Orange Avenue, Suite 600, Orlando, Florida 32801 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 30 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 89-79-D
ON BEHALF OF	:	
JACK WINNINGHOFF,	:	Black Pine Mine
Complainant	:	
v.	:	
BLACK PINE MINING COMPANY,	:	
Respondent	:	

FINAL ORDER DISMISSING PROCEEDING WITH PREJUDICE

Before: Judge Cetti

In accordance with my Decision approving Settlement of March 27, 1990, the Secretary, having advised that the settlement terms have been fully complied with by Respondent, this proceeding is dismissed with prejudice.

August F. Cetti
August F. Cetti
Administrative Law Judge

Distribution:

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Gary W. Callahan, Esq., Black Pine Mining Company, c/o Western Gold Exploration and Mining Company, Building 4, Suite 350, 1536 Cole Boulevard, Golden, CO 80401 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
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DENVER, CO 80204

APR 30 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : CIVIL PENALTY PROCEEDING
v. : Docket No. WEST 89-138-M
SIERRA AGGREGATE, INC.
Respondent : A.C. No. 04-04707-05508
: Docket No. WEST 89-173-M
: A.C. No. 04-04707-05509
: Red Top Mine

DECISION

Appearances: Jonathan S. Vick, Esq., Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California
for the Petitioner;
Donald G. Jolly, President, Sierra Aggregate, Inc.
for the 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, 30 U.S.C. § 801, et seq. (the Act).

After notice to the parties, a hearing on the merits commenced in Reno, Nevada on March 29, 1990.

At the hearing the parties reached an amicable settlement and entered into the following stipulation.

Docket No. WEST 89-138-M:

Citation No. 3286098: this citation should be affirmed as a non-S&S violation and the proposed penalty should be affirmed.

Citation No. 3286099: this citation should be affirmed as a non-S&S violation. Further, the proposed penalty of \$105 should be reduced to a penalty of \$20.

Citation No. 3293961: this citation should be amended to allege a non-S&S violation of 30 C.F.R. § 4200(b)(2). Further, the proposed penalty should be affirmed.

Citation No. 3293962: this citation and the proposed penalty of \$20 should be affirmed.

Citation No. 3293963: this citation should be amended to allege a non-S&S violation of 30 C.F.R. § 56.4200 (B)(2) and the proposed penalty of \$63 should be reduced to a penalty of \$20.

Citation No. 3293964: this citation should be amended to allege a non-S&S violation and the proposed penalty should be reduced from \$85 to \$20.

Docket No. WEST 89-173-M:

Citation No. 3293966: this citation is amended to allege a non-S&S violation of section 109(a) of the Act and the penalty should be reduced from \$50 to \$20.

Citation No. 3286032: this citation should be affirmed as a non-S&S violation and the proposed penalty should be reduced from \$126 to \$20.

Citation No. 3286033: this citation should be affirmed and the proposed penalty reduced from \$98 to \$75.

I have reviewed the stipulation and I find it is reasonable. Further, it is in the public interest that the proposed settlement should be approved.

Accordingly, I enter the following:

ORDER

1. The stipulation and proposed settlement are approved.

2. The foregoing citations, as amended by the stipulation, are affirmed.

3. The following civil penalties are assessed:

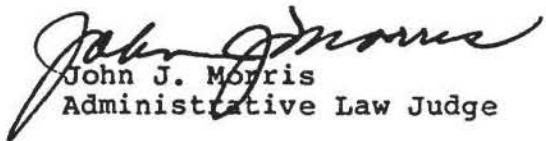
Docket No. WEST 89-138-M:

<u>Citation No.</u>	<u>Penalty</u>
3286098	\$20
3286099	20
3293961	20
3293962	20
3293963	20
3293964	20

Docket No. WEST 89-173-M:

<u>Citation No.</u>	<u>Penalty</u>
3293966	\$20
3286032	20
3286033	75

4. Respondent is ordered to pay to the Secretary the sum of \$235.00 within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

Distribution:

Jonathan S. Vick, Esq., Office of the Solicitor, U.S. Department of Labor, Room 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Mr. Donald G. Jolly, President, Sierra Aggregate Company, Inc., P.O. Box 1725, Bishop, CA 93514 (Certified Mail)

/ot

ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 2, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-41-M
Petitioner	:	A. C. No. 04-01924-05517
v.	:	Pleasanton Pit & Mill
	:	
M. JAMIESON COMPANY,	:	
Respondent	:	

ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

On January 24, 1990, an order to show cause was issued to the Solicitor directing him to file his penalty petition. On February 9, 1990, the Solicitor filed the proposal for penalty and responded to the show cause order.

A civil penalty petition should be filed within 45 days of receipt of a timely notice of contest of a penalty. 29 C.F.R. § 2700.27(a). The Commission has held that the late filing of a petition will be accepted where the Secretary demonstrates adequate cause and where there is no showing of prejudice to the operator. An extraordinarily high caseload and lack of clerical personnel were held adequate cause for filing two months late. Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981); See also, Medicine Bow Coal Company, 4 FMSHRC 882 (May 1982). However, adequate cause has not been found where there was a showing of prejudice, Price River Coal Co., 4 FMSHRC 489 (March 1982), and where the proposal was over a year and a half late, Lawrence Ready Mix Concrete, 6 FMSHRC 246 (Feb. 1984).

In this case, the Solicitor's motion states that the filing was late because:

The file in the captioned case, 90-41-M, was erroneously placed in with another pending matter against Respondent (WEST 89-464). Counsel for petitioner was unaware of the existence of 90-41-M and, therefore, did not file a proposal for penalty.

A relatively short period of time is involved and the response to the show cause was prompt. Further, there is no showing of prejudice by the operator nor does the operator allege this in its answer.

In light of the foregoing, the Solicitor's proposal for penalty is ACCEPTED.

This case is hereby assigned to Administrative Law Judge John J. Morris.

All future communications regarding this case should be addressed to Judge Morris at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, CO 80204

Telephone No. 303-844-3912



Paul Merlin
Chief Administrative Law Judge

Distribution:

George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1020, San Francisco, CA 94105 (Certified Mail)

Mr. Richard Kelly, M. Jamieson Company, P. O. Box 850, 501 El Charro Road, Pleasanton, CA 94566 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

March 13, 1990

WYOMING FUEL COMPANY,
Contestant : CONTEST PROCEEDINGS
v. :
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent : Docket No. WEST 90-112-R
: Order No. 2930784; 2/13/90
: Docket No. WEST 90-113-R
: Citation No. 2930785; 2/13/90
: Docket No. WEST 90-114-R
: Order No. 3241331; 2/16/90
: Docket No. WEST 90-115-R
: Citation No. 3241332; 2/16/90
: Docket No. WEST 90-116-R
: Citation No. 3241333; 2/16/90
: Golden Eagle Mine
: MSHA Mine ID No. 05-02820

ORDER

The Secretary has requested, pursuant to Rule 74, 29 C.F.R. § 2700.74, that the judge certify his ruling of March 2, 1990 to the Commission.

The Secretary restates her previous position.

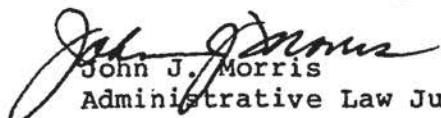
Discussion

The Secretary's request for certification is denied. As previously stated, the judge believes an expedited hearing is mandated when an order is issued under section 107.

In an unrelated case, Medicine Bow Coal Company, Docket Nos. WEST 90-117-R and WEST 90-123-R, the judge concluded an expedited hearing was not mandated for a section 104(d) order unless the operator met certain criteria. A copy of the order in Medicine Bow is attached.

The judge believes the statute is clear. Further, Commission Rule 52, 29 C.F.R. § 2700.52 does not address the issue.

Accordingly, the Secretary's motion is denied.


John J. Morris
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

March 13, 1990

MEDICINE BOW COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 90-117-R
	:	Citation No. 3241007; 1/17/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 90-123-R
	:	Citation No. 3295756; 2/13/90
	:	Pilot Butte Mine
	:	Mine I.D. No. 48-01012

ORDER

These cases arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Contestant seeks an expedited hearing. The Secretary opposes.

In WEST 90-117-R the Secretary, pursuant to Section 104(d)(1), issued Citation No. 3241007 on January 17, 1990. The citation alleges a violation of 30 C.F.R. § 75.807. The notice of contest was docketed with the Commission on February 20, 1990.

In WEST 90-123-R the Secretary, pursuant to Section 104(d)(1), issued Order No. 3295756 on February 13, 1990. The citation alleges a violation of 30 C.F.R. § 75.517. The notice of contest was docketed with the Commission on February 28, 1990.

As a grounds for its motion Contestant states it is subject to a continuing possibility of orders issued pursuant to Section 104(d) of the Act despite its belief that the citation and order were not properly issued pursuant to the Act.

Discussion

Portions of the Mine Act, and Commission Rule 52, 29 C.F.R. § 2700.52 l/ deal with expedited hearings. These sections should be considered.

l/ The Commission rule broadly addresses expedited hearings but it does not consider appeals of § 104(d) orders.

As a threshold matter: Section 107(a) ^{2/} and its subparts deal with imminent danger orders and withdrawal notices issued under section 107. Subpart (e) ^{3/} addresses a hearing before the Commission. The subpart provides as follows:

"(e)(i) Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

(2) The Commission shall take whatever action is necessary to expedite proceedings this subsection."

The enforcement documents involved in these cases were not issued under section 107 of the Act but under section 104. Accordingly, it is necessary to look to other portions of the Act. ^{4/}

The controlling portion of the Act is found in section 105 (a)(B)(2) which provides as follows:

2/ 30 U.S.C. § 817.

3/ 30 U.S.C. § 817(e).

4/ On March 2, 1990, in unrelated cases, Wyoming Fuel Company, WEST 90-112-R the judge ruled contestant therein was entitled to an expedited hearing. However, Wyoming Fuel dealt with an order issued under Section 107(a) of the Act.

"(2) As applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if -

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

In the instant cases contestant's sole basis for an expedited hearing is that it "is subject to a continuing possibility of the issuance of orders pursuant to Section 104(d) of the Act." However, Contestant's position is not unique. Every mine operator is subject to the "possibility" of the issuance of "104(a)" orders. In addition, these cases both involve 104(d) orders and contestant has failed to allege that it is within the criteria required by subparagraphs (A), (B) and (C) of § 105(a)(B)(2).

For the foregoing reasons contestant's motion to expedite is denied.


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
703-756-6232

April 16, 1990

RICKY HAYS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 90-59-D
	:	MSHA Case No. BARB CD 89-32
LEECO, INC.,	:	
Respondent	:	No. 62 Mine

ORDER DENYING MOTION TO VACATE ORDER GRANTING
MOTION TO PERMIT ENTRY UPON DESIGNATED LAND

This matter is scheduled for a hearing in Pikeville, Kentucky, on Tuesday, May 8, 1990. The parties have engaged in pretrial discovery, including the scheduling of depositions. On April 13, 1990, complainant's counsel filed a motion seeking an order permitting the complainant, his counsel, and an expert witness to enter the respondent's underground mine for the purpose of inspecting, measuring, and possibly photographing the continuous haulage system. The complainant claims that he was discharged because he had not serviced a grease fitting on the No. 1 bridge of said haulage system. He contends that the respondent required its electricians to service the equipment while it is in operation, in violation of Federal law, and that his failure to service the equipment was based on his belief that it would be unsafe to do so.

In support of the motion, complainant's counsel stated that he was unfamiliar with the continuous haulage system and has been informed by Long Airdox, the manufacturer, that there are no such systems available for inspection in Kentucky other than in underground mines. Counsel asserted that the inspection of the system is fundamental to a thorough preparation of his case, and that counsel and the expert witness are willing to receive the necessary training before entering the mine, and are willing to inspect the system during a non-production shift. Counsel stated further that after contacting the respondent's counsel seeking permission to enter the mine, he was informed that the respondent would not permit any entry into its mine without a court order.

On April 6, 1990, I issued an order granting the complainant's motion to permit entry into the respondent's mine. The order was issued before the expiration of the available 10-day period for a response pursuant to Commission Rule 10, 29 C.F.R. § 2700.10. The respondent's counsel has now filed a

motion to vacate my order and to deny the complainant's motion to permit entry to the mine. In support of his motion, counsel states that no order should have issued until on or after April 12, 1990, and he seeks leave to file his response and objections to the complainant's motion. With regard to the merits of the complainant's motion to permit entry to the mine, counsel advances the following arguments in support of his objections:

1. The respondent has already provided to the complainant's attorney the name of the manufacturer and the model numbers of the equipment in question, and complainant's counsel should be able to obtain photographs, diagrams, specifications, etc., sufficient for a determination as to the safety of greasing the equipment in question. Further, if the complainant has retained an "expert" on this matter, such expert, as a prerequisite of his being permitted to give opinion testimony, should already be familiar with the equipment in question.

2. The discovery requested by the complainant poses an undue burden upon the respondent. If the complainant's motion were granted, the respondent would be required to designate personnel to escort the complainant's attorneys and expert witness into the mine, at the cost of several man hours. It would also appear that the respondent is expected to provide safety training and orientation to the attorneys and experts. Further, the inexperience of the attorneys and experts as to the hazards presented in an underground coal mine, even during a nonproduction shift, poses a threat of harm not only to the attorneys and experts but to the employees at the mine as well.

On April 11, 1990, I held a telephone conference with counsel for the parties and heard further arguments with respect to the motion, including the complainant's response to the respondent's objections, which were subsequently reduced to writing and filed with me on April 13, 1990. Complainant's counsel has reasserted his need for an on-site inspection of the continuous haulage system, which he believes is crucial to his case. Counsel states that he intends to depose two of the respondent's key witnesses who are "intimately familiar" with the system, and in order to adequately prepare for the taking of their depositions, as well as the trial of the case on the merits of the complaint, it is essential that he be permitted to examine the system in place at the respondent's mine. Counsel further states that he has travelled underground, has completed a 40-hour inexperienced miner's safety training course required by the State of Kentucky, and that during the requested mine visit, the

complainant and his representatives would be accompanied at all times by the respondent's agents.

Conclusion

After careful consideration of the further arguments advanced by the parties, including the respondent's objections, I conclude and find that the complainant has established a reasonable basis for his request to enter the mine under the conditions stated in his motions, and that on balance, they outweigh the arguments advanced by the respondent. Under the circumstances, and upon further consideration of my prior ruling and order of April 6, 1990, IT IS AFFIRMED, and the respondent's objections ARE DENIED.

ORDER

The respondent IS ORDERED to permit the complainant, his attorneys, and expert witness to enter the mine for the purpose of inspecting, measuring, and possibly photographing the continuous haulage system in question. Counsel for the parties are expected to agree to a mutually convenient time for the mine visit, taking into account the safety of the inspection party, and with the least amount of disruption to the respondent's mining operations.

In view of the proximity of the scheduled hearing, and the complainant's established need for inspecting the haulage system prior to the anticipated taking of the depositions of respondent's witnesses, respondent is expected to expeditiously comply with this order.

George A. Koutras
George A. Koutras
Administrative Law Judge

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