JUNE 1994

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JUNE 1994

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

Secretary of Labor, MSHA v. North American Slate, Docket No. YORK 93-156-M. (Chief Judge Merlin, unpublished Default, April 25, 1994)

Secretary of Labor, MSHA v. Fort Union, Ltd., Docket No. WEST 94-120. (Judge Amchan, unpublised Settlement, May 1, 1994)

Secretary of Labor, MSHA v. Blue Bayou Sand & Gravel, Docket No. CENT 93-216-M. (Judge Weisberger, May 10, 1994)

Thunder Basin Coal Company v. Secretary of Labor, MSHA, Docket Nos. WEST 94-238-R, WEST 94-239-R. (Judge Amchan, May 11, 1994)

New Warwick Mining Company v. Secretary of Labor, MSHA, Docket No. PENN 93-199-R. (Judge Amchan, May 12, 1994)

Randall Patsy v. Big "B" Mining Company, Docket No. PENN 94-132-D. (Judge Feldman, May 13, 1994)

Secretary of Labor, MSHA v. Thunder Basin Coal Company, Docket No. WEST 94-148-R, WEST 94-303. (Judge Amchan, May 18, 1994)

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket No. WEVA 92-783. (Judge Fauver, May 25, 1994)

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

Secretary of Labor, MSHA v. W.S. Frey Company, Inc., Docket No. VA 93-59-M. (Judge Barbour, April 28, 1994 - case was remanded for correction of clerical order)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 2, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No . YORK 93-156-M
vs.	:	
NORTH AMERICAN SLATE, INC.	:	

ORDER

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1988) ("Mine Act"). On April 25, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to North American Slate, Inc. ("North American") for failing to answer the proposal for assessment of civil penalty filed by the Secretary of Labor ("Secretary") and the judge's January 27, 1994 Order to Show Cause. The judge assessed the civil penalty of $50 proposed by the Secretary.

The judge's jurisdiction in this matter terminated when his decision was issued on April 25, 1994. Commission Procedural Rule 69(b), 29 C.F.R. §2700.69(b) (1993). Under the Mine Act and the Commission's Procedural Rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. §823(d)(2); 29 C.F.R. §2700.70(a). On May 25, 1994, North American filed a timely petition for discretionary review. North American avers that the default was improperly entered after it "had attempted to respond to the citation . . . by mailing a notice of contest to [the] Secretary in accord with the Notice of Assessment." Pet. at 1.

We grant the petition. On the basis of the present record, we are unable to evaluate the merits of North American's position. Accordingly, we reopen this matter, vacate the judge's default order, and remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 7, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	DOCKET Nos. VA 93-59-M
	:	VA 93-80-M
v.	:	VA 93-89-M
W.S. FREY COMPANY, INC.	:	

ORDER

On May 26, 1994, W.S. Frey Company, Inc. filed a petition for discretionary review with the Federal Mine Safety and Health Review Commission under section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. at § 823(d)(2). That section provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A). No two members of the Commission voted to grant the petition or otherwise order review under 30 U.S.C. § 823(d)(2)(B). Consequently, the decision of the Administrative Law Judge is final as of 40 days after its issuance. 30 U.S.C. § 823 (d)(1).

Commission Procedural Rule 69(c), 29 C.F.R. § 2700.69(c)(1993), permits correction of clerical errors in a judge's decision. In his decision, the judge vacated citation No. 4083442, involving 30 CFR 56.18009, and affirmed citation No. 4083445, involving a violation of 30 CFR 56.12066. ALJ Slip Op. at 37, 44-45 and Exhibits P-5 and P-13. Pursuant to Rule 69(c), we remand this case to the judge to correct the clerical errors at pp. 44, and 49-50 of his decision where he references citation No. 4083445 to a violation of 30 C.F.R. § 56.18009, and describes citation No. 4083442, rather than citation No. 4083445, as the citation setting forth the affirmed violation. ALJ Slip Op. at pp. 44, 49-50.

Accordingly, we remand this aspect of the case to the judge for correction of clerical errors.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 9, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket SE 94-383
ADMINISTRATION (MSHA)	:	A.C. # 01-01401-04000
	:	SE 94-384
v.	:	A.C. # 01-01322-03949
	:	SE 94-389
JIM WALTER RESOURCES, INC.	:	A.C. # 01-01401-03988
	:	SE 94-390
	:	A.C. # 01-01401-03999

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

ORDER

BY THE COMMISSION:

In these matters arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Jim Walter Resources, Inc. ("JWR") filed with the Commission motions seeking to reopen uncontested civil penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Commission received the motions on May 9, 1994. As the basis for its motions, JWR relies upon Fed. R. Civ. P. 60(b)("Rule 60(b)"). The Secretary of Labor filed responses requesting evidentiary hearings before an administrative law judge to determine whether JWR's motions should be granted. We grant the motions in part.

JWR states in each motion that it failed to file with the Department of Labor's Mine Safety and Health Administration ("MSHA") a "Green Card" notice of contest challenging MSHA's proposed civil penalties within the 30-day period set forth in section 105(a); that its counsel had an unusually heavy case load at the time and that there was a delay in the interoffice transmittal of the penalty assessments to him; and that it has implemented a procedure to correct problems with its interoffice mail. JWR asks the Commission to reopen these matters pursuant to Rule 60(b) so that it may file its notices of contest. The proposed penalties have not been paid.

The Secretary's response requests a hearing to determine, inter alia, whether the Commission has jurisdiction to reopen these cases and, if so, whether JWR has satisfied the requirements for reopening under Rule 60(b).

Section 105(a) of the Mine Act requires that, after issuing a citation or withdrawal order for an alleged violation, the Secretary notify the operator of "the civil penalty proposed to be assessed." 30 U.S.C. § 815(a). Section 105(a) allows the operator 30 days to contest the proposed penalty and further provides that, if the operator fails to contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." Id.

JWR failed to contest the proposed assessments within 30 days, and, accordingly, they have become final orders of the Commission. The Commission has held that, in appropriate circumstances and pursuant to Rule 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). Jim Walter Resources, Inc., 15 FMSHRC 782, 787-90 (May 1993)("JWR"); see also, Jim Walter Resources, Inc., 16 FMSHRC 721, 722 (April 1994). Rule 60(b) relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect, but cannot be used to relieve a party from the consequences of its "deliberate litigation choices." JWR, 15 FMSHRC at 790.

On the basis of the present record, we are unable to evaluate the merits of JWR's position. In the interest of justice, we reopen these matters and remand them for assignment to a judge to determine whether JWR has met the criteria for relief under Rule 60(b). The judge shall take evidence with respect to the reasons for JWR's failure to file timely contests. If the judge determines that relief under Rule 60(b) is appropriate and permits JWR to file notices of contest, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

For the foregoing reasons, JWR's motion is granted in part and these matters are remanded for assignment.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 14, 1994

FORT UNION, LTD.	:	
	:	
v.	:	
	:	Docket No. WEST 94-120
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	

DIRECTION FOR REVIEW
ORDER

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On May 1, 1994 Administrative Law Judge Arthur J. Amchan issued a Decision Affirming Settlement based upon representations made by the Secretary of Labor's counsel in its Motion to Approve Settlement and Order Payment. For the reasons that follow, we vacate the Decision Approving Settlement and remand the case for further proceedings.

The judge's jurisdiction in this matter terminated when his decision was issued on May 1, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's Procedural Rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a).

On May 31, 1994 Fort Union Ltd. ("Fort Union") timely filed a petition for discretionary review asserting that "the parties did not agree to the language to be set out in the Motion to Approve Settlement." PDR at 2. In support, Fort Union has attached a copy of a letter it received from the Secretary's counsel, dated April 22, 1994, the same day the Secretary filed with the judge the motion to approve settlement. The Secretary's letter to Fort Union conveyed a copy of the motion to approve settlement and stated, "If . . . you believe the motion does not correctly state your intentions, you should immediately notify the Administrative Law Judge." On April 29, 1994, Fort Union wrote to the judge, objecting to the settlement motion.

"Settlement of contested issues is an integral part of dispute resolution under the Mine Act." Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). Section 110(k) of the Mine Act provides that no contested proposed penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). "[T]he record must reflect and the Commission must be assured that a motion for settlement, in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provision." Peabody Coal Co., 8 FMSHRC 1265, 1266 (September 1986).

Apparently, Fort Union does not dispute that it agreed to settle the proposed penalties for the amount approved by the judge, but there is disagreement between the parties as to the terms upon which the settlement is acceptable. Fort Union was not a signatory to the agreement it now disputes, and further consideration by the judge is necessary. See Peabody, 8 FMSHRC at 1267.

For the reasons set forth above, we vacate the judge's decision approving the settlement.[1] We remand this matter to the judge for appropriate further proceedings.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

[1] The Commission was unable to complete action in this matter before the 40th day following the judge's decision (30 U.S.C. § 823(d)(1)), and accordingly, reopens this matter in order to issue this direction for review.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., SIXTH FLOOR
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June 20, 1994

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	:	Master Docket No. 91-1
KEYSTONE COAL MINING CORP.,	:	
v.	:	Docket Nos. PENN 91-451-R through PENN 91-503-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. PENN 91-1176-R* through PENN 91-1197-R*
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 91-1264
	:	Docket No. PENN 91-1265
v.	:	Docket No. PENN 91-1266
KEYSTONE COAL MINING CORP.	:	Docket No. PENN 92-182
and	:	Docket No. PENN 92-183
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

ORDER

In its Petition for Discretionary Review filed on May 20, 1994, the Secretary of Labor ("Secretary") requested that "the Commission order that the remaining cases under Master Docket No. 91-1 continue to be stayed during the pendency of this appeal." PDR at 22.

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* The previously issued Direction for Review failed to reference Docket Nos. PENN 91-1176-R through PENN 91-1197-R. Those cases are included among the cases under review.

On June 2, 1994, Contestants Canterbury Coal Company, Cyprus Coal Company, Cyprus Shoshone Coal Corporation, Cyprus Plateau Mining Corporation, Cyprus Kanawha Corporation, Twentymile Coal Company, and Cyprus Empire Corporation, represented by Buchanan Ingersoll P.C., filed a response in opposition to the Secretary's request for continuation of the stay.

On June 10, 1994, all contestants represented by Crowell & Moring in this matter requested that "their cases be stayed until the Commission decides the common issues under review in Keystone." Response at 15.

We hereby remand consideration of the motion, and the responses thereto, to Chief Administrative Law Judge Paul Merlin, who shall direct the Secretary to comply with Commission Rule 10, 29 C.F.R. 2700.10, in order to ensure that all affected parties are on notice of the Secretary's motion. The stay order was issued by Administrative Law Judge James Broderick, who has since retired.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-421
MID-CONTINENT RESOURCES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-627
WILLIAM PORTER	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1,2]

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The

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[1] Commissioner Nelson participated in the consideration of this case but he passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

[2] Chairman Jordan assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. In the interest of efficient decision making, Chairman Jordan has elected not to participate in this matter.

issues are whether a violation by Mid-Continent Resources, Inc. ("Mid-Continent") of 30 C.F.R. § 75.400 for accumulations of combustible materials was significant and substantial ("S&S") (Docket No. WEST 91-421),[3] and whether Mine Superintendent William Porter "knowingly authorized, ordered, or carried out" the alleged violation within the meaning of section 110(c) of the Mine Act (Docket No. WEST 91-627).[4]

Administrative Law Judge John J. Morris concluded that Mid-Continent violated the standard, that the violation resulted from Mid-Continent's unwarrantable failure, that the violation was not S&S, and that Porter was not individually liable for a civil penalty under section 110(c). 15 FMSHRC 149 (January 1993)(ALJ). The Secretary filed a petition for discretionary review challenging the judge's S&S and section 110(c) determinations.[5] For the reasons that follow, we vacate the judge's conclusion that the violation was not S&S and remand for further analysis; we affirm the judge's determination that Porter was not liable under section 110(c).

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[3] 30 C.F.R. § 75.400 provides:

> Accumulation of combustible materials.
>
> 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.

[4] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [of this section].

30 U.S.C. § 820(c).

[5] In his decision, the judge also ruled on an order issued to Mid-Continent alleging a violation of section 75.400 on May 29, 1990, and on penalties proposed under section 110(c) against two other Mid-Continent employees in connection with that violation. Docket Nos. WEST 91-168, -594, and -626. Petitions for discretionary review with respect to those aspects of the judge's decision were filed by Mid-Continent and those employees found individually liable. We are issuing a separate decision on that petition. Mid-Continent Resources, Inc., 16 FMSHRC ____ (June 20, 1994).

I.

Whether the Violation Was S&S

A. Factual Background and Procedural History

Mid-Continent operates the Dutch Creek Mine, an underground bituminous coal mine in Pitkin County, Colorado. On May 1, 1990, James Kirk, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 103 longwall section. He found accumulations of loose coal at various locations along the 103 strike conveyor belt, which was approximately 3,000 feet long, beginning with the area around the stage loader and belt tailpiece near the face. The belt had broken on the previous shift and, during Kirk's inspection, it was operating only intermittently. 15 FMSHRC at 155-57, 162; Tr. 66, 508, 578. Approximately 100 feet from the tailpiece, Kirk found accumulations up to 12 inches in height that were in contact with the belt and belt rollers. Proceeding outby along the belt near the shark pump, Kirk noticed additional accumulations extending about 50 feet. The belt rubbed against the conveyor framework as well as against the accumulations. Kirk also found accumulations between crosscuts 11 and 10 and at the 11 and 10 doors. These accumulations were also in contact with the belt and belt rollers. Near the 9 door, there was a windrow of coal approximately 260 feet long and up to 18 inches high. Kirk found further accumulations at the 8, 7 and 6 doors, which were 20 to 40 feet long and mostly dry. At the 6 door, the belt and rollers were in contact with the accumulations. Kirk also observed wet accumulations around the drive area of the 103 belt and the tailpiece of the B-2 belt.

Kirk determined that the accumulations violated section 75.400. He issued a withdrawal order to Mid-Continent pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging that the violation was S&S and had resulted from the operator's unwarrantable failure to comply with the standard.

In concluding that the violation was not S&S, the judge determined that there was not a reasonable likelihood that the accumulations would result in a fire because the loose coal was of low combustibility. 15 FMSHRC at 159.

B. Disposition

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to a more serious type of violation. A violation is S&S 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 Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

> mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co. Inc., 7 FMSHRC 1125, 1130 (August 1985).

The judge found that Mid-Continent had violated section 75.400, that ignition or propagation of a fire is a hazard associated with coal accumulations, and that injuries resulting from the hazard could be serious and possibly fatal. 15 FMSHRC at 154, 156. He found, however, that there was not a reasonable likelihood that a fire would occur. Id. at 159-60. It is this finding that the Secretary challenges on review.

In concluding that the Secretary's evidence failed to satisfy the third element of the Mathies test, the judge found that Mid-Continent's coal has low oxygen and high ash content, burns with great difficulty, and will not spontaneously combust. 15 FMSHRC at 155, 159. The judge pointed out that Mid-Continent must add diesel oil to its coal to keep its coal-fired thermal dryers burning. Id. at 159. He noted that a major methane fire in a longwall section during the summer of 1990 failed to ignite adjacent coal pillars. Id. Accordingly, he concluded that, "[d]ue to the lack of ignitability of the loose coal," there was not a reasonable likelihood that a fire would result. Id.

On review, the Secretary contends that the judge's conclusion is not supported by substantial evidence in the record.[6] He argues that the judge failed to address adequately all the important evidence relevant to the likelihood of a mine fire occurring. The Secretary asserts that the accumulations could be ignited by frictional contact with the belt or belt rollers or by an ignition elsewhere in the mine. The Secretary also maintains that the judge failed to give due consideration to continued normal mining

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[6] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 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 [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

operations. In response, Mid-Continent submits that substantial evidence supports the judge's determination that there was only a remote possibility, if any, that either an ignition or an injury would occur as a result of the violation. Mid-Continent asserts that, at the time of citation, the belt had broken and thus all potential sources of friction were eliminated. It also contends that the Secretary failed to show a viable ignition source for any of the accumulations and that they were virtually incombustible.

The substantial evidence standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-89 (1951). A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). We agree with the Secretary that the judge failed to address adequately the evidentiary record in determining that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. See Eagle Nest, Inc., 14 FMSHRC 1119, 1123 (July 1992).

The judge's factual determinations with regard to the violation appear to be consistent with a finding of S&S, and he failed to reconcile those findings with his determination that the violation was not S&S. The judge recognized potential ignition sources such as frictional contact between the belt rollers and the accumulations, the belt rubbing against the frame, electrical cables for the shark pump, the electrical devices for the longwall and one area in the longwall that was not being maintained. 15 FMSHRC at 154-55. As specifically noted by the judge, Kirk had cited a permissibility violation on a power cable connected to a longwall control box. Id. at 155; Tr. 12-13, 29, 42. The judge also found that the accumulations could be introduced into an ignition causing a more serious ignition. 15 FMSHRC at 154.

Further, the judge failed to reconcile his finding that Dutch Creek is a gassy mine subject to five-day spot inspections with his determination that the violation was not S&S. Id. at 154, 158-60. The mine emits over one million cubic feet of methane in a 24-hour period. Tr. 28; see also Tr. 29-30. The 103 longwall is a gassy area. Tr. 297. Accumulations, in conjunction with a methane ignition in the face area, could propagate and increase the severity of a fire or explosion. 15 FMSHRC at 154; Tr. 30, 741-42.

We also conclude that the judge failed to take into account continued normal mining operations when he discounted Kirk's testimony as to the belt and belt rollers being in contact with the accumulations because the inspector did not recall any hot areas. 15 FMSHRC at 159; see Tr. 104. As the judge found, the conveyor belt had broken during the preceding shift and was under repair when Kirk entered the section. 15 FMSHRC at 156-57, 161-62.

Finally, to the extent the judge suggested that spontaneous combustibility of coal is required for an S&S finding, he erred. See 15 FMSHRC at 159. The evidence shows that loose coal in the Dutch Creek Mine is low in combustibility, but coal is, by its nature, combustible.

Accordingly, we vacate his conclusion that the violation was not S&S. We remand for further analysis consistent with this decision. If the judge finds that the violation is S&S, he shall assess the appropriate civil penalty.

II.

William Porter's Liability Under Section 110(c)

A. Factual Background and Procedural History

On May 1, 1990, William Porter, the mine superintendent responsible for the 103 longwall, came to work at 6:20 a.m. for the A shift (7:00 a.m. to 3:00 p.m.). He was told by a subordinate that the 103 belt had broken and had been down during the last hour and a half to two hours on the C shift (11:00 p.m. to 7:00 a.m.). Porter was unable to reach those currently working underground on the belt; he immediately instructed his foreman to see that the belt was repaired and the spillage cleaned up. Tr. 578-79. The accumulations along the 103 belt were the subject of Kirk's section 104(d)(2) order discussed above.

Following further investigation of the violation, the Secretary alleged, in a petition for assessment of civil penalty pursuant to section 110(c) of the Mine Act, that Porter had knowingly authorized, ordered, or carried out the violation of section 75.400 cited in Kirk's order.

The judge concluded that there was no evidence that Porter knowingly authorized, ordered, or carried out the violation. 15 FMSHRC at 162. The judge emphasized that the coal accumulations along the 103 belt were caused by the belt break that had occurred on the shift before Porter's. Id.

B. Disposition

The Secretary contends that the judge failed to consider evidence that there were coal accumulations along the 103 belt reported in the days before the belt break. The Secretary argues that Porter knowingly authorized a violation of section 75.400 when he countersigned the earlier preshift and onshift examination reports and, according to the Secretary, took no meaningful steps to clean up the accumulations. Mid-Continent replies that the cited accumulations resulted from the belt break and that the earlier examination reports show that the previous accumulations around the belt had been abated by shoveling.

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalty. 30 U.S.C. § 820(c).

The Secretary failed to establish that any of the cited accumulations existed before the belt break. The judge found that the belt broke on the May 1 C shift, causing coal spillage. 15 FMSHRC at 156. The record indicates that breakage of a belt carrying coal could result in the significant

accumulations later found by Inspector Kirk. See Tr. 134, 544, 548, 557. The inspector himself acknowledged that a great deal of coal could accumulate at the point of a belt break. Tr. 31, 67, 85. Accumulations would also result from removing coal from the belt in order to splice it. Tr. 83, 383-84, 493, 496-97.

Porter reported to work on the shift following the belt break. When he learned that the belt had broken, he assigned a foreman to repair it and clean up the area. Tr. 578-79.

The judge found that the entire production crew had spent one and a half to two hours repairing the belt (which took four hours), even before Kirk arrived at the mine. 15 FMSHRC at 156. Therefore, the record shows that Porter actively sought to address the belt and accumulation problem as soon as he became aware of it.

We conclude that substantial evidence supports the judge's determination that Porter did not knowingly authorize, order, or carry out the violation of section 75.400. Compare Prabhu Deshetty, 16 FMSHRC ____, No. KENT 92-549 (May 26, 1994)(affirming a finding of section 110(c) liability in connection with an accumulation violation). Accordingly, we affirm the judge's section 110(c) determination.

III.

Conclusion

For the reasons set forth above, we vacate the judge's conclusion that Mid-Continent's violation of section 75.400 was not S&S and remand for further analysis. We affirm the judge's determination that Porter is not liable under section 110(c) of the Mine Act for knowingly authorizing, ordering, or carrying out Mid-Continent's violation of section 75.400.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-168
MID-CONTINENT RESOURCES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-594
THOMAS SCOTT, employed by MID-CONTINENT RESOURCES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-626
TERRANCE J. HAYES, employed by MID-CONTINENT RESOURCES, INC.	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1,2]

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issues are whether Mid-Continent Resources, Inc. ("Mid-Continent") violated

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[1] Commissioner Nelson participated in the consideration of this case but he passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

[2] Chairman Jordan assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. In the interest of efficient decision making, Chairman Jordan has elected not to participate in this matter.

30 C.F.R. § 75.400;[3] whether that violation was of a significant and substantial ("S&S") nature and caused by Mid-Continent's unwarrantable failure to comply with the standard; and whether Thomas Scott and Terrance J. Hayes, employed as supervisors by Mid-Continent, were individually liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing, ordering, or carrying out the violation.[4]

Administrative Law Judge John J. Morris concluded that Mid-Continent violated section 75.400, that the violation was S&S and caused by Mid-Continent's unwarrantable failure, and that both Scott and Hayes were individually liable for civil penalty under section 110(c) of the Act. 15 FMSHRC 149 (January 1993)(ALJ). We granted Mid-Continent's petition for discretionary review, which challenged each of the judge's findings.[5] For the reasons that follow, we affirm the judge's conclusions that Mid-Continent violated the standard and that the violation was S&S and caused by the operator's unwarrantable failure. We reverse his determinations that Scott and Hayes were liable under section 110(c).

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[3] 30 C.F.R. § 75.400 provides:

> Accumulation of combustible materials.
>
> 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.

[4] Section 110(c) of the Mine Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

[5] In his decision, the judge also ruled on an order issued to Mid-Continent alleging a violation of section 75.400 on May 1, 1990, and on a related section 110(c) action involving another Mid-Continent employee. Docket Nos. WEST 91-421 and -627. A petition for discretionary review with respect to those aspects of the judge's decision was filed by the Secretary. We are issuing a separate decision on the Secretary's petition. Mid-Continent Resources, Inc., 16 FMSHRC ___ (June 20, 1994).

I.

Violation of 30 C.F.R. § 75.400 and Special Findings

A. Factual and Procedural Background

Mid-Continent operates the Dutch Creek Mine, an underground bituminous coal mine in Pitkin County, Colorado. On May 29, 1990, Frank Carver, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 211 longwall section.

In the intake roadway of the number 2 entry, approximately 300 feet from the face, Carver discovered that the No. 18 crosscut was mostly full of material consisting of timbers, lump coal, very dry coal dust, float coal dust, and coal fines. 15 FMSHRC at 162-63. The accumulation was 18 feet wide, 6 feet high and 21 feet long and was lightly "salted and peppered," indicating the application of rock dust. Carver also observed a hanging voltage cable and a non-permissible diesel tractor 20 to 40 feet from the accumulation and considered them to be ignition sources.

Carver found another accumulation of lump coal, float coal dust, and dry coal fines in the first crosscut adjacent to and behind the 211 longwall face in the number 2 entry. He estimated that the second accumulation was 30 feet wide, 6 feet high and 24 feet long.

Carver determined that the accumulations violated section 75.400 and issued a withdrawal order, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging that the violation was S&S and resulted from Mid-Continent's unwarrantable failure to comply with the standard.

The judge credited Carver's testimony that the accumulations were combustible and concluded that Mid-Continent had violated section 75.400. 15 FMSHRC at 163-65. He determined that the violation was S&S. Id. at 165. The judge concluded that Mid-Continent's move of the longwall power center, which occurred during the Memorial Day weekend (May 26-28), caused the accumulation in the No. 18 crosscut because space was needed to accommodate the equipment at its new location. Id. With respect to unwarrantable failure, the judge noted that the Secretary had cited Mid-Continent numerous times for violations of section 75.400. See Id. at 160; S. Ex. M-3. The judge concluded that the large number of citations established that Mid-Continent's violation of section 75.400 resulted from its unwarrantable failure. Id.

B. Disposition

1. Whether section 75.400 was violated

Mid-Continent submits that the Secretary failed to establish the combustibility of the accumulations and that, in any event, its ventilation plan permits it to maintain accumulations behind the longwall face. The Secretary argues that substantial evidence supports the judge's conclusion that the accumulations were combustible and that the ventilation plan does not permit accumulations.

We conclude that substantial evidence supports the judge's determination that the accumulations were combustible.[6] We note that several of the judge's findings are based on credibility resolutions and that Mid-Continent has not offered sufficient grounds to justify the extraordinary step of reversing those resolutions. See generally, e.g., Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987).

The Commission has held that section 75.400 "is violated when an accumulation of combustible materials exists." Old Ben Coal Co., 1 FMSHRC 1954, 1956 (December 1979); see also Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The Commission has further explained that a prohibited "accumulation" refers to a mass of combustible materials that could cause or propagate a fire or explosion. Old Ben, 2 FMSHRC at 2808.

Carver estimated that the accumulation in the No. 18 crosscut was 18 feet wide, 6 feet high and 21 feet long. S. Ex. M-1. He testified that the accumulation contained "some float dust mixed in, and some coal fines, and lump coal throughout the pile." Tr. 188-89; see also Tr. 205. He also noted that the accumulation was "dry to the touch" and contained combustible timber wedges. Tr. 188, 189. The judge credited Carver's description of the accumulation. 15 FMSHRC at 163-64. The inspector's testimony is corroborated in part by the examiners' books. Coal accumulations in the No. 18 crosscut were reported in one onshift and two preshift examinations on May 27 and in a preshift examination on May 28. S. Ex. M-16; see also Tr. 259-61. According to the inspector, the float coal dust and the dust fines were a fire and explosion hazard. Tr. 192. See also Tr. 213. He was especially concerned that the dust could contribute to a secondary explosion following an explosion at the face. Tr. 192-93. John Reeves, Mid-Continent's president, acknowledged that coal dust, loose coal and chunks of coal can contribute to the propagation of a methane ignition. Tr. 482-84.

Mid-Continent raises three objections to Carver's testimony. First, it relies on the testimony of Bruce Collins, its geologist, that the cited accumulation was not coal but non-combustible carbonaceous siltstone. The judge rejected Collins' testimony, reasoning that Mid-Continent would not have applied rock-dust if the materials were not combustible. 15 FMSHRC at 164. See Tr. 188. See also Tr. 268, 281. The judge noted that Collins failed to explain how such large masses of siltstone could have accumulated. Id. at 164. Indeed, the record contains no evidence that Collins had ever been to the 211 longwall section. See Tr. 531.

Second, Mid-Continent argues that the coal in question will not spontaneously combust and, indeed, is not combustible. The evidence, however,

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

suggests only that the coal is not highly combustible. See, e.g., Tr. 410-12, 461-62, 470-71, 481. Spontaneous combustibility is not a prerequisite to the creation of an ignition or propagation hazard in a coal accumulation.

Third, Mid-Continent argues that the material in the No. 18 crosscut was wet below the surface and, therefore, incombustible and not subject to section 75.400. The Commission has held that accumulations of damp or wet coal, if not cleaned up, can dry out and ignite. Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120-21 (August 1985); Utah Power & Light Company, Mining Division, 12 FMSHRC 965, 969 (May 1990), aff'd, 951 F.2d 292 (10th Cir. 1991) ("UP&L"). A construction of section 75.400 that excludes wet coal defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist. Black Diamond, 7 FMSHRC at 1121; see also UP&L, 12 FMSHRC at 970.

With respect to the second coal accumulation behind the longwall face, Mid-Continent preliminarily argues that Carver failed to testify about it. While Carver's testimony primarily addressed the accumulation in the No. 18 crosscut, Mid-Continent's own witnesses acknowledged the existence of the other accumulation. See Tr. 606, 636, 646. This accumulation was also reported in various reports in the examiners' books on May 27 and 28, 1990. S. Ex. M-16. The withdrawal order indicates that the second accumulation was similar in composition to the first. S. Ex. M-1.

Mid-Continent's main contention with regard to the second accumulation is that its approved ventilation plan, as modified (M. Ex. R-13), allowed it to maintain accumulations behind the longwall face as it advanced. The judge rejected that argument, finding that MSHA had not directly or implicitly authorized Mid-Continent to violate section 75.400. 15 FMSHRC at 164-65. We agree. The judge found that the modification relied on by Mid-Continent approves only "the lengthening and extension of two crosscuts to allow for advance of the face." Id. at 164-65. The plan's language cannot reasonably be construed to allow Mid-Continent to maintain accumulations behind the longwall face. See M. Exs. R-11, 12, and 13.

We conclude that the second accumulation was not permitted under Mid-Continent's ventilation plan. The cited accumulations of both coal and other materials were the kind of combustible and hazardous accumulations prohibited by the standard and either accumulation alone would have constituted a violation of section 75.400. Accordingly, we affirm the judge's determination of violation.

2. Whether the violation was S&S

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to a more serious type of violation. A violation is S&S 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 Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held that the third Mathies element "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

With regard to the first element of the Mathies test, we have affirmed the judge's finding of violation. 15 FMSHRC at 165. As to the second element, the judge found that there was a measure of danger contributed to by the violation and he further found that a mine fire would cause serious injuries, thus establishing the fourth element. Id. The operator does not dispute these two findings on review but, rather, objects to the judge's findings concerning the third Mathies element, that the hazards posed by the violation were reasonably likely to cause injury.

Mid-Continent argues that its coal burns only with great difficulty and, thus, there was only an extremely remote possibility that an ignition source would spark a fire. Mid-Continent asserts that, because the 211 longwall face was not producing coal and all pertinent ignition sources were deenergized at the time of the citation, the accumulation in the No. 18 crosscut, which was rock dusted and wet below the surface, did not present a reasonable likelihood of resulting in an injury-producing event.

Carver testified that, if the violative accumulation in the No. 18 crosscut continued, it was reasonably likely that an injury would occur. 15 FMSHRC at 163-65; Tr. 193, 213. He indicated that there were several ignition sources present, including the hanging power cable and the diesel tractor. Tr. 155, 192, 195. Because the air travels from the No. 18 crosscut to the working face, a fire or explosion would affect all miners in the section. Tr. 194. The inspector and other witnesses also expressed concern about propagation of an explosion at the face, explaining that coal dust, loose coal, and chunks of coal can contribute to the propagation of a methane ignition. Tr. 192-93, 297-99, 482-84. This is a gassy mine, emitting more than one million cubic feet of methane in a 24-hour period. 30 U.S.C. § 813(i). See Tr. 28, 29-30, 193.

Mid-Continent's argument that there was only a remote possibility of these hazards occurring fails to account for the risks emanating from continued normal mining operations once the power center move was completed and the section resumed operating. We also reject Mid-Continent's arguments based on the low combustibility of its coal and the dampness in the accumulation.

We conclude that substantial evidence supports the judge's determination that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. Accordingly, we affirm the judge's conclusion that Mid-Continent's violation of section 75.400 was S&S.

3. Whether the violation resulted from unwarrantable failure

Mid-Continent argues that it was impossible to clean up the accumulations in a timely manner due to unexpected mechanical and electrical problems, including the failure of the gearbox on the face conveyor, which prevented the removal of accumulations on that conveyor. Mid-Continent also asserts that most, if not all, of the accumulation in the No. 18 crosscut was the result of floor heave. The Secretary responds that conveyor problems do not excuse the delay in cleaning up because the power center move caused the accumulations to be dumped in the No. 18 crosscut and that move was undertaken after the gearbox failure was known to Mid-Continent. The Secretary further argues that Mid-Continent's long history of accumulation violations placed it on notice that greater efforts were necessary for compliance.

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Id. at 2001. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Id.

In reaching his conclusion as to Mid-Continent's unwarrantable failure, the judge relied heavily on the fact that, between October 1, 1988, and March 18, 1992, Mid-Continent received 215 citations and orders for violations of section 75.400. 15 FMSHRC at 160, 165; S. Ex. M-3. Mid-Continent properly questions the relevance of such violations after May 29, 1990, the date of the order in issue. The judge's error in relying on post-violation incidents was, however, harmless. Between October 1, 1988, and May 28, 1990, Mid-Continent was cited for 170 alleged violations of section 75.400, which should have engendered in the operator a heightened awareness of a continuing accumulation problem. S. Ex. M-3. Cf. Peabody Coal Co., 14 FMSHRC 1258, 1259, 1264 (August 1992); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011 (December 1987).

The cited accumulations were extensive and were noted in reports of various examinations conducted on May 27 and 28. S. Exs. M-9, M-16. Cf. Peabody, 14 FMSHRC at 1262. There is no evidence of attempts to remove the accumulations during two idle shifts on May 28 or at the time of Carver's inspection. See S. Ex. M-16. Cf. Peabody, 14 FMSHRC at 1262. As to Mid-Continent's argument that it was impossible to remove the accumulations from the mine via the conveyor belts due to unexpected mechanical problems and the power center move, as noted by the judge, the move itself resulted in the accumulation in the No. 18 crosscut because its implementation required additional space.[7] 15 FMSHRC at 165. See also Tr. 155-57, 270.

Accordingly, we affirm the judge's determination that Mid-Continent's violation of section 75.400 resulted from its unwarrantable failure to comply with the standard.

II.

Thomas Scott's Liability under Section 110(c)

A. Factual and Procedural Background

Thomas Scott was the mine's underground superintendent in May 1990, and usually worked the day shift, from 7:00 a.m. to 3:00 p.m. Upon learning on Friday evening, May 25, that the face conveyor gearbox on the 211 longwall face had gone out, he ordered the power center move. Tr. 631-32, 646. Scott did not work during the Memorial Day weekend but on Monday evening, May 28, he called the mine and learned that the 211 gearbox was not yet ready for installation and that the power center move had not been completed. When Scott returned to work at 6:30 a.m. the following day, he did not review Mid-Continent's examination books immediately. He was notified of Carver's order at approximately 8:30 a.m.

Following an investigation, the Secretary alleged that Scott had knowingly authorized, ordered or carried out the violation within the meaning of section 110(c) of the Act.

The judge found that, because Scott should have known from the examination books that the accumulation existed in the No. 18 crosscut, he was liable under section 110(c). 15 FMSHRC at 167. The judge found Scott negligent and assessed a civil penalty of $200. Id..

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[7] Mid-Continent also cites electrical problems with another belt, but does not explain the nature or extent of the problems, or any efforts to restart the belt. Thus, we do not address this argument.

Mid-Continent's additional argument that the accumulation was caused by floor heave is rejected. Substantial evidence supports the judge's determination that the accumulation occurred in connection with the power center move. 15 FMSHRC at 164-65.

B. Disposition

Scott argues that he did not actually know of the accumulations and that the judge found him only negligent, as distinguished from having engaged in more aggravated conduct. The Secretary responds that Scott knew or had reason to know that accumulations would occur during the power center move and that they could not be cleaned up in a timely manner because the gearbox had been removed for repairs.

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to individual civil penalty.

The accumulations occurred during Scott's three-day absence. The judge emphasized that, upon returning to work, Scott did not review the mine's examination records. 15 FMSHRC at 167. MSHA's order was issued within approximately two hours of his return. Scott's testimony was uncontradicted that he had directed the power center to be moved to a crosscut on the high side of the roadway, to an area that he had ordered to be cleared of the tools and equipment that had been stored there in order to accommodate the power center, but that the longwall coordinator moved the power center to the low side of the No. 18 crosscut without consulting Scott. Tr. 634-35, 646-47. At that location, excavation was necessary to accommodate the power center. Thus, Scott's testimony reflects that, when he left on May 25, he had no reason to expect accumulations in connection with the move.

We conclude that substantial evidence does not support the judge's conclusion that Scott knowingly authorized, ordered or carried out the violation. Accordingly, we reverse the judge's section 110(c) determination and vacate the civil penalty assessed against Scott.

III.

Terrance J. Hayes's Liability under Section 110(c)

A. Factual and Procedural Background

Terrance J. Hayes was shift foreman for the 211 longwall area of the mine. He normally worked on the C shift, from 11:00 p.m. to 7:00 a.m., but did not work May 26 or 27. He returned to work on Monday at 11:00 p.m., May 28. Hayes was briefed on the power center move and directed that it be completed. Hayes reviewed and countersigned the production and maintenance reports. He did not observe any coal accumulations. On May 29, Tuesday night, he became aware of MSHA's order.

Following its investigation, MSHA alleged in a petition for assessment of civil penalty that Hayes knowingly authorized, ordered or carried out the May 29 violation. The judge determined that Hayes knew or should have known of the accumulations yet failed to take remedial action. 15 FMSHRC at 168-69. The judge found Hayes negligent and assessed a civil penalty of $200. Id. at 169-71.

B. Disposition

Hayes and the Secretary raise essentially the same arguments made regarding Scott. Hayes additionally argues that the relevant examination records for the No. 18 crosscut did not indicate the presence of accumulations.

An earlier preshift report for May 28 and other reports for May 27 indicated coal accumulations in crosscut 18 and inby the longwall face. S. Ex. M-16. However, the preshift examination for the C shift on May 28 -- the shift on which Hayes worked -- did not reference the accumulations that formed the bases for MSHA's enforcement actions. S. Ex. M-9. Inspector Carver testified that, if one noticed a cited condition in the examination book that was not reflected in a subsequent examination, it could be assumed that the cited condition had been remedied. Tr. 243-46. Thus, according to Carver's testimony, Hayes may have reasonably assumed that the accumulations had been removed by the commencement of his shift. As the judge noted, Hayes may have simply not observed the contents of that crosscut. 15 FMSHRC at 164; Tr. 617. Hayes' testimony to that effect was uncontradicted.

We conclude that substantial evidence does not support the judge's conclusion that Hayes knowingly authorized, ordered or carried out the violation. Accordingly, we reverse the judge's section 110(c) determination and vacate the civil penalty assessed against Hayes.

IV.

Conclusion

For the reasons set forth above, we affirm the judge's determinations that Mid-Continent violated section 75.400, that the violation was S&S, and that it resulted from the operator's unwarrantable failure. We reverse the judge's determinations that Thomas Scott and Terrance J. Hayes were individually liable for the violation under section 110(c) and vacate the civil penalties assessed against them.

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Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1994

RANDALL PATSY, Complainant	:	
	:	DISCRIMINATION PROCEEDING
	:	
	:	DOCKET NO. PENN 94-132-D
v.	:	
	:	
	:	
BIG "B" MINING COMPANY, Respondent	:	

ORDER

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"). Following receipt of Complainant Randall Patsy's response to a prehearing notice, Administrative Law Judge Jerold Feldman, on April 14, 1994, had issued an Order to Show Cause and Notice of Hearing, in which the judge requested that the complainant unequivocally state whether he wished to pursue his complaint. In a response dated April 18, 1994, and received by the judge on May 4, Mr. Patsy stated that he felt that he would be better off "to pursue this as a civil suit locally." Based on this response, on May 13, 1994, the judge dismissed the complaint. For the reasons that follow, we vacate the Order of Dismissal and remand for further proceedings.

On June 6, 1994, the Commission received a letter from Mr. Patsy in which he stated that he "would like a reversal of the dismissal." Mr. Patsy stated further that he had written previously and inquired as to how he could appeal the dismissal of his case.

The judge's jurisdiction in this matter terminated when his decision was issued on May 13, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. 2700.70(a). We deem Mr. Patsy's letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

It appears that Mr. Patsy now wishes to pursue his complaint with the Commission despite his earlier statements to the judge expressing doubts about proceeding in an administrative hearing. Accordingly, we remand this matter to the judge, who shall again schedule it for hearing.

For the reasons set forth above, we vacate the judge's Order of Dismissal and remand this matter for further proceedings.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 1994

THUNDER BASIN COAL-COMPANY	:	
	:	
v.	:	Docket No. WEST 94-238-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

ORDER

Upon consideration of the petitions for discretionary review, we hereby vacate the judge's decision and remand this matter to him for appropriate proceedings. We note in particular the Secretary of Labor's assertions that he has been "deprived of an opportunity to present his legal position to the judge," (PDR at 1) and that certain material factual findings are not supported by substantial evidence. We intimate no view regarding the judge's legal conclusions in this matter.

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Joyce A. Doyle, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 1 1994

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 94-235-R
v.	:	Citation No. 3101220; 4/19/94
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine: Robinson Run No. 95

DECISION

Appearances: Elizabeth Chamberlain, Esq., Consol, Inc., Pittsburgh, Pennsylvania, for Contestant; Charles M. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Amchan

Issue Presented

Does the Secretary's regulation at 30 C.F.R. § 75.342(b)(2) require that the warning light on a methane monitor be within the line of sight of a person who can de-energize a longwall mining system at all times, or can the regulation be satisfied by visual signals conveyed when the system is automatically de-energized at the level at which the warning light is activated?

For the reasons set forth below, I conclude that warning signals employed by Contestant at its Robinson Run # 95 mine on April 19, 1994, complied with the standard cited and I, therefore, vacate citation number 3101220.

The April 19, 1994 Inspection

On April 19, 1994, Virgil Brown conducted an inspection of the 2-D longwall section at Consolidation's Robinson Run # 95 mine in Harrison County, West Virginia, on behalf of the Secretary of Labor (Tr. 19, Exh C-2). During this inspection he travelled to the headgate of the longwall where the control panel or control box for the longwall system is located (Tr. 23-24, Exh. G-2, C-6). He observed the longwall headgate operator, Bill Bowen, who was alone performing his duties (Tr. 54).

Mr. Bowen was observed shoveling spilled coal at the tailpiece of the conveyor belt which takes the coal out to the surface (Tr. 27, 28, 50). Brown walked to Mr. Bowen's position and determined that the headgate operator could not see the warning lights on the system's methane monitors, which were about 30 feet away (Tr. 27, 36, 52, Exh. G-2). It is uncontroverted that the headgate operator at Robinson Run will, at times, be out of the line of sight of the methane monitor's warning lights in the normal course of his duties (Tr. 49-55, 158-159, 203-204).

Inspector Brown issued Contestant citation number 3101220 due to the fact that the headgate operator or another person, who could de-energize the longwall, would not always be in a position where they could see the warning lights on the methane monitor. This citation alleged that Consolidation violated the standard at 30 C.F.R. § 75.342(b)(2), one of MSHA's ventilation standards that became effective in November 1992. Section 75.342 provides:

> (b)(1) When the methane concentration at any methane monitor reaches 1.0 percent the monitor shall give a warning signal.
>
> (2) The **warning signal device** of the methane monitor shall be visible to a person who can de-energize the equipment on which the monitor is mounted (emphasis added).

April 25, 1994, was set as the date by which the violation had to be terminated. Consolidation contested the citation and requested an expedited hearing before the Commission. A hearing was held in Morgantown, West Virginia, on May 13, 1994, after the termination date had been extended.

The methane warning system on the 2-D longwall at Robinson Run

The general scheme of the Secretary's regulations is that a methane monitor must give a visual signal to a person who can de-energize mechanized equipment used to extract or mine coal when methane levels reach 1%, 30 C.F.R. § 75.342. That person must then de-energize the equipment and take steps to reduce the methane concentration pursuant to section 75.323(b).

Section 75.342(c) requires that the methane monitor automatically de-energize the machine on which it is installed, at 2% methane, or if the monitor is not operating properly. The issue in this case would not likely arise in a section in which a continuous mining machine is being used. The methane monitor for a continuous miner is generally mounted on the machine and should, therefore, always be within the machine operator's sight (Tr. 55-56).

Longwall sections present a different situation because the headgate operator may not need to stand in front of the control panel every minute that the shear is mining coal (Tr. 55-56). While at other mines Consolidation does have a warning light that can be seen by the headgate operator wherever he may go while performing his duties, this is not the case on the 2-D longwall at Robinson Run (Tr. 57, 102-103, 153, 203-204).

Consolidation contends that it has complied with the MSHA ventilation standards at Robinson Run by essentially skipping the step in the regulatory scheme whereby a human being de-energizes the longwall at 1% methane. At the 2-D longwall, Consol has set its methane monitors so that at 1% methane they will automatically de-energize all equipment electrically connected to the longwall except for the methane monitors and face telephone system (Tr. 176-177).

Consolidation argues that it has complied with both the letter and the spirit of section 75.342(b)(2). It contends that it has provided a "warning signal device" that is visible to the headgate operator at all times. According to Contestant, the lighting on the longwall face, the lighting on the longwall shields, the face conveyor[1] and the drum on the shearing machine are part of this "warning signal device" because the lights go out and the equipment stops when methane reaches 1% (Tr. 149-150).

There is no disagreement that the headgate operator will be visually apprised of the fact that all the aforementioned events have occurred. The Secretary argues, however, that when the lighting goes out, etc., the operator will not necessarily know that this occurred because methane levels reached 1%. The Secretary also argues that because the operator may not realize that the methane monitor caused the shutdown of the lights and the equipment, he may re-energize the longwall equipment prematurely.

Contestant has conclusively established that there is no possibility that the headgate operator may re-energize the longwall on the mistaken assumption that the equipment shut down for some reason other than elevated methane levels. When the lights go out and the longwall stops operating, the headgate operator must return to the master control box to restart the power (Tr. 153-154, 174-176).

---

[1]The face conveyor is a metal chain with crosspieces which pushes the coal mined by the longwall shear to the crusher. It is to be distinguished from the conveyor belt which moves the coal to the surface (Tr. 33-35, 150, 181, Exh. C-6).

When the operator arrives at the control box after a methane shutdown, he will be confronted by computer display that will advise him in plain english that there has been a "methane monitor fault." (Tr. 153-154, Exhibit C-5(a)). In order to re-energize the longwall, the operator must push the reset button on the methane monitor, as well as a button on the master controller (Tr. 153-156, 188-189, Exhibit C-5(d), C-7(b)). If the monitor caused the power on the longwall to go out, the yellow warning light on the monitor will be flashing, the trip light on the monitor will be solid red, and the "power on" light of the monitor will be green (Tr. 185, Exhibit C-5(c), C-7(b)). Additionally, there is a digital display on the monitor which will provide a reading of the methane concentration (Tr. 185).

If the methane level dropped when the longwall equipment ceased operating, the digital display may indicate that methane levels are below 1% (Tr. 206). However, if the methane monitor caused the longwall to shut down, the computer display will still read "methane monitor fault," the red trip light on the methane monitor will still be on, as will the yellow warning light, and the green "power on" light (Tr. 206-207).

A major concern of Inspector Brown's was that the power to the longwall can go out for reasons unrelated to methane, and if the headgate operator mistakenly believes the power outage is due to other causes, he may prematurely re-energize the equipment (Tr. 81-82, 94, 107-108). First of all, if methane levels are 1% or above, the operator will not be able to re-energize the longwall (Tr. 171). Even if methane levels drop when the equipment stops, there are many ways to differentiate a longwall shutdown due to methane from one due to a general power outage.

These differences are clearly illustrated in Contestant's exhibit C-6, a-c. The major difference is that, when the headgate operator returns to the control box in the general power-loss situation, he will find the control box dark (Tr. 179-181). The computer display will be blank, and all the lights on the methane monitor will be off. There will be no digital display showing the methane concentration detected (Tr. 179-180). Also, the main conveyor to the outside, which is not electrically connected to the longwall, will stop, while in the case of a methane shutdown, it is likely to continue operating (Tr. 181).

In sum, Contestant contends, and I so find, that if the methane monitor shuts down the longwall, there is no way the operator can mistakenly believe that the power went off for some other reason. Although he may not initially know that the longwall shut down due to excessive methane, as soon as he gets to the headgate control box, it will be readily apparent to him whether the methane monitor tripped or the power went out.

Furthermore, the headgate operator must return to control box and hit the restart button on the monitor to re-energize the longwall.

Contestant complied with section 75.342(b)

In light of the above, I conclude that Contestant's mechanism for informing the headgate operator of the fact that methane levels had reached 1% provides equivalent protection to a warning light that is visible at all times. If I were confronted with such a situation under the Occupational Safety and Health Act, it would not be necessary to determine whether Consol complied with the standard literally. I could find that it violated the regulation in a de minimis manner, which would not entail an obligation to abate the cited condition, See, General Carbon Co. v. OSHRC, 860 F.2d 479 (D. C. Cir. 1988).

Under the Mine Safety and Health Act, however, there is no analogous mechanism for the Commission to find a violation but not require abatement. The statutory mechanism for handling such situations is for the operator to file a petition for modification under section 101(c) of the Act. Indeed, Inspector Brown indicated that he would have been satisfied with such a petition, if the facts were as they have been established on this record (Tr. 108).

Contestant has declined to file a petition for modification and insists that its methane monitoring system meets the letter of section 75.342(b)(2). Thus, the undersigned is forced to decide whether the term "warning signal device", as used in the regulation, includes a mechanism by which the longwall lights go out, equipment stops, and the operator--by going to the headgate control box--learns that the methane monitor has tripped.

In construing the language of section 75.342(b), I am not inclined to engage in a semantical exercise to any extent more than is absolutely necessary. More important considerations are applying the standard in a manner that is consistent with the underlying purposes of the statute and insuring that my interpretation does not compromise miner safety in situations that I have not contemplated.

I am loathe to require Contestant to spend money, time, and energy abating a condition if, as I am convinced in the instant case, abatement will not contribute to miner safety. Indeed, one must assume that whatever money and effort could be spent in abating this condition could be better used to improve safety in areas in which real hazards exist.

Therefore, I find that, given the circumstances of this case, the measures taken by Contestant constitute a visible "warning signal device" within the meaning of the 30 C.F.R.

§ 75.342(b)(2). These circumstances include a system that automatically shuts down the longwall at 1%, instead of relying on a miner to de-energize the equipment. They also include a visible signal to the headgate operator and other miners authorized to de-energize the longwall, by means of a partial loss of power, that methane may have reached 1%. Further they include the fact that the headgate operator, or other miner, must return to the headgate control box to re-energize the longwall, where he will necessarily find out whether the power loss is a partial one due to a methane monitor trip or a total power loss due to other causes.

Under the above circumstances, I conclude that "warning signal device" is not limited to the lights of the methane monitor. Additionally, I do not deem the dictionary definition of "device", which is "something devised or contrived", as precluding the result I have reached. I, therefore, vacate citation number 3101220.

ORDER

Citation number 3101220 is hereby vacated.

Arthur J. Amchan
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUN 2 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 92-110-M
	:	A.C. No. 34-00015-05509
v.	:	Hartshorne Rock Quarry
DOLESE BROTHERS COMPANY, Respondent	:	

DECISION ON REMAND

Before: Judge Fauver

On April 11, 1994, the Commission affirmed my decision finding a violation but remanded for further analysis as to the civil penalty. The Commission directed the judge to enter findings for each of the statutory penalty criteria and, based upon such findings, to assess an appropriate penalty.

Section 110(i) of the Act provides six criteria for civil penalties: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Based upon the hearing evidence and the record as a whole, I make the following findings as to the statutory penalty criteria:

1. History of Previous Violations

In the 2-year period before the violation, Respondent had 20 violations [1] of mine safety standards. Of these, 11 were significant and substantial violations. Assessed Violation History Report -- Detailed Violation Listings. Exhibit G-11; Tr. 6.

[1] Failure of an operator to contest a citation equates to a finding that the violation was committed as alleged.

2. Size of Business

Respondent is a small size operator, as indicated by MSHA's Base Penalty Calculation for Special Assessment Violations (Exhibit R-3) and the tables in 30 C.F.R. § 100.3 for company size and mine size.

3. Negligence

I find that the violation was due to a high degree of negligence. Section 56.14211(a) (30 C.F.R.) provides that "equipment in a raised position . . . [must be] . . . mechanically secured to prevent it from . . . falling accidentally." MSHA Program Policy Letter No. P90-IV-2 (June 4, 1990), provided that a "work platform shall not be suspended from the load line or whip line when a crane is used to hoist, lower, or suspend persons." A few months later, this policy was changed by MSHA Policy Letter P90-IV-4 (September 5, 1990), superseding Policy Letter P90-IV-2. The new Policy Letter provided that a work basket may be attached to the load line of a crane only if the equipment had a safety device to prevent the load line from breaking in a "two block" situation. Mine operators were given clear notice that it was forbidden by law to attach a work basket to the load line of a crane unless they provided an anti-two-block device to prevent the line from breaking. Respondent contends that it received the Policy Letters when issued but did not read them until after the accident (January 1991). This is not a defense. Respondent is accountable for actual or constructive knowledge of the regulation and Policy Letters.

In light of the high gravity involved (see Gravity, below), I find that Respondent was highly negligent in failing to exercise reasonable care to ensure that its use of a work basket complied with the applicable law. Respondent's practice of suspending a work basket from the load line of a crane without a safety device to prevent the line from snapping in two reflects a serious disregard for employee safety and the purpose of § 56.14211. This constitutes high negligence.

4. The Effect of the Penalty on the Operator's Ability to Continue in Business

The parties stipulated that the Secretary's proposed penalty of $5,000 would not affect the operator's ability to continue in business. There being no claim of financial hardship, I find that the penalty assessed below would similarly not affect the operator's ability to continue in business.

5. Gravity of the Violation

The violation involved a high degree of gravity. The employee was in a metal work basket that suddenly fell 19 feet to the ground when the load line snapped in two. He suffered multiple fractures in both feet and a broken rib. It is clear from the nature of the accident that the employee could have been killed or suffered grave neck or spinal injuries causing permanent, severe disabilities. Also, it was only the height of this particular job that limited the fall to about 20 feet. The height of the work basket could have been 50 or 60 feet, depending on the job. Respondent's practice of suspending a work basket solely from a load line without anti-two-block protection subjected workers to a risk of death or permanent, severe disabilities.

6. Good Faith Abatement of the Violation

The parties stipulated that the operator demonstrated good faith in abating the violation.

Assessment of a Penalty

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $8,000 is appropriate for this violation. In assessing a penalty higher than the Secretary's proposal, I have considered the high gravity and high negligence of this violation. "Two blocking" predicaments are highly hazardous, foreseeable, and can be observed by the crane operator. They are also mechanically preventable by installing an effective safety device to prevent the line from breaking. Respondent's conduct in attaching a work basket solely to the load line of a crane without the required safety device to prevent the line from snapping in two reflects a serious disregard for employee safety and the applicable safety standard.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $8,000 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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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 93-205
Petitioner	:	A.C. No. 36-00840-03882
v.	:	
	:	Cambria Slope Mine No. 33
BETHENERGY MINES INC.,	:	
Respondent	:	

DECISION

Appearances: Nancy Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Fauver

This is an action for a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. On December 2, 1992, Federal Mine Inspector Nevin Davis issued Citation No. 3708698 at BethEnergy's Cambria Slope Mine No. 33. The citation alleged a violation of 30 C.F.R. § 75.370(a)(1) as follows:

> The approved ventilation plan in effect for this mine, in order to control methane, was not being completely complied with at one location. The air current off bleeder evaluation point (CO #54), approved in lieu of traveling the old 3 left of D-East L.W. pillared area, was found to contain methane levels of 2.4 percent to 3.1 percent exiting from this gob area, thereby exceeding the maximum allowable level of 2.0 percent methane. Three air bottle samples were collected by this writer of this air current at this time (G-1).

2. The citation initially alleged a violation of BethEnergy's ventilation plan, but the Secretary moved to amend the citation to allege a violation of 30 C.F.R. § 75.323(e). The motion was unopposed, and granted.

3. Inspector Davis was accompanied by Denny Zeanchock, one of BethEnergy's supervisors.

4. Bleeder evaluation point (BEP) 54 is at a concrete block regulator in a bleeder connector that leads from the gob of a mined-out longwall panel to a return entry. The regulator has an opening about 3 feet by 3-1/2 feet with a board across the top. A screen was placed over the opening of the regulator to prevent travel into the gob area. The regulator is 14 to 15 feet from the rib line of the return entry. The BEP is regularly examined by company mine examiners who normally take methane measurements at a location indicated on a board in the mine roof, about 4 to 5 feet from the rib line of the return entry.

5. Inspector Davis measured methane with a hand-held detector, recording methane findings in his notes as follows:

4:30 p.m.	1.4 to 2.6 percent
4:40 p.m.	1.4 to 2.9 percent
4:50 p.m.	1.4 to 1.5 percent
4:55 p.m.	1.8 to 2.9 percent
5:05 p.m.	2.4 to 3.1 percent
5:10 p.m.	2.2 to 2.5 percent

He took the readings about 4 inches in front of the screen and 12 inches from the roof.

6. Inspector Davis also recorded 3 air velocity measurements in his notes (between 4:30 and 5:10 p.m.).

7. During the 40 minutes in which he took hand-detector measurements, Inspector Davis observed that the methane level was slowly starting to rise. To check whether there was compliance with the 2 percent methane limit, he conducted chemical smoke tests to find observe the mixing of the air currents in the bleeder and return entry, in order to find a place to take bottle samples.

8. Inspector Davis began puffing the chemical smoke in the return entry and saw it move into the bleeder connector. Using an approved method of slowly releasing a puff of smoke, following it, and then releasing another puff of smoke, he proceeded into the bleeder connector towards the regulator. In this manner, he located the point where the return air and bleeder air current mixed. Inspector Davis then used chemical smoke to establish a point near the mixture point. There he took three air bottle

samples, about 5:05 p.m., at three locations about 4 inches in front of the screen, and 12 inches from the roof.

9. The three bottle samples were analyzed by the MSHA laboratory in Mt. Hope, West Virginia, and showed methane concentrations of 1.860 percent, 2.850 percent, and 3.450 percent.

10. In addition to his observations and measurements, Inspector Davis made notes of the methane readings taken with the hand-held monitor, and drew a sketch of the air flow patterns in the vicinity of the mixing point he observed through chemical smoke tests.

11. On June 29, 1993, Inspector Davis prepared a memorandum for his District Manager (MSHA District 2) describing in detail the circumstances surrounding the issuance of Citation No. 3708698.

12. A week before the citation on December 2, 1992, Inspector Davis had observed an air reversal problem in the same bleeder. On December 2, he concluded that the air reversal problem could be recurring and causing a methane build-up in the gob area.

13. In investigating the rising methane levels, Inspector Davis checked the mine records and determined that the surface borehole in the area of the bleeder was not in operation at the time the rising methane levels were observed.

14. In assessing the violation alleged in Citation No. 3708698 as significant and substantial, Inspector Davis considered the documented rising levels of methane in the bleeder, the possibility that methane was building up in the gob area due to an air reversal malfunction, and the possibility that roof falls in the gob area, and the snapping of roof bolts in that area, could create methane ignition sources. He also considered that a flame from a safety lamp or a faulty methane detector carried by a mine examiner could be ignition sources.

15. On December 3, 1992, the day after Inspector Davis' citation, Mr. Zeanchock told Robert DuBreucq, Superintendent at Mine No. 33, that Mr. Davis had not taken methane readings just before the "mixing point" where the bleeder air joined the return air. Mr. DuBreucq sent Mr. Zeanchock and James Pablic, another foreman at Mine No. 33, to BEP 54 to establish the mixing point and take readings. They released smoke in the return entry against the right rib, and saw the smoke flowing along the rib and into the bleeder entry along the rib for about 4 to 5 feet. In their opinion, this was the "mixing point." The roof had previously been marked at that point to indicate the place where company mine examiners regularly took methane readings. This

point was about 8 feet from the place where Inspector Davis took the bottle samples.

16. The roof in No. 33 Mine is composed of sandrock and shale. Sandrock is highly prone to sparking.

17. The mine liberates over 11 million CFM of methane in a 24-hour period.

18. Sparking can occur in a gob area from pieces of roof striking against one another or striking against roof bolts or other metal objects.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Section 75.323(e), which was promulgated in 1992, provides:

> Bleeders and other return air courses.
> The concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air, or in a return air course other than as described in paragraphs (c) and (d) of this section, shall not exceed 2.0 percent.

When the new standard was promulgated, the Preamble to Safety Standards for Underground Ventilation stated the following as to § 75.323(e):

> Paragraph (e) permits no more than 2.0 percent methane to be present in a bleeder split of air at a point just before the air in that split enters another split of air. Also, for return air courses, other than those addressed in paragraphs (c) and (d), paragraph (e) permits no more than 2.0 percent methane to be present. Thus the final rule retains the maximum permissible methane limits established in existing § 75.329 and makes mandatory the existing § 75.316-2 criteria concerning the methane limit in return air courses. [57 Fed. Reg. 20879 (1992).]

Section 75.323(e) replaced 30 C.F.R §§ 75.329 and 75.316-2(h). Section 75.329 read as follows in relevant part:

> Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters another split.

Section 75.316-2(h) read as follows:

> The methane content of the air current in a bleeder split at the point where such split enters any other air split should not exceed 2.0 volume per centum.

As discussed below, I construe the phrase "immediately before" in § 75.323(e) as clarifying the requirement that bleeder air be measured as close as reasonably possible to the point where it joins another split of air. The substitution of "joins" in § 75.323(e) for "enters" in the predecessor standards does not indicate any material change. The Preamble's use of "enters" in discussing the new standard suggests that the drafters intended "joins" to be synonymous with "enters." Also, the Preamble states that "the final rule retains the maximum permissible methane limits established in existing § 75.329 and makes mandatory the existing § 75.316-2 criteria concerning the methane limit in return air courses" -- with no indication that case law for the predecessor standards was intended to be modified.

In Christopher Coal Company, 1 FMSHRC 1 (1978), the Commission affirmed a withdrawal order based upon a violation of § 75.329, which placed a 2 percent methane limit on the air coursed through a bleeder connector "when tested at the point it enters" another split of air.

The facts of Christopher Coal Company are strikingly similar to the present case. The inspector took methane readings and a bottle sample in front of a cement block regulator 30 feet from the intersection of the bleeder connector and the main air return. The bottle sample established a methane content of 5.38 percent. The operator contended that the bottle sample was not at the proper location because § 75.329 did not intend that the methane test be taken before the bleeder air left the bleeder split and joined the air return. The Commission affirmed the decision of Administrative Law Judge Cook, who ruled that "the regulation requires that the test be made before the bleeder air actually leaves the bleeder split of air and joins with the main return split." Christopher Coal Company (Docket No. MORG 76-8-P; unpublished opinion by Judge John Cook; October 18, 1976).

The Commission affirmed Judge Cook's holding that the inspector had performed the methane test in a proper location even though his sample was taken directly in front of the cement block regulator and 30 feet from the intersection of the bleeder connector and the main return. This holding was based upon Judge Cook's finding that, due to turbulence caused by the intersection of the main entry split of air with the bleeder split of air, and turbulence caused by the regulator itself, the location of the inspector's measurement was "as close as was reasonably possible to the place where the two splits of air join but before the

bleeder air entered the main entry." Thus, the Christopher Coal Company decision stands for the proposition that "at the point [where bleeder air] enters" a return split of air means "as close as reasonably possible" to the point where the two splits of air join and before the bleeder air is diluted by return air.

I conclude that § 75.323(e) requires (1) that the methane reading be taken in the bleeder split as close as reasonably possible to the point where the air in the bleeder split joins the return split of air and (2) that the reading be taken at a point where the bleeder air is not diluted by return air.

The testimony of Inspector Davis concerning his use of chemical smoke tests, and his explanation of the diagrams he prepared depicting the air currents, reasonably establish that air current from the return entry was being pulled into the bleeder connector and mixing with bleeder air. Based upon these observations, he took bottle samples about 4 inches in front of the screen device in the regulator, 14 or 15 feet inby the intersection of the bleeder connector and the return entry.

Edward Miller, MSHA's Chief of the Ventilation Division, stated that the configuration of air currents described by Inspector Davis and illustrated in his diagrams constituted a "venturi effect." Mr. Miller explained a venturi effect to mean that a high velocity of air flowing through the regulator and out of the bleeder connector was "pulling some air in from the return and actually having that turn around and go back the other direction." (Tr. pp. 126 and 130.)

The venturi effect explains why Inspector Davis, relying upon chemical smoke tests, took bottle samples near the screen of the regulator rather than closer to the intersection of the bleeder connector and the return entry. Under the reasoning of Christopher, Inspector Davis performed methane tests at "the nearest point where he could get an accurate measurement of the methane content in the air current coming out of the bleeder" (at 1689).

Mr. Zeanchock, the company supervisor who accompanied Inspector Davis, testified that he disagreed with Inspector Davis' determination of the proper place to take the air bottle samples. However, Mr. Zeanchock did not raise such concerns with the inspector or attempt to establish the proper test point himself until he returned to the bleeder connector approximately 7 days later. Mr. Zeanchock testified that when he and the mine shift foreman returned the following week, their smoke tests established the mixing point to be "4 or 5 feet off of the room neck" which is about 8 feet from where Inspector Davis took his air bottle samples. (Tr. 139.)

Considering the changes in air velocities and turbulence that can occur over time and affect the proper location to take methane tests, I find Inspector Davis' testimony and tests to be more reliable in determining the conditions that existed at the time of the citation. Also, I credit the testimony of the Secretary's ventilation expert, Mr. Miller, who gave the following opinion as to Inspector Davis' methodology and test location:

> Q. Now, you heard the testimony of Inspector Davis with regard to how he took the bottle samples which are the basis for the violation at issue today. Do you have an opinion within a reasonable degree of certainty as a ventilation specialist as to whether or not Mr. Davis was in a proper location when he took the air bottle samples?
>
> A. It's my opinion that Inspector Davis took the sample at the only location he could take it and be assured that it was not mixing with return air. [Tr. p. 118.]

I find that a preponderance of the reliable evidence establishes that Respondent violated § 75.323(e) by permitting an accumulation of methane in excess of 2 percent in the bleeder connector, at a point immediately before the bleeder split of air joined the return split of air.

Under the Commission's test for a significant and substantial violation (Mathis Coal Company, 6 FMSHRC 1, 3-4 (1984), et al), I find that the violation was reasonably likely to result in serious injury.[1] In finding an S&S violation, Inspector Davis considered the documented rising levels of methane in the bleeder, the possibility that methane was building up in the gob area due to an air reversal malfunction at that site, and the possibility that roof falls and the snapping of roof bolts in the gob area could create methane ignition sources. He also considered that a flame from a safety lamp or a faulty methane detector carried by a mine examiner could be ignition sources. Taken as a whole, I find that the reliable evidence supports the inspector's finding that the violation was significant and substantial.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a civil penalty of $288 is appropriate.

---

[1] In Mathies the Commission held that an S&S violation exists if the violation is reasonably likely to result in an injury of a reasonably serious nature.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated 30 C.F.R. § 75.323(e) as alleged in amended Citation No. 3708698.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3708698 as amended is AFFIRMED.

2. Respondent shall pay a civil penalty of $288 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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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

JUN 10 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-994
Petitioner	:	A. C. No. 15-17287-03506
v.	:	
	:	Mine: No. 1
DAGS BRANCH COAL CO. INC.,	:	
Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee for the Petitioner;
Mark Altizer, Project Manager, Dags Coal Branch Company, Meta, Kentucky, for the Respondent.

Before: Judge Feldman

The hearing in the above proceeding was convened on May 19, 1994, in Prestonsburg, Kentucky. The hearing concerned a petition for civil penalty filed by the Secretary of Labor against the corporate respondent pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., (the Act).

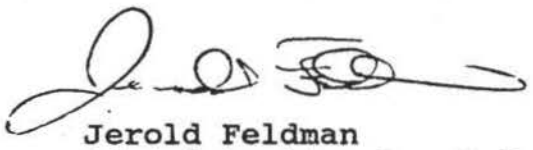
This case involves five citations with a total proposed civil penalty of $4,782. At the commencement of the hearing the respondent stipulated that it is a mine operator subject to the Act. The parties also stipulated that the respondent is a medium-sized operator that employs approximately sixty individuals with a yearly payroll of approximately $2,500,000. During the course of presenting stipulations prior to the presentation of the Secretary's direct case, the respondent contended that it is in financial distress and that paying the total proposed civil penalty would result in a severe hardship. (Tr. 18-19). Although I concluded the payment of the $4,782 proposed penalty would not jeopardize the continuing viability of the respondent given the size of its payroll, counsel for the Secretary requested time to confer for the purpose of settling this matter. (Tr. 20-21).

After conferring, the parties advised me that they had reached a settlement. The settlement terms were that the respondent would accept the citations as issued. In return, the Secretary agreed to reduce the total civil penalty by thirty percent in view of the respondent's reported financial difficulties. The thirty percent reduction results in a reduction in civil penalty from $4,782.00 to $3,347.40. The specific reductions for each of the five citations were presented on the record and are incorporated by reference. (Tr. 22).

The record was kept open in order to receive financial information from the respondent to justify the thirty percent reduction. The respondent provided the requisite financial information to counsel for the Secretary. Counsel for the Secretary forwarded this information to me on June 6, 1994.

ORDER

In view of the above, the parties' motion to approve settlement **IS GRANTED.** Accordingly, **IT IS ORDERED** that the respondent pay a civil penalty of $3,347.40 in satisfaction of the five citations in issue. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this Decision. Upon timely receipt of payment, these cases **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

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Mark G. Altizer, Dags Branch Coal Company, Inc., 123 Lower Johns Creek Road, Meta, KY 41501

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 10 1994

ROY FARMER AND OTHERS, Complainants	:	COMPENSATION PROCEEDING
v.	:	Docket No. VA 91-31-C
ISLAND CREEK COAL COMPANY, Respondent	:	VP-3 Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainants, in essence, request approval to withdraw their Complaint in the captioned case upon satisfactory payment of compensation under the terms of a settlement agreement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore **DISMISSED.**

Gary Melick
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

JUN 13 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-26 A.C. No. 46-05890-03549
v.	:	
	:	Tug Valley Coal Processing
TUG VALLEY COAL PROCESSING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

This proceeding concerns proposals for assessment of a civil penalty filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for one alleged violation of certain mandatory safety standard found in Part 56, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violation.

The parties now have decided to settle the matter, and the Secretary has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. The citation, initial assessment, and the proposed settlement amount are as follows:

Citation No.	Date	30 C.F.R. §	Assessment	Settlement
3991883	07/20/93	77.404(a)	$412	$412

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

CONCLUSION

After review and consideration of the pleadings and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the full payment is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion IS GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount shown above in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is **DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 14, 1994

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 93-367-A
Petitioner	:	A. C. No. 01-01247-04072
	:	
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: **William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Petitioner; Stanley Morrow, Esq., Jim Walter Resources Incorporated, Brookwood, Alabama, for the Respondent.**

Before: **Judge Merlin**

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Jim Walter Resources Incorporated under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

Statement of the Case

The violation in this case, Citation No. 3187628, and seven other violations were originally contained in Docket No. SE 93-367 which was set for a calendar call on February 2, 1994. All eight violations were discussed on the record at the calendar call, and the parties agreed to settle the other seven. On February 8, 1994, an order was issued creating this docket and removing Citation No. 3187628 from SE 93-367 and placing it into SE 93-367-A. A decision approving settlement has been issued for the seven violations remaining in Docket No. SE 93-367, disposing entirely of that docket number. On February 17, 1994, a notice of hearing was issued for SE 93-367-A and this case was set for hearing.

Citation No. 3187628 was issued as a 104(a) citation, for an alleged violation of 30 C.F.R. § 75.380(d). A hearing was held on April 19, 1994, the transcript has been received and the parties have filed post hearing briefs.

30 C.F.R. § 75.380(d) sets forth the following:

> (d) Each escapeway shall be (1) Maintained in a safe condition to always ensure passage of anyone, including disabled persons;
>
> (2) Clearly marked to show the route and direction of travel to the surface;
>
> (3) Maintained to at least a height of 5 feet from the mine floor to the mine roof, excluding the thickness of any roof support, except that the escapeways shall be maintained to at least the height of the coalbed excluding the thickness of any roof support where the coalbed is less than 5 feet;
>
> (4) Maintained at least 6 feet wide except- (i) Where necessary supplemental roof support is installed, the escapeway shall be not less than 4 feet wide; or (ii) Where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency;
>
> (5) Located to follow the most direct, safe and practical route to the surface; and
>
> (6) Provided with ladders, stairways, ramps, or similar facilities where the escapeways cross over obstructions.

Citation No. 3187628 dated April 8, 1993, and challenged herein, charges a violation for the following alleged condition or practice:

> The secondary escapeway off No. 9 section, No. 6 section, and No. 1 longwall was not being maintained in safe condition to always ensure safe passage of anyone, including disabled persons in that at least 10 overcast along this route were not provided stairways that are at least 4 foot wide, and these stairways were not provided with handrails.

The inspector found that the foregoing violation was significant and substantial and that it resulted from a moderate degree of negligence on the part of the operator.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 6-9):

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction of this case.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) A copy of the subject citation and a copy of the termination of the violation in issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.

(7) Payment of any penalty will not affect the operator's ability to continue in business.

(8) The operator demonstrated good faith abatement.

(9) The operator has an average history of prior violations for a mine operator of its size.

(10) The operator is large in size.

(11) The facts set forth in the subject citation are admitted as written.

Evidence of Record

On April 8, 1993, the MSHA inspector examined the secondary escapeway at the operator's Number 4 Mine. He stated that escapeways are avenues which allow miners to leave their work areas in the event of an emergency (Tr. 19). In the subject mine the primary escapeway is the track entry on intake air which is fresh air going toward working and longwall faces (Tr. 24-25, 62-63, 82, 86). In the event of an individual injury the primary escapeway would be used to evacuate the person (Tr. 43). The secondary escapeway located on return air would be used to leave the mine if an emergency such as an ignition or fire rendered the primary escapeway unusable (Tr. 35-36, 86-87). The inspector testified that the cited secondary escapeway is several thousand feet in length and that it took him an hour or two hours to walk it (Tr. 23).

An overcast is similar to an air bridge. It is designed not to leak air (Tr. 26). Air can pass through a door in the overcast going in one direction and on top of the overcast in the other direction (Tr. 62). In this situation intake air was going through doors in the overcasts (Tr. 62). Return air was going

over the overcasts and this path constituted the secondary escapeway (Tr. 62-63). Overcasts are made of mortared concrete blocks with a steel structure on top with rock dust bags over them (Tr. 26). They extend 20 feet from one side of the escapeway entry to the other, are 3 to 5 feet high and present the appearance of a concrete wall (Tr. 25-28). The distance between the top of the overcast and the top of the mine roof varies depending on the size of the opening and how much has been cut out for the overcast (Tr. 28-29).

Overcasts are generally grouped in twos and threes to separate intake air from return air and direct the air flow (Tr. 30-32). The ten cited overcasts were grouped in this manner and the stairs going over them consisted of blocks left over from construction (Tr. 32). The blocks were stairstepped up and loosely stacked two abreast from the bottom (Tr. 33). Because the overcasts were fairly high, the stairs extended about 4 or 5 feet off the mine floor (Tr. 33). The inspector estimated that the stairs were about 2 feet wide, but he did not measure the blocks and had never measured any such concrete blocks (Tr. 33-34, 83-84). He admitted that some of the stairs could have been as much as three feet wide (Tr. 84). He did not recall how each set of stairs was constructed and acknowledged that they were not all the same (Tr. 84-85). The inspector further testified that the stairs were loose, rickety, cumbersome and not mortared, but he did not include any of those conditions in the citation (Tr. 51, 63).

Based upon the assumption that the stairs were two feet wide, the inspector was of the opinion that they were not adequate to insure safe passage of anyone including disabled persons (Tr. 69). In the inspector's view four people would be ideal to carry a stretcher over the overcasts (Tr. 46). He believed 2 foot wide blocks would be inadequate, because even if only two persons were carrying the stretcher they would have to stop and lift the person on top of the overcast and slide him across the top (Tr. 49). A crew of four persons would not have sufficient room (Tr. 49). The inspector believed that 4 foot wide stairs would provide ample room to carry a stretcher over the overcasts without stopping (Tr. 49-50).

Findings and Conclusions

The requirements of the several subparagraphs of paragraph (d) of 30 C.F.R. § 75.380 are cumulative rather than alternate in nature. Subparagraph (1) imposes a general duty to maintain escapeways in a safe condition to insure safe passage including disabled persons. Subparagraph (2) additionally requires that the route of travel be clearly marked. Succeeding subparagraphs impose further conditions.

Some of the conditions in paragraph (d) apply only to specific situations. The 4 foot width requirement for escapeways set forth in subparagraph (4)(ii) applies only where the escapeway route of travel passes through a door or other ventilation controls. It is not, therefore pertinent here where the route of passage was not through a door in the overcast but rather over the overcast (Tr. 29, 62-63). The inspector did not issue the citation under this provision (Tr. 66).

It must also be noted that subparagraph (6) of paragraph (d) requires that escapeways be provided with ladders, stairways, ramps or other similar facilities where, as here, an escapeway crosses over an obstruction. Unlike the provision applicable to escapeways going through obstructions, the mandate for staircases and other facilities that go over obstructions sets forth no minimum width. 57 F.R. 20905 (May 15, 1992). The inspector did not mention subparagraph (6) either in the citation or in his testimony.

In light of the foregoing, it is clear that there is no express requirement that stairs going over an overcast be at least four feet wide. The inspector stated that he based the citation upon subparagraph (1) which as already noted, directs that each escapeway be maintained in a safe condition to always ensure passage of anyone, including disabled persons (Tr. 66-67). In determining whether the general obligation for safe escapeways imposed by subparagraph (1) has been satisfied, each case must be examined and judged on its facts.

When asked why he believed the escapeway would not insure safe passage of disabled persons, the inspector gave contradictory responses. He repeatedly stated that he issued the citation because the stairs were rickety, loose and not mortared (Tr. 51, 69, 72, 74). However, he admitted that he had not included those circumstances in the citation (Tr. 63). When asked why he did not put in the citation that the stairway was rickety and loose, the inspector answered, "If I sit and write every detail that I think is important in every citation I issue, I may never get my job done" (Tr. 71).

The citation also refers to the absence of handrails and the inspector stated that if handrails had been present, he would not have looked at rickety and loose as being important (Tr. 72-73). At another point, he stated that all these factors played a part. But he immediately followed up by saying that if the stairs had been wide enough, he would not have found a violation even had there been no handrails (Tr. 72-73). The inspector acknowledged that if the stairs had been the way he saw them, but had been 4 feet wide, he would not have issued the citation (Tr. 74-75). As he finally stated, four feet was the "bottom line" (Tr. 75). In light of the foregoing, I conclude that the inspector's finding

of violation was premised upon the fact that the stairs were not 4 feet wide.

Under the general duty provision of subparagraph (1) the staircases cited by the inspector must be evaluated to determine whether 4 foot wide stairs were necessary to insure safe passage. The record demonstrates that the citation is not based upon an evaluation of the staircases which allegedly violated the mandatory standard. Although he remembered that the staircases were not all the same, the inspector did not recall how they were constructed (Tr. 84-85). The inspector conceded that he did not measure the concrete blocks he cited and, indeed, had never measured any such blocks (Tr. 33, 83-84). He granted that some of the steps he cited could have been three feet wide depending on how they were stacked (Tr. 84). When confronted with his actions, the inspector said, "I wish I had to do this all over again. I would measure them and tell you exactly. I didn't take the time to do it." (Tr. 84).

There is therefore, no factual support for the inspector's finding that the staircases were unsafe because they were only two feet wide (Tr. 34). Moreover, the inspector's judgement that stairs four feet in width were necessary for safe passage cannot be accepted as a basis for finding a violation, because his conclusion was not predicated upon the characteristics of the staircases he cited. Since the inspector did not remember the features of these staircases, approval of his actions would constitute imposition of a blanket requirement that staircases going over overcasts be 4 feet wide. This is precisely what the mandatory standard fails to demand of staircases and other facilities that cross over obstructions. As set forth above, the Secretary knows how to require minimum widths for escapeways when he wants them, such as when the escapeway route of travel goes through an overcast. If it is the Secretary's wish that such an obligation obtain in a case like this independent of the particular facts, he should do what he has done before in like situations, i.e., engage in rulemaking. The adjudicatory route will not afford him the relief he seeks on a record such as the one made in this case.

In light of the foregoing, I conclude that the Secretary has failed to make out a prima facie case and that his penalty petition must be dismissed.

The foregoing is dispositive of the case. However, one further matter must be noted. At the outset of the hearing the Solicitor argued that if a violation occurred, it must be held significant and substantial because an underlying emergency, e.g., fire, explosion, should be presumed. The Solicitor advanced this position for the first time at the hearing. This case was discussed at a calendar call but the Solicitor did not raise this issue. Subsequently, preliminary statements were

filed and again, the Solicitor did not raise the issue. At my request, the parties briefed the issue in their post hearing briefs. However, upon review of the record I find that the failure of the Solicitor to bring up this matter before the commencement of the hearing was materially prejudicial both to the operator and to me. Operator's decision not to bring any witnesses to the hearing, might well have been different had the Solicitor made his intentions known in a timely manner. Even more importantly, if this issue had been reached in this case, I would have been deprived of the record necessary to determine whether adoption of the presumption was justified. What the Solicitor overlooks is that the adoption of a presumption cannot be divorced from consideration and analysis of the facts upon which it is sought to be justified.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is **ORDERED** that Citation No. 3187628 be and is hereby **VACATED.**

It is further **ORDERED** that the penalty petition filed in this case is **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 0 1994

CLARK WILLIAMSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 93-406-D
	:	HOPE CD 93-15
ELKAY MINING COMPANY,	:	
Respondent	:	Tower Mountain Mine

ORDER OF DISMISSAL

Before: Judge Hodgdon

This case is scheduled for hearing on June 21, 1994, in Logan, West Virginia. On June 6, 1994, the Complainant submitted a letter stating that he desired to withdraw the case "without prejudice." The Respondent opposed dismissing the matter "without prejudice."

In a telephone conference call on this date, I advised Mr. Williamson that the only way that the case would be dismissed would be "with prejudice." Knowing that, he stated that he still desired to have the case dismissed. The Respondent had no objection to the case being dismissed "with prejudice."

Accordingly, it is **ORDERED** that the hearing set for June 21, 1994, is **CANCELED** and that this case is **DISMISSED** with prejudice.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAMES E. DeROSSETT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 94-285-D
M & MB COAL COMPANY, Respondent	:	Pike CD 92-16
	:	No. 4 Mine

ORDER OF DISMISSAL

Before: Judge Weisberger

On May 5, 1994, an Order to Show Cause was issued which inter alia, contained the following language "Accordingly, complainant shall, within 10 days of this order, either file a response to the Pre-hearing Order, or file a statement setting forth good cause why the Pre-hearing Order was not complied with. If Complainant does not comply with this Order, a Decision will be issued dismissing the complaint."

Complainant has not complied with this order. Accordingly, it Ordered that this case be DISMISSED.

Avram Weisberger
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

JUN 2 1 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-428-M
Petitioner	:	A.C. No. 36-00005-05514
v.	:	
	:	Chase Quarry
AMERICAN ASPHALT PAVING,	:	
Respondent	:	

DECISION

Appearances: Anthony G. O'Malley, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Mr. Bernard C. Banks, Jr., Executive Vice President, American Asphalt Paving, Shavertown, Pennsylvania, for the Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding the Secretary of labor (Secretary), on behalf of his Mining Enforcement and Safety Administration (MSHA), alleges that American Asphalt Paving Company (American Asphalt) in eight instances violated 30 C.F.R. § 50.20, a mandatory standard promulgated pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), requiring in pertinent part that "[e]ach operator . . . report each accident . . . at the mine" by mailing to MSHA Form 7000-1 "within ten working days after an accident." The Secretary further alleges that the violations were the result of the company's "high negligence." The Secretary proposes civil penalties of $300 for each of the alleged violations and petitions for their assessment pursuant to sections 105(d) and 110 of the Act. 30 U.S.C. §§ 815(d), 820. The proposed penalties were derived through the Secretary's special assessment procedures. 30 C.F.R. §100.5.

American Asphalt responds that it was unaware of MSHA Form 7000-1 and the need to file such in the event of an accident. Further, the company contends it did not exhibit the high negligence attributed to it.

A duly noticed hearing on the merits was held in Wilkes-Barre, Pennsylvania. Anthony G. O'Malley, Jr. acted as counsel for the Secretary. Bernard C. Banks, Jr., an executive vice president of the company, represented American Asphalt. Subsequently, counsel for the Secretary submitted a helpful brief.

STIPULATIONS

At the commencement of the hearing counsel stated that the parties agreed as follows:

> 1. American Asphalt . . . is the owner and operator of the Chase Quarry.
>
> 2. [American Asphalt] utilizes tools, equipment, machinery, materials, goods and supplies in its business which have originated in whole or in part . . . outside . . . Pennsylvania.
>
> 3. [American Asphalt] engages in business which affect[s] commerce.
>
> 4. Operations at the Chase Quarry are subject to the [Mine Act].
>
> 5. The Administrative Law Judge has jurisdiction to hear and decide th[e] case pursuant to section 105 of the Act.
>
> 6. MSHA Inspector Gerald R. Keith was acting in his official capacity when he issued to [American Asphalt] on April 1, 1993, eight [section] 104(a) [c]itations for violations of . . . [section] 50.20.
>
> 7. True copies of the citations . . . were served on [American Asphalt] or its agents as required by the Act.
>
> 8. The Administrative Law Judge has the authority to [assess] . . . appropriate civil penalt[ies] . . . if he finds the citations . . . state violations of the Act and the [r]egulations.
>
> 9. [T]he violations . . . alleged in each of the eight . . . citations did, in fact, occur in the manner specified by the MSHA inspector.

10. [T]he only issues . . . are whether the inspector properly noted the degree of negligence . . . and, as a result, whether the proper penalty was assessed.

Tr. 10-13. (nonsubstantive editorial changes made).

In explaining further the company's understanding of stipulations 9 and 10, Banks stated, "[W]e have agreed that the eight violations were cited. [W]e have agreed that the only issue . . . is whether the inspector properly noted the degree of negligence for each of the eight [violations] . . . . [The company] also [is] going to be questioning whether there should be one violation or eight violations." Tr. 19-20. Counsel for the Secretary objected to this interpretation of the stipulations maintaining the stipulations meant American Asphalt agreed that eight violations occurred.

Banks is not an attorney. It was clear to me that if he had believed the wording of the stipulations precluded arguing for a single citation, he would not have agreed to stipulations 9 and 10. In other words, it was clear to me that there was no meeting of the minds on this issue. I therefore overruled the objection and indicated that I would consider the representative's single-citation argument. Tr. 21.

In addition, the parties agreed that American Asphalt's relevant history of previous violations is represented on Gov. Exh. 1, a computed print-out generated by MSHA's assessment office, and that the size of the company is accurately reflected in Gov. Exh. 2, a copy of MSHA's proposed assessment sheet. Tr. 13-14.

THE TESTIMONY

THE SECRETARY'S WITNESSES

Gerald Keith

Gerald Keith, an MSHA inspector with 17 years experience, works in MSHA's Wyomissing, Pennsylvania field office. Tr. 22-23. Keith is trained in the application and enforcement of the mandatory regulations found in 30 C.F.R. Part 50, regulations that, among other things, pertain to an operator's obligation to report accidents, occupational injuries and occupational illnesses. One of Keith's duties is to monitor compliance with Part 50. This requires him to audit company records for accidents resulting in injuries. Tr. 23-24.

On April 1, 1993, Keith went to American Asphalt's Chase Quarry and Mill to conduct an audit of the company's accident and injury reports. Tr. 25-26. The facility contains both a quarry

and an asphalt plant. The plant is inspected by the Occupational Safety and Health Administration (OSHA). It was Keith's first visit to the facility and the first time an official from MSHA had audited the company's reports. Tr. 47, 58. Keith stated there are 260 facilities audited by the Wyomissing field office and it "just took this long to get around to [American Asphalt.]" Tr. 62. Keith described the company's attitude during the audit as one of "full cooperation." Tr. 55.

At the company's office Keith asked to see copies of MSHA Form 7000-2, the quarterly mine employment and production report that operators are required to submit. See 30 C.F.R. § 50.30. Keith reviewed the copies and noted that the line on which the operator is asked "How many MSHA reportable injuries or illnesses did you have this quarter?" was left blank on all of the copies. Tr. 26-27; 44-45, 49; Gov. Exhs. 11, 12. Keith also reviewed the company's workmen's compensation files and the forms on which the company reported accidents to OSHA. The records indicated to Keith that accidents had occurred at the quarry which should have been reported to MSHA. Keith then checked the company's files for MSHA Forms 7000-1, the form used to report accidents. Tr. 28-32; see Section 50.20. There were no copies in the files.

As a result of the inspection, Keith issued to American Asphalt citations charging that between May 8, 1990 and September 15, 1992, the company failed to report eight lost time accidents and that each failure constituted a separate violation of section 50.20. Tr. 36-37; Gov. Exhs. 3-10. The citations where terminated when Gloria Suda, the company's executive secretary, completed the required Forms 7000-1. Tr. 37.

Keith asked why the accidents had not been reported. He was advised by company officials, including Banks, that American Asphalt believed it had to submit accident report forms to OSHA only, that submission of forms to MSHA was not required. Tr. 41, 45-46, 50.

Keith had inspected many facilities similar to the American Asphalt's in which inspection jurisdiction was divided between MSHA and OSHA. Keith stated that at such facilities, frequently he found MSHA-reportable accidents reported on OSHA forms as well as on MSHA forms. However, that this was the first time he heard an operator maintain it was unaware compliance with MSHA regulations was required or that compliance with OSHA regulations encompassed compliance with MSHA's requirements. Tr. 59-60.

Keith explained to company officials MSHA's regulations regarding reportable accidents and advised the officials that civil penalties assessed for the eight violations would be determined by MSHA special assessment procedures. Tr. 38; see 30 C.F.R. § 100.5.

Keith stated he found the violations to be the result of American Asphalt's high negligence because he followed MSHA policy as set forth in its Program Policy Manual (PPM). The policy requires such a finding absent mitigating circumstances. Tr. 61, 62. (The PPM states, "Failure to report any accident, [or] injury . . . should be considered highly negligent, absent clear, mitigating circumstances. Any violations of Part 50 considered to be the result of a high degree of negligence shall be referred for special assessment." Tr. 46; Gov. Exh. 13.) When asked what "high negligence" meant to him, Keith replied it was when the operator "really didn't know to . . . [report the accidents] and should have done it but didn't." Tr. 61.

In Keith's view, submission of Form 7000-1 is important because MSHA uses it to categorize accident types and to calculate accident and injury statistics. Further, inspectors receive a copy of each report submitted for mines they are assigned to inspect and therefore can better focus their inspection efforts. Tr. 41-42.

Charles McNeal

Charles McNeal supervises those inspectors who conduct inspections at facilities within the jurisdiction of the Wyomissing field office. McNeal also reviews citations issued by the inspectors and he reviewed the citations Keith issued to American Asphalt. Tr. 67-68. As part of the review McNeal discussed with Keith the findings of high negligence. McNeal advised Keith that circumstances mitigating high negligence could be things such as the person responsible for completing the MSHA forms being sick or American Asphalt assigning a new person to complete the forms. Completion of OSHA forms rather than MSHA forms would not be considered a mitigating circumstance because MSHA advises operators about their duty to complete the MSHA forms. Tr. 69-70. According to McNeal, all operators receive the PPM and its periodic updates. McNeal considered this to be notice to operators that MSHA audits operators for compliance with Part 50. Tr. 71. McNeal also stated that MSHA was supposed to provide operators with Part 50 forms. Tr. 88.

McNeal understood that the information on Form 7000-1 was tabulated by the MSHA Analysis Center in Denver which then advised MSHA district offices of problems causing accidents at mines within the district. The information was reviewed by inspectors prior to commencing inspections. In this way inspectors were alerted to areas that required heightened attention at the mines. Tr. 71-72.

McNeal stated that when a reportable accident occurred at a facility inspected by both OSHA and MSHA, the accident was reportable to the agency having jurisdiction over the accident

site. Tr. 73. OSHA and MSHA do not share the information reported. Id.

McNeal maintained if an inspector issued to an operator a citation for the violation of section 50.30 (failure to submit a quarterly employment and coal production report on MSHA -- Form 7000-2) the inspector invariable told the operator that any accidents during the quarter had to be report on MSHA Form 7000-1. Tr. 78-79. Further, an inspector always issued a citation if a violation of Part 50 occurred because that is what the law requires. An inspector never merely warned an operator to comply in the future. Tr. 84-85.

AMERICAN ASPHALT'S WITNESSES

James Koprowski

James Koprowski is the company's personnel insurance manager and safety directory. His duties include conducting safety meetings and walk-around inspections and, in conjunction with the company's insurers, evaluating accidents to determine what remedial action is required. Tr. 93-94.

Koprowski stated that he attended various MSHA authorized safety seminars. He acknowledged his familiarity with the safety and health regulations promulgated by MSHA and published in the Code of Federal Regulations, but he explained that "to go and read through . . . [the CFR] verbatim and know what everything pertains to, I just have too many other job duties to devote that much attention to one particular booklet like that." Tr. 94-95.

Koprowski testified that Keith's inspection was the first time an MSHA inspector had audited the company's records. Tr. 109. Because he was hospitalized, Koprowski was not at the mine office on April 1. Prior to the inspection he never had heard of MSHA Form 7000-1. Tr. 95. Koprowski was unaware of the PPM and did not know whether or not the company had a copy. Tr. 96.

Koprowski believed that American Asphalt had a strong safety program. He identified a copy of a memorandum detailing American Asphalt's plans for safety instruction. These include tool box talks, supervisory safety meetings, safety review visits by Koprowski and a program in which the company cites those of its employees who repeatedly violate company safety rules. Tr. 98; Amer. Asph. Exh. R-1. He also identified a policy statement issued by Banks that emphasizes the company's concern with safety. It states in part, "If you see or observe anything that you believe to be an unsafe condition or act, please report it to your supervisor at once. In our company, there is no such thing as a 'safety nut'." Id. 6. Other company safety documents include lists of management's and employees' responsibilities

with regard to safety standards for various tasks at the quarry and a memorandum mandating employee attendance at company safety meetings. Id. 7- 24; Tr. 98-100.

Koprowski explained the steps undertaken by the company when reporting an injury. First, the foreman completes the form on which the company reports the accident to the insurance company, and if the accident requires medical attention or time away from work, the foreman reports the injury to OSHA on OSHA Form 200. Next, a more complete report is sent to the company's insurance carrier. Finally, and subsequent to April 1, 1993, MSHA Form 7000-1 is completed and submitted to MSHA.

Koprowski stated that at the time the citations were issued he was unaware of Form 7000-1 or the regulatory requirements pertaining to it. He further stated that if Forms 7000-1 had been sent to the company by MSHA, he would have received them, which he never did. Tr. 107-108.

The company keeps copies of all of its safety records, including those for OSHA and workmen's compensation. The records are kept by incident, there being a single file for each accident. Tr. 110-111.

Gloria Suda

Gloria Suda described the process by which the company reports accidents. She stated when she receives a report from the superintendent and foreman that there has been an accident, she completes an OSHA Form 200 followed by an insurance company form. The forms are submitted first to Koprowski for approval, then to the superintendent and foreman for them to initial and then they are filed. After the citations were issued, the company added MSHA Form 7000-1 to the procedure.

On April 1, 1993, when Keith asked to see the accident forms for 1990, 1991 and 1992, Suda showed him the files containing the OSHA forms. When he asked about MSHA Forms 7000-1, Suda told him she was unaware of any. She also stated that she was unaware of MSHA Forms 7000-2. Tr. 116-117. The company made no effort to conceal anything. She stated, "Everything's in the files." Tr. 119.

Sharon Jennings

Sharon Jennings, an administrative assistant in the company's materials department, has been employed by American Asphalt for 6 years. One of her jobs is to complete MSHA Forms 7000-2 for the company. The person who filled out the forms for the company previous to Jennings told Jennings to complete them exactly as had been done in the past. Tr. 123, 126-127. Jennings tried her best to follow this instruction, which meant

she completed only the lines pertaining to the man hours worked, because this was what the person before her had done. She did not include any data on injuries or illnesses because it had not been included previously. Tr. 123-124. Jennings stated that Forms 7000-2 were received quarterly from MSHA. Tr. 125. As far as Jennings knew, the company never received Forms 7000-1 from MSHA. Tr. 125-126.

THE VIOLATIONS

American Asphalt does not contest the fact that it violated section 50.20 when it failed to complete and submit to MSHA a Form 7000-1 for each of the eight reportable injuries cited. Rather, and as noted in the above discussion of the parties' stipulations, it argues that it should have been cited once only for failing to report the eight injuries.

This is an argument the Act itself answers. Section 110(a) states: "Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. §820(a) (emphasis added). This language gives discretion to the inspector when confronted with a situation were multiple infractions of the same standard have occurred. Here, where each instance of a reportable violation is separate in time and involves a distinct injury, I find that Keith did not abuse that discretion in issuing separate citations.

The Act requires a civil penalty be assessed for each violation. Having concluded the eight violations existed as changed, the question becomes the proper civil penalty to assess for each violation.

CIVIL PENALTY CRITERIA

Gravity

The regulatory reporting requirements are more than just clerical hoops through which an operator must jump. As both Keith and McNeal explained, the regulations have a pragmatic impact on effective enforcement of the Act. They are a basis for the compilation and categorization of accident and injury statistics, statistics that alert MSHA to problem areas in mine safety and consequently permit the agency to more effectively focus its industry-wide enforcement and education efforts. Tr. 41-42, 71-72. In addition, the reporting requirements have a mine-specific impact in that copies of the reports are reviewed by inspectors prior to inspections. Id.

Counsel for the Secretary argues -- correctly, I believe -- that compliance with the Part 50 reporting requirements is "extremely important" and he has noted Chief Administrative Law Judge Paul Merlin's observation that Part 50 is a cornerstone of

enforcement under the Act. Sec. Br. 11. The Chief Judge's comments bear repeating:

> Since Part 50 statistics provide the basis for planning, training and inspection activities, accurate reporting is essential. Moreover, failure accurately to report could have extremely dangerous consequences by concealing problem areas of a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, he would be unable to decide how best to meet his enforcement responsibilities.

Consolidation Coal Company, 9 FMSHRC 727, 733-734 (April 1987).

To this I would add only that where, as here, an operator has failed totally to report as required, the harm that is done in general to agency enforcement efforts may well rebound on the particular mine involved because of a consequent failure to alert MSHA authorities to an ongoing safety hazard. For these reasons I conclude the violations were serious.

Negligence

Negligence is the failure to meet the standard of care required by the circumstances. Because the reporting requirements are central to effective enforcement of the Act, an operator is under a high standard of care with regard to their observance. This does not mean, however, that each violation of Part 50 is necessarily the product of "high negligence" on the operator's part. Keith found no circumstances in mitigation of American Asphalt's negligence, but after hearing all of the testimony and after considering all of the evidence, I do.

While I fully agree with counsel that a violation may not be excused by an operator's failure to know compliance is required, the concept of strict liability under the Act should not be confused with negligence in failing to conform to its standards. See Sec. Br. 7. In other words, there are instances -- and in my opinion this is one -- where an operator's lack of knowledge regarding compliance may be based on circumstances that mitigate its negligence.

All of the witnesses agreed that MSHA previously had not audited the records at the plant for Part 50 compliance. It is important to remember that MSHA's inspections are not simply vehicles for enforcement, they also serve as teaching tools. (In my opinion the instructional function of inspections has become even more important since MSHA discontinued its compliance assistance visit program.) Here, employees at the facility did

not have the benefit of a previous inspection by which to learn what the Part 50 regulations required of them.

It is all well and good for counsel to note that Koprowski, who was in overall charge of Part 50 compliance, had the CFR available to him and thus that American Asphalt had information readily available to know what section 50.20 requires. Sec. Br. 7. However, the reality of the situation is that the code is voluminous, and it is understandable that a regulation may be overlooked, especially when its link to miners' safety is derivative rather than immediate.

The company's failure to submit Forms 7000-1 is also understandable in light of Jennings unrefuted testimony that MSHA sent American Asphalt Forms 7000-2 on a quarterly basis but did not send the company Forms 7000-1. Tr. 125. This is not an excuse for failing to submit the forms. It is the operator's duty to obtain the proper forms. However, it is a circumstance that in my opinion helped to lead American Asphalt sincerely to believe it was observing all of MSHA's requirements.

Finally, this is not a situation in which an operator was attempting to avoid compliance or to conceal its actions. I accept as fact that prior to April 1, 1993, American Asphalt's procedures for reporting injuries, involve reports to its insurance company and to OSHA. Had the company been aware of the requirements of section 50.20, I have no doubt it would have submitted Forms 7000-1 as well. Company officials were open and above board with regard to the records. "Everything's in the files" said Suda. Tr. 119. I conclude the fact that "everything" did not include MSHA Forms 7000-1 was not the result of a dereliction from duty so extensive as to be considered "high negligence." Rather, the company's negligence was moderate.

History of Previous Violations

In the 24-months prior to April 1, 1993, 14 violations at the Chase Quarry were assessed and paid. Gov. Exh. 1. Of these violations five were assessed using the regular formula and nine were assessed using the single penalty formula. See 30 C.F.R. §§ 100.3, 100.4. (Of course, the company has no prior history of violations of the Part 50 regulations there having been no prior audit for Part 50 compliance.) These violations occurred over six inspection days. I do not find this to be a history of previous violations warranting an increase in the penalties otherwise assessed.

Size of Business

The Secretary's Proposed Assessment indicates the size of the company to be 110,926 production tons or hours worked per year and the size of the Chase Quarry to be 38,722 production tons or hours worked per year. Gov. Exh 2. These figures were not disputed, and I find American Asphalt to be a small to medium size operator. See 30 C.F.R. § 100.3(b).

Ability To Continue In Business

The burden is on the operator to establish that the amount of any penalty assessed will affect its ability to continue in business. American Asphalt offered no proof in this regard, and I find any penalties assessed will not adversely impact the company.

Good Faith Abatement

The violations were abated prior to the time set by the inspector. The company exhibited good faith in achieving rapid compliance after notification of the violations.

CIVIL PENALTIES

The Secretary proposes a civil penalty of $300 for each violation, an amount I find excessive. (The largest amount assessed and paid for a violation in the 24-months prior to April 1, 1993 was $178. Gov. Exh. 1.) The Secretary argues that "any reduction in the penalties proposed . . . will necessarily send the wrong message." Sec. Br. 13. I do not agree. American Asphalt does not strike me as an operator driven to compliance by the threat of monetary sanctions. All previous assessments have been modest and it has an active and ongoing safety program. I believe, as the company states, that the company recognizes it has "a firm responsibility to prevent injuries to employees," and I was impressed by Koprowski's description of the company's efforts to meet this responsibility. Amer. Asph. Exh. 1 at 6; Tr. 98-99 In my view the assessment of historically high penalties for unintentional violations would be more likely to foster resentment than compliance, especially when it seems clear the company has a commitment to Part 50 compliance now that it understands its responsibilities. For the foregoing reasons I conclude that a civil penalty of $50 is appropriate for each violation.

In making the assessments I note however that the hearing revealed areas wherein the company needs to improve awareness of its obligations under the Act. Certainly, someone in authority at the Chase Quarry should have a copy of the PPM and a working knowledge of its contents. Further, while one cannot expect Koprowski to know every jot and tittle of the regulations that

apply to metal and non-metal mines, he, or someone in an equivalent position at the facility, should have a thorough overall familiarity with what the regulations require.

ORDER

The Secretary is ORDERED to modify Citation Nos. 4083556, 4083557, 4083558, 4083559, 4083560, 4084661, 4084662 and 4084663 by deleting the findings of "high negligence" and by including a finding of "moderate negligence". As modified, the citations are AFFIRMED.

American Asphalt is ORDERED to pay to MSHA within 30 days of the date of this decision civil penalties of $50 each for the violations of section 50.20 set forth in Citation Nos. 4083556, 4083557, 4083558, 4083559, 4083560, 4084661, 4084662 and 4084663 and upon receipt of payment this matter is DISMISSED.

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 2 1994

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 94-157-R
v.	:	Citation 3305270; 12/28/93
	:	
SECRETARY OF LABOR, Mine Safety and Health Administration, (MSHA), Respondent	:	Humphrey No. 7 46-01453
	:	Docket No. WEVA 94-158-R
	:	Citation 3305893; 12/29/93
	:	
	:	Docket No. WEVA 94-159-R
	:	Order No. 3305392; 12/30/93
	:	
	:	Loveridge No. 22 46-01433

DECISION

Appearances: Elizabeth S. Chamberlain, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for the Contestant;
Caryl L. Casden, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Respondent.

Before: Judge Feldman

This consolidated proceeding concerns Notices of Contest filed On January 18, 1994, by the Consolidation Coal Company (the contestant) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(d), challenging two 104(d)(1) citations and a 104(d)(1) order issued at the above captioned facilities on December 28 through December 30, 1993. The Notices of Contest were accompanied by the contestant's Motion for Expedited Hearing. The contestant's motion was opposed by the Secretary on January 25, 1994. The Motion for Expedited Hearing was denied on February 14, 1994. Order, 16 FMSHRC 495. These matters were subsequently called for hearing on March 30, and March 31, 1994, in Morgantown, West Virginia. The contestant has stipulated that it is a mine operator subject to the jurisdiction of the Act. (Tr. 11-12). The parties' posthearing proposed findings and conclusions are of record.

The 104(d)(1) citations and order concern an alleged unsafe condition in primary and secondary escapeways in violation of the mandatory safety standard in Section 75.380(d), 30 C.F.R. § 78.380(d), as well as alleged accumulations of combustible materials prohibited by Section 75.400, 30 C.F.R. § 75.400. The issues for resolution are whether the cited violations in fact occurred, and, if so, whether they were properly designated as significant and substantial and attributable to the contestant's unwarrantable failure.

The Criteria for a Significant and Substantial Violation

The Secretary has the burden of proving that a particular violation is significant and substantial in nature. A violation is considered significant and substantial if "... there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). The Commission enumerated the elements that must be established for the Secretary to prevail on the significant and substantial issue in Mathies Coal Company, 6 FMSHRC 1 (January 1994). The Commission stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1)the underlying violation of a mandatory safety standard; (2)a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3)a reasonable likelihood that the hazard contributed to will result in an injury; and (4)a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

With respect to the third element in Mathies, the Secretary is not required to present evidence that the hazard will actually occur. Rather, the Secretary is required to establish, by a preponderance of the evidence, that there is a reasonable likelihood that the violation will contribute to the occurrence of an injury causing event. Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 678 (April 1987). The likelihood of this event must be evaluated in the context of continued normal mining operations. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). Finally, the question of whether a violation is properly designated as significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

The Criteria for an Unwarrantable Failure Finding

Unwarrantable failure is "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, supra; Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). In distinguishing aggravated conduct from ordinary negligence, the Commission stated in Youghiogheny & Ohio, 9 FMSHRC at 2010:

> We stated that whereas [ordinary] 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.

Docket No. Weva 94-157-R[1]
104(d)(1) Citation No. 3305270

Section 75.380, the cited mandatory safety standard in this instance, requires at least two separate and distinct travelable passageways to be designated as escapeways. 30 C.F.R. § 75.380(a). The escapeway ventilated with intake air must be designated as the primary escapeway. 30 C.F.R. § 75.380(f)(1). An escapeway that is separated from the primary escapeway must be designated as an alternative (secondary) escapeway. 30 C.F.R. § 75.380(h).

There are four entries in the contestant's headgate in its 13 East longwall section. The No. 1 entry (left-most entry) is a return entry. The No. 2 intake entry is the designated primary escapeway. The No. 3 track entry is the designated secondary escapeway. Entry No. 4 (right-most entry) is the belt entry. (Joint ex. 2).

On December 28, 1993, Mine Safety and Health Administration (MSHA) Inspector William Ponceroff issued Citation No. 3305270 for an alleged violation of Section 75.380(d) as a result of a broken waterline, four inches in diameter, which resulted in flooding of all four entries in the headgate section. The citation specified that the water level was knee-deep in the

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[1] There are two volumes of testimony transcribed in these consolidated proceedings. All references to transcript pages in Docket No. WEVA 94-157-R relate to the transcript dated March 31, 1994.

No. 2 primary intake and No. 3 secondary track escapeway entries. The citation noted that coal was being mined while this condition existed. The citation essentially quoted the language in Section 75.380(d) that each escapeway shall be "maintained in a safe condition to always insure passage of anyone, including disabled persons (emphasis added)." Although initially issued as a 104(a) citation, Ponceroff modified it to a 104(d) citation when he learned the midnight shift was sent to the face beginning at midnight December 28, 1993, despite the flooded condition of the escapeways.

Findings of Fact

On the afternoon shift of December 27, 1993, between the hours of 4:00 p.m. and 8:30 p.m., a four-inch waterline burst in the No. 4 entry of the contestant's 13 East longwall headgate section at its Humphrey No. 7 Mine. (Tr. 395). The waterline was repaired that afternoon but ruptured again at approximately 11:30 p.m. (Tr. 391).

Kathy Slifko, a belt shoveler on the midnight shift, testified that she arrived late at the mine site at approximately 11:30 p.m. on December 27. She was sent underground to join the midnight crew at approximately 12:01 a.m. on December 28. (Tr. 316). Slifko was transported in a mantrip to the mouth of the 13 East section. She then entered the No. 3 track entry and walked for a distance of approximately five blocks until she could no longer travel because the entry was blocked with water. (Tr. 317). Slifko then proceeded to the No. 4 belt entry where she met foreman Frank Rose. (Tr. 317). Rose informed Slifko that the midnight crew had already gone to the face. Rose stated that several of the crew had walked over to the No. 2 intake entry to determine if it was passable. However, Rose indicated these crew members returned to the belt entry and traversed over the water by crawling over the belt. (Tr. 318).

Slifko testified that she checked all of the entries in an effort to determine the best way to proceed to her work site. At the No. 2 primary escapeway intake entry, she walked to the edge of the water and checked the ribs. She testified that there is sloughage piled on the ground against the ribs. However, no sloughage was visible. She concluded the water was at least one foot in depth because the water obscured the sloughage. (Tr. 319-320). The elevation of the headgate entries is pitched downward from the No. 4 belt entry towards the adjacent No. 3 and No. 2 entries. This resulted in the flow of water from the broken waterline in the No. 4 belt entry through the stoppings into the No. 3 and No. 2 entries. (Tr. 190, 211-214). Consequently, while standing at the edge of the water in the No. 2 intake entry, Slifko heard and observed water pouring through the stoppings from the track entry into the intake entry.

(Tr. 319). Slifko described the intake entry as dark and the water therein as murky. (Tr. 320).

At approximately 1:00 a.m., Slifko returned to the belt entry where she again spoke with Rose who was then wearing hip boots and standing in water up to his thighs. (Tr. 322-323). Slifko told Rose that the water level prevented her from traversing the intake entry. (Tr. 322). Rose informed Slifko that Larry Herrington, the crew foreman, had crawled up the belt with his crew. (Tr. 322). Slifko then crawled over the belt to avoid the water below the beltline and proceeded to her work station. (Tr. 325).

The waterline was repaired on the midnight shift between 1:30 and 2:00 a.m. (Tr. 391). At that time, a 7½ horsepower Thromore pump and a 3½ horsepower Altman standup pump were installed to remove the water accumulation in the headgate section. (Tr. 373-374). Inspector Ponceroff testified that these pumps were inadequate given the magnitude of the flooding. At approximately 4:00 a.m. on the midnight shift (December 28), the contestant began to mine coal even though the accumulations of water remained in the escapeways. (Tr. 325).

On the morning of December 28, at the end of her shift, Slifko was advised to exit the mine through the belt entry with Tim Shaffer (Tr. 326). When they reached the water Ike Coombs, the assistant shift foreman, locked the belt and told Slifko and Shaffer to crawl on the belt to avoid the water below. They proceeded to crawl over the belt which was loaded with approximately five to six inches of coal. (Tr. 326-328). No escapeway route other than the No. 4 belt entry was suggested to Slifko either at the start or the end of her shift. (Tr. 329).

MSHA Inspectors Ponceroff and Thomas May arrived at the contestant's Humphrey No. 7 Mine site at approximately 7:30 a.m. on December 28. After holding an opening conference with mine management and reviewing the preshift examination books, the inspectors proceeded underground. (Tr. 183, 291). After the inspectors reached the bottom, Brian Whitt, the company safety escort, asked them if they would return to the surface to speak with the superintendent. (Tr. 183, 291). When the inspectors refused to return to the surface, Whitt spoke to the superintendent by phone. (Tr. 183). Whitt then asked the inspectors whether mining was permissible with knee-deep water in the escapeway. (Tr. 183, 291, 310). The inspectors informed Whitt that the company could not mine with knee-high deep water in the escapeway.

The inspectors then traveled through the No. 3 track entry to the 13 East longwall section. At the No. 7 or No. 8 block, they observed water from rib to rib for a distance of approximately two hundred feet. (Tr. 190, 292). No sloughage

was visible. (Tr. 191). May waded into the water. He backed out when the water was getting deeper to the point where it was approaching the top of his boots. (Tr. 292). The inspectors observed a very small pump that had been installed improperly in the track entry. (Tr. 190).

The inspectors entered the No. 2 intake escapeway, where they encountered the same conditions they had observed in the track entry. (Tr. 191, 292). Ponceroff stepped into the water in the intake escapeway. He retreated when the water was approaching the top of his boots because the slope of the intake entry was downhill and the water was getting deeper. (Tr. 191). The height of Ponceroff's boots from heel to the top is approximately 12¾ inches (Tr. 192).

The inspectors found similar flooding in the No. 1 return and No. 4 belt entries. (Tr. 193-194). A small sump pump had been installed in the belt entry. The inspectors crawled up the belt entry measuring the water as they went along. (Tr. 194). The water in the center of the entry was 19 inches deep and water along the side of the entry was between 23 inches and 24 inches deep. (Tr. 194). As they crawled on the beltline past the stoppings, they could see the waterline had dropped between eight and ten inches. (Tr. 194). It took the inspectors approximately fifteen minutes to crawl through the flooded area, a distance of approximately two hundred feet. (Tr. 195).

There were tripping and stumbling hazards on the mine floor in the intake and track entries. In the track entry, the track itself was covered with water. (Tr. 199). After the water was finally removed, May observed that the mine floor in the intake escapeway had cracks and openings in it and that it was very uneven. (Tr. 427). He also observed sloughage on the floor along the sides of the entry which would have made it difficult to walk safely. (Tr. 427). A 10 horsepower Flyte pump was ultimately set up on the morning of December 28, 1993. (Tr. 373-374). Ponceroff testified that this pump was powerful enough to effectively remove the flood water.

The contestant called John Demidovich, shearer operator on the 13 East longwall section, Richard Krynicki, assistant superintendent, and Brian Whitt, safety escort. These individuals approximated the depth of the water in the intake escapeway to be approximately ten to twelve inches. (Tr. 356, 358, 361, 373, 378-380, 396, 415-416). Demidovich testified that, although the water in the intake escapeway was two inches from the top of his 12 to 14 inch rubber boots, he did not notice any slipping or tripping hazards or anything that was atypical that would have prevented a disabled person from being carried through the water. (Tr. 356-358, 361). In this regard, Larry Herrington, longwall foreman on the 13 East longwall section on the midnight shift in question, testified that his crew examined

the water in the track and intake escapeways and did not feel that the water presented a hazard. (Tr. 363-366).

Although the longwall crew entered and exited through the headgate belt entry, Demidovich testified that the crew was instructed to exit through the tailgate entries if necessary. (Tr. 358-360). Herrington also testified that the tailgate entries could be used as escapeways. (Tr. 366-368).

Fact of Occurrence

In Consolidation Coal Company, 15 FMSHRC 1555, 1557 (August 1993) the Commission, citing the legislative history of the Federal Coal Mine Health and Safety Act of 1969, noted Congress' recognition of the importance of maintaining separate escapeways in a "travelable" and "safe condition." Consistent with this legislative interest, the mandatory safety standard in Section 75.380(d) requires that each escapeway must be maintained in a safe condition to always insure passage of anyone, including disabled persons. The Commission has construed this mandatory standard to require the functional test of "passability." See Utah Power and Light Company, 11 FMSHRC 1926, 1930 (October 1989).

Citing Utah Power, the contestant asserts the inspectors' testimony regarding the nature and extent of the flooding does not establish the escapeways were not "passable" at midnight on December 28, 1993, because the inspectors did not observe the conditions in the escapeway until approximately 8:00 a.m. the following morning. However, the uncontroverted testimony is that the waterline was repaired between 1:30 a.m. and 2:00 a.m. on December 28. During the interim period between the 2:00 a.m. waterline repair and the 8:00 a.m. inspection, the 7½ Thromore pump and the 3½ Altman standup pump were being utilized to clear the entries of floodwater. Therefore, the extensive flooding observed by inspectors Ponceroff and May at 8:00 a.m. could only understate the magnitude of the flooding prior to the remedial pumping.

Significantly, the testimony reflects mine personnel elected to use the beltline in the No. 4 entry rather than the No. 2 primary escapeway or the No. 3 secondary escapeway to avoid the significant accumulations of water. Moreover, it is clear that the condition of these escapeways, conceded by the contestant to be at least inundated with eleven inches of water, would preclude the rapid and safe evacuation of miners under exigent smoke contaminated circumstances. The condition of these escapeways would also preclude the safe removal of a disabled person, particularly an individual who required to be transported on a stretcher. It is clear, therefore, that the condition of the primary and secondary escapeways did not satisfy the passability

test in Utah Power. Thus, the subject escapeways were not maintained in the requisite safe condition as contemplated by Section 75.380(d).

Significant and Substantial

Section 75.380 requires the designation of primary and secondary escapeways. These escapeways are designated as such because they are determined to be the most effective means of evacuation. Under the traditional significant and substantial test set forth by the Commission in Mathies, it is apparent that there is a reasonable likelihood that the hazard contributed to by the cited violation, i.e., inhibiting or preventing evacuation, will result in injuries of a reasonably serious nature when viewed in the context of continued normal mining operations and the constant danger of fire or explosion. Notwithstanding emergency conditions, the routine traversing of escapeways in such hazardous condition creates the reasonable likelihood that an individual could sustain serious injuries as a result of slipping or falling. See Eagle Nest, Incorporated, 14 FMSHRC 1119 (July 1992). In addition, it is reasonably likely that disabled individuals requiring rapid evacuation, particularly those in need of transport by stretcher, could be adversely affected by the flooded condition of the escapeways.

Although it is clear that the traditional Mathies test is satisfied, I noted in Consolidation Coal Company, 15 FMSHRC 505, 510, (March 10, 1993), that violations of mandatory safety standards that expose miners to fundamental hazards are significant and substantial. For example, in Consolidation Coal Company, I concluded that an inadequate length of firehose resulting in the inability to fight a fire results in a fundamental hazard which constitutes a significant and substantial violation. So too, the failure to provide unobstructed primary and secondary escapeways deprives mine personnel of the most effective means of evacuation. To characterize the creation of this fundamental hazard as anything other than a significant and substantial violation would impede the Mine Act's statutory role in minimizing the potential for accidents that could cause serious injury or death.

In the alternative, the contestant asserts that even if the primary and secondary escapeways were not passable, the tailgate entries provided an efficient alternative means of escape. I find this argument unpersuasive. The purpose of designating primary and secondary escapeways is to identify the safest and most expeditious means of escape. In this regard, the primary escapeway must be an intake escapeway to prevent escaping miners from exposure to contaminated air. Consequently, alternative means to primary routes of escape are not significant mitigating factors as they are, by definition, less desirable than the

primary escapeway.[2] In fact, as a belt shoveler in the No. 4 headgate belt entry, Slifko would lose valuable time if she were required to traverse up the headgate entry and across the longwall face in order to use the tailgate as a means of evacuation. Consequently, I conclude the violation cited in Citation No. 3305270 was properly designated as significant and substantial.

Unwarrantable Failure

As noted above, determining whether the contestant's actions manifest an unwarrantable failure requires a qualitative analysis of the degree of negligence to ascertain if it is properly characterized as aggravated conduct. There is a positive correlation between the degree of negligence attributable to a mine operator's violative conduct and the foreseeability and degree of the risk caused to mine personnel by the hazard contributed to by the violation. As the eminent jurist Benjamin Cardozo stated in his landmark decision in Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928):

> We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension (emphasis added).

Thus, in assessing the degree of negligence, it is important to consider whether the operator was aware of the hazard contributed to by the violative condition, and, if so, whether the operator took any action to minimize the risks associated with the hazard. In this case, the operator was aware that all four entries were inundated with water and that these entries were escapeways. Despite the flooded conditions, the operator proceeded to mine during the midnight shift. The obvious impropriety of such action is demonstrated by the superintendent's futile attempt to avoid culpability by seeking the inspectors' permission to continue mining in the face of knee-deep water in the escapeways. Such conduct constitutes a

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[2] Webster's New Collegiate Dictionary, (1981 edition) defines "primary" as "1: something that stands first in rank, importance, or value: FUNDAMENTAL..."

conscious disregard of the risks associated with obstructed escapeways and provides an adequate basis for concluding that the cited violation is attributable to the operator's unwarrantable failure.

Accordingly, violation of Section 75.380(d) cited in 104(d) Citation No. 3305270 was properly characterized as significant and substantial in nature and directly attributable to the contestants' unwarrantable failure. Consequently, the contest of Citation No. 3305270 **IS DENIED.**

Docket No. WEVA 94-158-R[3]
Citation No. 3305893

On December 29, 1993, MSHA inspector John Sylvester issued Citation No. 3305893 at the contestant's Loveridge No. 22 Mine. The citation was issued as a Section 104(d) citation for an alleged violation of the mandatory safety standard set forth in Section 75.400 of the regulations, C.F.R. § 75.400. This mandatory standard provides:

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

MSHA inspectors John Sylvester and Chris Weaver inspected the 8 North belt at the Loveridge No. 22 Mine. Upon their arrival at the belt drive, they noticed accumulations of float coal dust. (Tr. 27, 150). The accumulations were observed around the belt drive, on the framework of the drive, on the screen of the roof, and on the waterline overhead. (Tr. 27, 159). Float dust coal consists of particles that are finer than fine coal dust. Consequently, float coal dust is more easily put into suspension and is therefore more hazardous. (Tr. 315). The inspectors were certain that the material they observed was float coal dust because the particles were so fine that they were difficult to discern. (Tr. 314).

The belt structure on the 8 North beltline is the elevated metal frame that keeps the belt in place. (Tr. 28). The height of the structure along the beltline is mainly eye-level. However, the height ranges from three to eight feet above the mine floor. (Tr. 78, 196). The inspectors walked the entire

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[3] There are two volumes of testimony transcribed in these consolidated proceedings. All references to transcript pages in Docket No. WEVA 94-158-R relate to the transcript dated March 30, 1994.

length of the belt, which is approximately 1,200 to 1,500 feet, and found the entire belt structure was covered with float coal dust. (Tr. 29). Sylvester ran his hand through the float coal dust at various locations along the beltline and determined that most of the deposit was dry. (Tr. 31).

At the drive, Sylvester noted only a trickle of water being supplied to the bottom belt, with no sprays running on the top belt, despite the fact that it was winter and conditions in the mine are drier in the winter season. (Tr. 32). Sylvester testified operators generally spray large quantities of water on the top belt in order to control dust. (Tr. 32-33). Sylvester testified that Mine Superintendent Robert Omear told Sylvester that he had ordered the sprays removed several weeks prior to the inspection. (Tr. 33). Omear testified that he felt that top belt water sprays were not required to control float dust and that the top sprays were removed from the 8 North beltline in order to remedy a serious slipping and tripping hazard. Omear testified that the top sprays were replaced by center sprays. (Tr. 81, 256, 260). Sylvester stated that a foreman informed him the dust on the 8 North belt had worsened since the sprays were removed. (Tr. 34).

Inspector Weaver, who accompanied Sylvester, estimated that approximately one third of the belt structure that he examined had rock dust underneath the float coal dust. Weaver stated that the float dust coal had accumulated to such an extent he could not see the bottom layer of rock dust. The remaining length of the structure had float coal dust accumulations directly on top of the structure. (Tr. 154). Sylvester and Weaver estimated the depth of the float coal dust along the length of the structure to be from a trace to approximately one-half inch in depth. (Tr. 78, 315). Mary Conaway, a miner who worked on this belt frequently, confirmed that during the inspection, float coal dust, gray to black in color, covered the belt structure for almost the entire beltline and that this condition had existed for several days. (Tr. 192, 193.)

Upon arriving at the tail roller at the 8 North beltline, Sylvester smelled "something...burning." (Tr. 35). As he walked from the left side of the belt around the tail roller to the right side, Sylvester observed sparks coming from the tail roller and he saw "hot cherry red coals" on the ground around the tail roller itself. (Tr. 35). Mary Conaway also observed sparks flying at the tail roller. (Tr. 201). Sylvester determined that the entire tail roller, which was approximately 12 to 15 inches in diameter, was hot. (Tr. 36). Sylvester concluded that the set screws in the tail roller had backed off and were causing the tail roller to shift to one side so that it was rubbing against the main frame of the tailpiece, creating friction. (Tr. 37). The contestant's escort, David Olson, conceded that the tail roller was malfunctioning. (Tr. 215-218). Sylvester informed

Olson that he was issuing a 104(d)(1) citation for a significant and substantial violation as a result of the impermissible combustible accumulation in the presence of a hot roller. (Tr. 47, 233).

Fact of Occurrence

The contestant challenges the cited violation of the mandatory safety standard contained in Section 75.400 which obliges an operator not to permit float coal dust, as a combustible material, to accumulate in active workings. A threshold issue is whether the float coal dust observed by the inspectors, described as from a trace to one half inch in depth, constitutes an accumulation under the cited safety standard. In Pittsburg & Midway Coal Company, 8 FMSHRC 4, 5 (January 1986), the Commission concluded coal dust accumulations ⅛ inch in depth in close proximity to an ignition source constitute "dangerous" accumulations. Consequently, it is clear that the cited float coal dust located near a hot tail roller was of sufficient magnitude to be considered combustible accumulations as contemplated by Section 75.400.[4]

As coal dust is a natural consequence of the extraction process, the next issue for determination is whether the contestant permitted these combustible accumulations to occur. In Utah Power and Light v. Secretary of Labor, 951 F.2d 292, 295 (10th Circuit 1991), the Court of Appeals, applying the mandatory safety standard in Section 75.400, stated that coal dust accumulations must be "...cleaned with reasonable promptness, with all convenient speed." Therefore, it is obvious that Section 75.400 does not contemplate citations for coal dust accumulations that are generated as a by-product of the extraction process. It is only the accumulation of coal dust particles, which inherently require a period of time to develop, that is prohibited by the mandatory safety standard.

In the instant case, Sylvester opined that it took approximately three to five shifts for the observed accumulations to occur. (Tr. 59). Sylvester's opinion with regard to the

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[4] Contestant witnesses Earl Kennedy, David Olson and Robert Omear opined that the area in question was adequately rock dusted and did not warrant a Section 75.400 citation. In support of their opinions, the contestant submitted its own laboratory analysis of the incombustible content of purported relevant dust samples that it had obtained. (Tr. 212, 259-260, 262, 266-271, 293; Contestant's Exs. 5(a), 5(b), and 6). To ensure reliability, samples requiring analysis must be obtained by, and, remain in the possession of, enforcement personnel. I can conceive of no alternative enforcement procedure. Therefore, the contestant's laboratory findings are afforded little weight.

duration of the accumulations is supported by the testimony of Mary Conaway who stated that the accumulations had existed for days. (Tr. 192-193). Significantly, Superintendent Omear testified that Conaway is a general inside laborer who "spends the most time working on [the Number 8] belt." (Tr. 255). Therefore, the testimony of Conaway, who is admittedly familiar with the subject beltline, is entitled to great weight. Consequently, the evidence reflects that the contestant permitted the subject accumulations to occur over a period of at least several shifts in contravention of the mandatory safety standard in Section 75.400.

Although I have concluded that the contestant did not timely clean up, and thus permitted the accumulations, the evidence also reflects the contestant failed to take adequate measures to prevent this combustible accumulation. Superintendent Omear admitted that the top sprays were removed from the No. 8 beltline. (Tr. 81, 256-260). Although Omear testified that the top sprays were replaced by center sprays, the presence of the accumulations observed by the MSHA inspectors and confirmed by Conaway establish that the water spray dust suppression methods employed by Omear were inadequate. Therefore, the record evidence provides an adequate basis for concluding that the contestant's failure to take adequate water suppression measures to prevent the accumulations also constitutes a violation of the mandatory safety standard in Section 75.400.

Significant and Substantial

In applying the Commission's Mathies criteria for establishing a significant and substantial violation it is clear that the impermissible accumulation of combustible materials contributes to a discrete safety hazard, i.e. the danger of combustion. It is also apparent that in the event of combustion, there was a reasonable likelihood that serious burn or smoke inhalation injury to mine personnel would occur.

The remaining issue is whether there is a reasonable likelihood that the hazardous event, namely combustion, could result as a consequence of the subject violation. Combustion requires a combustible fuel source in the presence of oxygen that is exposed to a source of heat constituting a source of ignition. Float coal dust is a combustible fuel source if it is placed in suspension. I credit the testimony of Inspector Weaver that float coal dust, comprised of particles small in size, can be easily placed in suspension. The suspension characteristics of float coal dust are particularly important in areas around a tail roller where dust particles can be easily mobilized. The presence of float coal dust around a tail roller that is malfunctioning and creating heat demonstrated by smoke, sparks, and "hot cherry-red coals," is particularly hazardous in that it provides all the elements of combustion. It is clear, therefore,

that the circumstances in this case satisfy the Commission's significant and substantial criteria in Mathies. Accordingly, the cited violation of Section 75.400 was properly designated as significant and substantial.

Unwarrantable Failure

A violation is properly attributable to an operator's unwarrantable failure if the circumstances surrounding the violation reflect that the operator's conduct was "not justifiable or inexcusable. Such conduct is properly characterized as aggravated. See Youghiogheny and Ohio, at 9 FMSHRC 2010. In mitigation, the contestant argues, in essence, that it did not know about the malfunctioning tail roller prior to Sylvester's inspection. As noted by Justice Cardozo in Palsgraf, the degree of negligence must be viewed in the context of the risk to be reasonably foreseen by the conduct in question. A mine operator must ensure that a tail roller, a source of coal dust suspension, is properly aligned to prevent friction and the resultant heat that could precipitate an explosion. Thus, the responsibility lies with the operator to discover and promptly remedy such a situation. The contestant's failure to do so until after Inspector Sylvester discovered the condition constitutes unjustifiable and inexcusable conduct on the part of the contestant rather than mitigating circumstances. Thus, the violation in question was properly attributable to the contestant's unwarrantable failure. Accordingly, the contestant's contest of 104(d)(1) Citation No. 3305893 **IS DENIED.**

Docket No. WEVA 94-159-R[5]
104(d)(1) Order No. 3305392

On December 30, 1993, MSHA Inspector Frank Bowers issued Order No. 3305392 at the contestant's Loveridge No. 22 Mine. The order was issued for an alleged violation of the mandatory safety standard concerning the prevention of combustible accumulations as set forth in Section 75.400.

Order No. 3305392 was issued as result of an inspection by Inspector Bowers and Inspector Joe Belacastro. Prior to proceeding underground to inspect the Loveridge 22 Mine, Bowers and Belacastro examined the preshift books. (Tr. 15). Inspector Bowers noticed that from December 22, 1993, the preshift examiners had noted that additional rock dust was needed in the No. 1 entry of the 1 Right 1 South section. (Tr. 17).

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[5] There are two volumes of testimony transcribed in these consolidated proceedings. All references to transcript pages in Docket No. WEVA 94-159-R relate to the transcript dated March 31, 1994.

Upon arriving at the No. 1 entry of the 1 Right 1 South section, the inspectors observed accumulations of float coal dust on the roof and ribs for a distance of approximately 180 feet outby the last open crosscut. (Tr. 12-13, 96). As a consequence, Inspector Bowers issued Order No. 3305392 for failure to prevent the accumulation of float coal dust in this area.

A trickle duster is a fan which holds approximately 100 to 150 lbs. of rock dust. It propels the rock dust a distance of approximately 400 feet inby in order to coat the roof and ribs. (Tr. 56-57, 59, 133-144). The purpose of the trickle duster is to contain float dust by mixing with rock dust to create an incombustible mixture. (Tr. 57-58). In addition to the trickle duster, the loading machine and hand dusting are additional sources of rock dust. The most effective method of rock dusting is utilization of a bulk duster. (Tr. 126). Section Foreman Ralph Cowger testified that it is standard operating procedure to operate a trickle duster at all times during mining operations. (Tr. 116).

Although Bowers characterized the subject accumulations as black in color, Bowers also testified that there was evidence of rock dusting efforts in the cited area. In fact, Bowers described the mine floor as gray in color. (Tr. 12-14, 68). On a scale of 1 to 10, one being perfect rock dusting and ten being no rock dusting, Bowers testified that he would rate the area between 5 and 7. (Tr. 76-77). Bowers characterized the rock dusting job done by the contestant in outby areas of the section as "pretty good" and "beautiful." (Tr. 30, 80).

Fact of Occurrence

The mandatory safety standard in Section 75.400, in pertinent part, prohibits the accumulation of float coal dust on top of rock dusted surfaces. The operator can escape liability under this standard if it complies with the rock dusting provisions of Section 75.402, 30 C.F.R. § 75.402, which requires rock dusting within 40 feet of all working faces. The adequacy of rock dusting is determined by the provisions of Section 75.403, 30 C.F.R. § 75.403, which sets forth the requisite content percentages of coal dust and rock dust materials.

In determining whether the Secretary has prevailed in establishing the fact of occurrence of this alleged violation of Section 75.400, it is helpful to compare this case to the facts in Docket No. WEVA 94-158-R discussed above. In that docket, the contestant was charged with permitting float coal dust accumulations on top of rock dusted surfaces and on the structure of its beltline. Here, the evidence reflects that the area 180 feet inby the last open crosscut was repeatedly rock dusted. The sole issue is the adequacy of the rock dusting. In this regard,

both Inspector Bowers and Mine Safety Escort Franklin C. Ash testified that the accumulations looked darker when viewed from the outby side facing into the air flow than from the inby direction. (Tr. 45, 149-150). This was attributable to the particle patterns that form as a result of the mixture of rock dust and float coal dust that is influenced by the inby direction of the air flow.

Bowers testified that he issued the order on December 30, 1993, because the condition had been reported in the preshift examination book on December 22, 1993, but had not been corrected. (Tr. 35-36). However, Bowers conceded that it was possible that remedial action might have occurred over the period from December 22 through December 30, 1993, but that float coal dust continued to accumulate as a result of continued mining operations. (Tr. 52).

In fact, the preshift examination book, relied upon by Bowers as evidence that the contestant had ignored the condition, documents the contestant had made several efforts to rock dust the area. For example, the day shift on December 29 reflects that the "last 180 feet was dusted by hand although additional dusting was needed." The notation on the morning of the issuance of the citation on December 30, 1993, reflects that the last 180 feet of the return was "dusted with loader - needs more." See Joint Ex. 1, pps. 35, 37 and 39.

Thus, the evidence establishes the area in question had been repeatedly rock dusted with the trickle duster, hand dusted and dusted with the loader. Given the entries in the preshift examination book, as well as the description of the variation in color of the accumulations depending upon the inby or outby orientation of the observer, it is apparent the appropriate issue should be whether the cited area was adequately rock dusted.

Consequently, the relevant mandatory safety standards are the rock dusting provisions in Section 75.402 and the incombustible content requirements set forth in Section 75.403. Dust samples for the purpose of analyzing the incombustible content of the accumulations in question were not obtained as the contestant was not charged with a violation of these mandatory standards. Therefore, the question of whether or not these rock dusting safety standards were violated is not before me.

Given Bowers' conflicting testimony, the grey color of the subject accumulations, and pertinent notations in the preshift examination book concerning relevant rock dusting efforts, the Secretary has failed to establish by a preponderance of the evidence that float coal dust was permitted to accumulate on rock dusted surfaces in violation of Section 75.400. Accordingly, Order No. 3305392 **IS VACATED** and the contestant's contest with respect to this order **IS GRANTED**.

ORDER

In view of the above, the contests of Citation No. 3305270 in Docket No. WEVA 94-157-R and Citation No. 3305893 in Docket No. WEVA 94-158-R **ARE DENIED. IT IS FURTHER ORDERED** that Order No. 3305392 **IS VACATED** and the contest of this order in Docket No. WEVA 94-159-R **IS GRANTED.**

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 4 1994

DOUGLAS E. DEROSSETT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 94-278-D
	:	MSHA Case No. PIKE CD 93-20
MARTIN COUNTY COAL CORP., Respondent	:	Diamond No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Melick

On June 8, 1994, Complainant was directed to file a response to Respondent's Motion to Dismiss dated May 12, 1994, or be subject to dismissal of his case. No response has been filed and this case is accordingly dismissed. The hearing previously scheduled for July 12, 1994, is accordingly canceled.

Gary Melick
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

JUN 2 4 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF	:	DISCRIMINATION PROCEEDINGS
CLETIS R. WAMSLEY, ROBERT A. LEWIS, JOHN B. TAYLOR,	:	Docket No. WEVA 93-394-D Hope CD 93-01, 93-05
CLARK D. WILLIAMSON, and SAMUEL COYLE,	:	Docket No. WEVA 93-395-D Hope CD 93-02
Complainants	:	
v.	:	Docket No. WEVA 93-396-D Hope CD 93-04
MUTUAL MINING, INC., Respondent	:	Docket No. WEVA 93-397-D Hope CD 93-07
	:	Docket No. WEVA 93-398-D Hope CD 93-11
	:	Mutual Mine I

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Complainants;
W. Jeffrey Scott, Esq., Grayson, Kentucky for the Respondent.

Before: Judge Amchan

Overview of the Case

This case arises under section 105(c) of the Federal Mine Safety and Health Act. Complainants allege that they were laid-off by Respondent on the afternoon of December 21, 1992, in retaliation for a "safety run" conducted by the United Mine Workers safety committee on December 17, and for initiation by the safety committee of an MSHA inspection that began the morning of the lay-off. For the reasons set forth below, I find that complainants have made a prima facie case of retaliatory discharge which has not been adequately rebutted by Respondent. I, therefore, conclude that the lay-off of complainants on December 21, 1992, violated the Act.

Factual Background

On Thursday, December 17, 1992, United Mine Workers (UMWA) local safety committeemen Cletis Wamsley and John Taylor, and a safety representative of the international union conducted an inspection, or "safety run," of Respondent's surface mine in Holden, Logan County, West Virginia (Tr. I: 14, IV: 17). [1] At the end of their inspection Mr. Wamsley and Mr. Taylor presented a list of safety defects to Joe Potter, Respondent's mine clerk (Tr. IV: 9-10). [2] Mr. Potter copied the list and gave it to Mine Superintendent Allan Roe (Tr. IV: 9-11). The next day, Friday, December 18, 1992, the union safety committee, which included Complainants Wamsley, Taylor, and Robert Lewis, submitted the same list to the Mine Safety and Health Administration through UMWA field representative Bill Hall. The committee requested an inspection of their employer's facility, pursuant to section 103(g) of the Act (Tr. I: 15-16, III: 65, Exh. G-1).

On Monday morning, December 21, 1992, between 8:00 a.m. and 9:00 a.m., MSHA began its inspection of Mutual Mining's worksite (Tr. I: 59, V: 73). [3] The MSHA inspectors met with Mr. Potter and Mr. Roe at the beginning of the inspection and gave them a copy of the section 103(g) complaint filed with MSHA. Either Mr. Potter, Mr. Roe, or both, commented that the list attached to the section 103(g) complaint was identical to that presented by the union safety committee (Tr. I: 18, III: 189). In any event, both Mr. Potter and Mr. Roe were aware that the lists were identical (Tr. IV: 11). There is no question that Potter and Roe realized that the inspection was initiated by the union safety committee (Tr. I: 140-41, V: 73).

Mr. Roe, the mine superintendent, reports to Astor "Red" Hatton, Respondent's mine manager. While Mr. Roe is the senior Mutual Mining official who is on site on a daily basis, Mr. Hatton, who otherwise works in Sandy Hook, Kentucky, comes to the Holden, West Virginia worksite two to three times a week (Tr. I: 227). On December 21, 1992, Mr. Roe was not expecting Mr. Hatton at the mine (Tr. V: 73). Hatton arrived at the site

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[1]The record in the temporary reinstatement proceeding involving Mr. Wamsley and Mr. Lewis, Dockets WEVA 93-375-D and WEVA 93-376-D, has been incorporated into the record of this case. There are five paginated volumes of transcript, 8/5/93, 2/1/94, 2/2/94, 2/3/94 a.m., and 2/3/94 p.m. In this decision the transcript volumes will be referred to as volumes I through V, starting with the transcript of August 5, 1993, although they are not numbered that way on their face.

[2]Joe Potter should not be confused with Johnny Porter, Respondent's president.

[3]The inspection of Respondent's equipment began no later than 9:05 a.m. (Exh. G-3, Citation No. 4000561, Tr. I: 84).

around 11:00 a.m. (Tr. V: 71-73). It is unclear whether Hatton learned of the MSHA inspection when he arrived at the site or before that (Tr. I: 193, V: 171).

Mr. Hatton and Mr. Roe had some discussions about Mutual Mining's workforce and then about noon drove to the office of Ron May, the human resources director of Island Creek Coal Corporation (Tr. I: 174-81, IV: 64, V: 71-78). Respondent mined the Holden site pursuant to a contract with Island Creek. Its employee relations were governed by Island Creek's collective bargaining agreement with the UMWA. Roe and Hatton sought May's advice regarding a proposed "realignment" of Mutual Mining's workforce (Tr. I: 178-179, IV: 56-57, 60-65). This realignment would have resulted in the shift of some employees from the day shift to the night shift (Tr. I: 178, IV: 56-57, 60-65). Roe and Hatton had discussed such a plan with May previously on several occasions, starting possibly as much as 6 months previously (Tr. IV: 70-71). They had also discussed such plans on a number of occasions over a period of several months with David Vidovich, a labor relations consultant (Tr. III: 44-46).

May advised Roe and Hatton that they could not realign their workforce as planned without violating the terms of Island Creek's collective bargaining agreement with the UMWA (Tr: IV: 61). May also told them that the only way they could shift employees from the day shift to night shift was to have a lay-off and a recall (Tr. IV: 62-63). On December 21, 1992, after the commencement of the MSHA inspection, Roe and Hatton decided to lay-off 12 of their 24 non-supervisory employees [4]. They effectuated the lay-off on the afternoon of December 21 (Tr. I: 20-23, 66). Among those laid-off were the complainants, three of whom (Taylor, Wamsley, and Lewis) constituted the membership of the safety committee which had initiated the inspection that day (Tr. I: 27, 61-63, Exh. G-2) [5].

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[4] The inference I draw from this record is that Respondent decided to lay-off the Complainants after the commencement of the MSHA inspection, but before Roe and Hatton spoke to Ron May.

[5] There is a great deal of contradictory and confusing testimony in this record as to whether Respondent had planned to lay-off anyone prior to December 21, 1992. I find that Respondent has not established that it had decided to lay-off anyone, and certainly none of the complainants, until after the commencement of the MSHA inspection. In August 1993, Roe testified that part of the lay-off list was compiled prior to December 21, 1992 (Tr. I: 124-25, 149-150). However, in February 1994, he stated that "as far as discussing the layoff, it was a realignment, is what had been discussed, and that probably took place two to three, or maybe four months before . . . "(Tr. V: 47). His testimony continues:

Q. Did any discussions take place in the week before the lay-off?
A. Yes, discussions went continuously for a long time.

Q. And did those discussions include consideration of a layoff?

On January 20, 1993, Complainant Clark Williamson and Willis Hill, the two most senior employees laid off except for Complainant Taylor, were recalled to work (Tr. II: 142, 157). Other employees were recalled in April 1993, including Complainants Samuel Coyle and John Taylor (Tr. II: 59-60, 174).[6] By August 1993 all 12 employees had been recalled except for Complainant Wamsley and one other. Both of these miners declined reinstatement (Tr. II: 60).

A. If they did, they would have been in a small scale, on a small scale.

* * *

A. Well, like I said, you know, we had discussed a realignment and there may have been one or two people got laid off in those discussions. But the actual lay-off wasn't the same discussion that we had on a continuous run.

(Tr. V: 47-48)

At the August 1993 temporary reinstatement hearing, Red Hatton testified as follows:

A. The layoff--I hadn't planned a layoff . . . The layoff, as such, was not planned the way it came down until I realized that my realignment wasn't going to work.

Q. When was that?

A. The Twenty-First.

(Tr. I: 202-203)

Hatton's February testimony on this point was the following:

A. . . . At the time I went up there [to the worksite on December 21, 1992], it was primarily a realignment with very few people to be laid off . . . .

(Tr. V: 182)

Given the imprecise nature of the evidence tending to indicate that any lay-off was planned prior to December 21, 1992, and Ron May's testimony that when Roe and Hatton appeared at his office on that date, they initially discussed only a realignment (Tr. I: 178-79, IV: 56-57, 70-71), I conclude that the preponderance of the evidence is that no decision to lay-off any employee was made until December 21, 1992. Other testimony that I have considered on this point includes that of David Vidovich (Tr. I: 104-17, III: 46-53), which is somewhat confusing and inconsistent. However, Vidovich's testimony that he advised Respondent that it had to pay the laid-off employees for December 22, because the company had not provided 24 hours notice, indicates that no lay-off decision was made until December 21 (Tr. I: 112-115). Johnny Porter's testimony regarding discussions of a lay-off prior to December 21, 1992, (Tr. V: 151-52, 162), is so inconsistent with the testimony of Hatton, Roe, May, and Vidovich that I accord it no weight on this issue.

[6]Taylor filed a grievance over his discharge alleging that Respondent had violated the collective bargaining agreement in laying him off and retaining a less senior employee as a coal loader. Although the retained employee was Respondent's regular coal loader, Mr. Taylor had performed the coal loader job when the other employee was absent and in past employment. His grievance was sustained (Exh. G-5).

The Issues

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> 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 . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a Complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. If the operator cannot, thus, rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainants' Protected Activity

In the instant case, there is no controversy regarding the fact that three of the complainants, Wamsley, Taylor, and Lewis, engaged in protected activity. Wamsley and Taylor engaged in such activity when they participated in the safety run of December 17, 1992. Although Lewis did not actually participate in this inspection due to illness, he had advised his supervisor that he planned to do so 24 hours beforehand (Tr. I: 62). Additionally, Lewis provided Wamsley and Taylor information about some equipment with which he was familiar and participated in the decision to refer the safety committee list to MSHA (Tr. I: 62).

Wamsley and Taylor also participated in the union inspection as well as the request for an inspection by MSHA. Wamsley, as well as a management representative, accompanied the government inspectors during the course of the MSHA inspection on December 21, 1992. [7]

Neither Mr. Coyle nor Mr. Williamson engaged in protected activity that is relevant to this case [8]. It is the Secretary's contention that they were laid off so that Respondent could lay-off Mr. Taylor without obviously violating the seniority provisions of Mutual Mining's collective bargaining agreement. If the lay-offs of Coyle and Williamson were motivated by a desire to retaliate against the union safety committee, their lack of protected activity creates no impediment to finding a violation of section 105(c) of the Act.

While I am aware of no cases on point under the Federal Mine Safety and Health Act, it is black letter law under the National Labor Relations Act that proof of an individual employee's protected activity is not necessary to prove a violative discharge if it is part of a retaliatory lay-off. The relevant inquiry is the motivation for the single decision to conduct the layoff. M.S.P. Industries v. N.L.R.B., 568 F.2d 166, 176 (10th Cir. 1977); Dillingham Marine and Manufacturing Co. v. N.L.R.B., 610 F.2d 319, 321 (5th Cir. 1980); N.L.R.B. v. Rich's Precision Foundry, Inc., 667 F.2d 613, 628 (7th Cir. 1981); Hyatt Corp. v. N.L.R.B, 939 F.2d 361, 375 (6th Cir. 1991). This principle was best stated by Judge Henry Friendly:

> A power display in the form of a mass lay-off, where it is demonstrated that a significant motive and a desired effect were to "discourage membership in any labor organization," satisfies the requirements of § 8(a)(3) to the letter even if some white sheep suffer along with the black.

Majestic Molded Products, Inc. v. N.L.R.B., 330 F.2d 603, 606 (2d Cir. 1964).

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[7]The management representative, foreman Wayne Thornbury, maintained radio contact with superintendent Allan Roe, advising him constantly as to which pieces of equipment were taken out of service due to MSHA citations (Tr I: 97-99).

[8]Coyle was a member of the union safety committee until September 1992 (Tr. II: 174). Williamson apparently made safety complaints to his foreman at some unspecified time (Tr. II: 132). However, there is nothing in this record that leads me to conclude that these activities contributed to the lay-off of Coyle and Williamson on December 21, 1992. Indeed, Williamson believes he was discharged so that Respondent could terminate Taylor (Tr. II: 156-57).

Respondent's Awareness of Complainants' Protected Activity

Respondent was aware of the safety activity. When MSHA began its inspection of December 21, it provided company officials with the list of alleged safety defects prepared by the union. Allan Roe, the job superintendent for Respondent, recognized that the list was the same one presented to the company by the union safety committee a few days earlier. It was, therefore, obvious to Respondent that the union safety committee had initiated the MSHA inspection.

Adverse Action

Each of the complainants suffered an adverse action. All were discharged on the day of the MSHA inspection, hours after the company became aware of the section 103(g) complaint. The proximate timing of the discharges creates an inference that the lay-offs were related to the protected activities of the union safety committee. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2511 (November 1981). Indeed, close timing alone may suggest that employer animus regarding the protected activity was a motivating factor for the adverse action. N.L.R.B. v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984). Thus, the Secretary has clearly made out a prima facie case that Respondent violated section 105(c) in laying-off the complainants on December 21, 1992.

Evidence of Animus

Another factor contributing to the inference that there is a relationship between complainants' discharge and their protected activities is the animus of Respondent. This case is somewhat unusual in that there is strong evidence of animus towards Cletis Wamsley and much less evidence of animus towards any of the other complainants. Respondent's job superintendent Allan Roe readily admits to a strong aversion towards Mr. Wamsley (Tr. V: 57-58). The record establishes that this animus may not have originated with Wamsley's safety-related activities. Nevertheless, Roe's belief that Wamsley was unreasonable in his safety-related demands was a factor in the strong animus towards this Complainant.

Mr. Wamsley was prominent in the prosecution of an unfair labor practice charge against Respondent, which alleged that Mutual Mining had violated the terms of its collective bargaining agreement in retaining certain employees of the Elm Coal Company, which had previously mined the Holden site. One of these employees was Complainant Taylor. Respondent argues that its successful defense to the unfair labor practice charge saved Mr. Taylor's job, and, thus, indicates that it bears no animus towards him.

Mr. Roe also believed that Complainant Wamsley purposely damaged a rock truck (Tr. V: 85). On another occasion, Roe had Wamsley suspended for leading a work stoppage because his paycheck bounced (Tr. V: 93-95).

Nevertheless, some of Roe's hostility towards Wamsley resulted from differences of opinion over safety matters. For example, on one occasion they had a heated discussion regarding the safety of the tires on a rock truck (Tr. V: 92-93). On another after an October 15, 1992, safety run, the two men cursed each other in front of an MSHA inspector. At an MSHA closing conference the same month, Roe called Wamsley a liar and referred to him as a "fat slob." (Tr. III: 191-93). That Mr. Roe considered Complainant Wamsley's safety activities in an unfavorable light is best evidenced by his explanation of his refusal to meet with him instead of the president of the union local in October 1992:

> Every time me and Cletis got together . . . there was a list this long . . . of things he wanted and there was never a list of anything we were going to discuss and try to work out. It was just a list of demands.
>
> So I didn't want to hear any more of the list of demands. I wanted the proper people to be at the meeting and maybe we could have actually ironed out some things.

(Tr. V: 106).

Although there is little direct evidence of animus towards any of the other complainants individually, there is a basis for inferring that Respondent may have equated Mr. Lewis, who was Mr. Wamsley's roommate, with Mr. Wamsley (Tr. II: 208-09, V: 102). Complainant Williamson testified that shortly before the lay-off, Superintendent Roe told him that the safety committee and "the Island Creek boys"--meaning Wamsley and Lewis--were giving him a hard time on safety matters (Tr. II: 132-33). There is also a basis for inferring animus towards Lewis as a result of his collaboration with Wamsley as part of the union safety committee at the mine. [9]

As to Complainant Taylor, one can infer animus from Respondent's failure to comply with the collective bargaining agreement in laying him off in December 1992. At no point did

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[9]Roe refused to allow Lewis to participate in the safety run of October 15, 1992. The superintendent testified that he had been given no notice that Lewis was going to participate and that Lewis' absence from work that evening would therefore have shut down production on the night shift. I have no basis for finding that Roe's conduct in this incident was not justifiable.

Respondent ever take issue with Taylor's assertion that he had performed the duties of a coal loader during his employment with Mutual Mining and at previous jobs (Exh. G-5, pp. 6-7, Tr. V: 98-99). Further, Respondent did not contend that Taylor performed the job of coal loader inadequately (Exh. G-5, p. 7, Tr. V: 98-100). Given the fact that Respondent had conferred with Ron May and David Vidovich at length on matters regarding the collective bargaining agreement, I infer that it was readily discernible that the lay-off of Taylor violated that agreement. Indeed, May had specifically explained to Roe and Hatton "how they must reduce; one, by seniority and ability to perform the jobs that they would have remaining after the layoff" (Tr. I: 179).

The arbitrator in Mr. Taylor's grievance noted:

> The many arbitration awards submitted by the parties disagreed on many matters. However, all arbitrators agreed when a panel laid-off employee is recalled, he must evidence minimal ability to do what the job calls for. He competes against the minimal requirements of the job. His ability must be minimally sufficient. He is not competing against other employees. Ability does not have to be equal or better to benefit from his seniority.

(Exh. G-5, p. 6).

Given what appears to me to be the facially obvious violation of the collective bargaining agreement in laying-off Mr. Taylor, I infer that his lay-off was the result of animus on behalf of Respondent and that it was related to his activities as chairman of the union safety committee. In addition to the inference drawn from the violation of the collective bargaining agreement, there is some indication of hostility on the part of Roe towards Taylor as the result of his safety committee activities. Complainant Wamsley testified that, after the October 1992 MSHA inspection, Roe was angry at Taylor and Wamsley, and called them both liars (Tr. III: 7). Taylor's account of the incident doesn't mention any remarks specifically directed to him, only that there was a "heated discussion" (Tr. II: 39).

As an indication of Respondent's animus towards the safety committee generally, complainants point particularly to Superintendent Roe's comments regarding a list of safety problems presented to him by the committee in October 1992. Roe told an MSHA inspector that he regarded the union safety list as no more than "suggestions." I am not inclined to impute anti-safety animus to Mr. Roe on the basis on this comment alone. The remark can be viewed as simply a statement that he is not under a legal

obligation to correct a condition simply because the union believes it violates the Act.

One can, however, infer animus towards the United Mine Workers and its safety committee at the Holden mine from other factors. Until 1988 when it became a contract mine operator for Island Creek Coal Company, Respondent had been a non-union employer. It has apparently experienced cash flow difficulties throughout its existence. On a recurring basis over a period of years, paychecks have bounced and Respondent has failed to pay employee health insurance premiums. It also failed for several years to contribute as required to the UMWA pension fund.

On November 30, 1992, a judgment in the amount of $486,250.23 was entered against Respondent in favor of the United Mine Workers pension fund (Exh. R-1). One can assume that this judgment may have created some degree of animus towards the UMWA on the part of Mutual Mining.

Additionally, one can infer that Mutual Mining was not happy about the aggressive activity of its union safety committee. Mr. Roe's reaction to the October 1992 safety run and deep-seated dislike of Mr. Wamsley support such an inference. Moreover, one can infer that the company was somewhat upset that its union safety committee filed a formal complaint with MSHA pursuant to section 103(g) of the Act on December 18, 1992. Almost all of the alleged violations about which the committee complained were equipment defects (Exh. G-1). Respondent's two mechanics were absent on December 17, 18, and 21, 1992, which would have made it impossible for Mutual Mining to quickly repair the defects (Tr. IV: 20-21).

Prima Facie Case Established

I conclude that the Secretary has made out a prima facie case of discrimination. This conclusion is based on the fact that the discharge occurred only hours after the start of the MSHA inspection and that Respondent knew the union safety committee was responsible for the inspection. Mr. Roe's strong dislike of Complainant Wamsley, which was due in part to Wamsley's activities on the union safety committee, and the likely identification of Mr. Lewis and Mr. Taylor with Wamsley, as fellow members of the union safety committee, are also factors leading me to conclude that a prima facie case has been established. Finally, the lack of any apparent basis to lay-off Mr. Taylor under the terms of the collective bargaining agreement indicates that his discharge was retaliatory.

The fact that nine of the 12 employees laid-off did not engage in protected activity does not dissuade me from drawing the inferences necessary to conclude that a prima facie case has been established. Under the National Labor Relations Act there

are numerous cases in which employers have been found guilty of committing unfair labor practices when many employees who have not engaged in protected activity have been discharged in addition to some who have engaged in such activity. See, e.g., N.L.R.B. v. Lakepark Industries, 919 F.2d 42 (6th Cir. 1990); Sonicraft, Inc., 295 NLRB No. 78, 766, 779-783 (1989), 133 BNA LRRM 1139, enforced, 905 F.2d 146 (7th Cir. 1990), cert. denied, 498 U.S 1024 (1991). The discharge of the nine "innocent" employees is a factor to be weighed with other factors in determining whether Respondent has rebutted the Secretary's prima facie case.

Respondent contends that it is preposterous to think that it would lay-off the nine to get at Taylor, Wamsley, and Lewis, and that the mass lay-off virtually proves that it had a legitimate economic motive for the lay-off. Mutual Mining notes that the lay-off left its equipment idle at night and this would make no sense if the lay-off was not economically justifiable. The answer to this contention was probably best stated by Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit:

> The company argues that it would not have been rational for it to shoot itself in the foot by curtailing the work week in the sewing department while it had orders to fill. But the long-term benefits of getting rid of the union might compensate for a short-term loss in filling orders more slowly . . . That is the logic of retaliation; a present cost is traded off against a future benefit from deterring behavior injurious to the retaliator.

N.L.R.B. v. Advertisers Manufacturing Co., 823 F.2d 1086, 1089-90 (7th Cir. 1987).

Rebutting the Prima Facie Case

Mutual Mining contends that the timing of the lay-off in relation to the section 103(g) complaint and ensuing inspection is pure coincidence. Respondent has the burden of overcoming the inference created by the proximate timing of the lay-off, its awareness of the protected activities, and its animus towards the union safety committee and its members, individually.

Mutual Mining must establish that the timing of the lay-off was entirely coincidental. If protected activities had anything at all to do with the lay-off, or the selection of the complainants for the lay-off, I would conclude that "but for" their protected activities, complainants would not have been discharged and that Respondent violated section 105(c) in terminating their employment on December 21, 1992.

Evidence Tending to Rebut the Prima Facie Case

There is a good deal of evidence in this record supporting Respondent's contention that the lay-off was made for legitimate business reasons and that the selection of the complainants for lay-off was nonretaliatory. Mutual Mining has been in precarious financial shape throughout its operations at the Holden site. It has bounced employee paychecks and failed to pay health insurance on a number of occasions over a period of years. Its financial situation became more complicated at the end of November 1992 by virtue of the judgment against it for failure to contribute to the UMWA pension fund (Tr. I: 184-185). [10] On the other hand, there are some indications that the company's financial situation was better than usual in December 1992. Its corrected 1992 Federal Income Tax Return apparently shows a $300,000 profit for 1992 (Tr. III: 172, V: 30-32, 180).

Nevertheless, the core of Respondent's case rests on two somewhat contradictory themes. Most important of these is a contention that shortly before the December 21, 1992, lay-off, Mutual Mining was informed by Island Creek Coal Company that it might be buying less coal from Mutual Mining in the next several months. The second theme is a contention that for several months prior to December 21, Mutual Mining had been considering realigning its workforce by shifting employees between the day shift and night shift in order to increase productivity. [11]

According to Mutual Mining it had decided to institute the realignment on December 21 for reasons totally unrelated to the union safety committee or MSHA. On that date Red Hatton and Allan Roe went to discuss the realignment with Ron May, the human resources supervisor of Island Creek Coal, and discovered that they could not effectuate this realignment without violating the collective bargaining agreement with the UMWA. Upon close analysis, neither of these explanations is sufficiently persuasive to overcome the strong inference created by the timing of the lay-off, as well as the evidence of animus towards the union safety committee and its members.

Anticipated Reduced Demand from Island Creek

The most important evidence in this record regarding Mutual Mining's anticipation of reduced demand for its coal is the

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[10]This judgment is being satisfied by a $25,000 initial payment and $16,000 monthly installments (Tr. I: 189-90, V: 187-88). Mutual Mining has also been paying $5,000 a month on a judgment in favor of East Kentucky Explosives Company since the Fall of 1992 (Tr. I: 187-88, V: 187-88).

[11]Although there is some evidence that Respondent had planned to lay-off a few employees prior to December 21, 1992, I have not credited that evidence for the reasons stated in footnote 5.

testimony of Mike Jones, the superintendent of Island Creek's subsidiary, Laurel Run Mining, who confirms that sometime in 1992 he did tell either Allan Roe or Respondent's president, Johnny Porter, that his company would be buying less coal from Mutual Mining for the next 2 months (Tr. IV: 40). However, Mr. Jones believes this conversation took place in early 1992, not at the end of the year proximate to Mutual Mining's lay-off (Tr. IV: 40). When pressed on the timing of the conversation, Jones responded "I can't recall exactly when it was in 1992. I know there was a slack in sales." (Tr. IV: 43).

Charles Leonard, Laurel Run's manager for contract coal at the time in question, testified that he told Mutual Mining that Island Creek would be accepting less coal "probably around in the last of '92, maybe a little bit before" (Tr. IV: 49). This testimony is not as helpful to Respondent as it first appears. In September and October 1992, Mutual Mining produced unusually large amounts of coal (Exh. G-4). The tonnage for those months, 38,374 and 40,954, was almost 33 percent higher than the normal amount of coal demanded by Island Creek (Tr. I: 212-213, Exh. G-4). Thus, the testimony of Jones and Leonard could show nothing more than demand would revert to its normal level. Since Mutual Mining had not hired any new employees since November 1991, this decrease in demand does not explain the lay-off.

Moreover, Mutual Mining's financial statement (Exh. G-8) prepared only 9 days after the lay-off does not comport with Respondent's contention that it anticipated sharply reduced demand for its coal at the time of the lay-off. Page two of that document shows an average tonnage of 32,000 per month for 1992 and an anticipated 30,000 tons per month for 1993. Finally, the testimony of Respondent's president, Johnny Porter, regarding his conversations with Jones and Leonard are just as consistent with a return to the normal levels of demand from Island Creek, as with an anticipated reduction in demand that would explain the lay-off.

Porter testified:

> He [Mike Jones] come up to me -- now, the date, I got so many things going, I can't remember a lot of dates. I think it was in November. He said, "Johnny, I got some news today." He said, "We might have to cut you back on production for November, December and maybe January."
>
> He said, "We might have a time where the stockpiles are full. We might even have to cut you off."

(Tr. V: 151).

As it is unlikely that Jones would have been telling Porter of an anticipated reduction in demand for November in November, it is likely that by Porter's account the conversation occurred earlier. It would, thus, be equally consistent with a return to normal production levels from the peak levels of September and October, as it would be with a reduction necessitating a lay-off.

Equally important is the fact that no sharp reduction in the demand for Respondent's coal ever occurred. Indeed, the retained employees continued to work 10-hour days and some vacation days (Tr. I: 195). Mutual Mining's failure to produce any documentary evidence supporting its proffered reason for the lay-off detracts greatly from its credibility. J. Huizinga Cartage Co., Inc. v. N.L.R.B., 941 F.2d 616, 621-22 (7th Cir. 1991).

Demand for Respondent's coal remained essentially constant from November 1992 until the company was hit by the UMWA's selective strike in September 1993. Given this constant demand, the recall of those laid-off in December detracts substantially from the credibility of the company's asserted legitimate business motive. Indeed, Allan Roe's explanation for the recalls is more consistent with Judge Posner's exposition of the economic logic of a retaliatory discharge.

Roe explained the decision to recall everyone still on lay-off status in August 1993 as due to "low tonnage" and the undersigned's order of temporary reinstatement for Complainants Wamsley and Lewis (Tr. V: 63-64). Since Respondent's production was fairly constant between the lay-off and August 1993, this indicates that the lay-off made no sense economically in the long-run. Roe's testimony also indicates that the lay-off affected production little initially but began to have an adverse effect afterwards (Tr. V: 67-68).

Moreover, only 1 month after the lay-off Respondent recalled Complainant Williamson and Willis Hill, the two bulldozer operators for the night shift. This recall accounted for 50 percent of the production on the night shift (Tr. V: 80). The extremely brief lay-off of the two bulldozer operators makes Mutual Mining's claim that it feared a sharp cutback in coal demand from Island Creek implausible. There is no evidence that Island Creek informed Respondent in January to disregard any prior warnings regarding reduced purchases. The January recall also gives credence to the Secretary's contention that Williamson and Hill were laid-off so that Respondent could lay-off Taylor, who had more seniority, without obviously violating the collective bargaining agreement.

The Nexus with the Realignment

A major component of Respondent's defense to charges of retaliatory motive is that there was an intervening event that

negates whatever inference could be otherwise drawn from the timing of the lay-off. The event is the meeting at mid-day on December 21, 1992, between Allan Roe, "Red" Hatton, and Ron May, the human resources director of Island Creek Coal Company. According to Hatton, there were no plans for a lay-off of the magnitude of the one that occurred until May informed Roe and Hatton that they could not effectuate their proposed realignment of the workforce without violating the collective bargaining agreement (Tr. V: 182). [12]

The difficulty with this explanation is that the objective of the realignment that Mutual Mining had been contemplating for several months was to increase production. There is an obvious inconsistency with the two primary nonretaliatory explanations for the lay-off. The concern regarding decreased coal purchases by Island Creek, if credited, does not explain why Mutual Mining would desire to increase productivity by shifting employees from the day shift to the night shift. [13] Mr. Hatton testified that when he got into his truck the morning of December 21, 1992--before he had learned of the MSHA inspection--he had decided to implement the realignment that day (Tr. V: 171). This testimony is extremely implausible if Respondent was expecting sharp cutbacks in its sales to Island Creek.

If the lay-off had nothing to do with the realignment, the question becomes why did it take place on December 21? There is little in this record that would indicate the need to effectuate the lay-off on such short notice absent the desire to retaliate for the MSHA inspection that morning. Sonicraft, Inc., supra. Roe testified that Respondent decided to implement the realignment on December 21, because Mutual Mining wanted to avoid paying holiday pay for the Christmas vacation (Tr. V: 73-75). However, a realignment would not have saved the company holiday pay--only a lay-off would do so. If the company wished to lay-off employees due to the warnings of reduced purchases from Island Creek, there is no reason why it waited until December 21, 1992, to do so--given the fact that these warnings were given some time prior to that date.

Respondent has attempted to tie the realignment to the lay-off by suggesting that it was undertaken only after Roe and Hatton were informed by May that to achieve the goals of the realignment, i.e., shifting employees from day to night, it would

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[12]As discussed in footnote 5, I conclude that the evidence fails to establish that Respondent had planned to lay-off any of its employees prior to December 21, 1992.

[13]The lack of logic in having the realignment if Mutual Mining expected that Island Creek would be sharply cutting back on its coal purchases was recognized by Respondent's labor consultant David Vidovich (Tr. III: 51).

have to institute a lay-off and recall. Indeed, Mr. May's testimony indicates that the idea for the lay-off originated with him.

One difficulty with this theory is that it is inconsistent with Respondent's other proffered explanation and its behavior immediately following the lay-off. If the lay-off was simply a means of achieving the realignment, Respondent's alleged anticipation of sharply reduced coal demand as a motive for the lay-off is obviously fallacious. Moreover, Roe's testimony regarding holiday pay indicates that Roe and Hatton had decided to implement a lay-off on December 21, 1992, prior to their trip to May's office (Tr. V: 73-75). The presentation of shifting, inconsistent, and/or implausible explanations for the lay-off itself suggests discriminatory motive. N.L.R.B. v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984); Hall v. N.L.R.B., 941 F.2d 684, 688 (8th Cir. 1991).

Secondly, if the lay-off was to accomplish the same purposes as the realignment, the recall of most or all the employees should have followed the lay-off quickly. Within a short time Mutual Mining's workforce should have resembled the "realignment with very few people to be laid-off," allegedly contemplated by Hatton on the morning of December 21 (Tr. V: 182). The pace of the recall is more consistent with retaliation in that the January 1993 recall involved only Complainant Williamson and Willis Hill, and the April 1993 recalls stopped just short of the point where Respondent would have had to recall Complainants Lewis and Wamsley (Exh. G-2, Tr. I: 151-52).

The third reason why it is hard to believe that the December 21, 1992, meeting with May induced a bona fide nonretaliatory lay-off is that nothing May told them at that meeting should have been a revelation to Roe and Hatton. They had been discussing shifting employees from the day shift to night shift with both May and Vidovich for some time prior to that date (Tr. I, 105-07, III: 45-53, IV: 64, 70-71). Vidovich had already told them that, under the collective bargaining agreement, such a realignment had to be performed according to the employees' seniority and job title (Tr. I: 106-07, III: 45-53).

Prior to December 21, 1992, possibly on several occasions, Respondent had also discussed with Mr. May, the shifting of employees from day shift to the night shift under the terms of the collective bargaining agreement (Tr. I: 168-69, 177-80, III: 64-65). Given the number of discussions Mutual Mining management had with Vidovich and May concerning the realignment, I do not believe that on December 21, 1992, that they gained surprising new information which caused them to institute a lay-off instead.

Indeed, I find the account of this implausible intervening event itself evidence that the lay-offs were pretextual. [14]

Conclusion

I find that the timing of the lay-off of the complainants establishes a prima facie case that their termination on December 21, 1992, was in retaliation for the safety run of December 17, 1992, and the filing of a section 103(g) request for the MSHA inspection that commenced the morning of December 21. I discredit the alternative nonretaliatory explanations for the lay-off proffered by Respondent and find that the lay-off of each of the complainants violated section 105(c) of the Act.

ORDER

1. The parties are to confer and advise the undersigned within 30 days of this decision as to whether they are able to stipulate to the amount of back pay due the complainants. The parties are also ordered to advise the undersigned as to whether they are able to stipulate to an appropriate civil penalty, or facts that will allow the undersigned to calculate a civil penalty pursuant to the criteria set forth in section 110(i) of the Act. If the parties are unable to stipulate to the amount of back-pay due and an appropriate penalty, they may either submit written arguments on these issues or request a supplemental hearing. The Secretary is ordered to offer Respondent documentary evidence, such as W-2 statements, for all employment of Mr. Wamsley between the date of his lay-off and the date he declined reinstatement.

2. Respondent IS ORDERED to inform all its employees by posting a legible notice in a prominent place at all its properties, which are subject to the Federal Mine Safety and Health Act, that the lay-off of December 21, 1992, at its Holden, West Virginia, mine has been found to violate section 105(c), the anti-retaliation provision of the Act. Said notice shall also inform Respondent's employees that they have a right under the Act to bring to the attention of management, the Mine Safety and

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[14]Given the fact that Roe and Hatton readily admit that the decision to conduct a mass lay-off was made on December 21, after they were aware of the MSHA inspection, it is somewhat anomalous to believe that they had the sophistication to cover their tracks by arranging a meeting with May to make it appear that the lay-off was precipitated by an event other than the inspection. However, I find this to be the most likely explanation for what transpired. First of all, Roe's testimony (Tr. V: 73-75), indicating that he and Hatton discussed saving holiday pay prior to meeting May on December 21, provides evidentiary support for this conclusion. As mentioned before, only a lay-off, not the realignment, would have saved the company the holiday pay. Secondly, the alternative explanation, that what May had to tell Roe and Hatton was a complete surprise and led to a mass lay-off that they had not previously contemplated, is even more implausible.

Health Administration, and state and local officials, any concerns they have with regard to safety and health conditions in their employment. Said notice shall also inform employees that such activities are protected by section 105(c) of the Federal Mine Safety and Health Act and they may file a complaint with the Mine Safety and Health Administration (MSHA) if they believe such rights have been violated. Said notice shall also inform employees that they may be entitled to reinstatement, back pay, and other remedies if a complaint filed under section 105(c) is found to be meritorious.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 7 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 93-343
	:	A.C. No. 36-07266-03536
v.	:	
	:	Docket No. PENN 93-431
RNS SERVICES, INCORPORATED, Respondent	:	A.C. No. 36-07266-03537
	:	Refuse Pile Reprocessing
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 93-479
	:	A.C. No. 36-07266-03501
v.	:	
	:	Docket No. PENN 94-30
MASE TRANSPORTATION CO., INC., Respondent	:	A.C. No. 36-07266-03502
	:	Refuse Pile Reprocessing

DECISION

Appearances: Richard Rosenblitt, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," to challenge citations and orders issued by the Secretary of Labor for the alleged failure of Respondents to have complied with regulations for miner training at the RNS Services, Inc. (RNS) No. 20 refuse reprocessing site. This site has been identified as the "Refuse Pile Reprocessing" mine.

On April 14, 1994, the Secretary filed a motion for partial summary decision on the issue of jurisdiction. However, as noted in Respondent's brief in opposition, a dispute remained regarding certain material facts. See Commission Rule 67(b), 29 C.F.R. § 2700.67(b). A hearing was thereafter held limited, upon agreement of the parties, to the jurisdictional issue.

There is no dispute that the No. 20 refuse disposal site at issue was purchased by RNS in early 1989 from the Barnes and Tucker Company, which had operated the site as part of its Lancashire No. 20 Mine. Until active mining ceased in April 1986, the Lancashire No. 20 Mine included an underground area from which bituminous coal was extracted, a coal cleaning and preparation plant on the surface approximately 100 to 200 feet from the mine's "Slope Portal," and the adjacent refuse site at issue in these cases.[1]

At the preparation plant bituminous coal was broken, crushed, sized, cleaned, washed, drying, stored, and loaded. Rejected coal and refuse from the preparation plant, as well as some surplus processed coal, was stored in the adjacent refuse pile. Also on the premises of the mine was at least one storage silo containing coal.

At the time of the inspection giving rise to the citations and orders at issue, and at the time these citations and orders were issued, the underground Lancashire No. 20 Mine had been permanently abandoned and the preparation plant had been dismantled and removed. Apparently only the coal refuse pile containing refuse from the preparation plant and some surplus processed coal and the storage silo containing coal remained.

The evidence shows that RNS provides services for cogeneration power plants by loading and transporting its product to fuel the plants and by removing ash waste. Mase Transportation Company, Inc. (Mase) provides the trucks that transport the material from the No. 20 site to the cogeneration facilities. Approximately 720,000 tons of this material per year is trucked directly from the refuse pile without processing to the Cambria cogeneration facility and approximately 120,000 tons per year of processed material is trucked to the Ebensburg cogeneration facility. The latter material is processed at the No. 20 site.

There appears to be no dispute that the portable processing plant at the No. 20 refuse site is similar to that depicted in Government Exhibit No. 1. Photographs in evidence (Exhibits R-2 through R-5) were taken of the actual processing unit. An end loader loads material from the refuse piles onto

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[1] The slope portal had an upper deck on which a conveyor belt conveyed the mine product to the preparation plant for processing and a lower deck containing a track for men and supplies. What was known as the "Man Portal," located about 1/4 mile from the preparation plant, also permitted entry for underground miners and smaller size supplies.

a grizzly on the portable processing unit and into a hopper (Point A on Government Exhibit No. 1). The grizzly consists of horizontal metal bars which break up clumps of material before it enters the hopper bin (Exhibit R-3). The grizzly also screens out large objects such as mine timbers and steel rails that may be in the material. According to Supervisory MSHA Coal Mine Inspector James Biesinger, the bucket on the front-end loader may also be used to smash-up larger pieces of material against the grizzly.

Neil Hedrick, President and shareholder of RNS and a graduate mechanical engineer with extensive experience in the coal mining industry, acknowledged that the crushing of the by the bucket of the front-end loader against the grizzly would constitute "breaking."

The material that enters through the grizzly passes through the hopper to a moving caterpillar tread-like conveyor at the bottom of the hopper (Point B on Government Exhibit No. 1).[2] The testimony of Inspector Fetsko is undisputed that the matted and clumped material that was dumped into the hopper exited at the bottom separated and no longer in clumps.

The material then proceeds up an inclined conveyor where it is dumped onto a metal grate and screener (Point D on Government Exhibit No. 1). The material falls through the grate onto vibrating screens. Larger material is separated by the screens and fine material passes through the screens onto another conveyor (Point F on Government Exhibit No. 1). The rock and other reject material is loaded with an end-loader onto trucks operated by Mase employees and is hauled away. The fine material is conveyed to a dump. An end-loader loads this material as needed onto trucks operated by Mase and is transported to the Ebensburg cogeneration plant.

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[2] While Inspector Fetsko believed, based upon the noise emanating from the hopper area of the portable processing unit and from the fact that material that was matted in clumps entered at Point A and exited at Point B at Exhibit G-1 broken up, that there was a crushing unit between Point A and Point B, the more credible evidence from the photographs, the testimony of MSHA Supervisory Inspector Biesinger and the testimony of Mr. Hedrick leads me to conclude that there was indeed no specific "crusher" between Point A and Point B of Exhibit G-1. The only crushing or breaking resulted from mashing the material against, and passing through, the grizzly bars and from dropping and displacement on the caterpillar-tread conveyor at the bottom of the hopper.

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 enter commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

"Coal or other mine" is defined in Section 3(h)(1) of the Act as follows:

> '[C]oal or other mine' means (A) an area of land from which minerals are extracted in nonliquid 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. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

The Secretary argues that he has jurisdiction under the Act under two theories. He first maintains that RNS was, in its work performed at the No. 20 refuse disposal site, "engaged in the work of preparing coal" under Section 3(h)(1) of the Act and as defined in Section 3(h)(2)(i) of the Act. Under the latter section "work of preparing the coal" is defined as the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal ... and such other work of preparing such coal as is usually done by the operator of the coal mine."

It is undisputed in these cases that the material being processed at the site at issue included surplus processed coal and coal remaining from the storage silo, as well as refuse material from the Barnes and Tucker coal mine and preparation plant. There is accordingly no need to determine in these cases whether the processing of refuse material alone constitutes

"work of preparing the coal." Moreover, the credible evidence of record establishes that RNS was engaged in "work of preparing" that coal.

The credible hearing testimony establishes that RNS engages in "breaking" of coal. In A Dictionary of Mining, Mineral and Related Terms, U.S. Dept. of the Interior, 1968 (Dictionary), "breaking" is defined, in part, as "[s]ize reduction of larger paritcles [sic]." The breaking in this case occurs at the grizzly bars, at the top of the hopper, and at the screens. MSHA Supervisory Inspector Biesinger testified that breaking occurs when the material passes through the "grizzly" bars and where the bucket of the front-end loader scrapes the deposited material along the bars to break up large chunks. Biesinger further testified that the screening operation causes coal breakage as the material drops off a conveyor and drops through metal screens. The vibration of the screens also causes some breakage.

It is also essentially undisputed that RNS engages in the "sizing" of coal. The Dictionary defines sizing, in part, as the "process of separating mixed particles into groups of particles all of the same size, or into groups in which all particles range between definite maximum and minimum sizes" and the "operation of separating an aggregate of particles into sizes on a series of screens." In order to meet the specifications of Ebensburg Power Company, the material provided by RNS must range in size from 0 to 3/4 of an inch. In order to achieve this, RNS uses a double screening process. This process clearly constitutes "sizing." RNS also mixes coal. RNS President Neil Hedricks testified that RNS mixes material from various parts of the refuse pile to obtain material with a 6,800 BTU rating for the Ebensburg plant.

In addition, RNS engages in the "cleaning" of coal. The Dictionary defines "cleaning, dry," in part, as "[t]he mechanical separation of impurities from coal by methods which avoid the use of liquid." In these cases, RNS uses "grizzly" bars at the top of a hopper to remove large, non-coal objects such as wood or metal and uses double screens to remove objects such as rocks.

The Secretary also argues that the No. 20 refuse site meets the definition of "coal or other mine" under Section 3(h)(1) of the Act in that "the area at issue constitutes lands ... structures, facilities ... or other property ... used in ... or resulting from the work of extracting such minerals from their natural deposits in non-liquid form ... ." In this case it is clear that the "lands," "structures," and "other property" on which the subject refuse pile and coal silo are situated and the structure of the coal silo resulted from the work of the Barnes and Tucker mine extracting coal from its natural deposits in non-liquid form. Accordingly, the land, the coal storage silo and other property constitute a coal or other mine within the meaning of that section of the Act and

jurisdiction also exists over the RNS operation for this additional reason. While RNS argues that the refuse area (but not the coal storage silo and the coal stored within) resulted from coal preparation, that fact does not preclude a concurrent finding that the area also resulted from the prior extraction of coal from its natural deposits.

It has been stipulated that if jurisdiction exists over RNS it also exists over Mase as a contractor performing services at the RNS No. 20 refuse location. Accordingly, I find jurisdiction under the Act also over Mase. I therefore also reach the Motion for Settlement filed by the parties and conditioned upon the finding of jurisdiction. In this motion, the Secretary proposes to vacate Citation Nos. 3708787 and 3708788 and to reduce the remaining proposed penalties from $909 to $636.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

ORDER

WHEREFORE, the motion for approval of settlement is **GRANTED**, Citation Nos. 3708787 and 3708788 are hereby vacated and it is **ORDERED** that Respondent pay a penalty of $636 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 28, 1994

ASARCO, INCORPORATED, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-443-RM
	:	Citation No. 3904841; 3/30/94
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Leadville Unit
	:	Mine ID 05-00516

ORDER OF DISMISSAL

Before: Judge Merlin

On May 27, 1994, the operator filed a notice of contest of Citation No. 3904841 which was issued on March 30, 1994, in the above-captioned action. On May 31, 1994, the Solicitor filed a motion to dismiss this case. On June 7, 1994, the operator filed its response to the Solicitor's motion.

The Federal Mine Safety and Health Act affords an operator the opportunity to challenge a citation under Section 105(d), 30 U.S.C. § 815(d), which provides in relevant part as follows:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 * * * the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing * * * *.

In her motion the Solicitor seeks dismissal on the ground that the notice of contest was untimely.

A long line of decisions going back to the Interior Board of Mine Operation Appeals holds that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Peabody Coal Company, 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990); Prestige Coal Company, 13 FMSHRC 93 (January 1991); Costain Coal

Inc., 14 FMSHRC 1388 (August 1992); C and S Coal Company, 16 FMSHRC 633 (March 1994); Cf. Rivco Dredging Corp, 10 FMSHRC 889 (July 1988); Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980); Wallace Brothers, 14 FMSHRC 596 (April 1992).

As quoted above, Section 105(d) requires that the operator notify the Secretary of its intent to contest the citation within 30 days of issuance. Notice is completed upon mailing. J.P. Burroughs, 3 FMSHRC 854 (1981). The citation was issued on March 30, 1994, and the operator was required to notify the Secretary on or before April 29, 1994. The operator mailed its contest on May 23 which was therefore, 24 days late.

The operator argues that its contest was timely filed because the inspector on April 14, 1994, and again on May 17, 1994, issued subsequent actions extending the citation. The May 17 action extended the citation until May 31 and it is this date the operator relies upon. Thus the operator characterizes the inspector's action as an extension of time to respond and contends that because of it the instant suit did not have to be filed until May 31. The operator's position is without merit. An MSHA inspector has no authority to extend the filing deadlines mandated by Congress in the Act. And it is clear that the inspector did not purport to do any such thing. In giving the reason for his action he referred to the further investigation and inspection by MSHA to determine methods of abatement or application of a petition for modification. There is no indication that in allowing the operator time to discuss the cited condition with its legal department, the inspector even thought that he was extending the time for the operator to file its notice of contest. What the inspector did was extend the time for abatement and termination of the citation. That was all he did and all he could do.

In light of the foregoing, it is **ORDERED** that this case be and is hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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JUN 2 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-212-M A.C. No. 29-00175-05526
v.	:	Mississippi Chemical Corp.
MISSISSIPPI POTASH, INC., (MISSISSIPPI CHEMICAL CORP.), Respondent	:	

DECISION

Appearances: Robert A. Goldberg, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Charles C. High, Jr., Esq., Kemp, Smith, Duncan & Hammond, P.C., El Paso, Texas, for Respondent.

Before: Judge Cetti

I

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), seeks a civil penalty of $8,000.00 from the Respondent, Mississippi Potash Inc. (formerly Mississippi Chemical Corporation), for the alleged violation of 30 C.F.R. § 57.3360. This safety standard in relevant part provides:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary.

The primary issue at the hearing was whether or not there was a violation of the cited safety standard. More specifically the issue was whether ground conditions or mining experience in similar ground conditions in the mine indicated the need for additional ground support.

II

The citation in question was issued after an MSHA ground fall investigation at Respondent's underground potash mine located near Carlsbad, New Mexico. There was a fatality resulting from a roof fall in the North 405 Panel of the mine. Respondent was mining potash using a modified longwall system. Basically, Respondent drove entries to the end of the ore body and then retreated using continuous miners to mine out the potash as they retreated to the starting point.

III

At the hearing the parties entered into the record Stipulations as follows:

1. Mississippi Potash Inc. (formerly Mississippi Chemical Corporation) is engaged in mining and selling minerals and its mining operations affect commerce.

2. Respondent is the owner and the operator of the Mississippi Potash, Inc., Mine Identification No. 29-00175.

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

4. The presiding Administrative Law Judge has jurisdiction over this matter.

5. The subject citation as well as any modifications issued thereto, was properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of the Respondent on the date and place stated therein.

Accordingly, the citation 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 proposed penalty of the $8,000.00 will not affect Respondent's ability to continue in business.

7. Respondent is a mine operator with 336,048 tons of production in 1991.

8. The certified copies of the Mine, Safety and Health Administration's Assessed Violations History accurately reflect the history of the mine for two years prior to the date of the citation.

IV

The record in this penalty proceeding includes 1,191 pages of transcript of the testimony of 13 lay and expert witnesses and 59 exhibits. It took four full days of hearing to take the testimony of the 13 witnesses. At the conclusion of the second day it appeared that the Petitioner had established a prima facie case. During the last two days of hearing, Respondent presented credible lay and expert testimony that convincingly established that prior to the ground fall, there were no detectable ground conditions nor mining experience in similar ground conditions in the mine to indicate that ground support was necessary. Particularly persuasive was the testimony of Respondent's expert witness, the mining consultant Dr. John F. Abel.

Near the conclusion of the hearing, I granted Petitioner's request for a short recess so counsel could consult with his expert before responding to Respondent's motion for dismissal. When the hearing resumed on the record, counsel for Petitioner stated that Respondent and Petitioner had discussed the facts of the case and came to an agreed proposed disposition. Counsel for Petitioner on behalf of both parties made a motion that MSHA be permitted to withdraw the citation and the related proposed penalty. Having heard all the evidence and having considered the matter I granted the motion.

ORDER

Citation No. 3277238 and its related proposed penalty are **VACATED** and the above captioned case is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

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JUN 2 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-95-M A.C. No. 42-01071-05517
v.	:	Intermountain Pit
INTERMOUNTAIN SAND COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, Denver, Colorado, for Petitioner;

K. Dale Despain, Pro Se, Provo, Utah, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges Intermountain Sand Company (Intermountain) with three mandatory safety standards set forth in 30 C.F.R. Part 56 and seeks civil penalties for those violations.

The primary issues raised by the parties at the hearing are jurisdiction, whether Intermountain violated the cited safety standards and, if so, the appropriate penalty to be assessed.

I

Jurisdiction

The Respondent, Intermountain Sand Company, is a small specialty sand company with a small open pit mine that extracts sand and gravel from the ground. The mine employs a foreman and two

or three other miners. It has a crusher, a screen, three conveyor belts and a dryer. It produces primarily traction sand for railroads and a special sand that is used in the production of a spray product used to spray the interior surface of tunnels for fire protection. This product is sent to Yuma, Arizona, Nevada atomic test site, Wyoming, Idaho and Colorado. (Tr. 46).

The Mine Act Section 4 (30 U.S.C. § 803g) states:

> "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."

Congress by its use of the phrase "which affect commerce" in Section 4 of the Act, indicates its intent to exercise the full reach of its constitutional authority under the commerce clause. See Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974)); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB, 322 U.S. 643 (1944) Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

The Mine Act, as well as the Act's legislative history, reflect a congressional determination that all mining-related accidents and diseases unduly burden and impede interstate commerce. Section 2(f) of the Mine Act, 30 U.S.C. § 801(f), states:

> [T]he disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce.

The Mine Act defines the Act's scope as including "the Nation's coal or other mines," with no express limitation or exception. 30 U.S.C. §§ 801(c), (d), and (g). The legislative history of the Federal Coal Mine Health and Safety Act of 1969, the statute from which the Mine Act derived, also indicates that Congress intended to regulate mining "to the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966). Thus, in enacting the Mine Act, Congress chose to regulate mines as a class. See Marshall v. Kraynack, 604 F.2d 231, 232 (3rd Cir. 1979), cert. denied, 444 U.S. 1014 (1980) (applying Coal Act to family-owned mining operation).

Congressional intent to counter the adverse effect of mining accidents and injuries by regulating the mining industry as a whole has been recognized by the Supreme Court. In Donovan v. Dewey, 452 U.S. 594, 602 (1982), a case involving a surface

limestone quarry, the Supreme Court stated that ". . . Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." Congress's finding was "based on extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries. (See S. Rep. NO. 95-181 (1977); H.R. Rep. No. 95-312 (1977)." Id. at 602 n. 7.

It is well established that when Congress regulates a class of activity under the Commerce Clause, all members of the class are covered and when Congress has determined that an activity affects interstate commerce, "the courts need inquire only whether the finding is rational." Hodel v. Virginia Surface Mining and Recl. Assn., 452 U.S. 264, 277 (1981). As stated in Donovan v. Dewey, supra, 452 U.S. at 602 n. 7, the Supreme Court properly deferred to the express findings of Congress, set out in the Mine Act itself and based on extensive evidence, about the effects of mining-related injuries and diseases on interstate commerce. 30 U.S.C. § 301(f).

A congressional finding that an activity affects interstate commerce is presumed to be valid, and a reviewing court will invalidate such legislation "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Hodel v. Indiana, 452 U.S. 314, 323-324 (1981). In the instant case Intermountain has never even attempted to show a lack of any rational basis for Congress's finding that mining-related accidents and diseases at all mines burden and impede interstate commerce. Clearly the legislative history of the Mine Act indicates that Intermountain's mine is properly the subject of congressional regulation and its mining activities fall within the broad scope of jurisdiction contemplated by the Mine Act.

II

Federal Mine Inspector Ronald Pennington testified that he and Inspector Jim Skinner inspected this small open pit sand and gravel mine. The inspectors observed three violations of applicable mandatory safety standards. The observations made by the inspectors are set forth in the three citations issued to Respondent after the inspection.

Citation No. 2653442

Citation No. 2653442 is a 104(d) S&S citation that charges Respondent with the failure to provide a handrail on a 20-foot high work platform in violation of 30 C.F.R. § 56.11027.

The citation reads as follows:

> Handrails were not provided on the work platform near the top of the dryer elevator building. A ladder leads to this work platform. This platform is approximately 3 feet X 3 feet in area and it is likely that a person could easily fall from the platform to the ground. A serious injury could result from the fall of approximately 20 feet (6.096 M). A tie-off system for this platform was not in effect and employees use this platform to service the elevator motor and V-belt drive.

Inspector Ronald Pennington testified that the 20-foot high, 3-foot square, work platform was used to service two V-belt drives and a motor that was located just above the work platform. The inspector testified that there was no fall protection whatsoever and it would be quite easy to fall or inadvertently step off of this small platform. The 20-foot fall would likely result in serious injury or death.

The inspector asked the foreman at the site if they had any safety lines. None could be produced and none were observed. Nothing was provided to enable an employee working on the service platform to tie off.

The inspector testified that he found the violation to be significant and substantial. He stated that the 20-foot high platform was so small that it was reasonably likely that an employee working on it without a handrail or other fall protection could easily fall off it and would sustain serious injury.

I credit the testimony of Inspector Pennington. I agree with his opinion and conclusion that the violation was significant and substantial. The preponderance of evidence presented established all four elements of the Mathies formula which is discussed in greater detail below under the heading "Significant and Substantial."

Citation No. 2653443

This 104(a) citation charges the operator with failure to guard moving machine parts to protect persons from contacting the V-belt and pulley drives as mandated by 30 C.F.R. § 56.141072. The citation describes the violative condition as follows:

> The elevator motor and V-belt drive was not guarded. This motor and drive is located approximately 4 feet above the work platform

> and can be contacted when standing on the platform. This motor is located in a low traffic area and it is unlikely that an accident would happen.

The inspector testified that the electric motor located 4 feet above the work platform had a V-belt drive with two pulleys. There was nothing to protect a person working on the platform from contacting the pinch points of the V-belt drive. The injury could result in permanent disability such as the loss of a finger.

Mr. Despain, owner and operator of the mine, testified that during prior inspections no inspector had ever issued a citation for failure to guard the V-belt drives at that location.

I credit the testimony of Inspector Pennington and based on his testimony find that there was a failure to guard a person working on the platform from contacting the pinch points of the V-belt pulley drive. The violation of 30 C.F.R. § 56.141072 was established.

I agree with the inspector's conclusion that due to the location of the hazard, injury was unlikely and that the inspector properly found this violation to be non S&S.

Citation No. 2653481

This 104(a) citation charges Intermountain Sand Company with a S&S violation of 30 C.F.R. § 56.14107(a) which requires the guarding of moving machine parts. The citation describes the violative condition observed by the inspector during his inspection as follows:

> The main V-belt drive for the Allis Chalmers screen plant was not adequately guarded. The pinch points of the V-belt drive could be contacted if a person would slip or fall while walking down the adjacent walkway. This walkway is on a steep decline and it is likely that a person could fall into moving machine parts.

It is undisputed that the walkway adjacent to the pinch points of the V-belt drive had a steep decline of approximately 15 or 20 degrees.

The inspector, based upon the conditions he observed, was concerned that a person could slip or trip and fall as he walked down the steep decline of the walkway and thus make contact with the "big V-belts and the wheels." The pinch points could be contacted from the top. On making contact, a person would likely

sustain an injury that would result in permanent disability such as a loss of a hand or arm.

Mr. Despain, while admitting he is not "regularly" at the mine, contended that employees do not approach or service the machinery while it is running.

III

No Collateral Estoppel

Mr. Despain testified in general terms that on numerous prior MSHA inspections of the mine no citations were issued for the violative conditions cited in this case. After due consideration I conclude that the claim of lack of prior citations is no defense in this proceeding. The claimed lack of prior citations could be due to many possible reasons, none of which is a defense in this proceeding. They include such things as failure to see or to observe, regulatory error, interpretation error, and others that could come to mind. Inspectors being human, at times do make errors of observation and judgment much like anyone else. MSHA is not estopped from the issuance of a citation because of an operator's reliance on the fact that no citation was issued on earlier inspections. The doctrine of collateral estoppel is not applicable and cannot be invoked under the facts of this case to deny miners protection of the Mine Act.

IV

Significant and Substantial Violations

The inspector in issuing Citation No. 2653442 found that the failure to have a railing on the 20-foot high 3 foot square service platform was a significant and substantial violation. The inspector also made such a finding in Citation No. 2653442 for failure to adequately guard against employee contact with moving machine parts while walking down the steep decline of the adjacent walkway.

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:

> 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:

> 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). (Emphasis in original).

Any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 329. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

With respect to the two citations in question, the first two elements of the Mathies formula are clearly established. I also find in the context of continuing normal mining operations that the preponderance of the credible evidence established the third and fourth elements of the Mathies formula. These findings are based upon the credible testimony of Inspector Pennington summarized above under the heading II Citation Nos. 2653442 and 2653448.

Since the Secretary established all four elements of the Mathies formula, I find, as did the inspector, that two violations in question are properly designate "significant and substantial."

V

Civil Penalty Assessment

In accordance with the mandate of Section 110(c) of the Mine Act I have considered the statutory criteria in determining the appropriate penalties to assess. Respondent is a small operator.

Respondent's history of prior violations is good with only three violations of regulatory safety standards during the two-year period immediately prior to the issuance of the citations in question. The operator was negligent in permitting the violative conditions to exist. The gravity of the two S&S violations is high and there existed a reasonable likelihood that the hazard contributed to would result in an injury of a reasonable serious nature. No evidence was presented to show the MSHA proposed penalties would have an adverse effect on the operator's ability to continue in business and it is presumed there would be no significant adverse effect. With respect to good faith it is noted that the violations were abated without the imposition of failure to abate penalties but that full abatement was not achieved until after the issuance of a 104(b) order for each of the violations.

Having considered the six statutory criteria in Section 110(i) of the Act, I find the appropriate penalty for each of the violations is the MSHA proposed penalty. Accordingly, I assess the following civil penalties.

Citation No. 2653442 - $292.00
Citation No. 2653443 - $195.00
Citation No. 2653448 - $240.00

ORDER

All three citations, Nos. 2653442, 2653443 and 2653448 are **AFFIRMED** as written and it is **ORDERED** that the Respondent, Intermountain Sand Company, **PAY** the assessed civil penalties in the sum of $727.00 to the Secretary of Labor within 30 days of this decision. On receipt of payment, this case is **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

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JUN 2 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-360-M A.C. No. 48-00639-05502 HUR
v.	:	Wyoming Soda Ash
KAMTECH INCORPORATED, Respondent	:	

DECISION

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Secretary seeks a $50 penalty from Kamtech Incorporated (Kamtech) for an alleged violation of 30 C.F.R. § 57.4600(a)(2).

In pertinent part the cited safety standard provides:

> (a) When welding, cutting, soldering, thawing, or bending --- (2) With an open flame in an area where no electrical hazard exists, a multipurpose dry-chemical fire extinguisher or equivalent fire extinguisher or equivalent fire extinguisher equipment for the class of fire hazard present shall be at the worksite.

Kamtech filed a timely answer and response to the Prehearing Order contesting the alleged violation.

On April 20, 1994, Kamtech filed a Motion for Summary Decision along with a (1) Brief in Support of the Motion; (2) Affidavit of M. Hunt; and (3) Affidavit of R. O'Steen.

Kamtech states that it received the citation while performing construction work at T.G. Soda Ash's mine located in Grainger, Sweetwater County, Wyoming, and asserts that the undisputed material facts demonstrate that Kamtech is entitled to summary decision in its favor as a matter of law. It is Kamtech's position that there was no violative condition nor exposure to an employee of a violative condition.

Kamtech further states that the material facts to which there is no genuine issue are as follows:

> Kamtech, Inc. is an industrial construction company that performs construction work throughout the United States. On the date of the alleged violation, Kamtech was performing construction work for T.G. Soda Ash, Inc. at its mine and facility located in Grainger, Sweetwater County, Wyoming. (Affid., of R. O'Steen, ¶ 3, 4). Although most of Kamtech's employees were engaged in the construction of the package boiler outside of the T.G. Soda Ash facility, a few employees were constructing a pipe system of the T.G. Soda Ash facility near the boiler area. (O'Steen Affd., ¶ 4).
>
> On September 16, 1992, while conducting an inspection of the entire mine facility, an MSHA Inspector, Thomas L. Markve, approached a Kamtech employee who was working on a catwalk in the boiler area. (Affid. of M. Hunt, ¶ 4, 5). The employee was a pipewelder. (Hunt Affid., ¶ 5; O'Steen Affid., ¶ 5). Like other pipewelders in the boiler area, Mr. Lish was using a process known as shielded metal arc welding (SMAW), which is a form of electrical welding used to fuse and cut pieces of pipe. Id. At this time, Lish's welding rod had not been "struck" to produce an electric arc, which is the heat source for the weld. (Hunt Affid., ¶ 5). The inspector approached the employee and asked him the location of his fire extinguisher. (Hunt Affid., ¶ 5; O'Steen Affid., ¶ 7).[1] Mr. Lish responded by turning around to pick up his fire extinguisher and found it to be missing. (O'Steen Affid., ¶ 7). At that time, Mr. Lish's helper returned to the area and explained that he had picked up the fire extinguisher just prior to the inspector's arrival and placed it in the gang box because he thought they were finished welding. Id. Mr. Lish did not begin welding until after the helper returned with the fire extinguisher. Id.
>
> Shortly thereafter, Inspector Markve met with Rick O'Steen, Kamtech's Quality Assurance/Quality Control Safety Inspector, to conduct an inspection of the package boiler construction site. Id. at ¶ 6. At this time, the inspector informed Mr. O'Steen that he was issuing a citation to Kamtech because Lish did not have a fire extinguisher in his immediate work area. Id. After Mr. O'Steen questioned the inspector as to the particulars of the citation, Inspector Markve explained that he was issuing the citation because he thought (but did not observe) that Lish had been

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[1] The conversation related to O'Steen by Inspector Markve does not constitute hearsay because, as an agent for the Secretary of Labor's office, his statements are admissions. Consolidation Coal Company v. Sec. of Labor, No. WEVA 81-222-R, 81-361, (FMSHRC February 8, 1992); Secretary of Labor v. Stanbest, Inc., 11 BNA OSHC 1222 (OSHRC No. 76-4355 1983) (decision under OSHA); McWilliams Forge Co., Inc., 8 BNA OSHC 1792 (OHSRCJ No. 79-228 1980) (decision under OSHA).

welding, or was going to begin welding again. (O'Steen Affid., ¶ 6, 7; Hunt Affid., ¶ 5).

Kamtech asserts these facts do not establish a violation of the cited standard under MSHA. Kamtech contends that it did not violate the cited standard because: (1) the welding process used did not involve an open flame; (2) the Kamtech employee allegedly exposed to the hazard was not engaged in welding, cutting, soldering, thawing, or bending without having a fire extinguisher present; and (3) because suitable extinguishing equipment was present at the worksite.

Kamtech states the type of welding process being used was shielded metal arc welding (SMAW), which is a form of electrical welding. (Hunt Affidavit, ¶ 5). Electrical welding does not produce an open flame and, therefore, is not subject to 30 C.F.R. § 57.4600(a)(2). See Secretary of Labor v. LeBlanc's Concrete & Mortar Sand Company, No. CENT 88-106-M, (FMSHRC April 24, 1989).

Kamtech further contends that even if the cited standard applies, Kamtech did not violate it because its employee was not engaged in welding when the fire extinguisher was removed from the immediate work area. Just prior to the MSHA inspector arriving at the allegedly exposed employee's work area, the employee (Lish) stopped welding and the employee's helper removed the fire extinguisher they had been using, mistakenly thinking that they had finished welding. Lish did not begin welding again until after the helper returned with the fire extinguisher. Inspector Markve never observed Kamtech employee Lish welding without a fire extinguisher. Instead, he assumed that the employee was going to begin welding again and, therefore, concluded that a citation was appropriate.

In order to establish a prima facie case of a violation, Kamtech asserts the Secretary must show that a violative condition existed and that an employee was exposed. E.g., Secretary of Labor v. Cathedral Bluffs Shell Oil Company, No. WEST 81-186-M, (FMSHRC August 29, 1984); Anning-Johnson Co. 4 OSHC 1193 (Rev. Comm'n 1976) (decision under OSHA). In this case, neither is established since Inspector Markve intervened before actual welding operations had recommenced. Kamtech points out that Lish's welding rod had not been "struck" to produce an electrical arc, which is the heat source for the weld. Speculation that an employee may commit a violation will not satisfy the Secretary's burden of proof. Id.; Secretary of Labor v. Patch Coal Company, No. CENT 88-2, (FMSHRC June 24, 1988). E.g., Secretary of Labor v. Southeastern Paper Products Export, Inc., 16 BNA OSHC 1276 (OSHRJC April 23, 1993) (decision under OSHA). An "anticipatory" violation would be inappropriate in this case because the facts indicate that had the inspector not intervened, the welder's helper would have retrieved the fire extinguisher or

stopped the welder once he realized that the welder intended to weld again.

In addition, Kamtech contends it did not violate the cited standard because proper fire extinguishing equipment was present "at the worksite." As discussed above, when it was discovered that the welder had not completed welding and was going to begin welding, the helper retrieved the fire extinguisher from the gang box, which is portable and was used to store tools. The term "worksite" is not defined by the regulations. Therefore, Kamtech contends a reasonable employer would interpret such a term in accordance with its ordinary meaning. The term "worksite," in its ordinary meaning, would certainly include a nearby gang box which was readily accessible. See Secretary of Labor v. LeBlanc's Concrete & Mortar Sand Co., (noting fire extinguisher required at work location, which was described as a 100' X 200' shop); Secretary of Labor v. Western Steel Corporation, No. WEST 81-132-RM, (FMSHRC March 29, 1983) (term "worksite" used in reference to large work area); Westwood Energy Properties v. Secretary of Labor, No. PENN 88-42-R, 3 FMSHRC (January 1989).

No objection has been filed to the "Statement of Material Facts As to Which There Is No Genuine Issue" nor to the Motion for Summary Decision.

CONCLUSION

Based upon the "Statement of Material Facts As to Which There Is No Genuine Issue," including the affidavits of M. Hunt and R. O'Steen, I find that in this case there was no violation of the cited safety standard 30 C.F.R. § 57.4600(a)(2).

ORDER

Citation No. 3908981 and its related proposed penalty are **VACATED** and this case is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 30 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. KENT 93-659
BEECH FORK PROCESSING, INC., Respondent	:	A. C. No. 15-16162-03578
	:	Docket No. KENT 93-668
	:	A. C. No. 15-16162-03579
	:	Docket No. KENT 93-669
	:	A. C. No. 15-16162-03580
	:	Docket No. KENT 93-699
	:	A. C. No. 15-16162-03581
	:	Docket No. KENT 93-709
	:	A. C. No. 15-16162-03582
	:	Docket No. KENT 93-780
	:	A. C. No. 15-16162-03583
	:	Docket No. KENT 93-781
	:	A. C. No. 15-16162-03584
	:	Docket No. KENT 93-903
	:	A. C. No. 15-16162-03586
	:	Docket No. KENT 93-904
	:	A. C. No. 15-16162-03587
	:	Docket No. KENT 93-992
	:	A. C. No. 15-16162-03588
	:	Mine No. 1

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Ted McGinnis, Mine Superintendent, Beech Fork Processing, Inc., Lovely, Kentucky for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Beech Fork Processing, Inc. pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege 40 violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, I dismiss one citation, vacate and dismiss one citation and one order, modify three citations, find that Beech Fork committed the remaining violations as alleged and assess total penalties of $51,211.00.

A hearing was held in these cases on February 8 and 9, 1994, in Paintsville, Kentucky. Mine Safety and Health Administration (MSHA) Inspector Kellis Fields testified for the Secretary. Mr. Ted McGinnis, Superintendent of Beech Fork's Mine No. 1, testified on behalf of the Respondent. The parties have also filed post hearing briefs which I have considered in my disposition of these cases.

In his brief, the Secretary contends Beech Fork that committed all of the violations as alleged, including the level of gravity and degree of negligence. On the other hand, the Respondent admits that most of the violations occurred, but maintains that they do not rise to the level of being "significant and substantial" or result from "unwarrantable failures." Therefore, Beech Fork argues, the violations do not deserve the penalties proposed by the Secretary.

The cases involve ten dockets, 40 citations and orders and, at least, 15 different inspections or dates that citations or orders were issued. Therefore, in an attempt to discuss the violations in some sort of orderly fashion, the infractions will be addressed by docket.

Docket No. KENT 93-659

This docket involves Citation No. 3816646 and Order No. 3816647, both issued under Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1),[1] and both alleging a violation of Beech

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[1] Section 104(d)(1) 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
(continued on next page)

Fork's Mine Ventilation Plan pursuant to Section 75.370(a)(1) of the Secretary's Regulations, 30 C.F.R. § 75.370(a)(1). Inspector Fields testified that he inspected Beech Fork's Mine No. 1 on December 16, 1992, and issued the citation and order, which he later modified, at that time.

Inspector Fields stated that on entering the mine, he observed coal coming off of the conveyor belt for the 003 working section and when he arrived at the face of the No. 4 entry he saw a continuous mining machine loading coal from the face into a shuttle car. He related that no line curtain[2] was installed in the entry and that when he attempted to take a reading of the amount of air moving at the face, he was unable to get a reading.

Inspector Fields said that he had measured the depth of the cut at approximately 52 feet. He further stated that the mine foreman was present while this occurred and admitted to him that a line curtain was supposed be installed when coal is being mined, cut or loaded and that the velocity of air at the face was supposed to be a minimum of 5200 cubic feet per minute (cfm).

Section 75.370(a)(1) requires, in pertinent part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." Beech Fork's Methane and Dust Control Plan, which was tentatively approved on February 13, 1992, requires that the minimum air quantity "at working faces, where coal is cut, mined or loaded" shall be "5200 cfm" and that the "[m]aximum distance for line curtain to be maintained from the point of deepest penetration of the working face where coal

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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.

[2] A "curtain" is "used to deflect the air from the entries into the working rooms and [is] used to hold the air along the faces." A Dictionary of Mining, Mineral, and Related Terms 292 (1968).

is being cut, mined or loaded shall be 20 Ft." (Gt. Ex. 2, p.3.)

Citation No. 3816646 was for the failure to install a line curtain and Order No. 3816647 was for the lack of air at the face. (Gt. Exs. 1 and 3.) Clearly Beech Fork did not comply with the requirements of its dust control plan and, therefore, violated Section 73.370(a)(1) of the Regulations.

Both violations were found by the Inspector to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

> We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S.

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

This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

Inspector Fields testified that he believed these violations to be S&S because without ventilating the area where mining was taking place methane could be encountered which could result in an explosion and fire and excessive coal dust would be present which could lead to pneumoconiosis. The Respondent argues that no methane had ever been detected in this mine, that the scrubber on the continuous miner was working while coal was being cut and that the miner had only been operating a short time because it was being tested to determine if repairs performed on it were sufficient.

I find that the Secretary has the stronger argument in this instance. The fact that methane had never been encountered in the mine does not guarantee that it will never be present. The scrubber on the continuous miner does not sufficiently remove coal dust from the environment, by itself, to make the area conform to the dust standards and certainly would have no affect on methane. Finally, even if the continuous miner was only being tested, those present were subjected to the possible dangers of no ventilation while it was being tested. For these reasons, I conclude that the violations were "significant and substantial."

Inspector Fields also found these violations to have resulted from an "unwarrantable failure" on the part of Beech Fork because the foreman was present and admitted that he knew that a line current had to be installed and that 5200 cfm of air was required at the face. The Respondent implies that this was not done because the repaired continuous miner was only being tested; the implication being that the line curtain would have been installed and the face properly ventilated before full production began.

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

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

"Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness or inattention.

Beech Fork's position is undercut by the fact that enough coal was being conveyed on the belt line to lead Inspector Fields to believe that full production was already in progress. More significantly, the Beech Fork employees had to go over two entry ways, to the No. 6 entry, to find a curtain to install. This indicates that the foreman, knowing that a line curtain was required, was not prepared to install it. Therefore, I conclude that the violations resulted from Beech Fork's "unwarrantable failure."

The Secretary has proposed a penalty of $4,000.00 for the failure to install the line curtain and $6,000.00 for the lack of air quantity at the face. The Respondent argues that these are essentially one violation and, therefore, the second violation amounts to over charging. (Resp. Br. 4.) While it is true that two separate sections of Beechfork's dust control plan are cited as having been violated, as Inspector Fields noted in Order No. 3816647, "no air was provided due to no line curtain installed . . . ." (Gt. Ex. 3.) It stands to reason that if the line curtain is what guides the air to the face, if there is no line curtain, there will be no air at the face.

I agree with the Respondent that these two violations are multiplicious, that is, they are multiple offenses arising in the course of a single act or, in this case, failure to act. If the Act did not require that a civil penalty be assessed for each violation, 30 U.S.C. § 820(a), I would assess a single penalty for both violations. Cf. Albernaz v. United States, 450 U.S. 333, 337-38, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Since I cannot assess a single penalty for both violations, I will consider the fact that the violations are multiplicious in assessing penalties for each. Taking into consideration the factors set out in Section 110(i) of the Act, 30 U.S.C. § 820(i),

I assess a civil penalty of $2,000.00 for Citation No. 3816647 and $2,000.00 for Order No. 3816648.

Docket No. KENT 93-668

On January 25, 1993, Inspector Fields issued two S&S citations to Beechfork. Citation No. 3816654 was for a violation of Section 75.380(d), 30 C.F.R. § 75.380(d), because the intake escapeway heading to the 003 section did not have a walkway or stairs provided to get over two overcasts.[3] (Gt. Ex. 4.) Citation No. 3816658 alleged a violation of Section 75.333(b)(1), 30 C.F.R. § 75.333(b)(1), because permanent stoppings used to separate the intake airway from the return airway were not being maintained up to and including the third open crosscut outby the face area between the No. 2 and No. 3 entries. (Gt. Ex. 5.)

Inspector Fields testified that the overcasts were 20 feet wide, that is, the width of the escapeway, and five or six feet high. He described that the only way to get over the overcast was to "jump up and try to get on top of the overcast." (Tr1. 46.)[4]

Section 75.380(d)(6), 30 C.F.R. § 75.380(d)(6), requires escapeways to be "[p]rovided with ladders, stairways, ramps or similar facilities where the escapeways cross over obstructions." In its brief, the Respondent admits that it violated this regulation. (Resp. Br. 16.) I agree and so find.

The inspector testified that he considered this violation to be "significant and substantial" because in trying to jump over the overcast someone could fall and break his arm or leg, or injure his back. In addition, he pointed out that in an emergency miners would be hindered in getting out of the mine using the escapeway and that it would make it very difficult to bring someone through the escapeway on a stretcher. The Respondent argues that the violation was not S&S because there were materials nearby from which someone could fashion some steps if he needed to.

Applying the Mathies test, I find that there was a reasonable likelihood that the lack of a way over the overcast would result in a reasonably serious injury. This would be

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[3] An overcast is "[a]n enclosed airway to permit one air current to pass over another one without interruption." A Dictionary of Mining, Mineral, and Related Terms 780 (1968).

[4] The hearing was held on February 8 and 9 and there is a separate transcript, beginning with page one, for each day. Accordingly, the transcript for February 8 will be cited as "Tr1." and the transcript for February 9 will be cited as "Tr2."

particularly likely when the escapeway was being used in an emergency as it was intended to be used. Accordingly, I conclude that the violation was "significant and substantial."

Turning to the second citation, Inspector Fields testified that while inspecting the Elk View section of the mine he found that permanent stoppings between the No. 2 and No. 3 entries had only been installed up to and including the fourth open crosscut outby the face. There was no stopping in the third crosscut.

Section 75.333(b)(1) provides, in pertinent part, that:

> (b) Permanent stoppings or other permanent ventilation control devices . . . shall be built and maintained -- (1) Between intake and return air courses . . . . Unless otherwise approved in the ventilation plan, these stoppings or controls shall be maintained to and including the third connecting crosscut outby the working face.

Beech Fork admits this violation. (Resp. Br. 4.) Accordingly, I conclude that Beech Fork violated the section as alleged.

Inspector Fields found this violation to be "significant and substantial" because the missing stopping permitted the intake air to cross the entry and enter the return before reaching the face. As a result, he opined that "it's reasonably likely somebody in there [the face] can encounter, when they're in production and mining coal, they can always encounter any poisonous or noxious gases or methane or coal dust." (Tr1. 53.) Although Beech Fork incorporates this violation in a general statement in its brief concerning violations not being S&S, at the hearing Mr. McGinnis agreed that the violation was S&S. (Tr2. 152-53.) Accordingly, I find that the violation was "significant and substantial."

In a continuation of this inspection, Inspector Fields issued Citation Nos. 4029824, 4029826 and 4029828 on February 10, 1993. The first of these involved a defective, dry chemical fire fighting system on a shuttle car in violation of Section 75.1100-3 of the Regulations, 30 C.F.R. § 75.1100-3. (Gt. Ex. 6.) The other two involved trailing cables from a continuous miner and a shuttle car that Inspector Fields found to be inadequately insulated in violation of Section 75.517, 30 C.F.R. § 75.517. (Gt. Exs. 7 and 8.)

With regard to the firefighting system, Fields testified that he found that a hose was broken off of the chemical tank rendering the system inoperative since in the event of a fire no chemicals would be sprayed on the fire. He believed that this

violation was S&S because of the possibilities of smoke inhalation or burning if the machine caught on fire and the fire could not be extinguished because the system did not work.

Beech Fork argues that this violation was not "significant and substantial" because the shuttle car operator would not have to travel more than 300 feet to get into fresh air in the event of a fire. In addition, the Respondent maintains that a pressured water hose would never be more than 300 feet from the shuttle car anywhere in the mine and that the shuttle car has firefighting systems on both sides, so that at least one-half of the car would be covered in the event of a fire.

Section 75.1100-3 requires that "[a]ll firefighting equipment shall be maintained in a usable and operative condition." Clearly, the broken hose violated this regulation. Further, applying the Mathies test, I find that the violation was "significant and substantial."

Looking next at the cable violations, the inspector testified that the cable to the continuous miner had been spliced, but that when it was resealed the seal did not completely cover the cut in the cable. He stated that part of the outer jacket of the trailing cable for the shuttle car had been torn off, exposing the inner leads. Inspector Fields related that he found these violations to be S&S because the cables have to be handled by miners to move them from one place to another, that the section was wet and muddy and that because of the exposed inner leads, which carried 575 volts for the miner and 440 volts for the shuttle car, a person could be electrocuted.

The Respondent contends that there was no violation in either of these cases because the inner leads were themselves insulated sufficiently to prevent electrocution. In the Respondent's opinion, the outer jacket serves a dual purpose, to resist nicks, cuts and scrapes, as well as for insulation. Therefore, any openings in the outer jacket do not necessarily mean that the insulation is not sufficient. Furthermore, Beech Fork argues, if the insulation on the inner leads were inadequate, a circuit breaker would be tripped. (Resp. Br. 6.)

Section 75.517 provides that "[p]ower wires and cables . . . shall be insulated adequately and fully protected." I find that both the inner lead insulation and the outer jacket must be intact to meet this standard. Therefore, I conclude that Beech Fork violated the regulation in both of these instances. I further find that these violations were "significant and substantial." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984).

Inspector Fields issued six more citations to the Respondent on February 16, 1993. Citation No. 4027041 alleges a violation of Section 75.1102 of the Regulations, 30 C.F.R. § 75.1102, because the slippage switch for the No. 3-A belt conveyor drive was inoperative. (Gt. Ex. 9.) Citations No. 4027042 and 4029840 are for violations of Section 75.1722(b), 30 C.F.R. § 75.1722(b), due to inadequate guarding of belt conveyor drives.[5] (Gt. Exs. 10 and 15.) Citations No. 4027043 and 4029839 are for accumulations of float coal dust in belt control boxes in violation of Section 75.400, 30 C.F.R. § 75.400. (Gt. Exs. 12 and 13.) Citation No. 4027045 sets out a violation of Section 75.604(a), 30 C.F.R. § 75.604(a), because a permanent splice in a trailing cable was not made mechanically strong. (Gt. Ex. 14.)

Beech Fork admits that the violations concerning the accumulations of float coal dust and the slippage switch occurred. (Resp. Br. 4 and 10.) However, it contests the remaining citations and Inspector Fields' S&S determinations on all of the citations.

Turning first to the guarding on the conveyor belt drives, the inspector testified that the guard to the 3-A belt conveyor drive was bent over and was not secured and that there was an opening on the sprocket chain housing. He further testified that the guard to the 2-A belt conveyor drive was also bent over. He stated that because the guards were bent over, they did not prevent people reaching in at the pinch point of the drive pulley and that the opening in the chain housing would permit someone to place a hand or finger in the sprocket chain. Finally, Inspector Fields testified that the guards were held in place by telephone wire which resulted in their bending over when loose coal, coal dust and mud piled up on them.

In the Respondent's opinion, the guards were properly secured with wire because the build-up of material on them required that they be frequently cleaned. Wiring them facilitated the cleaning, whereas bolting or welding them would make cleaning much more difficult.

Section 75.1722(b) provides that "[g]uards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." Since the guards could be bent over by the accumulation of material on a frequent basis, exposing the pinch points of the pulleys, when secured by wires, I conclude that they were not

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[5] On February 17, 1993, Inspector Fields issued Orders No. 4027047 and 4027048 pursuant to Section 104(b) of the Act, 30 U.S.C. § 814(b), for failure to abate these two violations. (Gt. Exs. 11 and 16.)

sufficient to prevent someone from reaching behind them and becoming caught. Therefore, I find that the two guards discussed above violated the regulation.

With respect to the cable splice, Inspector Fields testified that the splice had been accomplished by tying a square knot in the cable. As a result, he opined that this would produce greater resistance to the electrical current flowing through the cable causing the cable to get hot.

Section 75.604(a) requires permanent splices in trailing cables to be "[m]echanically strong with adequate electrical conductivity and flexibility." Based on the inspector's testimony, I conclude that Beech Fork violated this regulation.

Inspector Fields found all six of these violations to be "significant and substantial." With regard to the slippage switch, he testified that the failure of the switch to work would mean that the belt could not be stopped when it became fouled, overloaded or had some other malfunction. He related that if the belt kept running in such a situation, the resulting friction could cause smoke or a fire.

The inspector stated that, in addition to the required daily inspection of the belt lines, spillage from the conveyors required recurrent shovelling and cleaning in the area of the pulleys. Thus, there was opportunity for someone to lose a limb or worse due to the inadequate guards on the belt drives.

The inspector testified with regard to the dust accumulations that arcing between the various electrical components inside the junction control boxes could ignite the accumulated coal dust thereby causing smoke and a fire. He explained further that electrocution could result from the defective cable splice in the same manner as that which he described could happen with the cable insulation violations above. Supra, at 9.

In addition to its conclusory statement that the violations are not S&S, Beech Fork argues with respect to the coal dust accumulations that the damp, wet and muddy conditions in the mine and the fact that the coal dust is composed, "in substantial part," of rock dust would make the likelihood of an ignition very remote. (Resp. Br. 5.) The Respondent argues concerning the defective slippage switch that the damp conditions and a fire suppression system on the belt line make a fire unlikely.

The Commission has held that a construction of Section 75.400 "that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." Black

Diamond Coal Mining Company, 7 FMSHRC 1117, 1121 (August 1985). It has further held that dampness is not determinative of whether a coal accumulation violation is "significant and substantial" or not. Utah Power & Light Company, 12 FMSHRC 965, 970 (May 1990). Accordingly, applying the Mathies standards and crediting the inspectors testimony, I conclude that these six violations were "significant and substantial."

Finally, with regard to this docket, Inspector Fields issued two citations on March 5, 1993. The first, Citation No. 4026562, was for a violation of Section 75.515, 30 C.F.R. § 75.515, because a cable entering the metal junction for the belt motor at the No. 7 drive did not have a proper fitting. (Gt. Ex. 17.) The second, Citation No. 4027060, alleged a violation of Section 75.352, 30 C.F.R. § 75.352, because the No. 6 belt conveyor line was not separated from the return air course at Break 80 as about one-third of the stopping was "crushed out." (Gt. Ex. 18.)

Beech Fork admits that both of these violations occurred, (Resp. Br. 4 and 10-11), but argues that they were not "significant and substantial." Therefore, I conclude that Beech Fork violated both of these sections.

Concerning the improper fitting, the inspector testified that vibration from the belt drive could cause the cable to rub against the metal frame eventually exposing the power lines. If this occurred, anyone touching the metal frame could be electrocuted. With regard to the crushed stopping, Inspector Fields explained that return air could go through the hole in the stopping and mix with the intake air. He stated that if there was methane in the return air it could be ignited by electrical equipment in the belt line that was not "permissible." He further maintained that, with the stopping out, the air velocity could increase so that if a fire started, if would spread faster.

Based on Inspector Fields testimony, I conclude that these two violations were "significant and substantial."

The Secretary has proposed a total penalty for all of the violations in this docket of $18,637.00. Taking into consideration the requirements of Section 110(i) of the Act, particularly Beech Forks failure to abate the two guard violations, I conclude that a total penalty of $18,637.00 is appropriate.

Docket No. KENT 93-669

At the hearing, the Secretary moved to dismiss Citation No. 4026574 based on the Commission's decision in Keystone Coal. Keystone Coal Mining Corporation, 16 FMSHRC 6 (January 1994). The Respondent had no objection to the motion and it was granted.

Accordingly, the citation will be dismissed in the order at the end of this decision.

The only other citation in this docket was issued by Inspector Fields on March 10, 1993. It was for a violation of Section 75.523-3(a), 30 C.F.R. § 75.523-3(a), because the automatic emergency-parking brakes on the 488-1934 S & S scoop did not hold the scoop or "lock up" when checked by the inspector. (Gt. Ex. 23.)

Inspector Fields testified that automatic emergency-parking brakes on the scoop were inoperative. The Respondent concedes that that was the case. (Resp. Br. 12.) Accordingly, I conclude that Beech Fork violated Section 75.523-3(a).

Inspector Fields testified that he believed this violation to be S&S because the brakes would not hold the scoop on an incline and it could, therefore, roll and seriously injure or kill someone. The Respondent argues that the probability of injury from this violation is very remote because the scoop also had a service brake which could be used to hold it.

I conclude that this violation was "significant and substantial." The service brake requires that the operator set it. The automatic brake does not. I find it reasonably likely that an operator, not knowing that the automatic brake did not work, would not set the service brake, assuming that the automatic brake would hold the scoop.

The Secretary has proposed a penalty of $690.00 for this violation. Taking into consideration the criteria in Section 110(i), I find this to be an appropriate penalty.

Docket No. KENT 93-699

This docket consists of four citations issued on various dates during Inspector Fields' inspections. Citation No. 4026561 is dated March 5, 1993, and sets out a violation of Section 75.400 because loose coal and float coal dust was allowed to accumulate under a belt in various locations and in crosscuts beginning at the air lock inby the No. 6 head and extending inby to the No. 7 belt drive. (Gt. Ex. 19.) Citation No. 3816644, dated December 10, 1992, is for a violation of Section 75.202(a), 30 C.F.R. § 75.202(a), in that draw rock was sloughing from around resin roof bolts "in the intake air escapeway from 6 inches up to approximately 24 inches in several locations, ranging from 1 - 4 bolts up to approximately 20 bolts[,] starting approximately 600 feet inby the intake portal extending inby approximately 4,000 [feet] up to [the] seals on the intake." (Gt. Ex. 20.)

Citation No. 4029838, delineates another violation of Section 75.400 because float coal dust was allowed to accumulate in the No. 1-A belt control box on February 16, 1993. (Gt. Ex. 21.) Finally, Citation No. 4026568, dated March 10, 1993, outlines a violation of Section 75.1725(a), 30 C.F.R. § 75.1725(a), alleging that a continuous miner was not maintained in safe operating condition because the foot control switch, commonly called the "deadman" switch, was taped in the down position.

In each of these cases, the Respondent concedes that a violation occurred. (Resp. Br. 4, 7, 15-16.) Consequently, I conclude that Beech Fork violated the sections of the regulations alleged.

With regard to the loose coal and coal dust accumulations, the Respondent makes the same argument concerning the gravity of the violations that it did in Docket No. KENT 93-668. Supra, at 11-12. I find the violations to be "significant and substantial" for the same reasons set out in that docket. Id.

Turning to the problems with the roof falling away from the installed roof bolts, Beech Fork argues that the likelihood of an injury is remote because the only person travelling the airway is a weekly examiner. It concludes by stating that "[i]t is admitted that it is a serious violation, but it is contended that it is not an eminent [sic] danger." (Resp. Br. 16.) The Respondent apparently misperceives the law. An imminent danger does not have to exist for a violation to be S&S. In fact, a "significant and substantial" violation is defined as something less than an imminent danger. Cement Division, supra at 828.

As Inspector Fields pointed out, the intake airway is also used as an escapeway. He also noted that while a roof fall could obviously result in death or serious injury, small pieces of the roof falling on someone could also involve reasonably serious injuries. Applying the Mathies test, I conclude that this violation was "significant and substantial."

Finally, in connection with the "deadman" switch, it is Beech Fork's position that this violation is not S&S because the miner operator has access to a panic switch, a switch which completely turns off the miner, a breaker which de-energizes the machine and spring loaded control levers. However, the "deadman" switch is clearly designed to stop the continuous miner from moving when the operator is prevented by unconsciousness, incapacitating injury or death from using any of the devices relied on by the Respondent. Considering the well known dangers in mining and applying the Mathies test, I also conclude that this violation was "significant and substantial."

The Secretary has proposed a total of $2,147.00 in penalties for these four violations. After reviewing the criteria in Section 110(i) of the Act, I find the proposed penalties to be appropriate.

Docket No. KENT 93-709

This docket consists of three orders issued under Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2),[6] and one 104(a) citation. Order No. 3816656 sets out a violation of Section 75.220, 30 C.F.R. § 75.220, on January 25, 1993, charging that Beech Fork had violated its roof control plan by permitting work or travel under a roof that had not been permanently supported. (Gt. Ex. 24.) Order No. 3816657 was also issued on January 25 and relates a violation of Section 75.325(b), 30 C.F.R. § 75.325(b), because there was not a minimum air velocity of 9,000 cfm in the last open crosscut on the 003 section between the No. 2 and No. 3 entries. (Gt. Ex. 26.)

Order No. 4026565 is dated March 5, 1993, and recites a violation of Section 75.334, 30 C.F.R. § 75.334, because a roof fall had torn out a seal in the No. 4 entry in the return air course off of the 001 section, the seal in the No. 3 entry had been removed and the seals had not been reconstructed. (Gt.Ex. 27.)[7] Finally, Citation No. 9980129 was issued on January 25,

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[6] Section 104(d)(2) states:

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

[7] This order originally cited a violation of Section "75.334-2." It was modified on March 8, 1993, to allege a violation of Section "75.344-a-2." It was modified again on February 3, 1994, "to show that correct section of law is 75.334-2." (Gt. Ex. 28.) There is no Section 75.344-2 or Section 75.344(2). There is, however, a Section 75.344(a)(2), 30 C.F.R. § 73.344(a)(2), and it is clear that this was the section intended to be cited. In view of the fact that the Respondent did not question the section at the hearing or in its brief and does not appear to have been prejudiced

(continued on next page)

1993, detailing a violation of Section 70.207(a), 30 C.F.R. § 70.207(a), because the Respondent only submitted four valid respirable dust samples for the bimonthly period of November-December 1992 instead of the five required. (Gt. Ex. 29.)

Section 75.220(a)(1) requires that "[e]ach mine operator shall develop and follow a roof control plan." Beech Fork's approved roof control plan provides that "[b]efore any other work or travel in or inby an intersection which has an unsupported opening, . . . the roof shall be permanently supported in accordance with the roof control plan." (Gt. Ex. 25, p. 7.) Inspector Fields testified that there were tracks across the floor indicating that the roof bolting machine had gone by the open crosscut into the No. 4 and No. 5 entries which had not been supported either temporarily or permanently.

The inspector stated that he found this violation to be S&S because if a roof fall occurred it would be reasonably likely that if it fell on someone they would suffer death or serious injury. He further averred that this violation was an unwarrantable failure "[b]ecause the roof bolter had drove [sic] by this open crosscut. This crosscut had been mined prior to the roof bolter coming into the area." (Tr1. 225.) He also stated that the safety director accompanying him on the inspection was aware that the roof control plan was being violated.

Beech Fork concedes the violation in its brief. (Resp. Br. 15.) Therefore, I conclude that Beech Fork violated Section 75.220. I further find that this violation was both "significant and substantial" and an unwarrantable failure on Beech Fork's part.

Turning to the next order, Section 75.325(b) requires:

> In bituminous and lignite mines, the quantity of air reaching the last open crosscut of each set of entries or rooms on each working section and the quantity of air reaching the intake end of a pillar line shall be at least 9,000 cubic feet per minute unless a greater quantity is required to be specified in the approved ventilation plan. This minimum also applies to sections which are not operating but are capable of producing coal by simply energizing the equipment on the section.

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either in abating the violation or preparing for hearing, I conclude that this violation was sufficiently specific to be allowed to stand. Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993); Jim Walter Resources, Inc., 1 FMSHRC 1827, 1829 (November 1979).

Inspector Fields testified that he attempted to take an air reading in the last open crosscut of the 003 Section and he could not get a reading on his anemometer. He further recounted that there were no ventilation controls at all on the section.

The Respondent admits the violation but contests the S&S designation. (Resp. Br. 4.) Consequently, I conclude that Beech Fork violated Section 75.325(b) of the Regulations.

This was essentially the same violation that the Respondent had been cited for in Docket No. KENT 93-659. For the reasons set forth in that docket, I conclude that this violation was "significant and substantial." Supra, at 5. Since this was the same section of the minethat had been cited a month earlier with the violations in Docket No. KENT 93-659, I conclude that this violation was the result of an unwarrantable failure on Beech Fork's part.

The next order is for a violation of Section 75.334(a)(2) which requires:

> (a) Worked-out areas where no pillars have been recovered shall be--
> (1) Ventilated so that methane-air mixtures and other gases, dusts, and fumes from throughout the worked-out areas are continuously diluted and routed into a return air course or to the surface of the mine; or
> **(2) Sealed.**

Beech Fork admits that it violated this regulation. (Resp. Br. 4.) Therefore, I conclude that it did.

In Inspector Fields opinion this violation was S&S because the missing seals could result in low oxygen and suffocation. The Respondent addresses this issue only by making the statement that there was not a reasonable likelihood that a reasonably serious injury would result from this violation. In addition to the reason cited by the inspector, Section 75.334(a)(1) indicates why the break in the seals is reasonably likely to result in a serious illness or injury, i.e. methane-air mixtures and other gases, dusts and fumes are not removed from the worked-out area or prevented from entering the working areas. Any one of these conditions is reasonably likely to result in a reasonably serious illness or injury. Hence, I conclude that this violation was "significant and substantial."

The inspector testified that he found this violation to be an unwarrantable failure because:

> the operator had told me back in January about the fall [which crushed out the seal]; when I approached him about it on the mine map [before beginning the inspection], he told me at that time that it had been taken care of, they had reconstructed the seals and they had not.

(Tr1. 240.) He further pointed out that the seals were supposed to be inspected on a weekly basis. Clearly, this is inexcusable conduct resulting from more than mere inadvertence. I conclude that Beech Fork unwarrantably failed to comply with this regulation.

The final citation involves the failure to take the required number of dust samples. Section 70.207(a) requires that:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

The Respondent submits that this violation was inadvertent and not the result of high negligence on the part of Beech Fork. (Resp. Br. 10.) Based on this admission, I conclude that Beech Fork violated Section 70.207(a).

To show that the Respondent was highly negligent in connection with this violation, the Secretary put into evidence four other citations for the same violation. (Gt. Exs. 29A, 29B, 29C and 29D.) While all of these appear to be similar violations and may have put Beech Fork on notice that there was a problem with its submission of dust samples, they are not matters in aggravation in this instance since they were not received by Beech Fork until after it had submitted the dust samples in question. (Gt. Ex. 50.)

Furthermore, Mr. McGinnis testified that five samples were taken, that they were in contact several times with the Paintsville District Office in an attempt to find out what happened to the fifth sample and that they took this problem very seriously. Adding this testimony to fact that five samples have been required since at least November 1, 1980, and that nothing would be gained by an operator deliberately continuing to sent in only four samples, I accept Beech Fork's profession of diligence and conclude that at most Beech Fork was moderately negligent. Accordingly, the citation will be modified to indicate that and

the modification will be taken into consideration in assessing a penalty.

The Secretary has proposed total penalties in this docket of $20,300.00. I find that the proposed penalties for the three orders are appropriate. However, I am reducing the penalty for the dust sample violation to $50.00 in view of the reduced negligence I have found concerning it.

Docket No. KENT 93-780

This docket consists of a single citation, Citation No. 9980135, for a violation of the dust sampling requirements in Section 70.208(a) on February 12, 1993. (Gt. Ex. 30.) Once again, the Respondent admits the violation but challenges the degree of negligence.

Mr. McGinnis testified with respect to this violation that:

> This one occurred because of a clerical error. I have copies of the dust reports that are sent back to us. And it shows that we had an excessive sample for that cycling period on the 9020.
>
> We sent two samples in with the same number. One of them should have been 901, but both were--it was a clerical error. So we have got listed as an excessive sample for that site on that one. Corrective action was taken immediately once we were aware of that.

(Tr2. 176.) Again, I credit this testimony and find that although Beech Fork violated the regulation and was clearly negligent, it was not more than moderately negligent. Consequently, I will modify the citation and am reducing the penalty from the $1,100.00 proposed by the Secretary to $50.00.

Docket No. KENT 93-781

This docket consists of three citations. Citation No. 3816651, dated December 22, 1992, describes a violation of Section 75.523-3 in that the automatic brakes on the No. 2 shuttle car in the 003 section were inoperative when checked. (Gt. Ex. 31.) Citation No. 4029827 alleges a violation of Section 75.1100-3 because the fire suppression system installed on the continuous miner in the 002 section was not maintained in a usable and operative condition on February 10, 1993. (Gt. Ex. 32.) Lastly, Citation No. 4026564 sets out a March 5, 1993, violation of Section 75.400 for allowing loose coal and float coal dust to accumulate in various locations under the No. 7 belt conveyor line and in the entry and crosscuts starting at the head

drive and extending inby four crosscuts to about survey 4748. (Gt. Ex. 33.)

These violations involve the same type of violations found in Docket Nos. KENT 93-668, 93-669 and 93-699. The Respondent makes the same arguments concerning these violations that he did about the violations of the same sections in those dockets. (Resp. Br. 7-9, 12-13.) Supra, at 9, 11-14.

Hence, I found that Beech Fork committed each of these violations and that the violations are "significant and substantial" for the same reasons given in the previous dockets. Id.

The Secretary has proposed $1,881.00 in penalties for these three violations. I conclude that this is an appropriate penalty.

Docket No. KENT 93-903

Inspector Fields issued Citation No. 4026563 on March 7, 1993, for a violation of Section 75.202(a). The citation stated that additional roof support was needed in the No. 3 entry along the No. 7 belt line where a roof fall had occurred. (Gt. Ex. 34.) The inspector testified that he had been informed that the roof fall had occurred earlier that morning. The area had already been partially cleared and the equipment had been moved out of the area. However, he explained that there was no indication that any further roof support, other than the roof bolts put in prior to the fall, had been installed. Moreover, he said that the area had not been posted with danger signs.

Mr. McGinnis testified that this was the second roof fall in the area and that management was waiting to see if anything further developed. He related that some cribbing had begun after the first fall as additional roof support and that employees were instructed not to travel in that area. He admitted that no danger signs had been posted; in fact, he revealed that the danger signs put up after the first fall had been taken down by the time of the inspector's inspection.

Section 75.202(a) requires that "[t]he 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." I conclude that Beech Fork violated this regulation by failing to post danger signs in the area, i.e. by not "controlling" the area. Instructing the employees not to go through that area in which persons otherwise would have been working and traveling was not sufficient as some employees may have missed getting the warning and without out danger signs to reinforce it, it could be easily forgotten.

The hazards of roof falls are well known. Cyprus Empire Corporation, 12 FMSHRC 911, 920 (May 1990). Accordingly, I find that this violation was "significant and substantial."

Inspector Fields issued two citations on March 4, 1993. The first, Citation No. 4030141, alleged a violation of Section 75.400 because a roof bolting machine in the 001 working section had an accumulation of oil and grease as well as coal dust and loose coal on it. (Gt. Ex. 35.) The second, Citation No. 4030142, recited that the operator-side blower motor pulley and belt were not adequately guarded on the same bolting machine in violation of Section 75.1722(a), 30 C.F.R. § 75.1722(a). (Gt. Ex. 36.)

At the hearing, Beech Fork's representative stated that they did not contest Citation No. 4030141. (Tr2. 72.) Hence, I affirm that citation as written.

With regard to the second citation, Inspector Fields testified that the belt and pulley in question are located about ten to twelve inches from the operators seat when the bolting machine is being steered. He stated that a guard was present, but the pinch point was still exposed so that someone could catch a finger or hand in it if his hands, for instance, slipped off of the steering wheel. He opined that a permanently disabling injury could result from such an incident.

Section 75.1722(a) requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." The inspector's testimony on this violation was unrebutted at the hearing and Beech Fork has not addressed it in its brief.

Based on the inspector's evidence I conclude that Beech Fork committed this violation. I further conclude that the violation was "significant and substantial."

Inspector Fields issued five citations on May 26, 1993. Citation No. 4030151 sets out a violation of Section 75.1725(a) in that a diesel power mantrip was not properly maintained since the throttle cable had broken and it was being operated by a piece of telephone cable. (Gt. Ex. 37.) Citation No. 4030152 alleges a violation of Section 75.370(a)(1) because coal was being mined on the third shift in the No. 2 entry face and no line curtain was being used within 20 feet of the face as required by the ventilation plan. (Gt. Ex. 38.)

Citation No. 4030154 recites a violation of Section 75.1722(b) for inadequate guarding of the 003 section tail piece pulley because the guard was bent up and part of the guard was

down exposing the drive pulley on the left side and the guard was completely gone exposing the pinch point on the right side. (Gt. Ex. 40.) Citation 4030155 describes another violation of Section 75.1722(b), this time because the guards across the front of the drive pulleys and the right side of the discharge roller on the No. 3-B belt conveyor drive were missing. (Gt. Ex. 41.) Finally, Citation No. 4030156 is for a violation of Section 75.400 as fine coal and float coal dust was allowed to accumulate under the belt and around the No. 3-B belt conveyor line for approximately 400 feet. (Gt. Ex. 42.)

With regard to the mantrip, Inspector Fields testified that he saw it arrive at the surface with a load of miners, being operated with a piece of telephone wire running over the top of the mantrip as a substitute throttle cable. He indicated that the throttle cable, which was broken in this case, normally runs under the mantrip. He stated that the problem with using the telephone cable as it was was that the cable could become caught or fouled causing the throttle to stick open with no way to stop the mantrip. He further theorized that if this occurred the mantrip could run into something or throw someone off resulting in serious injuries.

Mr. McGinnis testified that the throttle cable broke as the crew started out of the mine. It was his opinion that the potential problems described by the inspector were not likely to occur.

Section 75.1725(a) requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." Since the mantrip throttle cable was not properly repaired and the mantrip was not immediately removed from service, I conclude that the Respondent violated the section in this case.

However, I find that the violation was not "significant and substantial." It is apparent that the telephone cable substitute was used only to complete the trip out of the mine. There is no evidence that the mantrip had been continuously operated in this manner and a new throttle cable was installed before it was used again. No accident had occurred on the way out of the mine. Thus, it was not reasonable likely that a reasonably serious injury would result from this violation. I will modify the citation accordingly.

The four remaining citations are similar to ones discussed in previous dockets. The Respondent makes the same arguments concerning these four that he did previously. Therefore, for the reasons set out concerning the earlier violations, I conclude that Beech Fork committed these four violations and that they were "significant and substantial." Supra, at 4-5, 11-12.

The last citation in this docket was issued by Inspector Fields on June 8, 1993. Citation No. 4034025 sets out a violation of Section 75.220(a)(1) because there was evidence that a scoop had been cleaning the ribs and roadways by the open crosscut and face of the No. 4 entry under unsupported roof in violation of the roof control plan. (Gt. Ex. 43.)

With regard to this citation, Inspector Fields testified that he observed evidence that a scoop had been in the area of the upper two sections of the face of the No. 4 entry and the right crosscut cleaning the roadways and ribs. He recounted that the coal had been cleaned through and cut and there were rubber tire tracks in the area. He stated that the area had not been roof bolted.

Beech Fork concedes the violation. (Tr2. 209.) Beech Fork's roof control plan prohibits work or travel in or inby an intersection which has an unsupported opening before the roof is permanently supported. (Gt. Ex. 44, p. 11.) Consequently, I conclude that the Respondent committed this violation and, because of the obvious dangers of a roof fall, that the violation was "significant and substantial."

The Secretary has proposed a total of $4,373.00 in penalties for these citations. With the exception of the proposed penalty for Citation No. 4030151, which I am reducing to $50.00, I find that the penalties proposed by the Secretary are appropriate.

Docket No. KENT 93-904

This docket consists of one Section 104(d)(2) order issued on May 4, 1993, for a violation of Section 75.370(a)(1) of the Regulations. Order No. 4030143 states "[t]he approved ventilation plan was not being complied with on the 001 section in the #4 entry face where the . . . roof bolter was observed bolting top and a line curtain had not been installed as required by the approved ventilation plan." (Gt. Ex. 45.)

Inspector Fields testified that the line curtain was required to be installed up to the rear of the roof bolting machine as set out in Item 1 of page D (also denominated as page 3A) of Beech Fork's ventilation plan. (Gt. Ex. 39.) He stated he saw the roof bolter at the No. 4 entry face, installing roof bolts and no line curtain was present. When asked how what he observed was a violation of the ventilation plan, he replied:

> Because this particular Ventilation Plan, the section had a dust sample there that showed quartz, and the plan was revised to require a line curtain to be

installed up to the roof and the roof bolt machine for that purpose; they call it a DA.

(Tr2. 130.)

I can find nothing in the ventilation plan which requires that a line curtain be installed up to the rear of the roof bolt machine. I can find nothing in the plan concerning its revision in the event quartz is encountered. When I asked Inspector Fields if the line curtain was required because the velocity of the air in that area was not 3,000 cfm, he stated that the curtain "was needed because the Ventilation Plan was being revised due to the fact that where the quartz contents and the [silicone] contents could be chronologically [sic] installed, otherwise the Ventilation Plan wouldn't even be required to be any place." (Tr2. 134.) The following colloquy then took place:

Judge Hodgdon: I don't see how you get from Page D, where it says roof bolting operating at 3,000 cfms, to the requirement based on quartz.

The Witness: Well, the quartz comes from the samples which were sent to Pittsburgh to be analyzed, and that makes the determination as to where the silicone quartz is in the sample itself.

Judge Hodgdon: Is there something in the plan that says, what you called a designated area, that there has to be a line curtain?

The Witness: No. Once the roof bolt becomes a DA, the plan was revised to require a [line] curtain to be installed because a roof bolt becomes a DA and it's revised, or otherwise you wouldn't have it.

Judge Hodgdon: Is there someplace in the plan it says that or is that [found in the] regulations?

The Witness: As part of the regulation in which it conforms with the DA or the Ventilation Plan . . . .

(Tr2. 134-35.)

Surprisingly, the Respondent agreed that what the inspector described was a violation of the ventilation plan. (Tr2. 216.) It may well be that this was a violation of one or more of the Secretary's Regulations. However, it clearly is not a violation of the ventilation plan based on the evidence presented at the

hearing, nor is it readily apparent what other regulation may have been violated. Accordingly, I vacate the order.

Docket No. KENT 93-992

The last docket consists of one citation for a violation of Section 75.1725(a) of the Regulations issued on March 17, 1993. Citation No. 4026571 states that a diesel scoop was not being maintained in safe operating condition because the automatic brakes were inoperative.

Inspector Fields testified that on March 17 he investigated an accident which had occurred on March 16. He determined that the engine had died on the scoop, that the scoop then rolled down an incline and onto the side of an embankment where it turned on its side. The scoop operator was taken to the hospital with minor bruises. The inspector related that the scoop was still on its side when he made his investigation and that at that time he was able to turn the tires by hand leading him to believe that the automatic braking system was inoperative.

Inspector Fields further reported that the operator told him that the braking system had been working prior to the accident. The inspector also talked to the Beech Fork mechanic who inspected the scoop and was informed that the brake caliper had ruptured and split open.

It is Beech Fork's position that the caliper was destroyed during the incident because the caliper could not sustain the sudden load placed on it when the automatic braking system was engaged after the scoop started rolling down the incline. I conclude that the Secretary has not proved this violation by a preponderance of the evidence presented at the hearing.

There is no direct evidence as to when the caliper broke, but there is circumstantial evidence that it was functioning just prior to the accident. If it broke without prior warning during the accident, as the evidence seems to indicate, then it cannot be said that Beech Fork did not maintain the scoop in safe operating condition. Accordingly, I vacate the citation.

CIVIL PENALTY ASSESSMENTS

In arriving at appropriate civil penalty assessments in these cases, I have taken into consideration the statutory criteria set out in Section 110(i) of the Act. In the two years preceding these violations, Beech Fork had accumulated 227 violations. (Gt. Ex. 48.) That does not seem to be excessive for a company of Beech Fork's size. The pleadings indicate that Mine No. 1 produces 843,785 tons of coal per year and that, in all, Beech Fork produces 1,777,147 tons per year. Consequently,

I conclude that the assessed penalties are appropriate for a company the size of Beech Fork and will not effect its ability to remain in business. I have also considered that most of the violations were "significant and substantial" and that most of the violations involved only moderate negligence on Beech Fork's part. Finally, I have considered that on at least two occasions, Beech Fork did not abate the violations as rapidly as it should or could have and that many of the violations were repeated.

Accordingly, I have assessed a penalty for each citation or order as follows:[8]

Docket No. KENT 93-659	
Citation No. 3816646	$2,000.00
Order No. 3816647	$2,000.00
Docket No. KENT 93-668	
Citation No. 3816654	$ 595.00
Citation No. 3816658	$1,155.00
Citation No. 4029824	$ 595.00
Citation No. 4029826	$1,450.00
Citation No. 4029828	$1,450.00
Citation No. 4027041	$ 595.00
Citation No. 4027042	$4,600.00
Citation No. 4027043	$ 595.00
Citation No. 4027045	$1,450.00
Citation No. 4029839	$ 595.00
Citation No. 4029840	$4,600.00
Citation No. 4026562	$ 690.00
Citation No. 4027060	$ 267.00

[8] Without explanation or rationale, the Secretary has submitted in his brief that all but one of the civil penalties be double the amount that he originally proposed in these cases. My review of the record provides no basis for such punitive action. Therefore, I have not followed the Secretary's suggestion.

Docket No. KENT 93-669

Citation No. 4026569	$ 690.00

Docket No. KENT 93-699

Citation No. 4026561	$ 267.00
Citation No. 3816644	$ 595.00
Citation No. 4029838	$ 595.00
Citation No. 4026568	$ 690.00

Docket No. KENT 93-709

Order No. 3816656	$8,000.00
Order No. 3816657	$7,000.00
Order No. 4026565	$4,600.00
Citation No. 9980129	$ 50.00

Docket No. KENT 93-780

Citation No. 9980135	$ 50.00

Docket No. KENT 93-781

Citation No. 3816651	$1,019.00
Citation No. 4029827	$ 595.00
Citation No. 4026564	$ 267.00

Docket No. KENT 93-903

Citation No. 4026563	$ 903.00
Citation No. 4030141	$ 50.00
Citation No. 4030142	$ 431.00
Citation No. 4030151	$ 50.00
Citation No. 4030152	$ 431.00
Citation No. 4030154	$ 431.00
Citation No. 4030155	$ 690.00

Citation No. 4030156	$ 267.00
Citation No. 4034025	$ 903.00
Total Penalty	$51,211.00

ORDER

Order No. 4030143 in Docket No. KENT 93-904 and Citation No. 4026571 in Docket No. KENT 93-992 are **VACATED** and **DISMISSED.** Citation No. 4026574 in Docket No. KENT 93-669 is **DISMISSED.** Citation No. 9980129 in Docket No. KENT 93-709 and Citation No. 9980135 in Docket No. KENT 93-780 are **MODIFIED** by reducing the level of negligence from "high" to "moderate." Citation No. 4030151 in Docket No. KENT 93-903 is **MODIFIED** by deleting the "significant and substantial" designation.

Order Nos. 3816646 and 3816647 in Docket No. KENT 93-659; Citation Nos. 3816654, 3816658, 4029824, 4029826, 4029828, 4027041, 4027042, 4027043, 4027045, 4029839, 4029840, 4026562 and 4027060 in Docket No. KENT 93-668; Citation No. 4026569 in Docket No. KENT 93-669; Citation Nos. 4026561, 3816644, 4029838 and 4026568 in Docket No. KENT 93-699; Order Nos. 3816656, 3816657 and 4026565 and Citation No. 9980129 in Docket No. 93-709; Citation No. 9980135 in Docket No. KENT 93-780; Citation Nos. 3816651, 4029827 and 4026564 in Docket No. KENT 93-781; Citation Nos. 4026563, 4030141, 4030142, 4030151, 4030152, 4030154, 4030155, 4030156 and 4034025 in Docket No. KENT 93-903 are **AFFIRMED.**

Beech Fork Processing, Inc. is **ORDERED** to pay civil penalties in the amount of $51,211.00 for these violations within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

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/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 30 1994

LARRY E. SWIFT, MARK SNYDER and RANDY CUNNINGHAM, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 91-1038-D
v.	:	MSHA Case No. PITT CD 90-09
CONSOLIDATION COAL COMPANY, Respondent	:	Dilworth Mine

DECISION

Appearances: William Manion, Legal Counsel, United Mine Workers of America, Region 1, Washington, Pennsylvania, for Complainants;
Elizabeth Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon remand by decision dated February 14, 1994. See 16 FMSHRC 201. In that decision the issues were delineated as (1) whether the reporting of injuries under the Consolidation Coal Company (Consol) Program for High Risk Employees (Program) constitutes protected activity under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act";[1] (2) whether the

[1] Section 105(c)(1) of the Act provides as follows:
"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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify

Program is facially, or per se, discriminatory in violation of section 105(c)(1) of the Act; (3) whether the Program was instituted for discriminatory reasons; and (4) whether the Program was applied to miners in violation of section 105(c)(1).

In its decision the Commission affirmed the findings below that injury reporting constitutes protected activity, but a Commission majority reversed the findings that the program was facially discriminatory and remanded for consideration of the third and fourth issues.

Background

Consol operates the Dilworth Mine, an underground coal mine in Greene County, Pennsylvania. On January 1, 1990, the Dilworth Mine initiated the Program which directs that each employee report to management any incident resulting in personal injury. See 14 FMSHRC 361, 365-67 (1992). The Mine's previously adopted safety rules also require employees to report all injuries.

Step I of the Program consists of designating as "High Risk" any employee who experiences four injuries in 18 working months. Such an employee receives counseling from Consol's management. If the employee at Step I works 12 months without experiencing an additional injury, he clears his record and leaves the Program; the employee reaches Step II if he incurs an additional injury within 12 months. The employee at Step II is counseled, suspended from work for two days without pay, and required to attend a special awareness session. That employee leaves the Program if he works 12 months without experiencing further injury; if the employee experiences an injury within the 12 months, he reaches Step III. At Step III, the employee is suspended with intent to discharge. 14 FMSHRC at 365-66 (Appendix paras. 3-5).

On January 23, 1990, Dilworth employees Larry Swift, Randy Cunningham and Mark Snyder, who were members of the United Mine Workers of America (UMWA) and safety committeemen at the mine, filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration (MSHA) alleging that implementation of the Program penalized miners and restricted them from reporting all accidents. Following its investigation, MSHA determined that Consol had not violated the Mine Act and the Secretary of Labor declined

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fn. 1 (continued)
in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act."

to prosecute. Swift, Snyder and Cunningham pursued their claim with private counsel. They filed a discrimination complaint with the Commission on July 20, 1990, on behalf of themselves and all Dilworth Mine employees pursuant to section 105(c)(3) of the Act. At the initial hearings, the miners argued that the Program violated section 105(c)(1) of the Act on its face, in its motivation, and as it was applied.

Following trial, it was held in the initial decision that reporting mine injuries is a protected right under the Act and that the Program was discriminatory on its face. It was further held that, by subjecting Consol's employees to suspension and discharge based upon the filing of reports of personal injury, the Program on its face inhibited the reporting of mine injuries and, in so doing, constituted illegal interference with such protected activity. Consol was accordingly ordered to "cease and desist from implementation of any disciplinary action" under the Program and to expunge from all records any references to disciplinary action taken under the Program. 14 FMSHRC at 364. As noted, a Commission majority reversed those findings and remanded for a specifically limited determination of whether the Program was initiated for discriminatory reasons and, if not, whether the Program was applied to miners in a discriminatory manner.

Issues on Remand

The Commission has held that discriminatory motive will invalidate a policy that it considers to be otherwise facially lawful. Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1533 (1990). The Pasula-Robinette test provides the framework for analyzing the reasons for Consol's adoption of the Program. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (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 (1981). Under the Pasula- Robinette framework, the complainant bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated, in any part, by that activity.

Since it has been established that two of the Complainant miners, i.e, Swift and Cunningham, engaged in protected activities on behalf of themselves and other miners by filing complaints to the Secretary pursuant to section 103(g) of the Act[2] for Consol's alleged under-reporting of injuries prior to

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[2] Exhibit Nos. C-7L, C-7N, C-7R, C-7S and C-7T; Tr. I (hearing transcript for October 3, 1991): 182 and Tr. II (hearing transcript for October 4, 1991): 36-37.

the implementation of the Program at the Dilworth Mine, the first prong of the Pasula-Robinette test has been established. Consol also acknowledges that Cunningham engaged in protected activities by participating in conferences following the issuance of citations to Consol for failure to have reported injuries.[3]

Whether the adverse action complained of (i.e., the implementation of the Program by Consol at its Dilworth Mine) was motivated in any part by the protected activity is more difficult to establish. As the Commission has noted, direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent, Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds, sub nom., Donovan v. Phelps Dodge Corp., 809 F.2d 86 (D.C. Cir 1982); Sammons v. Mine Service Co., 6 FMSHRC 1391 (1984). The Commission has also quoted from analogous statements by the Eighth Circuit with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the [adverse action] and the [protected activity] could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

3 FMSHRC at 2510.

In the instant case, the Complainants argue that the "primary evidence" of discriminatory motivation is the "chronology" of events (Complainants' Brief on Remand, p. 4). In particular, they note that in 1984, then Chairman of the Safety Committee, Ken Krause, began an investigation into the alleged failure of Consol to report certain accidents or injuries at the Dilworth Mine in accordance with 30 C.F.R. Part 50. Complainant Larry Swift purportedly continued to investigate allegations of Consol's failure to report accidents when he became Chairman of the Mine Safety Committee in 1986. Complainants maintain that Krause, Swift and Cunningham thereafter filed a series of complaints under Section 103(g) of the Act which also resulted in the issuance of "notices of violations" by MSHA. While they note that the initial program was voided in arbitration, essentially the same program, the Program at issue, was thereafter instituted.

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[3] Tr. II: 40-41.

While the timing of the Program does appear suspicious, an equally reasonable and non-discriminatory inference from the chronology of events is that the Program was implemented as a result of, and in an attempt to reduce, the large number of injuries at the Dilworth Mine and where the records interpreted by Consol show there was the worst safety record in Consol's Eastern Region.[4]

The Complainants next argue that discriminatory motive can be shown because "[i]t is clear that the aim of the program is not to punish and/or correct unsafe acts." (Complainants' brief on remand p. 5, emphasis in original). In alleged support of this argument they state as follows:

> The evidence offered by the claimants in this regard is both statements of general observation of the application of the program. Swift described the program in operation as qualifying people on the plan for having scrapes and bruises that did not even require first aid. (Tr. 195). He also testified that 122 mines [sic](out of 254) were on the first step of the program by June, 1991. (Tr. 210). This clearly shows that the employer is not placing people on the program only for injuries that were caused by negligence. (Id, emphasis in original).

This argument is difficult to follow but, in any event, the asserted conclusions do not logically follow from the factual assertions. The fact that the Program includes minor as well as serious injuries and that many employees may have, at some point in time, been in the first step of the Program does not, in itself, demonstrate unlawful motivation for instituting the Program. Under the circumstances, I cannot find that Complainants have met their burden of proving that Consol instituted the Program for discriminatory reasons.

In its remand order, the Commission also directed examination of the issue of whether Consol applied the Program in a disparate way to individual miners or classes of miners in contravention of the Act, citing as an example, the exclusion from the Program of an injury to one miner and inclusion of a similar injury to another miner. There is, however, simply no evidence of such discrimination in the

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[4] It should also be noted that Complainants have not shown that Consol had knowledge that they had filed the confidential section 103(g) complaints with the Secretary although it may reasonably be inferred that Consol officials knew that 103(g) complaints had been filed since at least one of the resulting citations makes reference to such a complaint (Exhibit C-7 M).

record herein. Indeed, none of the Complainants even makes such a claim.

The Complainants do appear to claim in their brief, as evidence of discriminatory application of the Program, that "[v]irtually all injuries, no matter how minor (including small cuts, abrasions or abrasion [sic]) are considered injuries under the Program [and that] [v]irtually all injuries are considered as 'fault' or 'culpable' injuries even when such a finding of fault is unreasonable." (Complainants' brief on remand, p. 3)

While the assertion (that "virtually all injuries are considered 'fault' or 'culpable' injuries even when such a finding of fault is unreasonable") is not supported by record evidence, even assuming that the assertions were true, the Complainants have failed to cite or produce credible evidence that they, or any other employees, have been singled out for disparate treatment or have been discriminatorily charged with minor injuries or "no fault" injuries. Accordingly, there is no basis to support this theory of discrimination in this case. Under the circumstances, and given the criteria in the remand directive, there is no alternative but to dismiss this case.

ORDER

Discrimination Proceeding Docket No. PENN 91-1038-D is **DISMISSED.**

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 30 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 93-22
	:	A. C. No. 36-02713-03575
v.	:	
	:	Docket No. PENN 93-73
POWER OPERATING COMPANY, INC., Respondent	:	A. C. No. 36-02713-03577
	:	
	:	Docket No. PENN 93-360
	:	A. C. No. 36-02713-03585
	:	
	:	Docket No. PENN 93-386
	:	A. C. No. 36-02713-03586
	:	
	:	Docket No. PENN 93-166[1]
	:	A. C. No. 36-02713-03579
	:	
	:	Frenchtown Mine
	:	
	:	Docket No. PENN 93-165
	:	A. C. No. 36-04999-03535
	:	
	:	Docket No. PENN 93-287
	:	A. C. No. 36-04999-03537
	:	
	:	Leslie Tipple Mine

DECISION

Appearances: Linda Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Tim D. Norris, Esq., and Farrah Lynn Walker, Esq., Stradley, Ronon, Stevens & Young, Philadelphia, Pennsylvania for Respondent.

Before: Judge Weisberger

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[1] This decision is only a partial decision as it relates to Docket No. PENN 93-166. Only one of the two citations in this docket number was litigated on March 8, 1994. The remaining citation (No. 3709746), will be heard on August 30, 1994.

Statement of the Case

These cases, consolidated for hearing, are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner), alleging violations by the Operator (Respondent), of various mandatory safety standards. Subsequent to discovery,[2] and pursuant to notice, the cases were heard in Bellefonte, Pennsylvania on March 8, 9, and 10, 1994.

Findings Of Fact and Discussion

I. Docket No. PENN 93-22, (Citation No. 3490508)

A. Violation of 30 C.F.R. § 1606(c)

1. Loose Ball Stud

Charles S. Lauver, an MSHA inspector, testified that on August 28, 1992, while inspecting Respondent's facilities, he asked the driver of a Unit Rig Electra haul truck to move the steering wheel back and forth. Lauver observed the vehicle, which was stationary at the time, and looked under the front wheels. He observed that the left ball stud moved back and forth. He estimated that it moved one quarter of an inch in each direction. He issued a citation alleging a violation of 30 C.F.R. § 77.1606(c), which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

The vehicle in question is equipped with two steering jacks on each side of the truck that turn the front wheels. Each jack is attached to a cylinder, which in turn is attached to the main truck frame by a ball stud. Because the stud tapers down towards the end that protrudes through the outside of the frame, the hole in the frame through which the stud is positioned has a smaller

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[2] On July 19, 1993, Respondent filed a Motion to Compel Response to Interrogatories, Response to Request for Production and Deposition Testimony. On August 3, 1993, Petitioner filed a Response in Opposition. On August 16, 1993, an Order was issued requiring Respondent to file a statement identifying the specific requests it wanted to compel Petitioner to answer, along with a statement setting forth facts to establish its need for the information sought. Petitioner was ordered to describe and summarize the documents it claimed were privileged, and to file a formal claim of privilege. On October 29, 1993, oral argument was held on the issues raised by Respondent's Motion, and Petitioner's Response. On the record, at the oral argument, Orders were issued regarding all the issues raised by the Motion and Response.

On September 21, 1993 Petitioner filed a motion to amend its Petition in Docket No. Penn 93-133 to add "eight additional citations." Respondent filed a response. On November 19, 1993, an Order was issued denying the motion.

diameter on the outside of the frame, as opposed to the diameter of the hole inside the frame. The stud is attached to the frame by way of a washer and bolt, both of which are located on the outside of the frame. According to Lauver, because the stud was loose, it could shear off or become detached from the frame, should the truck be driven over rough roads, or hit a hole in the road. Lauver opined that should the stud either shear or separate from the mainframe, extra strain would be placed on the jack on the other side of the vehicle, and the effectiveness of the steering would be reduced.

William Bratton, a maintenance foreman employed by J.E.M. Industries, has repaired and assembled Unit Rig Electra trucks. He indicated that since each steering jack turns the wheels in both directions, should one steering jack become inoperative due to failure of the stud, both wheels would still turn. He also opined that a quarter inch movement of the stud would not affect the steering on the truck, as long as the stud and cylinder are attached, and the stud is attached to the frame.

Lauver indicated there were no cracks in the stud or on the frame, and that when he observed the vehicle being operated it appeared to "steer fine." (Tr. 44, March 8, 1994). He also agreed that if the stud did shear off, the vehicle could still be steered.

On cross-examination, Bratton agreed that the conical portion of the stud should be stationary. He said that if, upon inspection, he had found play in the stud to the extent noted by Lauver, he would have repaired it. He was concerned that if the steering jack should become detached, "it would slow the steering" (Tr. 70, March 8, 1994).

Within the framework of the above evidence, I find that a separation of the stud from the frame was not likely to occur, due to the manner in which it was attached, and the tapering of the hole in the frame in which the stud was placed. However, I find that it is possible that with continued operation of the truck over rough roads, because the stud was not stationary it could shear, resulting in some decreased efficiency in the steering. Accordingly, I find that the looseness of the stud was a defect which could affect safety. (See, Pittsburgh and Midway Coal Mining Company, 8 FMSHRC 4 (1986)). I thus find that since the loose stud had not been corrected, the use of the truck in question constituted a violation of Section 1606(c) supra.

2. Emergency Steering System.

The emergency steering system in the vehicle at issue is designed to operate automatically should there be an engine failure. According to Lauver, he asked the operator of the truck to shut off the engine, and try the emergency system. Lauver indicated that the operator attempted to activate the system, but the steering wheel moved only an inch, and the wheels did not move.

Although the emergency system applies only when the engine fails, it is nonetheless designed to provide limited steering ability in the event of an engine failure. Since this emergency feature did not work, it is conceivable that there could have been some impact on safety, should the engine have failed. Thus, under Section 1606(c) supra, this condition should have been corrected.

B. Significant and Substantial

According to Lauver, a loss of steering control was reasonably likely to have resulted in a collision with another vehicle, since there was extremely heavy traffic on the haul road in question. In this connection, Petitioner argues that, given continued operation on bumpy roads, the cited loose ball stud would become looser to the point where it would shear off, or become detached. Petitioner also cites the loss of steering control that would have occurred as a result of the inoperative emergency system. I do not find much merit in Petitioner's arguments.

The record before me establishes the following: (1) the cited truck operates at a slow speed; (2) the lack of any crack in the stud or in the frame; (3) the stud was securely attached to the frame; and (4) the lack of any condition that would indicate that engine failure was reasonably likely to have occurred. Considering these facts, I conclude that it has not been established that there was a reasonably likelihood for any injury producing event as a consequence of the violative conditions found herein.[3] (See Mathies Coal Co. 6 FMSHRC 1, 3-4 (1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)). Accordingly, I find that it has not been established that the violation is significant and substantial.

According to Lauver, the driver of the vehicle in question told him that he was unaware that the stud was loose, and that he had not had the opportunity to report the lack of emergency steering. There were no apparent problems steering the cited truck. The loose stud was not obvious. Respondent's management did not have notice or knowledge of the lack of the emergency steering. Based on these factors, I conclude that Respondent

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[3] It also has not been established that an injury producing event was reasonably likely to have occurred as a result of the lack of emergency steering. This system activates only when the engine fails. There is no evidence of the presence of any condition that would have made it reasonably likely for the engine to fail. Also, in the event of engine failure, an emergency braking system allows the brakes to be operated 8 to 10 times.

was negligent to a less than moderate degree. I find that a penalty of $200.00 is appropriate for this violation.

II. Docket No. PENN 93-73, (Citation No. 3709641).

Accordingly to Lauver, when he inspected the 009 Pit on September 15, 1992, he observed a fully loaded Caterpillar 777 rock truck. He said that he observed a very large rock balanced on top of the load. Lauver said that the rock was teetering back and forth, and appeared ready to fall. Lauver measured the rock in question after it was dumped and found that it was 16 feet long, nine feet wide, and 47 inches thick. Lauver issued a citation alleging a violation of 30 C.F.R. § 77.1607(aa) which provides as follows: "Railroad cars and all trucks shall be trimmed properly when they have been loaded higher than the confines of their cargo space."

James Hepburn, an MSHA inspector who was present at the site on September 19, 1992, corroborated Lauver's testimony, and indicated that he observed the rock teetering when the truck backed up.

Ronald L. Krise, Respondent's shift foreman, indicated that he would have "tampted" the rock down (Tr. 142, March 8, 1994) to make it settle on the truck bed. Richard DuFour, who was operating a grader on September 19, observed the vehicle in question from a point approximately 100 feet removed. He stated that the rock on the truck was not swaying or teetering, but that the truck "was rocking back and forth", as there were a few "rough spots" on the road. (Tr. 154, March 8, 1994).

Based on the testimony of Lauver, corroborated by Hepburn, I find that a rock 16 feet long, 9 feet wide, and 47 inches thick, was higher than the cargo space of the truck.

The term "trimmed properly" as contained in Section 77.1607(aa) supra, is not defined in the Act, or Title 30 of the Code of Federal Regulations. "Trim" is defined in Webster's Third New International Dictionary (1970 Edition) ("Websters"), as pertinent, as follows: "to reduce by removing excess or extraneous matter." Hence, applying the common meaning of the term "trim" I find that, the term "trimmed properly" means that if a truck contains excess material that is over the height of the cargo area, and is unstable, the material must be trimmed. (See, Peabody Coal Company 2 FMSHRC 1072, May 7, 1990 (Judge Laurenson); Power Operating Company, 16 FMSHRC 591 (March 23, 1994) (Judge Weisberger). I accept the testimony of Lauver, as it was corroborated by Hepburn, and find that a large rock extended above the cargo area, and was not stable. I thus conclude that Respondent did violate Section 77.1607(aa) supra.

According to Lauver, the rock was teetering back and forth, and appeared ready to fall. DuFour testified that when he observed the truck traveling on the haul road, the rock was not swaying or teetering. Krise opined that the rock was not likely

to fall off due to it's size, and the fact that it "was settling into the soft material." (Tr. 145, March 8, 1994). I accept the testimony of Lauver, inasmuch as Hepburn corroborated that the rock was teetering. I accept Lauver's opinion that due to the way the rock was balanced, it could have fallen off at any time. Lauver's testimony also was not contradicted that other vehicles traveled the same road.

Within the framework of this record, I find that as a consequence of the violation herein, an injury producing event, i.e., the rock in question falling off the truck, was reasonably likely to have occurred. I also accept the uncontradicted testimony of Lauver that, due to the size of the rock, should it have fallen, any person in the vicinity would have been crushed. I conclude that the violation was significant and substantial. (See, U.S. Steel supra).

Lauver indicated that within the preceding three months of the issuance of the citation at issue, he had cited Respondent three times under Section 77.1607(aa) supra. He said that in connection with the issuance of these citations, he had discussed with Respondent's management the hazards of materials falling off loaded rock trucks. He also met with the shovel operators who load the rock trucks, and explained to them the hazards involved in loading trucks when materials no longer stay in the bed of the truck. He also indicated that after each cited violation, he discussed the issue of loading trucks with Krise. However, on cross-examination, he indicated that the specific condition cited herein was "unusual", and that none of the other citations that he had issued were for the same condition. (Tr. 108, March 8, 1994).

Lauver also indicated that on the day of the inspection at issue, he had a discussion with an individual at the mine who informed him that "it was normal procedure to load the trucks in this manner" (Tr. 98, March 8, 1994). Petitioner did not divulge the identity of this individual claiming the informant's privilege, and the claim of privilege was upheld. Petitioner did not produce this individual to testify. Accordingly, I do not place much weight upon this hearsay testimony.

According to Krise, it is not Respondent's usual procedure to load trucks in the fashion the truck at issue was loaded. Lauver also indicated that Kanour had told him that the shovel operators would be disciplined "for this type of loading" (Tr. 121, March 8, 1994). Krise indicated that once he saw the rock on the truck he told the shovel operator who had loaded the truck, that he had made a mistake loading it that way. Krise also indicated that the positioning of the rock on the truck is not the way operators are instructed to load a truck. He indicated that there was no time to do anything about the improperly loaded truck prior to the issuance of the order at question. He testified that he would have made the rock more stable had he been aware of the condition before it was cited. Within this framework, I conclude that it has not been

established that there was any aggravated conduct on the part of Respondent. I thus conclude that it has not been established that the violation was the result of Respondent's unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987)).

Since the violative condition was obvious, and could have led to a serious injury, I find that a penalty of $2,000 is appropriate.

III. Docket No. PENN 93-287, (Citation No. 3709741).

Lauver issued a citation alleging a violation of 30 C.F.R. § 48.25(a), inasmuch as an employee of an independent contractor, Michael Baney, working on the subject site, had not received any newly employed miner training. Respondent has conceded the violation. In light of this concession, and considering the testimony of Lauver, I find that Respondent did violate Section 48.25(a) supra.

According to Lauver, he testified that Baney was operating the front-end loader in a "very hesitant manner", and that he appeared inexperienced (Tr. 169, March 8, 1994). Lauver opined that an operator of a front-end loader must be aware of the specific hazards of operating at the subject site. He explained that the operator must keep in mind the positions of stationary structures such as belts, and their supports. Also, one must be careful not to run under the belt, and must be aware of the presence of standing water located in a shallow pit near the end of the belt. Lauver also noted the hazards of driving on the road in the area in question which he indicated was not level.

Section 48.25(a) supra, provides, in essence, that a newly employed inexperienced miner shall be given eight hours of training before he is assigned to work duties. The training consists of the following: "Introduction to work environment, Hazard recognition, and Health and safety aspects of the tasks to which the new miner will be assigned. The employee in question did not receive this training, due to a mistake. However, he was given, along with three other individuals, newly employed experienced miner training. Section 48.26 provides, in essence, that newly employed experienced miners shall receive, inter alia, the following training before being assigned to work duties: Introduction to work environment, Mandatory health and safety standards, Transportation controls, communication systems, and Hazard recognition. Larry Kanour, Respondent's safety director, indicated that he did provide such training. There are no specific facts in the record to predicate a finding that, as a consequence of the lack of the eight hours of inexperienced miner training, there was a reasonable likelihood of an injury producing event. Although Baney may not have been operating the loader properly, the initial eight hours of inexperienced miner training would not have covered instruction in this area. Thus, I find that it has not been established that the violation was significant and substantial (See, U.S. Steel, supra.)

On the day of the initial training, Kanour had a telephone conversation with Allen Albert, the independent contractor (Albert Contracting). Albert explained that he was sending two additional men for training, one of whom, Baney, was subsequently cited in the citation at issue, and that these men needed newly employed experienced miner training. Kanour indicated that Albert told him, that these two men had worked for him, and they were experienced in working as operators of loaders, dozers and trucks. Kanour said that he asked Albert if he had the certificates for these men and Albert indicated in the affirmative. Kanour did not ask Albert to produce these certificates.

According to Kanour, when the men arrived for the training, he asked them the level of their experience and they "replied the same way" (Tr. 205, March 9, 1994). Kanour indicated that he asked these men whether they had MSHA training, and they indicated that they had eight hours of annual training.

I observed Kanour's demeanor and found him credible in his testimony on these matters, and I accept his version. Within the above framework, I conclude that Respondent was negligent to a less than moderate degree. I find that a penalty of $50 is appropriate for this violation.

IV. Docket No. PENN 93-165, (Citation No. 3709742).

On November 19, 1992, Lauver tested three occupations for exposure to coal dust. One of the occupations tested was that of plant operator. According to Lauver, he asked the plant operator where he spent most of his time. The operator showed him a stool located in front of the control panel in the control room on the second floor of the preparation plant. Lauver then placed a dust collecting device on a small bench or ledge within two feet of the stool. Lauver indicated that the stool was 2 1/2 to 3 feet high, and the bench or ledge was 4 feet off the ground.

Lauver estimated that the plant operator spent over half his time in the control room monitoring controls. Lauver indicated that he decided not to place the sampling device on the person of the operator. Lauver reasoned that since the operator did not remain in one place, if he were to wear the sampling device, it could get dumped by accident, thus voiding the sample. He said, in essence, that it is MSHA policy to either place the sampling device on a miner, or in the dirtiest place that he is exposed to.

Sample dust collection over five consecutive days indicated an average concentration of 2.1 milligrams of respirable dust per cubic meter of air. Lauver issued a citation alleging a violation of 30 C.F.R. § 71.100 which requires the maintenance of ". . . the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active

working is exposed at or below 2.0 milligram of respirable dust per cubic meter of air."

Gary Crago, the assistant manager of the preparation plant, indicated that the plant operator has the responsibility of overseeing the operation of the plant. In essence, he said that normally the operator spends 5 minutes each hour in the control room, but that he can spend up to 15 minutes if there is a problem with a pump. He indicated that aside from checking the controls in the control room, the operator also checks the belts, hoses, and all machinery.

In essence, Section 71.100 supra, provides for the maintenance of coal dust in concentrations at or less than 2.0 milligrams per cubic meter of air in the mine atmosphere ". . . during each shift to which each miner in the active workings is exposed." Hence, the critical question is whether the samples collected from a ledge in the control room represented the average concentration of dust "during each shift" to which the plant operator was exposed while in the active workings i.e., the control room.[4] In other words, at issue is the amount of time during each shift that the plant operator spent in the control room. Lauver did not testify based upon any personal knowledge of the amount of time the plant operator actually spent in the control room. I do not accord much weight to Lauver's hearsay testimony that the operator told him[5] that he spent most of his time in the control room sitting on the stool. Crago indicated that in normal operations, the operator does not remain in the control room, but goes in and out. I found his testimony credible based on my observations of his demeanor. Within the framework of this evidence, I conclude that it has not been established that the atmosphere tested, i.e., the control room, was the atmosphere in which the plant operator was exposed for all, or a significant portion of the shifts tested.[6]

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[4] "Active workings", is defined in 30 C.F.R. § 71.2(b) as "any place in a surface coal mine or the surface area of an underground coal mine where miners are normally required to work or travel" (Emphasis added).

[5] The operator was not called to testify.

[6] In essence, Petitioner argues the inspector had the discretion to place the testing device at a location representing the maximum concentration of dust to which the operator was exposed, i.e., in the control room. Petitioner's cites 30 C.F.R. § 71.208(g)(2) to support its position. I reject Petitioner's argument since 30 C.F.R. § 71.208 pertains to bimonthly sampling by the operator of designated work positions. As such, Section 71.208(g)(2) supra, does not control the location of a testing device placed by an MSHA inspector in determining whether an operator is in compliance with Section 71.100, supra.

Accordingly, I find that it has not been established that Respondent violated Section 71.100 supra. Therefore, Citation No. 3709742 is to be vacated.

V. Citation No. 3709806, (Docket No. PENN 93-287)).

The parties stipulated that the disposition of Citation No. 3709806 will depend entirely on my decision regarding Citation No. 3709742. I found that Citation No. 3709742 is to be vacated, (IV, infra). Hence, consistent with this finding, and taking into account the parties' stipulation. I find that Citation No. 3709806 is to be vacated.

VI. Docket No. PENN 93-386 (Citation No. 3709996).

On April 28, 1993, at approximately 7:00 a.m., MSHA inspector Perry Raymond McKendrick, observed a road or ramp, that he estimated was elevated 20 feet, that did not have any berms on the outer bank for the entire approximately 100 feet of the road. He issued a citation alleging a violation of 30 C.F.R. § 77.1605(k) which provides as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

According to Robert Greenawalt, Respondent's foreman, on April 28, 1993, at approximately 6:00 or 6:30 a.m., he had assigned a bulldozer operator to make a ramp for drill trucks to travel to "the drilling area" (Tr. 271, March 8, 1994). The ramp was only to be used for 1-2 days as is the practice with this type of ramp. He indicated that the outside edge of the ramp was approximately one to two feet higher than the inside edge. He estimated that the ramp was between 15 and 20 feet wide. He opined that it was safe for drill rigs to travel the ramp. He said that the road gradually sloped from the outside to the inside. He described the outside edge as being compacted from the tracks of the bulldozers, for the entire length of the road.

The plain language of Section 1605(k) supra, provides that berms shall be provided on the outer bank of elevated roadways. Since the roadway at issue was elevated, and did not have any berm or guard, I find that Respondent did violate Section 1605(k) supra.[7]

According to McKendrick, due to the violation herein, it was reasonably likely that a vehicle would have run off the roadway because the outside edge contained loose consolidated material, and it was standard procedure for trucks to travel on the left

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[7] I reject Respondent's argument that Section 1605(k) does not apply as the ramp in question was only "a temporary access ramp." Since the ramp was traversed by trucks as a path to the drill site, I find that it constituted a roadway as that term is commonly understood (See, Webster's New Collegiate Dictionary, at at 993 (1979 ed.)).

side. He indicated that two drill trucks could not pass side by side on the road. He also noted that one truck that traveled this ramp had a loose tie-rod. He opined that should a vehicle run off the road, the operator of the vehicle could possibly suffer broken bones in an extremity.

The record does not establish, by way of actual measurement, the width of the vehicles that traverse the road, and the width of the road. Nor does the record establish that the road was slick or slippery, or that vehicles traveling the road would not have had good traction. Further, McKendrick indicated that there was not a sharp drop off from the road. McKendrick indicated that the outside edge of the road contained loose unconsolidated material. I observed the demeanor of the witnesses, and found Greenawalt's testimony more credible that the outside edge was one to two feet higher than the inside edge, and the outside edge was compacted from the tracks of the bulldozer. Within the framework of this record, I conclude that it has not been established that an injury producing event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

I find Greenawalt's testimony reliable that on April 28, 1993, between 6:00 and 6:30 a.m., he had ordered the construction of the ramp at issue, and that he did not see the ramp until it was cited at 7:30 a.m. I further find Greenawalt's testimony credible that had he observed the road beforehand, and noted that it did not have a berm, he would have required that a berm be provided. I find that Respondent was negligent to only a low degree. I find that a penalty of $50.00 is appropriate.

VII. Docket No. PENN 93-386 (Citation No. 371000).

On April 28, 1993, McKendrick, while driving onto a roadway to the highwall, observed three fist sized rocks falling in the air. He said that they landed on the roadway six feet out from the highwall. McKendrick indicated that the rocks rolled six more feet on the road.

McKendrick described the highwall as being 300 feet long, and containing loose rock along the top edge and face. He said that there was loose material "like a roll of dirt" along the top edge (Tr. 26, March 9, 1994). According to McKendrick, there were rocks on the highwall that ranged in size from smaller up to larger pebbles that were one foot in diameter. He also said that there were loose rocks on the face. However, on cross-examination he agreed that the highwall could not be characterized as "Loose unconsolidated material" (Tr. 39, March 9, 1994).

McKendrick issued a citation alleging a violation of 30 C.F.R. § 77.1001 which provides that "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

Greenawalt testified that on the day the citation was issued he did not see any loose material. He also indicated that in his daily inspections of the highwall during the previous six months, he had not observed any loose material. I find Greenawalt's testimony insufficient to contradict McKendrick's specific testimony that he saw three rocks falling, that these rocks fell within six feet of the highwall, that there were loose rocks along the top edge and the face of the wall, and there were loose rocks on the face. Based upon the testimony of McKendrick, I conclude that on the date cited, loose hazardous materials were present on the highwall. There is no evidence that the materials were either stripped, sloped, barricaded or that other devices were provided that afforded equivalent protection. Hence, I find that Respondent did violate Section 77.1001 supra.

McKendrick indicated that trucks on the site in question drive on the left side of the road. He opined that a rock falling from the highwall could have hit a windshield, or gone through a window of a truck traveling on the road below the highwall. He opined that should such an event have occurred, it could have resulted in a broken arm, abrasions, or scratches. He opined that such injuries were reasonably likely to have occurred, as he observed rocks falling off the wall. He also noted that the road in question is heavily traveled. According to the uncontradicted testimony of Greenawalt, although the pick-up trucks and service trucks that travel this road do not have canopies, rock trucks and coal trucks, which are the most common vehicles on the road, are equipped with canopies. These extend approximately one-half to two feet beyond the windshield. Also, these vehicles have guards over the driver's door that extend about one foot.

The record does not indicate the amount and location of loose material on the wall, or on the top. Within this framework I conclude that although an injury producing event was possible, it has not been established that it is reasonably likely to have occurred. Thus, I find the violation was not significant and substantial.

McKendrick opined that the loose rocks should have been seen by the foreman, or the safety director, who travel along the road once a day. However, McKendrick who traveled on the same road earlier that morning, had not noticed the cited conditions at that time. I thus find that Respondent's negligence herein was moderate. I conclude that a penalty of $400.00 is appropriate for this violation.

VIII. Docket No. PENN 93-386 (Citation No. 3715154).

Mervin M. Himes, an MSHA inspector, testified that on April 28, 1993, he was informed by an employee of Respondent that a windshield wiper on the driver's side of a bus did not work. According to Himes, at approximately 1:00 p.m., he observed this bus parked at least 100 feet from the changing rooms. According

to Himes, he was told that this bus was used to transport employees from the changing room to the pit area.

Himes stated that he inspected the bus, and the windshield wiper "would not activate" (Tr. 61, March 9, 1994). Himes stated that he looked through the windshield from the inside of the bus, and there was dust on the windshield, and the visibility was "poor" (Tr. 65, March 9, 1994). He also indicated that there were "real dusty conditions" (Tr. 65, March 9, 1994). He opined that because of the dust on the windshield, the operator of the bus would have impaired vision, and "it could create a hazard" (Tr. 65, March 9, 1994). He also noted that due to the absence of a wiper, should it rain, the driver's vision would be impaired. He issued a citation alleging a violation of Section 77.1606(c) supra.

Himes did not see the bus in operation on the day he issued the citation. According to Greenawalt, had it rained, another bus parked within 300 yards from the bus in question would have been used to transport miners, as the cited bus is not used when it rains. Greenawalt also indicated that wipers are not used when there is dust on the windshield, as the windshield could get scratched. He also opined that, in general, when the bus is being driven, operators of trucks and other equipment that kick up dust would be in the bus, thus reducing dusty conditions.

I accept the uncontradicted testimony of Himes that the windshield wipers on the driver's side did not work. Hence, it would not have been possible to clear dust from the windshield with the use of the windshield washer. Therefore, the operator's vision would have been diminished to some degree. Clearly safety can thus be affected. In the same fashion, it is possible that the bus could suddenly be exposed to falling rain while being operated, thus causing the operator to suffer from some degree of diminished vision. I thus find that Respondent herein did violate Section 77.1606(c) supra.

According to Himes, because the violative condition cited causes diminished visibility, it was reasonably likely that an accident could have resulted inasmuch as other vehicles travel the same road as the bus in question. Himes opined that should such an accident have occurred, a broken arm or leg or laceration would have resulted. He opined that an accident was reasonably likely to have occurred.

Greenawalt indicated that although the bus is used twice a shift, in general, it is used for a total of only 1/2 hour a day.

Within the above framework, I conclude that although an injury producing event could have occurred, there is a lack of evidence that such an event was reasonably likely to have occurred. Accordingly, I find that the violation was not significant and substantial.

According to Himes, one of Respondent's employees told him that, in essence, the wiper blade had not been in operation "for days." (Tr. 77, March 9, 1994). Greenawalt indicated that, in general, the bus does not operate in the rain. I find Respondent's negligence to have been moderate. I find that a penalty of $500.00 is appropriate for this violation.

IX. Docket No. PENN 93-386, (Citation No. 3709681).

One of Respondent's O&K shovels is used in the pits to load various trucks. Partash testified that on April 28, 1993, as part of his inspection, he sat on a seat located in the rear of the cab shell (Cab) of the shovel behind the operator's seat. He stated that the shovel was shaking back and forth, and up and down. He indicated that 3 out of the 6 bolts that attached the cab of the shovel to the mainframe, were loose. He opined that because of the shaking, the operator of the shovel could be injured. Partash also was concerned that the cab itself might be torn loose. He issued a citation alleging a violation of 30 C.F.R. §77.1606(c) supra.

Richard DuFour, who was operating the shovel when it was cited by Partash, testified, in essence, that although the cab shell would move "a little bit" (Tr. 150, March 9, 1994) it did not impair his ability to operate the shovel. He opined there was no danger of the cab falling off.

Bratton, who helped erect the shovel in question when it came from the manufacturer, indicated that the cab shell is five feet wide, and 10 feet long. He said that eight bolts inserted through a two inches wide horizonal member located on the bottom of the cab, attaches the cab to the mainframe of the shovel. Due to the extent of Bratton's experience with the shovel, I accord considerable weight to his testimony as to its physical characteristics. In contrast, I place less weight on the testimony of Partash whose testimony was based upon the recollection of one inspection almost a year prior to the hearing. I thus find that the cab shell was attached to the shovel mainframe by eight bolts, but three of these were loose. I accept the testimony of Partash that the cab shell was shaking, inasmuch as this testimony was not contradicted by DuFour. Bratton explained that if the cab was vibrating up and down a quarter of an inch, it would bounce on the rubber strip upon which it was seated. He also indicated that there was no danger of the shell coming off, as it was still attached by five bolts. However, since three of the eight bolts attaching the cab shell to the platform of the shovel were not secured, and since the cab shell was vibrating, it is possible that, over time, other bolts could work loose due to the vibration which could in turn exacerbate. In this situation, an injury to the operator could possibly result. I thus find that the loose bolts were defects that did affect safety. I conclude that Respondent did violate Section 1606(c), supra.

In essence, Partash testified that since the shovel is used 24 hours a day, 7 days a week, an injury to the operator as a result of the vibration of the cab shell was reasonably likely to have occurred. However, the shell was still secured by five out of eight bolts, and the bottom edge of the shell was seated on a rubber strip. In this context, I conclude that a reasonably serious injury was not reasonably likely to have occurred.

According to Partash, the operator of the shovel told him that the problem with the bolts was reported to management on February 24, 1993. DuFour, the operator, indicated that he had reported loose bolts in the daily sheet. However, he indicated that the three bolts by the door that were loose or broken on the day the citation was issued, were not loose the day before "that I can recall." (Tr. 153, March 9, 1994). I find that Respondent's negligence herein was moderate. I find that a penalty of $200 is appropriate for this violation.

X. Docket No. PENN 93-166 (Citation No. 3490532).

On December 3, 1992, Partash inspected a Caterpillar grader. When the operator lifted up the front of the grader, it rose an inch and a half before the four wheels rose. Partash said there was excessive play where the vertical kingpins attached the axle to the front wheels. He opined that because of this play, it was possible that the wheels could come off, as the grader travels over rough haul roads. He also observed engine oil leaking from the fuel line onto the hot engine. He opined that this condition created a possible fire hazard. In addition, he observed an accumulation of hydraulic oil under the cab, and on the hydraulic tank. He described the oil accumulations as follows: "It was a coating to a dripping running off of the tank in the lines" (sic) (Tr. 172, March 9, 1994). He indicated these conditions also contributed to a fire hazard. Additionally, he stated that the operator had to keep fiddling with both door handles of the cab in order to open these doors. He opined that in an emergency such as a fire it would be difficult for the operator to open the doors quickly and escape. Lastly, the wiper blade for the lower left window on the grader was missing. The top of this window was about the same level as the seat upon which the operator sits. Partash opined that because the wiper blade was missing, there would not be adequate visibility for the operator to operate the grader. Partash issued a citation for all these conditions citing a violation of 30 C.F.R. § 77.1606(c).

Bratton, who worked on the grader the day it was cited, indicated that he did not have any problems steering it. Muth, who repaired the vehicle in question, indicated that the kingpins in question were covered by retainer caps at the top and bottom, and were secured by bolts. He said that although the kingpins were worn, they were not near the breaking point. Muth indicated that, after the grader was cited, he replaced the bearings, kingpins, seals, caps, and bolts.

Bratton indicated that he observed just a few drops of engine oil seeping down the side of the engine, but that no oil was spraying out under pressure. He did note that there was oil running on the side of the block. He opined that there was no hazard. Muth observed that there was an oil leak from or near the injectors. He indicated that the oil was not pressurized. He said that the turbo and exhaust were on the other side of the engine, approximately 20 inches away. He also observed hydraulic oil beneath the cab, on a "couple" of hydraulic lines, and "occasionally" dripping off the pilot control system (Tr. 265, March 9, 1994).

Bratton indicated that the left front window which did not have a wiper blade, is used to view the road when grading. He also indicated that the window can be opened. Bratton also indicated that he inspected the door handles, and found that the linkage was worn, and that accordingly there would be excessive movement in the door handle.

Based on the testimony of Partash, that in the main was not contradicted or impeached, I find that, when cited, the grader had the following defects: play between the front wheel and axle, an engine oil leak, a hydraulic oil leak, a missing wiper blade, and two door handles that were difficult to open from the inside. Essentially for the reasons stated by Partash, I conclude that these conditions can possibly have an affect on safety. I thus conclude that Respondent did violate Section 77.1606(c) supra.

I find that the worn/loose kingpins was a violative condition that was significant and substantial. My conclusion is based on the following factors: the constant use of the grader, the road conditions, and the volume of other traffic in the areas the grader traveled. In addition, the violative oil leaks were significant and substantial. My conclusion is based upon a finding that oil was leaking on a hot engine.[8] The likelihood of serious injuries in the event of a fire is exacerbated by the violative conditions of both doors, which would delay the operator's exit from the cab.

According to Bratton, operators of the grader at issue are to indicate on a form under the section headed "REPAIRS NEEDED" when repairs are needed on the grader. (See, Government Exhibits 26, 27). These forms, contain the following notations for the following dates: 11/11 "Hyd leak"; 11/13 "Hyd leak"; 11/15 "Hyd oil leak under cab"; 11/16 "Hyd leak"; 11/20 "Injector leaking fuel on motor"; 11/24 "Hyd hose leaking", "Injector leaking"; 11/12 "door handle mess up" (sic); 11/13 "door handle mess up"

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[8] I accept Partash's testing in this regard as it was not specifically rebutted or contradicted by Respondent's witnesses.

(sic); 11/15 "door handles"; 11/16 "doors handle mess up" (sic); 11/20 "door latches needs fixed" (sic); 11/24 "door latches are hard to get open"; 11/11 "need bottom wipers left side"; 11/12 "Need bottom wipers"; 11/13 "need bottom wipers"; 11/15 "wiper missing;" 11/16 "need bottom wipers." (Gov't Exhibits 26, 27)

Bratton indicated that the clip securing the blade to the wiper often breaks, and that he has replaced them more than once on the same shift.

There is no evidence that any of the conditions reported in the forms were repaired prior to the issuance of the citations at issue. Within this framework, I conclude that Respondent's negligence herein regarding the violative defects pertaining to the doors, oil leaks, and wiper blade was more than ordinary negligence, and constituted aggravated conduct. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)). Thus, I find that the violation herein resulted from Respondent's unwarrantable failure. (See, Emery, supra). I find that a penalty of $7000 is appropriate.

XI. Docket No. PENN 93-386 (Citation No. 3709684).

Respondent utilizes a water tank, transported by a caterpillar engine, on all its roads to control dust. The water tank has a capacity of approximately seven thousand gallons of water, and weighs approximately 25 tons. It is welded to frame rails that surround it on the top and bottom. The rails support the tank on the main body of the equipment.

Partash testified that he observed water "squirting" (Tr. 11, March 10, 1994) out of the frame rails. He said that he observed four cracks on both sides, approximately three to four inches long, where the frame and tank met. He was concerned that if the equipment should bounce while being transported, the tank could break free of the front of the machine, especially considering the heavy weight of the water when the tank is full. Partash issued a citation alleging violation of 30 C.F.R. § 77.1606(c).

Greenawalt stated that after repairs had been made to the tank after it was cited, he did not observe the cracks that were cited. He indicated that the rails do not contain any water. He said that the tank was welded all around its perimeter, and the welds were solid. He said neither the frame rails nor the tank was bowed and there was nothing to indicate that the frame was breaking.

I resolve the conflict in the testimony regarding the existence of cracks, in favor of Partash, as I give more weight in this instance, to his disinterested testimony in his capacity as an MSHA inspector (See, Texas Industry, Inc., 12 FMSHRC 235 (February, 1990) (Judge Melick)). It thus is possible, considering the weight of water being transported, that, over time, the cracks might spread and endanger the integrity of the

members supporting the tank, and the tank could fall, and possibly cause an injury. I thus find that the violation herein did, to some degree, affect safety, and hence Respondent did violate Section 77.1606(c) supra.

Considering the fact that the tank was welded to a support frame over its entire perimeter, and the welds were intact, I find that any injury producing event was not reasonably likely to have occurred. I thus find that the violation was not significant and substantial.

According to Partash, he observed water squirting out and that this should have been seen by anyone. However, such a squirting of water would have alerted a person to a possible leak in the tank, but would not have alerted a person necessarily to a crack in the weld or supporting frame which do not contain water. I thus find that Respondent's negligence herein was less than moderate. I find that a penalty of $50 is appropriate for this violation.

XII. Docket No. PENN 93-360

The parties stipulated as follows: (1) an independent contractor employee, John Leitzinger was injured on February 6, 1993; (2) Leitzinger was an employee of the independent contractor, J.E.M., Inc.,; (3) the injured miner was a welder for J.E.M.; (4) Leitzinger was injured on the first day of the job with J.E.M.; (5) Leitzinger was injured on the first day on Power Operating property; (6) the injured miner had 22 years of experience welding in the strippings (surface coal mining); (7) Leitzinger had probably been laid off within the last 2 years; (8) the injured miner had a valid annual refresher training; (9) the injured miner had not been provided any hazard or newly employed experienced miner training upon starting employment with J.E.M.

Partash explained that Leitzinger was injured while lifting a piece of steel with a chain and boom truck. According to Partash, the chain hook either slipped or opened up, and the steel fell on Leitzinger dislocating his shoulder and breaking his hip. Partash said that Leitzinger had received annual refresher training at another mine more than a year prior to the accident. He issued Order No. 3490538 alleging a violation of 30 C.F.R. § 48.31(a), and Order No. 3490539 alleging a violation of 30 C.F.R. § 48.28(a). [9]

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[9] On August 31, 1993 Partash modified Order No. 3409539 to allege a violation of 30 C.F.R. § 48.26(a) instead of Section 48.28(a) supra. At the hearing, Respondent's motion to dismiss this order on the ground that it was modified after the petition and answer were filed, was denied. Petitioner's motion to amend its petition was granted.

A. Order No. 3490538.

In its brief, Petitioner moved to vacate Order No. 3490538 on the ground that the issues presented in this order were litigated and decided in L & J Energy Company, Inc., 16 FMSHRC 424 (February, 1994) (Judge Weisberger). For the reasons set forth in L & J supra, Petitioner's motion is granted.

B. Order No. 3490539

Because Leitzinger, a newly employed experienced miner, did not receive training pursuant to Section 48.26(a), I find Respondent did violate Section 48.26 supra.

According to Partash, this violation resulted from Respondent's unwarrantable failure in that a sign posted at the entrance to Respondent's mine states that all persons must be trained. In addition, he referred to the fact that Respondent had been cited within the past year for failure to train independent contractors' employees.

Kanour, testified that in the first part of January, 1993, he notified J.E.M. of the training required to be provided of their employees. He also said that the Wednesday prior to the Saturday when Leitzinger was injured, he checked all J.E.M. training records, and their employees were in compliance. Kanour testified that he was on the site the day of the accident, but did not see Leitzinger on the site prior to the accident. He said that he had seen him prior to the accident, he would have provided him with hazard training. Bratton, testified that on the Friday prior to the accident, he told John Wilkinson, an agent of J.E.M., that repairs were needed to be made to a boiler, and a truck. He asked the latter to send him a list indicating which employees were to work on which equipment. Bratton stated that he received this list on late Friday, but that Leitzinger's name was not on the list. Also, he stated that on the day of the accident a J.E.M. supervisor reported to him, and he met the crew from J.E.M. He said that specifically he never saw Leitzinger prior to the accident.

Based upon the testimony of Respondent's witnesses, that was not contracted or impeached, I find that Respondent's conduct herein was not aggravated, and thus was not the result of its unwarrantable failure (See, Emery, supra).

Partash in explaining the injury to Leitzinger stated that "it appears" that he was in the process of lifting up a piece of steel with a chain, and "it appears" that either the chain hook slipped, or the chain hook opened up causing the steel to fall on him. (Tr. 82, March 10, 1994). There is no other evidence in the record contradicting or impeaching this testimony, and I accept it. I find that there is no nexus between the hazardous conditions that caused the accident, and the specific subject

matter that would have been covered in the newly employed experienced miners training (See, 30 C.F.R. § 48.26(b) 1-8; Government Exhibit 45, pg. 4-5). In this context, I find that the violation was not significant and substantial (c.f., Mathies, supra). I find that a penalty of $300 is appropriate for this violation.

XIII. Citation No. 3490513 (Docket No. PENN 93-22), and Citation Nos. 3715153 and 3715236 (Docket No. PENN 93-386).

Subsequent to the hearing, Petitioner filed motions to approve settlement agreements that were negotiated by the parties. A reduction in total penalties from $10,438 to $4,893 is sought. I have considered the representations and documentation presented in these motions, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the motions to approve settlement are **GRANTED**.

XIV. Citation Nos. 3709682 and 3709683 (Docket No. PENN 93-386).

The parties stipulated at the hearing, that these two citations involve the same piece of equipment, and almost identical facts as those cited in Citation No. 3709821 which was previously heard by me in December 1993 as part of Docket No. PENN 93-152. The parties further stipulated that the evidence they were to present regarding Citation Nos. 3709682 and 3709683 would essentially be the same as that presented in the hearing regarding Citation No. 3709821.

Based on these stipulations, and for the reasons set forth in my decision regarding Citation No. 3709821 (Power Operating Co., 16 FMSHRC 591, 596-597 (March 1994)), I find that a violation has not been established regarding Citation Nos. 3709682 and 3709683, and they should be **DISMISSED**.

ORDER

It is ordered as follows:

1. The following orders/citations are to be dismissed: 3709742, 3709806, 37090538, 3709682 and 3709683.

2. The following order/citations are to be amended to reflect the fact that the violations cited therein are not significant and substantial: 3490508, 3709741, 3709996, 3710000, 3715154, 3709681, 3709684, and 3490539.

3. The following orders are to be amended to reflect the fact that the violations cited are not the result of Respondent's unwarrantable failure: 3709641, and 3490539.

4. Respondent shall within 30 days of this decision, pay a total civil penalty of $11,643.

Avram Weisberger
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

June 15, 1994

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 94-213-M
Petitioner	:	A. C. No. 05-04245-05506
	:	
v.	:	
	:	
KIEWIT WESTERN COMPANY,	:	
Respondent	:	Universal Portable Crusher

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The Solicitor has filed a motion to approve settlement for the two violations in this case. A reduction in the penalties from $4,267 to $1,267 is proposed. The Solicitor proposes to reduce the penalty for one of the violations, Citation No. 4335289, from $4,000 to $1000. With respect to the remaining violation, the operator has agreed to pay the proposed penalty in full.

Citation No. 4335289 was issued for a violation of 30 C.F.R. § 56.12016 because the control circuit was not locked out while maintenance work was performed. The violation contributed to a moving machinery accident, which caused injuries to an employee's arm. The basis given for the reduction is that negligence was less than originally thought. According to the Solicitor, the operator had implemented safe operating procedures which had in fact been utilized prior to the accident. The Solicitor states that the accident can be attributed to a "communication mix up". However, the Solicitor does not explain what this "communication mix up" was, who was involved, and why it is not attributable to the operator.

The Solicitor is reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the Solicitor's motion, I cannot properly discharge my statutory responsibilities because I have not been given sufficient information upon which to conclude that the recommended penalty of $1,000 for Citation No. 4335289 is appropriate under the six criteria of section 110(i).

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit additional information to support his motion for settlement. Otherwise, this case will be set for further proceedings.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 16, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	: : : : :	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-57 A. C. No. 46-01968-04121
v.	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, Respondent	: :	

ORDER DENYING MOTION TO CONSOLIDATE
ORDER DENYING MOTION TO EXPEDITE PROCEEDINGS
ORDER DENYING MOTION TO VACATE
ORDER CONTINUING STAY

On February 22, 1994, this case was stayed on a motion by the operator pending the completion of MSHA's special investigation under Section 110(c) of the Act.

On June 13, 1994, operator's counsel filed a motion to consolidate, motion to expedite and motion to vacate the stay. Counsel advises that on or about May 23, 1994, three Consolidation Coal employees were informed by MSHA that as a result of the 110(c) investigation, MSHA proposed to specially assess civil penalties against them as individuals. Apparently, there has been a health and safety conference, but according to counsel the conference officer did not have the authority to terminate the 110(c) proceedings. Counsel seeks to consolidate this case with any proceedings against the employees.

As grounds for her motions, counsel asserts that the employees contest the underlying 104(d)(2) order. She argues that in light of potential personal liability resulting from a 110(c) proceeding, an expedited hearing is necessary. She states that the employees desire a prompt hearing without waiting for the penalty assessment and that Consolidation concurs with the request of the employees. And she tells me that Commission judges are mandated to exercise their informed discretion when considering all motions for expedition.

The motions are misplaced and premature. Counsel wishes to consolidate this matter with 110(c) proceedings that have not yet been initiated before the Commission. Indeed, she does not advise whether the individuals involved have filed a request for a hearing with the Secretary and she offers no proof that they have designated her as their representative. No indication is given how this case can be consolidated with one that thus far has not been filed. Without such a filing there is no way to judge the propriety of the relief counsel seeks.

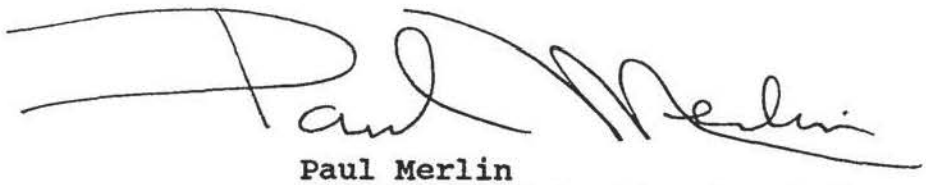
An administrative agency cannot exceed the jurisdictional authority granted to it by Congress. As has been held by the Commission, the Act grants subject matter jurisdiction to the Commission by creating specific causes of actions which the Secretary of Labor, operators, and individuals may institute. Kaiser Coal Company, 10 FMSHRC 1165, 1169 (September 1988). The steps that must be followed to commence an action before the Commission are spelled out in the Commission's procedural rules. 29 C.F.R. § 2700.25 et seq. These rules cannot be ignored.

It may be that this case which is against the operator under Section 110(a) should be heard at the same time as a 110(c) matter, but that determination must await the filing of the latter suit and the designation by the individuals involved of whom they wish to have as their legal representative.

Accordingly, it is **ORDERED** that the motion to consolidate be **DENIED.**

It is further **ORDERED** that the motion to expedite be **DENIED.**

It is further **ORDERED** that the motion to vacate the stay in this case be **DENIED**, and that the stay in this case be **CONTINUED** until further notice.



Paul Merlin
Chief Administrative Law Judge

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