JUNE 1995

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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JUNE 1995

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

Secretary of Labor, MSHA v.Midwest Material Corporation, Docket No. LAKE 94-126-M (Judge Amchan, April 24, 1995)

Secretary of Labor, MSHA v. Sunny Ridge Mining Company, Docket No. KENT 93-63, etc. (Judge Fauver, April 27, 1995)

Secretary of Labor, on behalf of Kenneth Hannah, et al. v. Consolidation Coal Company, Docket No. LAKE 94-704-D. (Judge Melick, April 28, 1995)

Secretary of Labor, MSHA v. T.E. Bertagnolli & Associates, Docket No. WEST 94-681-M. (Chief Judge Merlin, unpublished Default issued March 13, 1995)

Secretary of Labor, MSHA v. Wiser Construction, L.L.C., Docket No. WEST 94-720-M. (Chief Judge Merlin, unpublished Default issued March 13, 1995)

Western Fuels-Utah, Inc., v. Secretary of Labor, MSHA, Docket No. WEST 94-391-R. (Judge Manning, May 15, 1995)

Secretary of Labor, MSHA v. Frick Sand & Gravel, Inc., Docket No. CENT 95-194-M. (Operator's Request for Relief from MSHA's Order)

Secretary of Labor, MSHA v. Drummond Company, Inc., Docket No. SE 95-316, etc. (Operator's Request for Relief from MSHA's Order)

Review was not granted in the following cases during the month of June:

Secretary of Labor, MSHA v. Dixie Fuel Company, Docket No. KENT 94-1210. (Judge Weisberger, May 4, 1995)

Secretary of Labor, MSHA v. North Star Contractors, Inc., Docket Nos. KENT 94-92, etc. (Chief Judge Merlin, unpublished Default issued March 21, 1995)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 8, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 94-308-M WEST 94-309-M
v.	:	
LAKEVIEW ROCK PRODUCTS, INC.	:	

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

ORDER

BY THE COMMISSION:[1]

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 March 2, 1995, the Commission received from Lakeview Rock Products, Inc. ("Lakeview") a request for a 30-day extension of time to file a petition for discretionary review contesting a decision issued by Administrative Law Judge Arthur Amchan on January 30, 1995. 17 FMSHRC 83 (January 1995) (ALJ). Lakeview's counsel states that he was unable to turn to the decision when he received it on February 6, that mining law materials were not readily available in local libraries, and that Lakeview's decision-makers were temporarily out of state. In opposition to Lakeview's motion, the Secretary of Labor argues that the Commission lacks subject matter jurisdiction. In reply to the Secretary's opposition, Lakeview states that the notice it received from the Commission indicates that an operator may seek an extension for good cause shown. It also requests that the Commission consider its request for an extension as its petition. The Secretary opposes treating Lakeview's request as its petition.

Under the Mine Act and the Commission's Procedural Rules (29 C.F.R. Part 2700), relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days

[1] The Commissioners agree, in result, to deny Lakeview's request for an extension of time to file its petition for discretionary review, but differ as to the rationale for that determination. The portion of the decision upon which all Commissioners agree is followed by the opinions of Chairman Jordan and Commissioner Marks and of Commissioner Doyle and Commissioner Holen, respectively, setting forth their separate views.

of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a) ("Rule 70(a)"). Lakeview did not file a timely petition, nor did the Commission direct review on its own motion within the 30-day period. 30 U.S.C. § 823(d)(2)(B). Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

The Commission denies Lakeview's motion for an extension of time and rejects Lakeview's request to treat the motion as its petition for discretionary review. Under the Mine Act and the Commission's Procedural Rules, a party must set forth the grounds for appeal in its petition. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(c). Lakeview's request did not set forth those grounds. Indeed, Lakeview stated in its request that it needed additional time to evaluate the merits of an appeal, suggesting that a petition might not be forthcoming. Accordingly, upon consideration of Lakeview's motion, it is denied.

Separate opinions of Commissioners follow:

Chairman Jordan and Commissioner Marks:

The Commission has strictly enforced the 30-day time limit for filing petitions for discretionary review, accepting petitions filed late only where the accompanying motion to excuse the late filing has shown good cause for the delay. *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1203-04 (June 1980); *see also Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981). In *McCoy*, the Commission explained that adherence to the 30-day time limit is essential because the Commission has only 10 days, between the last day for filing a petition and the date the judge's decision becomes final, during which to evaluate the merits of a petition. 2 FMSHRC at 1204. Here, we deny Lakeview's request because Lakeview has failed to show good cause for delay in filing a petition for discretionary review.

We need not decide whether the Commission's procedural rule pertaining to extensions of time, 29 C.F.R. § 2700.9 ("Rule 9"), applies to requests for extensions for filing petitions for discretionary review. Assuming, however, that Rule 9 applies, we conclude that Lakeview's request was untimely. A request for an extension must "be filed *before* the expiration of the time allowed for the filing or serving of the document." Rule 9 (emphasis added). The Commission has applied unique filing requirements to petitions, establishing that filing is effective only upon

receipt. 29 C.F.R. § 2700.5(d) ("Rule 5(d)") & Rule 70(a).[2] Lakeview's petition, to be timely, should have been *received* by the Commission within 30 days after the judge's decision, by March 1, 1995. Consequently, pursuant to Rule 9, Lakeview's request for an extension should have been filed within that 30-day period as well.

Our general filing rule, Rule 5(d), provides that pleadings other than petitions for discretionary review are considered filed on the date of mailing, while petitions are considered filed only upon receipt. We view the filing requirement for a motion to extend time for filing a petition in the light of Rule 5(d)'s provision that a petition itself is effectively filed only upon receipt. Interpreting Rule 5(d) to permit Lakeview's request to be filed on the date of mailing, rather than upon its receipt, would undermine the unique filing requirements for review petitions. Construing Rules 5, 9, and 70(a) together, we would disallow as untimely any request for an extension to file a review petition received by the Commission after expiration of the 30-day period for filing that petition. *See generally, e.g., Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (in interpreting single enactment, courts should give "the most harmonious, comprehensive meaning possible") (citations omitted). Although Lakeview has certified that it mailed its request for an extension on March 1, the request was filed out of time because it was *received* by the Commission on March 2, one day after the expiration of the 30-day period.[3]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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[2] Lakeview received, as an attachment to Judge Amchan's decision, a notice that provided: "PETITION FOR DISCRETIONARY REVIEW MUST BE RECEIVED BY THE COMMISSION WITHIN THIRTY (30) CALENDAR DAYS AFTER THE ISSUANCE DATE OF THE DECISION TO BE CONSIDERED [29 C.F.R. § 2700.5(d) and .70(a)]." (Emphasis in original).

[3] Given our disposition, we need not reach the Secretary's argument that the Commission lacks subject matter jurisdiction to entertain Lakeview's motion.

Commissioner Doyle and Commissioner Holen:

There is no provision in the Mine Act for extension of the time to file a petition for discretionary review ("PDR"). Nor do the Commission's Procedural Rules, 29 C.F.R. Part 2700, provide for such an extension. Therefore, we conclude that the Commission is without authority to entertain such a motion and, accordingly, we deny the operator's motion for an extension of time to file its PDR.

Lakeview's reliance on 29 C.F.R. § 2700.9 ("Rule 9") is misplaced. The Commission's Procedural Rules, including those under which parties may seek Commission review, are set forth in Subpart H--Review by the Commission. Rule 70, entitled "Petitions for discretionary review," provides in part:

> Any person adversely affected or aggrieved by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days after issuance of the decision or order.

29 C.F.R. § 2700.70(a). Subpart H makes no provision for extensions of time to file PDRs. Further, the notice attached to the judge's decision (the "Notice") gave Lakeview actual notice of the 30-day requirement. It states:

> PETITION FOR DISCRETIONARY REVIEW MUST BE RECEIVED BY THE COMMISSION WITHIN THIRTY (30) CALENDAR DAYS AFTER THE ISSUANCE DATE OF THE DECISION TO BE CONSIDERED [29 C.F.R. § 2700.5(d) and .70(a)].

Notice at 1 (emphasis in original). Reference in the Notice to other procedural rules relevant to the review process does not overcome either Rule 70 or the clear statement in the Notice of the filing requirements for PDRs. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (January 1992).

We note that the Commission has, in appropriate circumstances, accepted late-filed petitions for review. Such relief has been granted pursuant to Fed. R. Civ. P. 60(b)(1) & (6), on the basis of mistake, inadvertence, surprise, excusable neglect or other reasons justifying relief.[4] *E.g., Turner,* 14 FMSHRC at 77-78; *Boone v. Rebel Coal Co.,* 4 FMSHRC 1232, 1233 (July 1982). Motions to excuse late filing have been granted only where good cause for the delay has been shown. *McCoy v. Crescent Coal Co.,* 2 FMSHRC 1202, 1203-04 (June 1980); *Duval Corp. v. Donovan,* 650 F.2d 1051, 1054 (9th Cir. 1981). We conclude that, even if the Commission had, as Lakeview asked, treated its request for an extension of time as a late-filed PDR, good cause for such late filing has not been shown.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

[4] The Commission's Procedural Rules incorporate, as appropriate, the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 12, 1995

MADISON BRANCH MANAGEMENT	:	Contest Proceedings
	:	
v.	:	Docket Nos. WEVA 93-218-R
	:	WEVA 93-219-R
SECRETARY OF LABOR,	:	WEVA 93-220-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 93-373
	:	WEVA 93-412
v.	:	
	:	
MADISON BRANCH MANAGEMENT	:	
	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 93-415
	:	
v.	:	
	:	
PROTECTIVE SECURITY SERVICES AND	:	
INVESTIGATIONS, INC.	:	

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

DECISION

BY: Jordan, Chairman and Marks, Commissioner

These consolidated contest and 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"). On September 16, 1994, Madison Branch Management ("Madison") petitioned the Commission for

interlocutory review of interlocutory orders issued by Administrative Law Judge Jerold Feldman. *See* Commission Procedural Rule 76(a)(1)(ii), 29 C.F.R. § 2700.76(a)(1)(ii). Madison also requested suspension of the hearing scheduled before the judge. The Secretary of Labor ("Secretary") filed a statement in support of Madison's petition. By order dated September 20, 1994, the Commission granted the petition, suspended briefing, and stayed the hearing.

In his orders, Judge Feldman, in effect, denied motions by the Secretary to dispose of these cases pursuant to a settlement agreement reached by the parties. The judge based his determinations on his concern that additional abatement measures beyond those required by the Secretary might be necessary to remove the safety risk posed by the violations. We view the instant petition as one seeking review of these interlocutory orders taken as a whole. For the reasons that follow, the Commission vacates the orders and remands the issue of whether the settlement agreement should be approved.[1]

I.

Factual Background

These consolidated proceedings arose from two citations and an imminent danger order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Madison and from a citation and an imminent danger order issued by MSHA to Protective Security Service and Investigations, Inc. ("PSSI"), an independent contractor that provided security services at Madison's Job No. 3 mine. MSHA issued the citations following the death on March 1, 1993, of Allen Garrett, a security guard employed by PSSI, who was asphyxiated in his vehicle on mine property. An MSHA investigation determined that the vehicle's damaged

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[1] All Commissioners vote to overturn the judge's determination that the settlement motion should be denied because, in his view, there exists a genuine factual issue, i.e. the efficacy of the vehicle inspection program, concerning whether respondents abated the violations. Order dated August 29, 1994, at 2. The Commissioners agree that this issue is not relevant to whether the respondents demonstrated good faith in attempting to achieve rapid compliance, the sixth penalty criterion. Chairman Jordan and Commissioner Marks vote to vacate the interlocutory orders, remand the question of approving the settlement, and permit the judge to consider non-monetary factors in ruling on the motion to approve the settlement. Commissioners Doyle and Holen disagree that non-monetary factors are appropriate considerations and conclude that a remand is unnecessary. They would approve the proposed settlement. In *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1619-20 n. 3 (August 1994), the Commission determined that, in the event of a tie vote, the vote of Commissioners closest in effect to the judge's decision is the Commission's disposition. The vote of Chairman Jordan and Commissioner Marks to remand this matter to the judge is closest in effect to the judge's decision and is therefore the Commission's disposition.

exhaust system, which permitted excessive amounts of carbon monoxide to enter the cab, was the proximate cause of the fatality.

Citation Nos. 3976644 and 3976646 issued to Madison and PSSI, respectively, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleged that PSSI operated the vehicle in an unsafe condition on mine property in violation of 30 C.F.R. § 77.404(a).[2] The inspector designated the violation significant and substantial.[3] The Secretary proposed civil penalties of $2,000 against Madison and $3,000 against PSSI. The inspector further determined that the vehicle posed an imminent danger to employees working at Job No. 3 and, accordingly, pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a), issued Order Nos. 3976643 and 3976645 requiring its removal from mine property.

The citations are basically identical and state:

> The Ford Bronco II Serial # IFMBU14T7GUA67264 being operated on the surface mine property was not being maintained in a safe operating condition in that the exhaust system was damaged and leaking carbon monoxide at (3) locations.
>
> This was a contributing factor which resulted in a fatal injury.
>
> This citation is issued in conjunction with 107A Order No. 3976643 therefore no abatement time is set.

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[2] Section 77.404(a) provides:

> Mobile and stationary equipment and machinery shall be maintained in safe operating condition and machinery . . . in unsafe condition shall be removed from service immediately.

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

In Citation No. 3976647 issued to Madison, MSHA also alleged a violation of 30 C.F.R. § 48.31(a)[4] for failure to provide hazard training to Garrett before he began working at the mine. The Secretary proposed a civil penalty of $88 for this violation.

II.

Procedural Background

On March 31, 1994, the Secretary filed motions with the judge to approve settlements in these cases. The settlements would have required payment of $550 of the $2,088 in proposed penalties against Madison, and $1,000 of the $3,000 in proposed penalties against PSSI. By order dated April 7, 1994, Judge Feldman denied the Secretary's motions on the grounds that the Secretary had not shown "adequate mitigating circumstances to justify the significant reductions in the proposed penalties."

On April 8, 1994, the Secretary filed "Amended Motions to Approve Settlement," which provided that Madison and PSSI would pay in full the penalties proposed by the Secretary.[5] The proposed settlement also required that PSSI inspect the exhaust systems of security employees' vehicles at least once every 90 days and that PSSI maintain and, upon request, produce to MSHA documentation of such inspections.

The judge thereafter issued an order requiring Madison and PSSI to provide additional information. He ordered the Secretary to explain, *inter alia*, why the proposed inspection program would be adequate to abate "the hazard associated with exposure to carbon monoxide poisoning." Order Requesting Clarification at 3. The judge reserved ruling on the motions pending review of the requested information. On May 16, 1994, the parties filed a Joint Response to Order Requesting Clarification.

On June 8, 1994, the judge denied the motions to approve the settlement on the grounds that, in order to determine the appropriate civil penalties, disputed facts concerning the adequacy of the proposed vehicle inspection program had to be resolved. Order Denying Motions for Approval of Settlements, Prehearing Order and Notice of Hearing ("June 8th Order").

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[4] Section 48.31(a) provides in part:

> Operators shall provide to . . . miners . . . a training program before such miners commence their work duties.

[5] On May 16, 1994, the Secretary filed a "Second Amended Motion to Approve Settlements" ("S. Mot. to Approve Set."), which consolidated the two earlier amended motions.

The judge scheduled the matter for hearing and ordered the Secretary to call as a witness the Chief Medical Examiner of the West Virginia Department of Health and Human Services to testify to:

> the circumstances surrounding the decedent's death and his expert opinions concerning the health hazards associated with the short-term and continued long-term exposure to exhaust fumes and/or carbon monoxide poisoning.

June 8th Order at 6. The Secretary was also directed to call:

> a minimum of two qualified safety and health experts employed by the Occupational Safety and Health Administration (OSHA) . . . to testify whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by Section 5(a)(1) or Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1) and (a)(2).

Id. The judge further ordered the Secretary to call "[a] licensed qualified automobile mechanic" to testify about "the procedures and requisite qualifications for performing an adequate inspection of a motor vehicle's exhaust system. . . ." *Id.*

On July 19, 1994, the Secretary submitted a witness list. He stated that he did not intend to call as witnesses the individuals identified in the June 8th Order and that the parties intended to submit a joint motion for summary decision. The judge construed the latter statement to be a joint motion for summary decision, which he denied on July 22, 1994. Order Denying Joint Motion for Summary Decision ("July 22nd Order"). In his order, the judge identified what he described as disputed material facts relating to the adequacy of the proposed inspection program to remove hazards to security guards posed by carbon monoxide poisoning. *Id.* at 4. The judge advised the parties of his intention to call the Chief Medical Examiner as a "court" witness. *Id.* at 4-5.

The Secretary filed a "Motion for Summary Judgment" on August 25, 1994. He contended that the undisputed facts established the violations alleged in the citations as well as the statutory criteria to determine an appropriate penalty. S. Mot. for Summ. J. at 7-11. He noted respondents' good faith attempts to achieve rapid compliance. *Id.* at 12. The Secretary argued that the five issues identified by the judge in the July 22nd Order were not properly before him. *Id.* at 15-18. The Secretary requested by letter that, in the event his motion was denied, the judge certify the denial to the Commission pursuant to Commission Rule 76(a)(1)(i). Madison supported by letter the Secretary's motion.

The judge denied the Secretary's motion on August 29, 1994. Order Denying the Secretary's Motion for Summary Judgment ("August 29th Order"). The judge ruled that, in order to determine the appropriateness of the proposed civil penalties, it was necessary to determine whether the hazard training and the vehicle inspection program were adequate to eliminate the danger of carbon monoxide poisoning to security guards who remain in their vehicles for long periods seeking heat and shelter. August 29th Order at 2. The judge also refused to certify to the Commission for interlocutory ruling either his July 22nd or August 29th order as requested by Madison and the Secretary, respectively. The instant petition for interlocutory review followed.

III.

Disposition

The issue before us is whether the judge properly denied the parties' motions to approve settlement.[6] In the judge's view, unresolved factual issues concerning the adequacy of abatement precluded his approval of the settlement.

Settlements are committed to the "sound discretion" of the Commission and its judges. *See, e.g., Medusa Cement Co.*, 12 FMSHRC 1913, 1914 (October 1990). Although Commission judges are not "bound to endorse all proposed settlements," their rejections of settlements, as well as approvals, must "be based on principled reasons." *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (November 1981). On review, the Commission will not disturb a judge's approval or rejection of a settlement if it is supported by the record, is consistent with the six statutory criteria specified in section 110(i) of the Act for the assessment of civil penalties, and is not otherwise improper. *Id.* In reviewing such cases, "abuses of discretion or plain errors are not immune from reversal." *Id.*

In rejecting the parties' settlement, the judge focused on Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), which sets forth six criteria for determining the appropriateness of a civil penalty. The judge stated that "demonstrated good faith . . . in attempting to achieve rapid compliance," the sixth criterion, involved "a factual question that must be resolved through the testimony of expert witnesses in the hearing process." August 29th Order at 2. He identified as the central issue:

> [W]hether the respondents have adequately removed the risk of carbon monoxide poisoning through hazard training and vehicle

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[6] In his Motion for Summary Judgment, the Secretary requested the judge to "memorialize" in an order the provisions of the settlement proposal, in particular the vehicle inspection program. S. Mot. for Summ. J. at 14. Accordingly, we construe the Secretary's Motion for Summary Judgment as a motion to approve the settlement agreement.

maintenance, to security personnel who continue to use stationary vehicles for prolonged periods of time with no alternative means of warmth and shelter.[7]

Id.

The scope of abatement is determined by the underlying citation and by the requirements of the statutory provision, standard or regulation alleged to have been violated. *See Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509-11 (April 1989). In determining whether the factual issues set forth by the judge were material to his consideration of whether the operator had demonstrated good faith in attempting to achieve rapid compliance, we examine the scope of the citations and the actions required for abatement.

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[7] The August 29th Order incorporates by reference the July 22nd Order, which listed the following five factual inquiries that the judge stated were "unresolved issues of material fact":

> 1. The nature of carbon monoxide intoxication and the correlation between the level of toxicity and the period of exposure;
>
> 2. Given the characteristics of carbon monoxide, whether the risk of carbon monoxide intoxication to individuals who seek warmth and shelter in stationary vehicles for extended periods of time can be effectively alleviated by the methods proposed by the respondents;
>
> 3. Whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by . . . the Occupational Safety and Health Act of 1970 . . . ;
>
> 4. The qualifications of the individual assigned by [PSSI] to inspect employee vehicle exhaust systems and the methods of such inspection; and
>
> 5. The requisite qualifications, equipment and procedures necessary for performing an adequate vehicle exhaust system inspection.

July 22nd Order at 4.

The citations are narrowly drawn. They do not allege a pattern or practice of shoddy vehicle maintenance or a general failure by Madison to provide hazard training to its miners. Rather, they address a particular defective vehicle that contributed to the fatality and the failure to train security guard Garrett. The regulations at issue also impose specific requirements. The Commission has held that section 77.404(a):

> imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation.

Peabody Coal Co., 1 FMSHRC 1494, 1495 (October 1979). This standard does not require unsafe equipment to be repaired so long as it is immediately removed from service. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1982) ("[O]nce unsafe equipment is removed from service abatement is completed.") (construing identical language in section 75.1725(a)). Section 48.31(a) is also specific, requiring operators to provide training to individuals before they begin working at a mine. Abatement is completed when the affected miners are trained. *See Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 319-20 (D.C. Cir. 1990) (operator abated violation of section 48.7 by task training affected employee).

In the instant case, the Secretary determined that respondents abated the unsafe equipment violation when they removed the defective vehicle from service. *See Alabama By-Products*, 4 FMSHRC at 2130. Likewise, by citing only the failure to train a particular employee, the Secretary did not trigger a broad duty of abatement with respect to that violation. Thus, the issue identified by the judge in the August 29th Order, "whether the respondents have adequately removed the risk of carbon monoxide poisoning through hazard training and vehicle maintenance," is immaterial to the issue of whether the respondents demonstrated good faith in attempting to abate the narrow violations charged in this particular instance.[8] Accordingly, we

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[8] We do not suggest that the duty to abate is necessarily always narrow in scope. The nature of a given violation or the regulatory or statutory provision violated may lead the Secretary to impose broad abatement duties. In the present case, for example, the Secretary issued imminent danger orders in connection with the unsafe equipment citations. In discussing the Mine Act's imminent danger provision, the Senate drafters stressed the importance of adequately abating such hazards:

> If miners are to receive the continuing protection that Congress intends inspectors and operators must look to the underlying conditions and practices causing an imminent danger. Section 10[7](a) thus requires the operator to correct the root causes as well as the symptoms of mine health and safety problems which gave rise to the order.

conclude that the judge erred to the extent that he denied the settlement motions because of a determination that the parties had failed to provide facts demonstrating the good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. We therefore vacate the judge's orders that effectively disapproved the proposed settlement.

IV.

Remand

We remand for the judge to reconsider the settlement motions without recourse to the erroneous abatement analysis discussed above. The general principles governing a judge's disposition of a proposed settlement are well established. Section 110(k) of the 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). *See also* Commission Procedural Rule 31, 29 C.F.R. § 2700.31. Section 110(k) charges the Commission and its judges with the duty "to protect the public interest by ensuring that all settlements of contested penalties are consistent with the . . . Act's objectives." *Knox County*, 3 FMSHRC at 2479. The judge shall review the adequacy of the penalties proposed to settle this matter in light of the other five statutory penalty criteria, which he did not discuss in his prior orders. In that regard, of course, he is not bound by the parties' assertions concerning these criteria. *Knox County*, 3 FMSHRC at 2479-81. *Cf. Sellersburg Stone Co.*, 5 FMSHRC 287, 293-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Although the vehicle inspection program that the operator proposes to adopt as part of the settlement is not relevant to a determination of whether this operator "exercised good faith in achieving compliance after notification of a violation," we do not imply that the program's efficacy cannot be a factor in the judge's determination of whether to approve or reject the proposed settlement. In determining whether to approve a proposed settlement a judge must consider, *inter alia*, whether the amount proposed will accomplish the underlying purpose of a civil penalty -- to encourage and induce compliance with the Mine Act and its standards. *Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (December 1980), *citing* S. Rep. 41, *reprinted in Legis. Hist.* 629. *See also Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982); S. Rep. 42-45, *reprinted in Legis. Hist.* 630-33. The "affirmative duty" that section 110(k) places on the Commission and its judges to "oversee settlements," *Co-op Mining*, 2 FMSHRC at 3475-76,

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S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977) ("S. Rep."), *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 625 (1978) ("*Legis. Hist.*"). Thus, in the circumstances presented here, the Secretary had the authority to include broader abatement duties than he actually required.

necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects.

The requirement that a judge consider all elements of a settlement presented to him for approval is consistent with the settled principle that, in considering whether to approve a proposed settlement, a judge must determine whether it is "fair, adequate and reasonable." *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971). *Accord, United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982); *see also, United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991) (settlement should be reviewed for "fairness, reasonableness and consistency with the statute"); *United States v. City of Jackson, Mississippi*, 519 F.2d 1147, 1151 (5th Cir. 1975) (judge must assure himself that the settlement's terms "are not unlawful, unreasonable or inequitable"); *Neuwirth v. Allen*, 338 F.2d 2, 3 (2d Cir. 1964) (judge correctly determined that "the settlement was fair"). These inquiries are bottomed on a concern that the settlement "adequately protects the public interest." *United States v. Seymour Recycling*, 554 F. Supp. at 1337; *see also United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 86 (D. Alaska 1977) (judge should determine that settlement "adequately protects the public interest and is in accord with the dictates of Congress"). In assessing the fairness of the settlement and whether it is consistent with the public interest, a judge must examine "*all* relief . . . , not just the [monetary] provisions of the settlement . . . ." *Luevano v. Campbell*, 93 F.R.D. 68, 86 (D.D.C. 1981) (emphasis supplied); *see also, United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 864 (5th Cir. 1975) (monetary relief must be viewed in light of other relief provided in settlement), *cert. denied sub nom. Harris v. Allegheny-Ludlum Industries, Inc.*, 425 U.S. 944 (1976).

Our dissenting colleagues err in concluding that the Mine Act "clearly" proscribes Commission judges from considering non-monetary settlement provisions presented to them by the parties for approval. Slip op. at 13. In construing the Mine Act, we are guided by the principle that "the primary dispositive source of statutory construction is the wording of the statute itself." *Association of Bituminous Contractors v. Andrus*, 581 F.2d 853, 861 (D.C. Cir. 1978). Section 110(k) of the Act, which governs settlements, does not contain language restricting in any way the scope of the Commission's inquiry in reviewing them. Had Congress desired to depart from the law governing the scope of review of settlements, it could easily have inserted in section 110(k) terms limiting the scope of the Commission's review of settlements. It did not do so, and the Commission is without authority to insert such terms itself.

The parties have made the vehicle inspection program part of the settlement package and they relied on its inclusion in arguing to the judge that the penalties proposed were consistent with the statutory criteria and should be approved. S. Mot. to Approve Set. at 3-4. It is appropriate for the judge to consider the weight to be given to each of the statutory penalty criteria in light of the planned inspection program's contribution to compliance. To the extent the parties are unsuccessful in persuading the judge of the efficacy of the inspection program as currently agreed to, the judge need not accord the program significance in his evaluation of the penalty proposed in the settlement. If the judge disagrees with the proposed penalties, he is free to reject

the settlement and direct the matter for hearing. *Knox County*, 3 FMSHRC at 2481-82. Alternatively, since the parties couched their renewed settlement approval motion in terms of a motion for summary judgment (*see* n.5, *supra*), the judge may examine the record and, if there are no factual disputes relating to liability and penalty assessment, issue a decision based on the record. *See Knox County*, 3 FMSHRC at 2481-82 & n.5. Rejection of the current settlement proposal would be without prejudice to the parties' resubmission of a settlement package tailored to meet the judge's objections.

V.

Conclusion

For the foregoing reasons, we vacate the judge's orders denying the motions for summary decision and the amended motions for approval of settlement, and remand for further proceedings consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioner Doyle and Commissioner Holen, concurring in part and dissenting in part:

A. Judge's Ruling

We concur in our colleagues' opinion that Judge Feldman erred in denying the settlement motion filed by the Secretary of Labor ("Secretary") because he believed factual questions relevant to abatement, i.e., "whether the respondents have adequately removed the risk of carbon monoxide poisoning through hazard training and vehicle maintenance," remained unresolved.[1] Order Denying Sec. Mot. for Summ. J. ("August 29 Order") at 2. We agree that those facts are immaterial to a determination of whether the operators, Madison Branch Management ("Madison") and Protective Security Services and Investigations, Inc. ("PSSI"), demonstrated good faith in attempting to achieve compliance, the sixth penalty criterion set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act").[2] 30 U.S.C. § 820(i). Thus, the issue identified by the judge in his August 29 Order was not a proper consideration in his evaluation of the settlement agreements.

B. Review of Non-pecuniary Settlement Provisions Is Not Authorized

We must, however, respectfully dissent from that portion of the opinion in which our colleagues remand this matter to the judge and from the theory they set forth in their remand instructions to him: "The 'affirmative duty' that section 110(k) places on the Commission and its judges to 'oversee settlements' necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects." Slip op. at 9 (citation omitted). We disagree that the Mine Act authorizes the judge to consider the non-pecuniary provisions of a settlement agreement as well as the penalty amount.[3]

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[1] Respondents abated the unsafe equipment violation by removing the defective vehicle from service. The training violation pertained only to the particular employee who had been using the defective vehicle. Citation No. 3976647.

[2] "Subsequent violative conditions, not described in the original citation, may be subject to separate enforcement actions by the Secretary, but are not properly grandfathered into the abatement duties imposed upon the operator as a result of the original citation." *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 510 (April 1989).

[3] Neither the Secretary nor the operators have argued that the Commission has authority under the Mine Act to consider non-pecuniary factors in evaluating settlement agreements.

1. Plain Language of Section 110(i)

Section 110 of the Mine Act is expressly entitled "PENALTIES" and each subsection thereunder clearly addresses matters related to penalties. Subsection 110(i) provides, in part:

> In assessing civil monetary penalties, the Commission shall consider[:] [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [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 person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

We believe that the Mine Act clearly provides that the Commission, in determining penalties and the appropriateness of a settlement, must rely on the six criteria set forth in section 110(i).[4] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that the initial question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ." 467 U.S. at 842. When Congress has directly spoken to an issue, an argument that an alternative construction better effectuates Congressional intent is without merit. *Sec. of Labor v. Shirel,* No. 94-1030, slip op. at 1, (March 29, 1995) (per curiam). Thus, because the Mine Act has clearly set forth the criteria upon which the assessment of penalties is to be based, the Commission is without authority to consider factors other than the criteria.[5]

---

[4] Our colleagues do not say whether, in their view, the language of the Mine Act is clear or whether they have found it ambiguous and are setting forth an interpretation they believe is reasonable and entitled to deference.

[5] The decisions referenced by our colleagues to support their contention that Congress intended no departure from the general law regarding settlements, slip op. at 10, do not overcome the explicit provisions of the Mine Act.

2. Legislative History of Section 110(i)

Moreover, there is no indication in the legislative history that Congress contemplated such considerations. The Conference Report states:

> The conference substitute conforms to the Senate bill, with an amendment incorporating the six criteria contained in the House amendment in lieu of the four in the Senate bill; which criteria shall be those upon which the Secretary shall propose a civil penalty and the Commission shall assess such penalty.

Conf. Rep. No. 461, 95th Cong., 1st Sess. 58 (1977), *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 1336 (1978) ("*Legis. Hist.*").

3. Supreme Court Decision

The Supreme Court has also noted: "[T]he Commission reviews all proposed civil penalties *de novo* according to six criteria." *Thunder Basin Coal Co. v. Reich*, 127 L. Ed. 2d 29, 38 (1994).

4. Plain Language and Legislative History of Section 110(k)

Our colleagues also err in relying on section 110(k) of the Mine Act to support their position. Slip op. at 9. Section 110(k) provides that no contested penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The language of section 110(k) does not require the Commission to consider both the monetary and non-monetary aspects of a proposed settlement package, nor does it grant the Commission authority to consider non-monetary aspects. Moreover, the legislative history contains no suggestion that Congress contemplated such an extension of the Commission's authority. The legislative history of section 110(k) shows congressional concern with compromising penalties off the record. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 44-45 (1977) ("S. Rep."), *reprinted in Legis. Hist.* at 632-33. The legislative solution to "the unwarranted lowering of penalties" was to allow compromise of a contested penalty amount only on the "public record" with Commission approval. S. Rep. 45, *reprinted in Legis. Hist.* at 633.

C. Effect of Remand Instructions

Under our colleagues' remand instructions, the judge, in reviewing the proposed settlement, is to consider the efficacy of the vehicle inspection program as part of his determination. Slip op. at 10. Thus, he apparently is free to delve into, and require the presentation of evidence on, factual issues well outside the statutory criteria.

D. Settlement Amounts Are Consistent with Statutory Criteria

Based on our determination that the Commission's oversight of this settlement does not extend to the non-monetary aspects of the settlement, we also disagree that there is a need to remand this matter to Judge Feldman for further proceedings. Although the judge did not make factual findings relating to the penalty criteria set forth in section 110(i), the record contains the facts necessary for consideration of those criteria. In the interest of judicial economy, we would make the required findings. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293-94 (March 1983).

As to the first penalty criterion, history of previous violations, the record reveals that Madison and PSSI have strong records of compliance with the Secretary's regulations. In the 24 months prior to the accident, Madison received no citations and PSSI received one. Concerning the second criterion, the operator's size, it is undisputed that both Madison and PSSI are small operators. The production at the mine at the time of the violations was approximately 80,000 tons per year, Madison's overall production was about 890,000 tons per year, and PSSI's employees worked approximately 27,000 hours per year. As to the third criterion, negligence, the Secretary asserts that Madison and PSSI were moderately negligent. Although respondents do not concede that level of negligence, they do not object to the penalty being based on that assertion. *See* Sec. Mot. for Summ. J., August 25, 1994, at 2, 4-6. Concerning the fourth criterion, respondents do not claim that the penalties will affect their ability to continue in business. As to the fifth criterion, the gravity of the violation is very serious in view of the fatality. Concerning the sixth criterion, abatement satisfactory to the Secretary was rapidly achieved.

We find that the penalties proposed by the Secretary for the violations in issue and accepted by respondents, $2,088 against Madison and $3,000 against PSSI, are consistent with the statutory penalty criteria and effectuate the purposes of the Mine Act. Accordingly, we would approve the settlement agreements, which incorporate those penalties.

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 19, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v	:	
	:	Docket No. KENT 92-17
DAVIS SHOULDERS, employed by PYRO MINING COMPANY	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1988) ("Mine Act"), the Secretary of Labor has filed a Motion to Lift Stay and Dismiss Petition for Review. Respondent has not opposed the motion. In the proceeding below, Administrative Law Judge David F. Barbour concluded that section 110(c) of the Mine Act provides for individual liability only against agents of operators that are corporations. 14 FMSHRC 2099 (December 1992) (ALJ). In his petition for discretionary review, the Secretary asserted that conclusion is erroneous.

In support of his motion, the Secretary states that this issue is controlled by the recent decision of the U. S. Court of Appeals for the District of Columbia Circuit in *Sec. of Labor v. Shirel,* No. 94-1030 (March 29, 1995) (per curiam). The court held that section 110(c) applies only to corporations, not to operators organized as corporate partnerships.

Upon consideration of the Secretary's motion, we grant it. *See generally Golden Oak Mining Co.,* 12 FMSHRC 1758 (September 1990).

Accordingly, we dissolve the stay, vacate the direction for review and dismiss this proceeding.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
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June 20, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 94-681-M
T.E. BERTAGNOLLI & ASSOCIATES	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On March 13, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to T.E. Bertagnolli & Associates ("Bertagnolli") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalties or the judge's December 22, 1994, Order to Respondent to Show Cause. The judge assessed civil penalties of $9800.

In a letter to the judge dated March 27, 1995, Bertagnolli states that, on October 21, 1994, it had responded to the Secretary's penalty proposal but had inadvertently mailed its response to an attorney in the Office of the Department of Labor's Solicitor in San Francisco, California. It enclosed a copy of that letter, which it states is a "duplicate" in all respects except that it is addressed to Judge Merlin.

The judge's jurisdiction over this case terminated when his default order was issued on March 13, 1995. 29 C.F.R. § 2700.69(b). 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). Due to clerical oversight, the Commission did not act on the March 27 letter within the statutory period for considering petitions for discretionary review. The judge's default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991).

In the interest of justice, we reopen this proceeding and treat Bertagnolli's March 27 letter as a timely filed petition for discretionary review, which we grant. *See Cedar Lake Sand & Gravel Co.*, 15 FMSHRC 2253, 2254 (November 1993). On the basis of the present record, we are unable to evaluate the merits of Bertagnolli's position. We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 94-720-M
WISER CONSTRUCTION, L.L.C.	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On March 13, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Wiser Construction, L.L.C. ("Wiser") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalties or the judge's January 4, 1995, Order to Respondent to Show Cause. The judge assessed civil penalties of $4300.

In a letter to the judge dated March 16, 1995, Wiser's managing member states that, on January 1, 1995, Wiser had responded to the Secretary's penalty proposal but that it had inadvertently mailed its response to an attorney in the Office of the Department of Labor's Regional Solicitor in Denver, Colorado. He enclosed a copy of that letter, which is dated January 9, 1995.

The judge's jurisdiction over this case terminated when his default order was issued on March 13, 1995. 29 C.F.R. § 2700.69(b). 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). Due to clerical oversight, the Commission did not act on the March 16 letter within the statutory period for considering petitions for discretionary review. The judge's default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991).

In the interest of justice, we reopen this proceeding and treat Wiser's March 16 letter as a timely filed petition for discretionary review, which we grant. *See Cedar Lake Sand & Gravel Co.*, 15 FMSHRC 2253, 2254 (November 1993). On the basis of the present record, we are unable to evaluate the merits of Wiser's position. We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 26, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 95-316
	:	A.C. No. 01-00323-03747
v.	:	
	:	Docket No. SE 95-317
DRUMMOND COMPANY, INC.	:	A.C. No. 01-00323-03748
	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On June 2, 1995, the Commission received from Drummond Company, Inc. ("Drummond") a Motion for Relief from Final Order. Drummond states that, on April 18, 1995, it mailed a "Green Card" request for a hearing in each of the subject cases but that it had mistakenly circled the citations and orders it was not contesting rather than those it wished to contest. Attached to the motion are copies of the Green Cards and correspondence from Drummond to the Department of Labor's Mine Safety and Health Administration ("MSHA") that accompanied payment of penalties in those same enforcement actions. Drummond requests relief pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"). On June 8, 1995, the Secretary of Labor filed a response to Drummond's motion, requesting that the Commission assign this case to an administrative law judge with instructions to hold a full evidentiary hearing.

Under section 105(a) of the Mine Act, 30 U.S.C. § 815(a), an operator has 30 days following receipt of the Secretary's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). Relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect.

On the basis of the present record, we are unable to evaluate the merits of Drummond's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Drummond has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
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June 29, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 94-92
	:	Docket Nos. KENT 94-271
	:	KENT 94-272
v.	:	KENT 94-362
	:	KENT 94-363
NORTH STAR CONTRACTORS, INC.	:	KENT 94-426
	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On January 17, 1995, the Secretary of Labor filed a Motion for Default Judgment, asserting that North Star Contractors, Inc. ("North Star") had agreed to pay certain penalties proposed by the Secretary in six cases but had subsequently failed to sign the Joint Motions to Approve Settlement mailed to North Star on April 15, 1994, and on October 20, 1994. On February 1, 1995, Chief Administrative Law Judge Paul Merlin issued two orders to show cause, directing North Star to answer with either a signed copy of the settlement motion or with an explanation for its failure to do so.[1] On March 21, 1995, after no response had been filed, Judge Merlin issued two default orders, corresponding to the show cause orders, entering judgment in favor of the Secretary and ordering North Star to pay the proposed penalties.

On March 30, 1995, the Commission received from Pamela Taylor, North Star's secretary, two letters dated March 27. In the first letter, regarding the default order that had been entered in Docket No. KENT 94-92, Taylor requests a copy of the proposed settlement, explaining that she recently had assumed responsibility for the operator's penalty cases and that she did not have all of the information necessary to discuss the cases.

[1] The judge issued a show cause order in Docket No. KENT 94-92, and a separate show cause order pertaining to the other five subject cases.

In the second letter, regarding the default order that had been entered in the other five cases, Taylor states that, on March 8, 1995, she had sent a letter to an attorney with the Department of Labor's Regional Solicitor's Office and had attached a list of various penalty assessments, including five of the subject actions. She states that she requested a reduction of penalties and the formulation of a payment plan but received no response. Taylor requests that the Commission consider all the cases listed in the attachment to her March 8 letter, which includes 14 cases in addition to the subject cases.

The judge's jurisdiction over this case terminated when the captioned default orders were issued on March 21, 1995. 29 C.F.R. § 2700.69(b). 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). Due to clerical error, the Commission did not act on the March 27 letters within the statutory period for considering requests for discretionary review. The judge's default orders became final orders of the Commission 40 days after their issuance by operation of section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen these proceedings and deem North Star's March 27 letters to constitute petitions for discretionary review, which we grant. *Mitchell, emp. by HB&B Equip. Co.*, 15 FMSHRC 2458, 2459 (December 1993); *Remp Sand & Gravel*, 16 FMSHRC 501, 502 (March 1994).

North Star has offered no explanation in its March 27 letters for its failure to answer the judge's show cause orders. We conclude that relief from the judge's orders is not warranted and we deny North Star's request as to the subject six cases. *Cf. Pit*, 16 FMSHRC 2033, 2034 (October 1994) (denying request for relief).

We also deny North Star's request that we consider the other 14 cases referenced in its March 8 letter to the Solicitor. The request is inappropriate for a majority of those cases because, by the date of North Star's March 27 letters, they had been settled or dismissed, or were not reviewable because an administrative law judge had not issued an order constituting his final disposition of the matter. In the remaining cases, in which default orders had been entered and had become final orders of the Commission, North Star has offered no justification for relief under Rule 60(b).

Accordingly, we deny North Star's request for relief.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, 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 2 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 95-81-M
Petitioner	:	A. C. No. 30-00612-05503 X7X
v.	:	
	:	Docket No. SE 95-113-M
DILLINGHAM CONSTRUCTION	:	A. C. No. 38-00612-05504 X7X
Respondent	:	
	:	Lyman Quarry Mine

DECISION APPROVING SETTLEMENT

Appearances: Leslie J. Rodriguez, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Mr. Joe Meyer, Dillingham Construction Company, Asheville, North Carolina, for Respondent.

Before: Judge Weisberger

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). A hearing was scheduled for May 9, 1995, in Greenville, South Carolina. At the hearing, the Parties entered into a settlement agreement, and Petitioner moved to approve the settlement. A reduction in penalty from $4800 to $1200 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**. It is **ORDERED** that respondent pay a penalty of $1200 as follows: $600 is to be paid on May 9, 1995 and $600 is to be paid on June 9, 1995.

Avram Weisberger
Administrative Law Judge

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JUN 5 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-298 A.C. No. 05-03505-03619
v.	:	Deserado Mine
WESTERN FUELS-UTAH, INC., Respondent	:	

DECISION

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

Before: Judge Cetti

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, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), seeks civil penalties from Respondent Western Fuels-Utah, Inc. for the alleged violation of four mine safety standards contained in 30 C.F.R. Part 75, subpart L involving fire protection.

Facts Not In Dispute

1. Western Fuels-Utah, Inc., is engaged in mining and selling of bituminous coal in the United States, and its mining operations affect interstate commerce.

2. Western Fuels-Utah, Inc., is the owner and operator of Deserado Mine, MSHA I.D. No. 05-03505.

3. Western Fuels-Utah, Inc., is a medium size mine operator with 2,606,398 tons of production in 1991.

4. Western Fuels-Utah, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").

5. The presiding Administrative Law Judge has jurisdiction in this matter.

6. The subject citations and failure to abate orders were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing issuance and not for the truthfulness or relevancy of any statements asserted therein.

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

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

II

The Deserado Mine is a medium size underground coal mine located near Rangely, Rio Blanco County, Colorado. The mine operates on three shifts, five days a week.

On August 10, 1992, at about 7:10 p.m. during the mine's evening shift, a fire occurred in the drive unit of the conveyor belt located in the Number 3 East Mains (EM3) of the Deserado Mine. The fire was detected when the Conspec computer system noted a CO (carbon monoxide) alarm. Alarms were set off by the rise in carbon monoxide and the discharge of the dry chemical fire suppression system at the EM3 conveyor system.

It is undisputed that there were no injuries and that the fire was immediately reported to MSHA as soon as it was controlled even though it was not a reportable fire in the opinion of the MSHA inspectors.

On August 11, 1992, the morning right after the swing shift fire, MSHA personnel went to the mine and inspected the area of the fire and the equipment at the EM3 belt drive. No violations were found at the time of this first inspection and no citations were issued. A week later MSHA personnel returned to the area of the fire at the mine and issued four citations. Two of the citations involved electrical safety switches, and the other two the dry chemical powder fire suppression system.

III

There was considerable speculation and different theories advanced by the parties at the hearing as to what caused the fire but very little direct or persuasive evidence. The operator's theory as to what caused the fire as set forth in the first two pages of Respondent's post-hearing brief is as follows:

> Logs, trash or coal jammed into the drive of the belt. Friction created by the belt drive rollers against the logs ignited the wood within perhaps one to two minutes after the jam. The ensuing fire rapidly burned through the jammed belt. The dry chemical powder fire suppression system discharged and the nozzles which were directed at the top and bottom of the top belt and the top of the bottom belt, extinguished the fire on the belt. However, the fire between the drive rollers was not extinguished. Warned by the alarms which were set off by the raise in carbon monoxide and the discharge of the fire suppression system, miners from the Deserado Mine, using backup fire hoses, extinguished the fire in the belt drive, and in the cribbing above the belt drive. The fire which began at about 7:10 was controlled at about 7:34 P.M. and extinguished by 8:00 P.M.

It was the Secretary's position that the cause of the fire was either a jumper at the control center that resulted in the bypass of the sequence and slippage switches for the EM3 conveyor belt flight or the failure of those switches to function as intended. The Secretary in post-hearing brief at page 7 states:

> ... Inspector Gore issued [two citations] ... for an inoperable sequence switch and ... an inoperable switch on the fire suppression system. The inoperable switches were determined to be the cause of the accident, since the only other possible cause presented was jumper at the control center. The mine insists there were no jumpers, leaving us to conclude that the switches must have been ineffective.

This was the basis for the issuance of Citation No. 3587226.

Turning now from the speculation and the various theories advanced by the parties during the hearing and in their post-hearing briefs as to what caused the fire, we now take a close look at each specific citation issued and determine if the preponderance of the evidence presented established the violations alleged in each citation.

Citation No. 3587226

This citation charges the operator with an S&S violation of 30 C.F.R. § 75.1102. That safety standard in its entirety reads as follows:

> Underground belt conveyors shall be equipped with slippage and sequence switches.

The citation issued by Inspector Gary K. Frey, one week after the fire at the time of the second inspection reads as follows:

> The sequence and slippage switches installed for the East Mains No. 3 conveyor belt flight failed to function as intended, in that the belt drive continued to operate when the East Mains No. 2 belt was deenergized causing a coal spillage at the head roller of the No. 3 belt. This condition stalled the belt causing the drive rollers to slip on the belt, the resulting friction caused a belt fire to occur; on 08-10-92.

Inspector Gary K. Frey who signed the citation was not available at the hearing. Although signed by Mr. Frey the citation was written by Inspector Art Gore who was present and testified at the hearing. Mr. Gore was not present, however, at the time of the initial MSHA inspection of August 11, 1992, the morning immediately following the swing shift fire. Mr. Gore was at the mine on August 18th when the four citations were issued.

It is undisputed that sequence and slippage switches in question were installed for the East Main No. 3 conveyor belt flight. Both switches were "designed" to perform their proper function. Both of the switches were properly working before and after the August 10, 1992 fire and continued in use to the present (time of hearing) without any repair or alteration. During his inspection of August 18th Inspector Gore did not look at the switches to find out whether they were functioning or not. His conclusions were based upon his examination of the electrical wiring diagrams and the Conspec computer printout. Inspector Gore testified:

> Q. ... So looking at the Conspec and the electrical wiring diagram, you concluded that the switch must not have been functioning?
> A. That's true.
> Q. Did you look at the switch to find out if it was functioning or not?
> A. No, I did not.

In item 17 of the citation Inspector Gore states "The system was examined and no malfunctions were found or occurred at the time of examination."

Evidence was presented by Respondent showing that the reliability of the Conspec printout is questionable. Errors were

shown to exist in the Conspec printout. Credible evidence was also presented to show the switches in question had been inspected three days before the fire and were functional prior to the fire, that the switches had not been changed or modified in any way after the incident, and that the same switches were still in place, and functional two years later at the time of the hearing.

In another vein, looking at the plain wording of the regulation in question it clearly states that the conveyor shall be "equipped" with specified equipment. What is the ordinary plain meaning of the word "equipped". If the transmission of your car were to suddenly not function properly for a short period of time, you would not say your car was not "equipped" with a transmission. Particularly were the transmission for some unknown reason without any modification or repair appeared to be functioning in a very proper manner within a few minutes or hours thereafter. Using ordinary plain english you wouldn't say your car was not "equipped" with a transmission. I also believe that if the promulgators of the regulation intended to make the sudden unexpected malfunction of required equipment a citable offense, they would have worded the regulation differently so that a person of ordinary prudence on reading the regulation would have known of that intent.

Upon evaluation of all the evidence presented, I find that the preponderance of the probative evidence fails to establish that the EM3 belt conveyor was not "equipped with slippage and sequence switches" as required by 30 C.F.R. § 75.1102. The citation is vacated.

Citation No. 3587227

This citation alleges a violation of 30 C.F.R. § 75.1101-16(a). The safety standard in relevant part reads as follows:

> 30 CFR § 75.1101-16(a)
>
> (a) Each self-contained dry powder chemical system shall be equipped with sensing devices which shall be designed to activate the fire control system, sound and alarm and stop the conveyor drive motor in the event of a rise in temperature, ... (Emphasis added).

Petitioner charges the operator with a 104(a) S&S violation of the above quoted safety standard. The citation reads as follows:

> Citation No. 3587227
>
> The self-contained dry powder chemical system installed on the East Mains No. 3 belt flight

> failed to stop the conveyor drive motors after the fire suppression system for the No. 3 belt flight was activated. This condition is believed to have contributed to a belt fire which occurred on 08-10-92 at this belt drive.

The record shows the citation was issued on August 18, 1992 at 9:45 a.m. The citation was terminated five (5) minutes later, at 9:50 a.m. without any change in the self-contained dry powder chemical system's sensing devices. Inspector Gore who wrote the citation wrote in item 17 of the citation:

> The system was examined and no malfunctions were found or occurred at the time of examination.

The evidence clearly shows that the dry powder chemical fire suppression systems was equipped with a sensing device that did in fact activate (discharge) the fire control system and sounded the alarm. There is disagreement as to whether or not the fire suppress system stopped the conveyor drive motor. Assuming arguendo that it did not stop the conveyor drive motor no persuasive evidence was presented that (in the words of the regulation) it was not "equipped" with a sensing device that was "designed" among other things, to stop the conveyor drive motor. The undisputed fact that the citation was abated without any repair, service or modification of this sensing device and continued to function properly after the August 10th fire is very strong, if not, conclusive evidence that the fire suppression system was equipped with sensing devices "designed" to stop the conveyor drive motor in the event of a rise in temperature.

The Secretary, the charging party, has the burden of proof. On careful evaluation of all the evidence I find that within the meaning of the safety standard in question, that the preponderance of the evidence presented fails to establish that the self-contained dry powder chemical system was not "equipped" with sensing devices "designed" to activate the fire control, sound the alarm and stop the conveyor drive motor in the event of a rise in temperature. The citation is vacated.

Citation Nos. 3587228 and 3587229

Citation No. 3587228, as amended at the hearing alleges a violation of 30 C.F.R. § 75.1101-14(a). The citation reads as follows:

> The dry chemical fire extinguishing system installed at the East Mains No. 3 belt drive was not installed as required in that it was measured with a standard rule to contain over

> 81 feet of piping and hose between the chemical container and the furthest nozzle which was located at the belt take-up unit.

Up to the time Petitioner modified the citation at the hearing this citation alleged a violation of 30 C.F.R. § 75.1107-9(a)(3) which with respect to dry chemical fire extinguishing systems requires that the "Hose and pipe shall be as short as possible; the distance between the chemical container and the furthest nozzle shall not exceed 50 feet."

At the commencement of the hearing, without objection, the Petitioner amended Citation No. 3587228 to allege a violation of 30 C.F.R. § 75.1101-14(a) which provides as follows:

> (a) Self-contained dry powder chemical systems shall be installed to protect each belt-drive, belt takeup, electrical-controls, gear reducing units and 50 feet of fire-resistant belt or 150 feet of non-fire-resistant belt adjacent to the belt drive.

Turning now to the other fire suppression citation, Citation No. 3587229 alleges a violation of 30 C.F.R. § 75.1101-15(d) which reads as follows:

> Nozzles and reservoirs shall be sufficient in number to provide maximum protection to each belt, belt take-up, electrical controls and gear reducing unit.

The citation alleging a violation of the above quoted safety standard reads as follows:

> The reservoirs containing the dry chemical powder used for fire suppression at the East Mains No. 3 belt drive was not sufficient in number to provide maximum protection for this belt in that on 08-10-92 a fire occurred, the fire suppression system was activated, the dry powder chemical was expelled and failed to extinguish the fire.

Inspector Vetter inspected the area of the fire at the 3 East Mains section of the mine on August 11, 1992, the morning after the swing shift fire. Vetter testified that the fire suppression system was inadequate. Although the system sensed the fire and automatically discharged, it was inadequate because it failed to completely put out the fire. The miners had to bring in and use auxiliary water hoses to put out the fire.

There was only one dry chemical powder reservoir and 81 feet of pipe from the reservoir to the discharge nozzles. This length of pipe made it very difficult on discharge for the system to adequately carry the dry powder chemical through this length of pipe to the nozzles and expel the chemical so as to provide maximum protection particularly to the "belt take-up".

Inspector Vetter testified:

> A The pipe is to carry this dry powder to the nozzles. If there's an unlimited amount of piping in the system, then it stands to reason that it will just more or less stay in the system. The chemical won't be expelled. The energy that's forcing this chemical through the system is dissipated throughout the system and it's ineffective when it reaches its final destination.
>
> It might have expelled some, but the majority of it, I believe, was still left in the piping that transfers this chemical from the reservoir to the nozzles.
>
> Q Okay. The belt -- and just so we're clear, on this belt takeup unit, did the fire spread that far?
>
> A No, it didn't.
>
> Q Was this an area that was washed down by the hoses, do you know?
>
> A The takeup unit?
>
> Q Yea
>
> A No. No, it didn't show a sign of being washed down
>
> Q Okay. So that was a place that was easier to observe how much, if any, chemical was expelled; is that correct?
>
> A Yes

With respect as to the amount of the dry chemical expelled in the area of the take-up unit, Vetter testified:

> A What I saw was just a sprinkling of dry powder chemical. Normally, it's a blanket of

> yellow substance and this was just a dribbling or a sprinkle of dry powder chemical.

Vetter based upon his observations of the amount of dry chemical he found at the belt take-up unit testified that if the belt take-up unit had been on fire there wasn't enough chemical expelled out of that nozzle to adequately cover the take-up unit and put out the fire.

I credit Inspector Vetter's testimony and find the preponderance of the evidence established a violation of 30 C.F.R. § 75.1101.

The violation was abated by installing a second dry chemical reservoir which considerably shortened the length of the needed piping to less than 50 feet from each reservoir to the nozzles through which the chemical is expelled.

This is the same abatement action that terminated the violation of Citation No. 3587228 and the corresponding 104(b) order. Considering this fact along with the evidence presented with respect to these two fire suppression citations leads me to the conclusion that Citation No. 3587228 is duplicative and along with its corresponding 104(b) order should be vacated and Citation No. 3587229 and its corresponding 104(b) order should be affirmed.

Inspector Vetter found the violation in Citation No. 3243029 significant and substantial (S&S). It is well established that 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 (January 1984), the Commission explained:

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

6 FMSHRC at 3-4. 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. 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original).

The Commission has consistently held that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations and must be based upon the particular facts surrounding the violation in issue. Texasgulf, Inc. 10 FMSHRC 498, 500-01 (April 1988).

This is not a case where the Judge is asked to assume an emergency situation in determining whether the violation is significant and substantial (S&S). In this case there was no need to make such an assumption as there definitely was an emergency. The belt foreman Nepp reported that it was an "uncontrolled fire" and the mine rescue team was notified that the mine had an emergency. (Tr. 54-55). The fire suppression system at EM3 conveyor was clearly inadequate. It failed to extinguish the belt fire. The conveyor belt burned in two and the fire spread to the cribbing above the belt drive. It generated a lot of smoke. Miners were evacuated from the mine except for the few miners that remained to fight the fire with auxiliary water hoses.

Fortunately no miner was injured. Nevertheless there was a serious emergency with reasonable likelihood of serious injury from the fire, from smoke inhalation and from the hazard of fighting an underground coal mine fire with auxiliary hoses. I agree with Inspector Vetter that this violation of the fire suppression standard was a significant and substantial violation. The evidence presented established a violation of a mandatory safety standard, a significant measure of danger to safety that was significantly contributed to by the violation and a reasonable likelihood that the hazard contributed to would result in injury of a reasonable serious nature. The preponderance of the evidence established a significant and substantial violation.

PENALTY

The Deserado Mine is a medium size underground coal mine. The mine failed to abate the serious violation charged in the fire suppression citations within the one week set for abatement by the mine inspector. There was no reasonable excuse for this failure to timely abate. The violation was very promptly abated only after MSHA issued the 104(b) order.

The gravity of the violation charged in Citation No. 3587229 is high. A fire in an underground coal mine is a serious hazard. A belt fire must be extinguished immediately because of the

serious potential for harm that can result from the fire and smoke, particularly if the fire spreads. A fire in an underground coal mine such as we have in this case is reasonably likely to result in a serious injury and can result in tragic loss of life.

Considering the statutory criteria enumerated in section 110(i) of the Act, particularly the high gravity of this S&S violation of the fire suppression standard I assess a civil penalty of $4,000.00.

ORDER

In view of the foregoing findings and conclusion it is **ORDERED** that:

1. Citation Nos. 3587225 and 3587226 are **VACATED.**

2. Citation No. 3587228 along with its corresponding 104(b) order is **VACATED.**

2. Citation No. 3587229 including its S&S designation and its corresponding 104(b) order are **AFFIRMED** and a penalty of $4,000.00 is assessed for the violation of 30 C.F.R. § 75.1101-15(d).

3. **RESPONDENT SHALL PAY** a civil penalty of $4,000.00 to MSHA within 40 days of this decision. Upon receipt of payment, this case is dismissed.

August F. Cetti

August F. Cetti
Administrative Law Judge

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JUN 5 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-401-M A.C. No. 48-01459-05511
v.	:	
LARAMIE COUNTY ROAD & BRIDGE, Respondent	:	Laramie County Crusher

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Roberta A. Coates, Esq., Laramie County Attorney, Cheyenne, Wyoming, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Laramie County Road & Bridge ("Laramie County"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges a single violation of the Secretary's safety standards. For the reasons set forth below, I affirm the citation and assess a civil penalty in the amount of $250.00.

A hearing was held in this case before Administrative Law Judge John J. Morris, in Cheyenne, Wyoming. The parties presented testimony and documentary evidence, but waived post-hearing briefs. This case was reassigned to me on April 24, 1995, for an appropriate resolution.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Laramie County Crusher is operated by the government of Laramie County, Wyoming. The crusher supplies gravel for use on county roads. The citation that is the subject of this proceed-

ing was issued at the cone crusher (the "crusher") by MSHA Inspector Arthur L. Ellis on March 24, 1993.

Inspector Ellis observed an employee of Laramie County standing on the lip of the crusher. (Tr. 13). He believed that a falling hazard was presented and issued a combination section 107(a) imminent danger order and section 104(a) citation (the "citation"). The citation states:

> An employee was observed standing on a narrow lip of cone crusher, exposing himself to the possibility of falling approximately (12') 260 cm to the ground below. The employee was not wearing a safety belt and line. The employee was removing rocks from the cone crusher, which was bound up with rocks and would not operate.

The inspector stated on the citation that the violation was highly likely to cause a permanently disabling injury and was of a significant and substantial nature. He determined that Laramie County was moderately negligent. The citation was immediately abated when the foreman removed the employee from the lip of the crusher.[1]

The citation charges Laramie County with a violation of 30 C.F.R. § 56.15005, which provides, in pertinent part, that "safety belts and lines shall be worn when persons work where there is a danger of falling... . The inspector believed that it was highly likely that the employee would fall because he was using both hands to lift rocks off the screen that covered the crusher and throw them over the side of the crusher. (Tr. 19). He testified that "it would be easy for him" to lose his balance while performing that task and fall off the crusher. Id. Based on MSHA reports on falling hazards, the inspector concluded that the employee could have sustained serious back, neck, or head injuries. (Tr. 21-22). Inspector Ellis determined that the employee was not using a safety belt and line, and issued the citation on that basis.

The crusher is a portable trailer-mounted cone crusher that is fed by a conveyor belt. (Tr. 12). The inspector measured the distance between the lip of the crusher and the ground at 12 feet. (Tr. 13). The lip is near the top of the crusher. Id.

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[1] The issue of whether the cited condition presented an imminent danger was not contested by Laramie County or litigated in this proceeding. Accordingly, I make no findings in that regard.

The configuration of the crusher and the position of the employee when he was leaning over the crusher is depicted on Ex. 2, which is a photograph taken by Inspector Ellis at the time he issued the citation. (Tr. 14). Inspector Ellis testified that he also observed the employee standing with both feet on the lip of the crusher. (Tr. 18, 36).

Laramie County does not dispute that its employee was at the lip of the crusher, leaning over the crusher, and throwing rocks out. It maintains that the ground was only eight feet below this lip, based on measurements taken by Donald R. Beard, Laramie County Public Works Director, a few days after the citation was issued. (Tr. 49). It also maintains that the cited safety standard is so vague as to be unreasonable, arbitrary, and capricious and, therefore, contends that the standard is unenforceable as applied to the facts of this case. Laramie County contends that Inspector Ellis overstated the hazard presented, the degree of any injuries that might be sustained, and the negligence of the operator. In addition, it argues that the use of a safety belt and line would increase the danger of a serious injury because an employee would be snapped into the side of the heavy metal crusher if he fell. Without a safety belt, an employee could jump clear of the metal equipment and avoid serious injury if he lost his balance. Finally, Laramie County maintains that the citation should not have been specially assessed under 30 C.F.R. § 100.5.

The safety standard at section 56.15005 is, by necessity, broadly worded so that it can be applied to a wide range of circumstances. The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). The Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990); Lanham Coal Co., 13 FMSHRC 1341, 1343 (September 1991).

In Great Western Electric Company, 5 FMSHRC 840 (May 1983), the Commission affirmed a violation of this safety standard where an employee was installing a light fixture while standing on a ladder about 18 feet above the ground. In its decision, the Commission stated that the reasonably prudent person test for this standard is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." 5 FMSHRC at 842.

In Lanham Coal Co., a dump truck driver was injured when he fell ten feet from the top of his truck while trying to place a tarp over the load. Following an investigation, MSHA cited the mine operator under section 77.1710, which is similar to section 56.15005, because the truck driver was not using a safety belt and line. (13 FMSHRC at 1342). The mine operator argued that it did not consider the cited safety standard to be applicable to the tarping of trucks and was not given any notice that it would be applied in such a manner. The Commission held that a safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." 13 FMSHRC at 1343 (quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)). Because the administrative law judge affirmed the citation without considering this issue, the Commission remanded the proceeding to the judge for application of these principles.

The record establishes that the employee in the present case was standing and leaning over the top of the crusher approximately eight to twelve feet above the ground. He was reaching in the crusher to pick up rocks and was throwing the rocks on the ground behind him. Thus, he was not stationary but was moving about as he worked. The employee was not wearing a safety belt or line, nor was he tied off in any manner. Safety belts and lines were not available at the job site. Inspector Ellis was concerned that the employee could fall and sustain a serious injury if he should lose his balance while throwing rocks or moving around. I credit his testimony in this regard.

Based on the evidence, I find that a reasonably prudent person would have recognized that the employee was in danger of falling and that use of a safety line was warranted. The position of the employee on the lip of the crusher while he cleared loose rock supports a reasonable conclusion that he was in a precarious location which exposed him to a falling hazard. Such falls are usually unexpected and may occur at any time while an employee is preoccupied with his work. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." Great Western Electric, 5 FMSHRC at 842. A safety line or other means of protection helps prevent injury in the event of a fall.

I also find that a reasonably prudent person would have recognized that the safety standard applied in this instance. On remand in Lanham Coal Co., the administrative law judge vacated the citation because the undisputed evidence established that MSHA had never applied the safety line standard to the tarping of dump trucks. (13 FMSHRC 1710, 1712 (October 1991)). The safety standard is frequently applied to employees working on crushers and other similar equipment, however. See, for example, Adams

Stone Corp., 15 FMSHRC 1080 (June 1993)(ALJ). One of the purposes of the safety standard is the prevention of dangerous falls from mining equipment.

Laramie County's argument that a safety belt and line could increase the likelihood of a serious injury is not well founded. The argument is based on the use of a six-foot safety line to protect against a eight-foot fall. Inspector Ellis testified that other mine operators use safety lines in similar situations, so there is no reason why Laramie County cannot devise a safety line that protects miners without creating other hazards or interfering with their work.

Based on the above, I conclude that the Secretary established a violation of 30 C.F.R. § 56.15005.[2] I also conclude that the violation was S&S. I find that the evidence establishes that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). As Inspector Ellis stated at the hearing, miners have been seriously injured and killed as a result of falling from heights of eight to twelve feet.

II. Civil Penalty Assessment

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $250.00 for the violation. As stated above, Laramie County maintains that the citation should not have been specially assessed under 30 C.F.R. § 100.5. Because the penalty I have assessed in this proceeding is based on the evidence developed at the hearing, the Secretary's penalty regulations at 30 C.F.R. § Part 100 are not relevant. Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147, 1151-1152 (7th Cir. 1984). I have not considered those regulations in assessing a penalty in this case.

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[2] In its answer to the petition for assessment of penalty, Laramie County argued that because the product from the crusher is used exclusively on the roads of Laramie County, Wyoming, the crusher does not affect interstate commerce. Accordingly, it maintained that MSHA does not have jurisdiction over the crusher under 30 U.S.C. § 803. It did not raise this issue at the hearing. The Commission and the courts have consistently held that Congress intended to exercise its authority to the maximum extent feasible when it enacted the Mine Act. See, for example, Jerry Ike Harless Towing, Inc., 16 FMSHRC 683, 686 (April 1994); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993).

I find that Laramie County was issued four citations in the 24 months preceding the inspection in this case. (Ex. 1). I also find that Laramie County is a very small operator with about 5,000 man-hours worked in 1992. (Tr. 6). I find that the civil penalty assessed in this decision would not affect Laramie County's ability to continue in business. The conditions cited by the inspector were all timely abated. I find that Laramie County made good faith efforts to comply with MSHA's safety standards.

I also find that Laramie County's negligence was low to moderate with respect to the violation. The Mine Act is a strict liability statute. Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). A citation issued by MSHA for a violation of a safety standard must be affirmed if the facts show that the standard was violated, even if the mine operator was not negligent. The degree of the mine operator's negligence, however, is an important factor in determining the civil penalty.

Laramie County received a combination citation/imminent danger order on April 17, 1990, from a different MSHA inspector when he observed an employee on the crusher removing rock in a similar manner while the crusher was operating. (Ex. A). The inspector charged Laramie County with a violation of 30 C.F.R. § 56.14105, because the equipment was operating while the task was preformed. Mr. Beard testified that during abatement discussions between Laramie County's foreman and the inspector, Laramie County was led to believe that if it installed a screen across the top of the crusher and deenergized the crusher whenever rock was removed by hand, it would be complying with MSHA's requirements. (Tr. 44, 56-57). Mr. Beard stated that the MSHA inspector did not mention the need for safety belts and lines. Id.

The Secretary contends that because a different safety standard was cited, a discussion of safety lines by the inspector was not necessary. He also points to the "Action to Terminate" section of the previous citation where it states that Laramie County's foreman agreed that "no one would try to [remove rock from the crusher] until the power was off or until safe access was provided and there is a secure covering [for the crusher] ... ." (Ex. A). He maintains that Laramie County should have known that "safe access" referred to the use of safety lines. As stated above, Mr. Beard stated that Laramie County did not interpret the citation or the discussions to require the use of safety lines. (Tr. 57). I credit his testimony in this regard. I find that, even if Laramie County incorrectly interpreted the prior inspector's actions, it believed, in good faith, that it was complying with MSHA's requirements as a result of these discussions. Accordingly, I find that Laramie County was not as negligent as MSHA determined.

III. ORDER

Accordingly, Citation No. 4124092 is **AFFIRMED**, and Laramie County Road & Bridge is **ORDERED TO PAY** the Secretary of Labor the sum of $250.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 6 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-181-M
Petitioner	:	A. C. No. 23-01785-05528
v.	:	
	:	Moberly Stone Company
MOBERLY STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
No appearance for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a proposal for assessment of 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 of $385 for five alleged violations of the mandatory safety standards found in 30 C.F.R. Part 56.

The respondent contested the violations and requested a hearing. Pursuant to notice, a hearing was convened in Moberly, Missouri, on March 7, 1995, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without them. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

ISSUE

The issue presented in this case is whether the petitioner has established the violations cited, and, if so, the appropriate civil penalty that should be assessed for the violations.

MSHA'S TESTIMONY AND EVIDENCE

The following MSHA Exhibits were received in evidence in this proceeding:

1. A copy of the proposed assessment data sheet (Exhibit P-1).

2. A copy of section 104(a) Citation No. 4322264, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-2).

3. A copy of section 104(a) Citation No. 4322265, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-3).

4. A copy of section 104(a) Citation No. 4322266, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-4).

5. A copy of section 104(a) Citation No. 4322267, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-5).

6. A copy of section 104(a) Citation No. 4322268, issued by Inspector LeRoy Parmalee on April 20, 1994 (Exhibit P-6).

The petitioner also presented oral testimony on the record at the hearing and based on all the evidence presented, I conclude and find that the violations have been established, and accordingly, the contested citations are affirmed as issued.

RESPONDENT'S FAILURE TO APPEAR AT THE HEARING

The record in this case indicates that after first giving the parties an opportunity to select their own trial date by Prehearing Order dated October 25, 1994, a Notice of Hearing

dated January 12, 1995, setting this case down for hearing in Moberly, Missouri, on March 7, 1995, was received by respondent on January 17, 1995. Respondent received the aforesaid Prehearing Order on October 27, 1994, but opted not to respond.

Respondent was first heard from by fax on February 15, 1995, requesting that the hearing be moved to Burlington, Iowa, on either a Monday morning or a Friday afternoon.

During a telephone conference between myself and the parties, where the petitioner objected to moving the date or location of the trial, I denied the respondent's motion and informed them that the hearing would proceed as scheduled.

On February 26, 1995, respondent faxed a request for reconsideration of that denial of their motion for continuance, wherein it is erroneously stated that: "[w]e were not given an opportunity to review our schedule before the date was selected by the Commission and MSHA." In point of fact, the trial date was selected entirely by the undersigned.

One of the purposes of the prehearing order is for the parties to mutually agree upon a trial date, and I will in all likelihood, accede to their wishes. However, if the parties cannot or do not present me with a mutually agreeable trial date, ultimately I must select one myself. But for the respondent to state they had no opportunity to have an input into the selection of a trial date is patently false. A prehearing order inviting their participation in selecting a trial date and by implication, a location, was received by them on October 27, 1994, by certified mail. They simply neglected to respond to it in a timely fashion, or for that matter, at all.

The respondent's prehearing motions to continue the hearing and change the venue of the hearing were both vigorously opposed by the Secretary on common sense grounds. The Secretary objected to the change in venue because the mine is located at Moberly, Missouri, and the witnesses for the Secretary are also located in central Missouri, as are the respondent's witnesses, if it should have chosen to present any testimony. The only reason advanced for the requested change of location is that respondent's attorney, whoever that might be, lives in Iowa. I note that

there has been no entry of appearance in the record by any attorney, anywhere. Be that as it may, in any event, it would have been more cost effective for all the parties[1] if respondent's attorney traveled to Moberly for the hearing, rather than all of the witnesses traveling to Iowa to accommodate him. The Secretary also objected to changing the date of the hearing since all the arrangements for both lawyer and witnesses had already been made to travel to Moberly on March 7. These objections were well-taken, and respondent's motions were denied.

As previously stated above, the hearing proceeded in the respondent's absence. The Secretary put in his case and then by counsel, moved that a default judgment be entered against the respondent pursuant to Commission Rule 66(b), 29 C.F.R. § 2700.66(b),[2] and that the five citations at bar be affirmed and that the proposed civil penalty of $385 be assessed against the respondent.

Under the circumstances in this record, I conclude and find that the respondent has waived its right to be heard further in this matter and that it is in default, and that the violations, as alleged, have been proven by a preponderance of the evidence, and that it is appropriate to assess the respondent the proposed civil penalty of $385.

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[1]See generally, 29 C.F.R. § 2700.51, which instructs the presiding judge to consider the convenience of both parties and their witnesses in assigning a hearing site.

[2]29 C.F.R. § 2700.66(b) provides as follows:

Failure to attend hearing. If a party fails to attend a scheduled hearing, the judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

ORDER

Respondent is **ORDERED TO PAY** a civil penalty of $385 to MSHA within 30 days of the date of this decision and upon receipt of payment, this matter is **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 7 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 94-64 A.C. No. 44-06483-03536 A
v.	:	
	:	Mine No. 1
MICHAEL GRIFFITH, II, Employed by TEAL MINING, INCORPORATED, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 94-65 A.C. No. 44-06483-03538 A
v.	:	
	:	Mine No. 1
MICHAEL GRIFFITH, Employed by by TEAL MINING, INCORPORATED, Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, Arlington, Virginia, on behalf of the Secretary of Labor;
Michael Griffith and Michael Griffith, II, Jewell Ridge, Virginia, pro se.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act" charging Michael Griffith and his son, Michael Griffith, II as agents of corporate mine operator Teal Mining, Incorporated (Teal Mining) with knowingly authorizing, ordering or carrying out three admitted violations of mandatory standards and seeking civil penalties of $2,200 and $2,800 respectively. The general issues before me are whether Michael Griffith and/or Michael Griffith, II were agents of the corporate mine operator as alleged and, if so, whether they knowingly authorized, ordered or carried out the admitted violations. If the above issues are resolved in the affirmative, then it will be necessary to determine appropriate civil penalties to be assessed considering the relevant criteria under Section 110(i) of the Act.

As a preliminary matter it should be noted that seven exhibits (Government Exhibit Nos. 11 - 17) offered by the Secretary and admitted at hearing under Commission Rule 63, 29 C.F.R. § 2700.63, are given no weight in this decision. The exhibits consist of summaries of witness interviews prepared from the notes of an investigator for the Mine Safety and Health Administration (MSHA). The subjects of these interviews were neither subpoenaed nor called to testify at hearings on the charges against these pro se Respondents nor does it appear that Respondents had any notice before hearing that the Secretary would be offering these interview summaries as evidence. The Respondents are also each charged with three quasi-criminal violations under Section 110(c) of the Act[1] subjecting them to $150,000 in penalties each under Section 110(a) of the Act. Under the circumstances they are entitled to a federal constitutional right of confrontation. *Maryland v. Craig*, 497 U.S. 836 (1990); *Greene v. McElroy*, 360 U.S. 474 (1959); *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also David B. Sweet, Annotation, *Federal Constitutional Right to Confront Witnesses - Supreme Court Cases*, 98 L. Ed. 2d 1115.

The inability of the Respondents to confront and cross examine these critical witnesses at hearing and thereby test their recollection and the accuracy of their purported statements and to compel them to stand before this tribunal to test their demeanor would constitute a denial of due process.

As the Supreme Court stated in *Greene v. McElroy:*

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case

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[1] Section 110(c) provides as follows:

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

> of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mattox v. United States*, 156 US 237, 242-244, 39 L ed 409-411, 15 S Ct 337; *Kirby v. United States*, 174 US 47, 43 L ed 890, 19 S Ct 574; *Motes v. United States*, 178 US 458, 474, 44 L ed 1150, 1156, 20 S Ct 993; Re Oliver, 333 US 257, 273, 92 L ed 682, 694, 68 S Ct 499, but also in all types of cases where administrative and regulatory actions were under scrutiny. E.g., *Southern R. Co. v. Virginia*, 290 US 190, 78 L ed 260, 54 S Ct 148; *Ohio Bell Tel. Co. v. Public Utilities Com.* 301 US 292, 81 L ed 1093, 57 S Ct 724; *Morgan v. United States*, 304 US 1, 19, 82 L ed 1129, 1133, 58 S Ct 773, 999; *Carter v. Kubler*, 320 US 243, 88 L ed 26, 64 S Ct 1; *Reilly v. Pinkus*, 338 US 269, 94 L ed 63, 70 S Ct 110. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 168, 169, 95 L ed 817, 852, 71 S Ct 624 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, *5 Wigmore on Evidence* (3d ed. 1940) § 1367:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

The limited exception to the right to confrontation provided under certain circumstances for the admission of written reports by an examining physician in certain administrative proceedings set forth in *Richardson v. Perales*, 402 U.S. 389, (1971), is, of course, not applicable to these cases. Under the circumstances and within the above framework of law, it would be constitutionally impermissible to give any weight to the seven interview summaries at issue.

Even assuming, *arguendo*, there is no constitutional infirmity in giving weight to these exhibits, they are, in any event, untrustworthy and entitled to no weight. These interview summaries were not taken under oath, were not signed nor apparently reviewed by the purported authors, and, indeed, are not even verbatim statements but only summaries of interviews based upon the investigator's notes. It appears, moreover, that language attributed to witnesses may have actually been authored by the special investigator himself -- for example, the reference to "the controversial conversations" attributed to Richard Roberts (Government Exhibit No. 14, page 2). The investigator also acknowledged that on at least four occasions in the statement of one witness he failed to accurately attribute statements to their true author, i.e. statements purportedly of Michael Griffith, II, attributed to Michael Griffith, Sr. (Government Exhibit No. 10, page 2). In addition, the investigator acknowledged that, while apparently relying upon the statement of Howard Cordle in reaching investigative conclusions, he did not find the statement to be "100 percent truthful". Accordingly, the inaccuracy and lack of credibility of these exhibits undermines their potential probative value. They would, therefore, in any event, be entitled to no weight.

As previously noted, the underlying violations charged in these cases and incorporated in Citation No. 4002030, and Orders Nos. 4002031 and 3799489 are not disputed. Citation No. 4002030 alleges a February 9, 1993, violation of the approved mine ventilation plan under the mandatory standard at 30 C.F.R. § 75.370(a)(1) and charges as follows:

> The main return from the surface to the 2nd right mains was not maintained to ensure safe passage at all times of persons, in that water was allowed to accumulate 18 inches to 32 inches in depths, at approximately five (5) locations. The mining height is approximately 40 inches. Foreman Howard Cordle stated that he knew of the conditions, water accumulations was observed and citations issued during the last inspection. The approved ventilation, methane and dust control plan requires that return entries be maintained free of water to ensure safe passage.

In relevant part the applicable ventilation plan provides as follows:

> Water which will inhibit safe travel or bleeder function shall not be permitted to accumulate in bleeders. It shall be pumped or drained. (See Government Exhibit No. 6).

Order No. 4002031 alleges a violation of the same provisions of the mine ventilation plan on February 9, 1993, but charges as follows:

> The ventilation, methane and dust control plan was not being complied with. The bleeder entries provided for the 3rd left panel (pillar out area) off of the mains were not adequately maintained and free of water to permit safe travel. Water was allowed to accumulate from 15 inches to 40 inches in depth, beginning 60 feet inby survey station number 553 and extended [sic] inby for an unknown distance. The results of the weekly examinations conducted by Edward Cordle, Foreman, on 02-07-93 stated he could not traveled [sic] all of the bleeder because of water.

Order No. 37949489 alleges a June 3, 1993, violation of the mine operator's roof control plan under the mandatory standard at 30 C.F.R. § 75.220 and charges as follows:

> The approved roof control plan was not being complied with in that the No. 6 entry (left conveyor entry) 001 Section is 21 to 22 feet wide for a distance of approximately 150 feet. Starting 70 feet inby survey station No. 1351 and extending inby to the face. Also the last row of roof bolts in the face is 6 to 8 feet outby the face. The approved roof control plan sketch shows the entry not to exceed 20 feet in width and roof bolts installed within 4 feet of the face.

It is undisputed that the operator's roof control plan limits entries, including the belt conveyer entry at issue herein, to a width of 20 feet (Government Exhibit No. 18).

There is no dispute that as of March 18, 1993, Michael Griffith (senior) became a corporate officer of Teal Mining, namely Secretary/Treasurer and remained in that capacity at the time of the June 3, 1993, violation charged in Order No. 3799489. (Government Exhibit No. 19). He was, therefore, in a category of agent specifically set forth in Section 110(c) of the Act as of the date of the June 3, 1993, violation. The Secretary maintains that Griffith (senior) was also an agent of Teal Mining when the two violations were committed on February 9, 1993, based upon the observations of the issuing inspector (Inspector Roger Vance) and upon the interview summaries (Government Exhibit Nos. 11-17) which I have found to be entitled to no weight.[2]

The term "agent" is defined in section 3(e) of the Act as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." In attempting to show the agency status of Michael Griffith (senior) the Secretary argues, but without explanation or record support, that the

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[2] The parties were advised by notice issued April 5, 1995, that their briefs should be based upon evidence other than Government Exhibit Nos. 11-17).

"relationship that existed between him and his son clearly implied an agency in fact." In addition, the Secretary maintains that Griffith's presence at the mine was "consistent throughout the time that the mine was opened." The secretary again fails, however, to cite any credible record evidence to support this conclusion or show how that evidence in any event supports a finding of "agency". Indeed, aside from his own admissions that he was around the mine beginning in October 1992 and in January, the only credible evidence that Griffith (senior) was present on any particular date came through the testimony of MSHA Inspector Roger Vance. Vance testified that, at the time of his inspection on October 21, 1992, he saw Griffith (senior) at the mine but at that time he was performing only work as a mechanic. The only other time Vance had observed Griffith (senior) at the mine was during the February 9 inspection when Griffith, who was then apparently incapacitated by injuries, was present but apparently not performing any work. While this evidence does indicate that Griffith (senior) was present at the mine on occasion this presence, standing alone without any evidence that he was then "charged with any responsibility for the operation of all or a part" of the mine or with the "supervision of the miners" is hardly sufficient to establish his agency under the Act at the time of the February 9, 1993, violations.

Griffith's lack of involvement in a responsible capacity is further supported by his own testimony that he had nothing to do with his son's mine until around October (presumably 1992) when he volunteered to help as a mechanic/electrician to keep the equipment operating. Michael Griffith, II corroborated his father's lack of authority at the mine characterizing his initial participation as that of an advisor. Griffith, II hired certified mine foremen, Coleman, Cordle and later Dye to run the mine since he personally had no knowledge of the mining business. He maintains that his father was never an employee and was not paid for any work at the mine.

The Secretary next argues, but without specifying any relevant time period, that Griffith (senior) was "clearly viewed as an owner of the mine by many of the miners as well as by an inspector". The basis for the Secretary's conclusion in this regard appears, however, to be the interview summaries which I have found to be entitled to no weight, and the testimony of Griffith himself that, at some point in time Randy Dye, one of the other foremen, may have thought of him as a supervisor (Tr. 279-280). This somewhat ambiguous testimony is hardly sufficient, however, to establish the status of Griffith (senior) as an "agent" as of the February 9, 1993, violations.

Finally the Secretary maintains that Griffith (senior) was an agent because he and his son "never sought to tell the miners that the father was not an owner of the mine." Under this novel argument the Secretary is impermissibly attempting to shift his

burden of proof to the Respondent himself to prove he was not an agent. Carried to its logical conclusion, the Secretary would argue that the failure of Respondents to have declared to miners that they were not "agents" makes them agents by default. Under all the circumstances I find that the Secretary has failed to sustain his burden of proving that Mr. Griffith (senior) was an "agent" of the corporate operator on February 9, 1993. Accordingly, the charges against him for activities as an "agent" on that date as set forth in Citation No. 4002030 and Order No. 4002031 must be vacated.

With respect to the violations, charged against Michael Griffith, II in Citation No. 4002030 and Order No. 4002031, the Secretary argues that he "knowingly" acted or committed the violations based on his testimony that he knew the water was being pumped out of the mine.[3] In this regard the Secretary relies on the following colloquy at hearing:

> "Q. [by attorney Fitch] Well, why didn't you have the returns clear of water?
>
> A. Well, I didn't know they wasn't clear of water, to be honest. I knew there was water in there, but every time --- there's water coming outside, I'd call inside and tell them that there wasn't water coming out, to work on the pump, make sure it's pumping water." (Tr. 255)

I do not agree that the above testimony supports a finding that Griffith, II knowingly acted or violated the ventilation plan. To the contrary, the testimony shows that Griffith was aware that water was continually being pumped outside and, indeed, that they were making continuing efforts in an attempt to comply with the ventilation plan. Moreover, the cited provision of the ventilation plan may reasonably be construed as requiring only that "water which will inhibit safe travel or bleeder function . . . shall be pumped or drained."

In these cases the Secretary does not dispute that mine production had already been discontinued and that the water was

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[3] The term "knowingly" is evaluated within the framework of the Commission decision in *Secretary v. Kenny Richardson*, 3 FMSHRC 8 at 16 (1981) aff'd on other grounds 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). In that case the Commission stated as follows:

> "If a person in a position to protect employee safety and health fails to act on tne basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute."

being pumped out of the mine, but argues only that, in his opinion, the pumps being used were inadequate to pump the water fast enough. This determination is clearly a judgment call about which reasonable persons may disagree and is not the sort of judgment sufficient to warrant a "knowing" violation under Section 110(c). When this evidence is considered in conjunction with Respondent's clear lack of knowledge and experience in the industry and the reliance he placed upon the certified mine foremen he hired, I find the Secretary has not sustained his burden of proving the charges herein. Under the circumstances, both charges against Michael Griffith, II, set forth in Citation No. 4002030 and Order No. 4002031 must be vacated.

With respect to the violation alleged to have occurred on June 3, 1993, (Order No. 37949489) the Secretary, in his post-hearing brief, cites no evidence to support a finding that the Respondents "knowingly" acted or violated the law or that they were even aware of the conditions cited. Inspector Paul McGraw, testified that he discovered the violation during his June 3, 1993, inspection and found that the entry was 21 to 22 feet wide over 150 feet in linear distance. McGraw acknowledged that he did not have an opportunity to talk to either of the Griffiths about this violation. According to McGraw, section foreman Howard Cordle told him that he thought the belt entry could, in fact, be cut 22 feet wide.

Michael Griffith, II testified that he had no mining experience before entering into the business herein and later hired and relied upon Howard Cordle to run the mine. Michael Griffith (senior) confirmed that his son knew nothing about mining and, indeed, initially warned his son to stay away from the mine since he knew nothing about the business. Griffith (senior) testified that at first he had nothing to do with the mine but, beginning around October, helped by trying to keep the equipment operating. Around March 1993, apparently after he became Secretary/Treasurer, he began signing pay checks along with his son. After the instant violation was issued, he asked Cordle about mining with a 22-foot-wide entry. According to Griffith (senior), Cordle stated that he thought it should be 22 feet wide because that was the way he cut it at another operation.

Based upon the paucity of evidence regarding Michael Griffith, senior's authority, participation and knowledge surrounding the instant violation, I cannot find that he "knowingly" acted or violated the cited requirements of the roof control plan. Accordingly, the charges against Michael Griffith (senior) in this regard, must be vacated.

With respect to the allegations that Michael Griffith, II knowingly violated the roof control plan under Order

No. 37949489, the Secretary has again failed to cite any evidence to support the charges. Indeed, this appears to be for good reason for there is, in fact, insufficient evidence to support charges against Michael Griffith, II for knowingly acting or violating the requirements of the corporate operator's roof control plan as charged.

ORDER

The charges set forth herein against Michael Griffith and Michael Griffith, II, are hereby vacated and these civil penalty proceedings are dismissed.

Gary Melick
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 9, 1995

SECRETARY OF LABOR,	:	**CIVIL PENALTY PROCEEDING**
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	**Docket No. WEVA 94-274**
Petitioner	:	**A. C. No. 46-01453-04123**
	:	
v.	:	
	:	**Humphrey No. 7 Mine**
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: **Elizabeth Lopes, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, for Respondent.**

Before: **Judge Merlin**

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

This case contains seven violations three of which were settled prior to the hearing. The operator agreed to withdraw the fourth (Tr. 317). The settlements and the motion to withdraw were placed on the record and approved (Tr. 17-20, 317). Accordingly, Citation No. 3304292 is modified to delete the significant and substantial designation and a penalty in the amount of $693 is assessed. Citation No. 3116375 is modified to delete the significant and substantial designation and a penalty of $94 is assessed. A penalty in the original amount of $235 is assessed for Citation No. 3305650. And a penalty in the original amount of $288 is assessed for Citation No. 3304289.

On April 18, 1995, a hearing was held with respect to the remaining three 104(a) citations. The transcript has now been received and the parties have filed post hearing briefs.

The parties have agreed to the following stipulations (Court Exhibit No. 1) which provide as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.

2. Consolidation Coal Company is the owner and operator of the Humphrey No. 7 Mine.

3. Operations of the Humphrey No. 7 Mine are subject to the jurisdiction of the Act.

4. Consolidation Coal Company is a large operator.

5. The maximum penalties which could be assessed for these violations pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consolidation Coal Company to remain in business.

6. MSHA Inspector William Ponceroff was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation Nos. 3304285, 3304287 and 3304288.

7. True copies of Citation Nos. 3304285, 3304287 and 3304288 were served on Consolidation Coal Company or its agent as required by the Act.

8. Citation Nos. 3304285, 3304287 and 3304288 are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the accuracy of any statements asserted therein.

9. Citation Nos. 3304285, 3304287 and 3304288 are not the subject of review proceedings before the Commission.

10. Consolidation Coal did not Contest Citation No. 3305609 and paid the fifty dollar ($50.00) penalty assessed for this violation.

11. MSHA's Proposed Assessment Data Sheet accurately sets forth (a) the number of assessed penalty violations charged to the Humphrey No. 7 Mine for the period from January 1991 through February 1994, and (b) the number of inspection days per month during this period.

12. MSHA's Assessed Violations History Report, R-17 report, may be used in determining appropriate civil penalty assessments for the alleged violations.

13. The operator demonstrated good faith abatement.

Without objection, all stipulations were accepted except for No. 11, for which the operator was given five days from the close of the hearing to submit any objections (Tr. 13). No objections having been received, Stipulation No. 11 is accepted. In addition, operator's Exhibit No. R-4, a piece of wire mesh, is hereby admitted into the record.

Citation No. 3304285

Citation No. 3304285 dated, January 12, 1994, charges a violation of 30 C.F.R. § 75.202(a) for the following conditions or practices:

> The mine roof was not adequately supported or otherwise controlled starting 20' outby the first intersection from the 1 East injection point. The roof is eroded between the boards. In the second intersection outby the referenced location and continuing for a distance of 40' the roof is eroded between the boards exposing the rock. The 3rd intersection outby and continuing for 50' the roof is eroded 10" to 15" deep, 42" wide and 4' long. The boards are broken. The 4th intersection has loose roof, 2 roof bolts have fallen out and the roof is sagging. The roof is eroded 12" to 18" above the boards, 42" wide and 4' long. The crosscuts on each side of this intersection require additional support. The 5th intersection need additional support. The roof is broken around the cribs and is sagging for a distance of 60' toward the injection point. The second crosscut outby the walk through door to the main line needs additional support where the roof is eroded.

30 C.F.R. § 75.202 sets forth the following:

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

The inspector who issued the subject citation testified that on the day in question he was conducting an inspection as part of a winter alert program (Tr. 28). According to the inspector during the winter the mine drys out and there are a lot more roof falls (Tr. 28, 120). A second inspector who accompanied the issuing inspector also stated they were conducting a winter alert inspection for hazardous conditions (Tr. 130).

The cited area is a travelway going from the main track to an injection point (Tr. 30-31, Exhibit No. R-1). It is an intake aircourse used to ventilate abandoned areas (Tr. 202). The area had been mined through several years ago and miners do not now have to pass through it to get to where they work (Tr. 31). But it is subject to weekly examinations (Tr. 33).

The issuing inspector stated that the entire passageway was several hundred feet and that a few hundred feet had unsupported roof (Tr. 36). In places head coal was gone and rock was exposed

(Tr. 78). The immediate roof he could see was shale (Tr. 78). The inspector also testified that he saw no floor to ceiling supports in the areas he cited (Tr. 82). These descriptions were confirmed by the accompanying inspector who said the roof had deteriorated extensively and there were large areas where planks and boards were broken and there was a large amount of exposed roof (Tr. 130-131). This second inspector also advised that he had been in the subject area during the prior quarter and that since that time the roof had deteriorated drastically, which he attributed to the change in the weather and the drying out of the mine (Tr. 140-141, 147).

In contrast to the foregoing, the operator's ventilation foreman who was the weekly examiner for the travelway, testified that there was only some sloughing and breaking loose at the roof with a little powder falling down and some small piles on the ground (Tr. 167). He said the roof was in good shape without signs of breakage and that sagging was due to potting out (Tr. 192-193). Where the roof was eroded, it was bolted and intact to the roof with additional supports (Tr. 176). He did not believe any more supports were needed and stated that the area was sound (Tr. 191). In his opinion it was a pretty good travel area (Tr. 168). In addition, the ventilation foreman stated that the roof in this area had not changed since he began walking it ten years previously in 1985 (Tr. 156, 167). According to the operator's safety inspector who walked the passageway after the citation was issued, there was no problem with the roof and the top was not sagging (Tr. 222-223, 224-225).

The record also contains testimony specific to each location enumerated by the inspector in the citation. For the first intersection the inspector testified that the roof was eroded between the boards for twenty feet (Tr. 110). However, he further stated that he saw no signs of roof movement and that by itself the condition in this intersection was not a significant and substantial violation (Tr. 111). The accompanying inspector remembered the conditions in the citation, although he could not say they were in the first intersection (Tr. 145-146). According to the accompanying inspector the condition was significant and substantial (Tr. 146). The ventilation foreman took the position that although there was roof erosion, the intersection was well bolted and supported (Tr. 175-176). After reviewing and evaluating the testimony, I conclude that the evidence presented by the Secretary is persuasive in establishing the existence and extent of the conditions cited. The issuing inspector offered precise and detailed descriptions and in all material respects his testimony was confirmed by the second inspector who had been sequestered.

With respect to the second intersection, the issuing inspector's testimony stated that the roof was eroded between the boards for 40 feet (Tr. 89). The accompanying inspector

confirmed the distance involved, advising that he and the first inspector counted the number of planks to get the measurement (Tr. 132-133). The issuing inspector said that he would not consider this condition by itself to be significant and substantial because there were no other signs of roof deterioration in this location (Tr. 111-112). The ventilation foreman denied seeing any 40 foot distance and said there were only some areas that had potted out (Tr. 182-183). I find credible the evidence offered by the Secretary because the inspectors' recollections were clear, exact, and consistent. In light of these circumstances, the denials of the foreman are not convincing.

The issuing inspector testified that in the third intersection there were broken boards indicating that the roof was eroding away to a depth of 15 inches and a width of 44 inches (Tr. 112). Several boards adjacent to each other over the center of the entry were sagging where they were broken (Tr. 112-114). The sagging boards indicated that there was movement of the upper strata of the roof (Tr. 114). The roof showed signs of taking weight and there could be a failure (Tr. 112). The issuing inspector also asserted that the violation in this area was significant and substantial because the roof was taking weight and could fail (Tr. 112). The accompanying inspector verified the distance of 50 feet stating that he and the issuing inspector counted the boards which were quite a few in number and next to each other (Tr. 133). He had an independent recollection of the 50 feet (Tr. 144). On the other hand, the ventilation foreman said he did not see any eroded roof for 50 feet and nothing of the depth and height given by the inspector (Tr. 183-184). He did not see broken boards or anything major (Tr. 184). I find the Secretary's evidence convincing because of the precise measurements and comprehensive descriptions given by the two inspectors. The issuing inspector's explanation of why the conditions and their consequences were significant and substantial was particularly cogent.

In the fourth intersection the issuing inspector stated that the roof was sagging and eroded, rock was exposed and two roof bolts which had fallen out, were lying on the mine floor (Tr. 32, 84, 88). He explained that the roof was composed of consolidated strata (Tr. 43-44). The fallen bolts meant that the anchorage zone where the strata was secured had weakened and the strata were not tightly held together (Tr. 45). Roof erosion had exposed rock which allowed subsequent layers of the roof to shift (Tr. 88). When support weakens in the center the roof drops down and sags (Tr. 86). The inspector expressed the view that the violation in this area was significant and substantial because of all these factors (Tr. 115). Also he relied upon the fact that the crosscuts on either side of the intersection required additional supports (Tr. 115). He believed that these serious conditions could cause a failure of the roof and a fatality (Tr.

115). The second inspector remembered the fallen bolts, sagging roof and broken boards (Tr. 133-134). Here again, the operator's ventilation foreman disputed the inspectors on all important points. He admitted there were fallen bolts, but said they had been on the floor for 10 years (Tr. 183-184). He saw no sign of sagging and stated that the roof was merely potted out, but standing just as nice as it was (Tr. 184, 193). I find convincing the proof offered by the Secretary because it is based upon the exact and consistent recitals of the two inspectors. Also, the issuing inspector gave a comprehensive explanation of why the strata were not holding together. In light of the Secretary's evidence, the foreman's denials are not credible. I do not accept the argument that the bolts had been lying on the floor for ten years and that the roof was standing just as well as it had been.

According to the issuing inspector the roof had broken down around a crib in the fifth intersection so that the crib was no longer supporting the strata of the roof for a distance of 60 feet (Tr. 41-42, 86-87, 91-92). There were no additional supports and the roof was loose (Tr. 33, 93). The roof was sagging which indicated the consolidated strata was broken (Tr. 41-42). The fact that the roof was down over the crib meant the roof was weakened and not supported (Tr. 41-42, 87). Bolts were not effective which was why the crib had been built (Tr. 98-99). Head coal and shale were gone for a depth of 15 to 17 inches (Tr. 95). The inspector believed the violation in this area was significant and substantial because the crib no longer supported the roof and it was reasonably likely that the roof would let loose and somebody would be killed (Tr. 116). These observations were seconded by the accompanying inspector who also said that the roof was sagging around the crib and that fallen rock had pushed the head coal out (Tr. 131, 135). As with the other locations the ventilation foreman disagreed with the inspectors, asserting that he saw no broken cribs or sagging roof in the cited area (Tr. 185, 189, 209-210). According to the foreman the cribs were in another place (Tr. 185). The company safety inspector testified that during his walk through the area after the citation was issued he did not see anything like what was described in the citation (Tr. 222). Unlike the ventilation foreman he saw a crib in the area but said it was as good as when it was put in (Tr. 223-224, 229-230). I find persuasive the descriptions, explanations and conclusions of the inspectors.

As appears from the testimony set forth above, a conflict exists between the inspectors and the ventilation foreman over the conditions at the various cited locations. At one point the foreman characterized these differences as a judgment call (Tr. 199). I do not accept this characterization. When one party sees several adverse conditions and the other party denies their existence, the issue is not one of judgment but rather one of credibility. In light of the detailed and precise recollections

of both inspectors, I cannot find that they did not see what they reported. Nor can I find that they fabricated the conditions about which they testified. Their testimony and the manner in which they gave it simply are too direct and convincing. This is why as trier of the facts, I find the Secretary's evidence more persuasive.

In addition, other factors cast doubt upon the operator's case. The foreman's allegation that the travelway remained unchanged for ten years strains credulity, because it is premised upon the mine being impervious to atmospheric, climatic and seasonal changes for a decade or more (Tr. 167). Far more telling is the evidence of the accompanying inspector that the roof conditions had deteriorated drastically since the prior quarter or two when he last visited this area of the mine (Tr. 141). In addition, the testimony of both inspectors that the winter is especially hazardous due to drying out in the mines is supported by the fact that this inspection itself was part of a winter alert (Tr. 28, 42, 120, 130).

In light of the foregoing, I find that the conditions and practices existed as charged in the citation and described by the inspectors. It is therefore, my conclusion that the roof was not adequately supported or controlled to protect persons from hazards related to falls of the roof.

Under the mandatory standard, quoted supra, the area required to be adequately supported or controlled is one where persons work or travel. Both inspectors testified that the weekly examiner would go through this travelway weekly in order to make the examination mandated by 30 C.F.R. § 75.364 (Tr. 33, 102, 137). They also said that rock dusters could be in the area (Tr. 47, 108-109, 138). The foreman agreed that for the past ten years he had walked the travelway weekly in his capacity as weekly examiner and that when he was going to be unavailable he found someone else to do it (Tr. 158). He also said that in his absence the general mine foreman performed the exam or assigned someone else (Tr. 211). The foreman initially emphasized that he usually did the weekly examination by himself (Tr. 158-159). However, when asked if he then would be the only one who would know about unreported conditions, he responded that the general mine foreman travelled the area at least once a month and that because the mine had been on strike, in the last year he had performed the weekly inspections only 50% of the time, while another man did the rest (Tr. 211-214). Upon consideration of the testimony, I find the area was one travelled weekly by examiners, at least monthly by the general mine foreman and occasionally by rock dusters. The cited travelway is, therefore, covered by the mandatory standard and a violation existed in all locations described by the inspectors. Tunnelton Mining Company, 12 FMSHRC 2602 (December 1990).

As set forth above, the issuing inspector found that the violations in the third, fourth and fifth intersections were significant and substantial. The Commission has determined that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981); U.S. Steel Mining Company Inc., 6 FMSHRC 1573, 1574, (July 1984). In Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the requirements necessary for a finding of significant and substantial as follows:

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

I have found a violation of the mandatory standard. The inadequately supported or controlled roof contributed to a measure of danger because the roof could fall in the third, fourth and fifth intersection. The recital by the issuing inspector why there was a reasonable likelihood of a fall in these areas was based upon cogent explanations of what was happening to the roof and what could reasonably be expected to happen. The serious deficiencies in roof support and control and the consequences of these shortcomings satisfy the reasonably likely requirement. Finally, it was reasonably likely that a roof fall would result in reasonably serious injuries or even death. Accordingly, I conclude that the violation was significant and substantial in the three intersections identified by the issuing inspector. Based upon these considerations and the evidence regarding the first two intersections, I conclude that for purposes of determining the level of gravity under section 110(i), the violation was serious in all cited locations.

With respect to negligence, another factor to be taken into account under section 110(i) in determining the appropriate amount of penalty, the issuing inspector believed the level was only moderate (Tr. 48-49). He found negligence was mitigated because before the citation was issued, the foreman had taken steps to change the route of travel away from the cited area by bringing a man door into the area (Tr. 49, 73). The accompanying inspector agreed that a man door had been moved to the area, but

not yet installed (Tr. 139, 152). Both inspectors reported that the foreman told them he intended to reroute because of the bad roof conditions (Tr. 48-49, 124, 125, 140). However, because the foreman had denied the existence of all the adverse conditions, he was placed in the curious position of having to deny that he had any prior intention of changing the travelway or that he had brought up a man door for that purpose (Tr. 166, 171). I find the testimony of the inspectors more credible on these points and based thereon I conclude that because of the dangerous state of the roof, the foreman had decided to move the travelway before the citation was issued. As the foreman acknowledged, it took only one shift to reroute and the distance to the injection point was much shorter the new way (Tr. 169). However, I do not agree with the inspector that bringing one man door into the area is sufficient reason to reduce the level of negligence to moderate. The severe conditions in the area had existed for some weeks or months (Tr. 47, 140-141). Moreover, the weight of the evidence demonstrates that the ventilation foreman must have been aware of the state of the roof for some time. His failure to take corrective action created risks for other examiners, the general mine foreman and rock dusters. Therefore, I find that the foreman was highly negligent and that in view of his position his negligence is imputable to the operator. Nacco Mining Co., 3 FMSHRC 848 (April 1981); Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982); Rochester and Pittsburgh Coal Company, 13 FMSHRC 189, 194-198 (February 1991); Mettiki Coal Co., 13 FMSHRC 760, 772 (May 1991); Virginia Crews Coal Co., 15 FMSHRC 2103, 2106 (October 1993).

In accordance with the stipulations of the parties which I have accepted the operator is found to be large in size; imposition of a penalty will not affect its ability to engage in business; there was good faith abatement, and the operator's history of prior violations is as it appears in evidence submitted by the Secretary.

One final matter. In its post hearing brief, the operator questions the credentials of the issuing inspector because he had not been in the Pittsburgh seam for eight years (Tr. 55-56). The inspector was a trained expert in roof support systems and conducted roof control inspections twice a week in the years he had been in the west and away from the Pittsburgh seam (Tr. 58-59). He returned to the Pittsburgh seam as the roof control supervisor (Tr. 61). I find the inspector fully qualified. In this respect I note that the operator's ventilation foreman maintained that conditions in the subject travelway had not changed for 10 years.

Upon consideration of the foregoing, a penalty of $700 is assessed for this violation.

Citation No. 3304287

Citation No. 3304287 dated January 12, 1994, charges a violation of 30 C.F.R. § 75.364(h) for the following alleged conditions or practices:

> An inadequate weekly examination was conducted in that a record of the hazardous conditions and there locations were not recorded in the weekly examination book. There were several locations where the roof was not adequately supported or controlled as identified in Citation No. 3304285 dated 1/12/94. There was also float dust extended for a distance of 22 blocks as referenced in citation 3305609, dated 1/12/94. These conditions occurred in the entries into the 1 East injections point.

30 C.F.R. §75.364(h) provides as follows:

> (h) Recordkeeping. At the completion of any shift during which a portion of a weekly examination is made, a record of hazardous conditions, their locations, and the corrective action taken, and the results and location of air and methane measurements shall be made. The record shall be made by the person making the examination or a person designated by the operator and shall be countersigned by the mine foreman. If made by a person other than the examiner, the examiner shall verify the record by initials and date.

There is no dispute that the ventilation foreman did not record any hazardous conditions for the subject areas in the weekly examination book (Tr. 47). The issue is whether there were hazardous conditions which the regulations require to be reported. The underlying circumstances which the foreman had not reported were float coal dust and the inadequately supported roof (Tr. 51-52). The inspector testified that the float coal dust violation was not significant and substantial (Tr. 107). I note that the operator paid the assessed penalty of $50 for this violation, an amount customarily reserved for non serious violations (Stipulation No. 10). Accordingly, I find that the float coal dust violation was not serious and that it was not a hazardous condition which was required to be reported.

The roof conditions are another matter. As set forth above, I have found violations of the roof in the third, fourth and fifth intersections to be significant and substantial as well as serious. Under these circumstances I reject the foreman's assertion that there was nothing hazardous to report (Tr. 203-205). I find that the roof conditions in these locations were hazardous and should have been recorded. I also accept the inspector's testimony that the failure to record by the foreman

increased the likelihood that someone could be injured by the roof (Tr. 48). Accordingly, I find that the failure to record the roof problems was a significant and substantial as well as a serious violation. Consolidation Coal Co., 15 FMSHRC 1408, 1415 (July 1993); Consolidation Coal Co., 15 FMSHRC 1264, 1272 (June 1993); Eagle West Inc., 14 FMSHRC 1800, 1802 (Nov. 1992); Kaiser Steel Corp., 5 FMSHRC 2224, 2229 (Dec. 1983). Because the dangerous state of the roof existed for an appreciable period of time and must have been known to the foreman, I find that he was highly negligent and that, as previously explained, his negligence is imputable to the operator. The remaining criteria under section 110(i) have been set forth above.

Upon consideration of the foregoing, a penalty of $500 is assessed for this violation.

Citation No. 3304288

Citation No. 3304288 dated, January 21, 1994, and challenged herein, charges a violation of 30 C.F.R. § 75.202(a) for the following alleged condition or practice:

> The mine roof was not adequately supported or controlled in the old 1 East Loop, one car inby the explosive car. There is a hanging rock approximately 10' high x 8" to 2' wide x 3' long and 2" thick in a roof cavity area the wire side of the tracks. There are also large rocks causing the screen to sag to the extent that the wire is broken on one side. This is an inactive area. The rock is located so that when it falls it could knock the trolley wire into the cars; causing a hazard to the person installing the line switch.

The inspector who issued the citation testified that the roof in the Old East Loop was inadequately supported. This area was a side track that ran off the main entry where supply cars and lowboy cars were kept (Tr. 237-238, 253, 295-296). An earlier roof fall had created a cavity in the roof of this track (Tr. 257-258). The cavity was covered with a wire mesh screen (Tr. 236). According to the inspector, the wire was broken in places and the screen was loaded with rocks, some of which had fallen out of the screen to the ground (Tr. 238-240, 274, 280). The broken wires were on the tight or wire side of the entry (Tr. 277-278). In addition, a large rock, 2'x 3'x 2", was hanging in the cavity behind the broken wire and on the tight side of the entry (Tr. 236, 237, 276-277). The inspector who accompanied the issuing inspector confirmed that there were broken strands in the mesh and that loose material was hanging suspended in the screen with large and small rocks (Tr. 282-283). The operator's safety supervisor agreed that a mesh screen covered the cavity and that a large rock of the dimensions given by the issuing inspector was

hanging inside the cavity (Tr. 298-299, 315-317). However, the supervisor did not see any breaks in the mesh wire or any rocks on the ground (Tr. 311). He expressed the opinion that what the inspector thought were breaks was only overlapping pieces of wire (Tr. 296-298). Upon due consideration, I am convinced by and accept the testimony of the two inspectors that there were breaks in the wires and that rocks had fallen through and were lying on the ground. The presence of the large hanging rock in the cavity was acknowledged by all the witnesses.

There is no dispute that the fireboss walks through the cited area on his preshift examination and I so find (Tr. 268, 302). The issuing inspector believed supplies would be stored in this side track and that people would go there to get them (Tr. 241-243, 270). However, he did not remember the type of cars in the side track (Tr. 256-257). The safety supervisor testified that the car under the fall was a lowboy and there was another flat car in front and six or seven cars behind (Tr. 302). The safety supervisor did not know why the lowboy was parked in the side track, but said it could be used to carry equipment and was low to the ground so a piece of equipment could be put on it (Tr. 303-304). I find that individuals would enter this area to use the lowboy for transport of equipment.

In light of the foregoing, I conclude that a violation of § 75.202(a) existed. The roof was not adequately supported or controlled due to the large hanging rock as well as the other rocks which were either held by the mesh or had fallen through to the floor. Clearly, this was an area where people worked and travelled.

The issuing inspector believed it reasonably likely that a serious injury would result if the hanging rock fell (Tr. 243). He stated that the rock could fall at any time without any intervening conditions, just some vibrations or further deterioration (Tr. 244). The safety supervisor did not believe the roof was inadequately supported or that there was a reasonable likelihood of substantial injury (Tr. 296-297). His opinion is based upon wire mesh holding the rocks (Tr. 300). However, I have found that the wires were broken and that some rocks were on the ground. In view of these circumstances, I accept the view of the inspectors that it was reasonably likely the rocks could fall and hit someone (Tr. 243, 285-286). I further conclude this hazard was reasonably likely although the broken mesh and the rocks were on the wire side of the entry. When rocks broke through the already damaged mesh, persons in the entire entry would be at risk not just those who might be directly under the cavity. I am persuaded by the evidence that falling rocks could hit the lowboy car and give a glancing blow to an individual in the entry (Tr. 245-246, 285).

The inspectors also were of the view that it was reasonably likely that a falling rock could hit the energized trolley wire in this track causing the wire to fall on the car leading to a shock or a burn (Tr. 263-264, 285-286). I reject this suggestion. The issuing inspector admitted that the preshift examiner would not have to energize the trolley wire when he entered the area (Tr. 269). There is no showing when or how often the trolley wire would be energized by other people going into the area. In other words, the reasonable likelihood of a hazard from an energized trolley wire would depend upon the occurrence of intervening events, the likelihood of which was not shown by the Secretary.

I have found a violation of the mandatory standard. The inadequately supported or controlled roof contributed to a measure of danger because the roof could fall. As explained above, there was a reasonable likelihood the hazard would result in injury and there can be no doubt that the injury would be serious. Accordingly, I conclude that the violation was significant and substantial. Mathies Coal Company, supra. Based upon these considerations, I also conclude that for purposes of determining gravity under section 110(i), the violation was serious.

With respect to negligence, another factor to be taken into account under section 110(i) in determining the appropriate amount of penalty, the issuing inspector found moderate negligence. Although he did not know how long the conditions had existed, he estimated that they occurred over a couple of shifts to a couple of days (Tr. 251-252). He did not know how long the cars had been in the side track (Tr. 256). The evidence supports a finding of nothing more than moderate or ordinary negligence and that is what I find.

In accordance with the stipulations of the parties which I have accepted the operator is found to be large in size, imposition of a penalty will not affect its ability to engage in business, there was good faith abatement, and the operator's history of prior violations is as it appears in evidence submitted by the Secretary.

Upon consideration of the foregoing, a penalty of $350 is assessed for this violation.

POST HEARING BRIEFS

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

ORDER

It is ORDERED that Citation Nos. 3304292, 3116375, 3305650, 3304289, 3304285, 3304287, and 3304288 be AFFIRMED.

It is further ORDERED that the findings of significant and substantial for Citation Nos. 3304285, 3304287, and 3304288 be AFFIRMED.

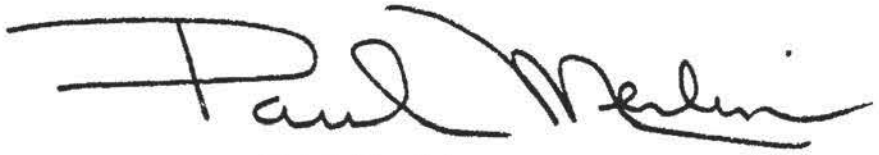
It is further ORDERED that Citation Nos. 3304292 and 3116375 be MODIFIED to delete the significant and substantial designations.

It is further ORDERED that the negligence findings for Citation Nos. 3304285 and 3304287 be assessed as high.

It is further ORDERED that the following penalties be ASSESSED:

Citation No. 3304292	$693
Citation No. 3116375	$ 94
Citation No. 3305650	$235
Citation No. 3304289	$288
Citation No. 3304285	$700
Citation No. 3304287	$500
Citation No. 3304288	$350

It is further ORDERED that the operator PAY the above penalties totaling $2,860 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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JUN 13 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-380 A.C. No. 42-01697-03668
v.	:	
C.W. MINING COMPANY, Respondent	:	Bear Canyon #1 Mine

DECISION

Appearances: Ned Z. Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;[1] Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C.W. Mining Company ("C.W. Mining"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("Mine Act"). The petition alleges two violations of the Secretary's safety standards. At the start of the hearing, the Secretary agreed to vacate Citation No. 3588362.[2] With respect to the remaining citation, C.W. Mining does not contest the fact of violation, but contends that the violation was not of a significant and substantial nature ("S&S"). For the reasons set forth below, I find that the violation was not S&S and I assess a civil penalty in the amount of $225.00.

A hearing was held in this case on February 8, 1995, in Salt Lake City, Utah. The parties presented testimony and documentary evidence but waived post-hearing briefs.

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[1] Mr. Zamarripa was permitted to represent the Secretary in this proceeding and was under the supervision of counsel for the Secretary, Kristi Floyd, Esq.

[2] This stipulation is at Tr. 4-5 in WEST 93-375, February 7, 1995.

I. FINDINGS OF FACT

The Bear Canyon No. 1 Mine is an underground coal mine in Sevier County, Utah. On January 11, 1994, MSHA Inspector Robert Baker issued to C.W. Mining Citation No. 3588361, under section 104(a) of the Mine Act, which stated:

> Loose coal and coal fines was accumulated in the roadway of the 2nd East pillar section from the pillar split off of 2nd Left entry across #27 crosscut to the pillar split in 20 feet inby #28 crosscut off of 2nd Right up to 12 inches deep and up to 12 feet wide, in 1st and 2nd Left it was dry in 1st and 2nd Right it was wet, the roof bolter was bolting in the split in 2nd right entry, also float coal dust was accumulated on the rock dusted surfaces around the feeder on the off walkway side and outby 20 feet in to the stopping in #26 crosscut.

He alleged a violation of 30 C.F.R. § 75.400. In the citation, Inspector Baker stated that an injury was reasonably likely, that if an injury occurred it would result in lost workdays or restricted duty, and that the violation was S&S. He determined that C.W. Mining's negligence was moderate. The violation was abated by cleaning up the loose coal, coal fines, and float coal dust, and rock dusting the area.

Section 75.400 provides:

> 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.

On January 11, 1994, while inspecting the second east pillar section, Inspector Baker observed loose coal and coal fines in Crosscut No. 27 (the "crosscut"). (Tr. 9). He also observed loose coal and coal fines in the intake entry inby the crosscut where a miner was installing roof bolts with a roof bolting machine. Id. These accumulations were wet and up to 12 inches in depth. Id. Inspector Baker then returned to the crosscut and walked its length. He determined that the accumulations became dryer as he walked through the crosscut towards the left side of the pillar section. A generalized representation of the accumulations is set forth in Ex. G-2.

Accumulations existed throughout the crosscut and they varied in depth between one and twelve inches. Large areas of the accumulations were between one and two inches in depth. (Tr. 14-15, 46). They were generally about four to five feet wide. (Tr. 14-15). Inspector Baker could not estimate the amount of coal and coal fines that had accumulated, but he believed the total length to be about 700 feet. Id. Accumulations were also present in the belt entry between the crosscut and the feeder breaker at the No. 26 crosscut. Inspector Baker took a methane reading in the crosscut and determined that there was no methane in the area. (Tr. 24).

A continuous mining machine was parked in the crosscut on the left side of the pillar section. The continuous miner was not energized. When Inspector Baker reached the continuous miner, he spoke to Mine Superintendent Randy Defa. The inspector asked Mr. Defa if he had noticed the accumulations. Mr. Defa stated that he knew about them, that he was not mining in the section because of them, and that a scoop was on the way to clean them up.[3] (Tr. 10, 19, 24). Inspector Baker told Mr. Defa that he was going to issue a citation for the accumulations and, while they were discussing abatement time, the scoop arrived. (Tr. 11). The crew immediately started cleaning up the accumulations. Id. Mr. Defa told the inspector that he did not believe that the accumulations were S&S.

The cited area was a pillar section, which means that C.W. Mining was engaged in retreat mining in that section. The continuous miner was used to cut the pillars in a pre-established pattern. Considerable pressure was placed on the roof, ribs and floor as the pillars were cut and the roof fell in the gob. (Tr. 27-28). As a consequence, significant amounts of coal sloughed from the ribs and the floor heaved in the center of the crosscut. (Tr. 52). Inspector Baker was not able to determine how much of the accumulations he observed were coal sloughage from the ribs and how much was coal that had fallen from shuttle cars during mining. (Tr. 11, 31). He believed, however, that C.W. Mining had overloaded its shuttle cars on the previous shift and that a significant amount of the accumulations were coal that had fallen off these cars. (Tr. 15-16). He based his conclusion, in part, on tracks he observed in the area. (Tr. 16, 25).

Inspector Baker testified that, even though the superintendent knew of the accumulations and was taking steps to clean them up at the time of the MSHA inspection, the accumulations should have been removed before the end of the previous shift or the area should have been dangered off at the start of the day shift.

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[3] Apparently, the scoop on the pillar section would not start. (Tr. 10, 19).

(Tr. 20). He estimated that the accumulations had been created on the previous shift and had existed for at least four hours. (Tr. 20, 36-37). There is no dispute that no mining had occurred on the day shift and that the day shift crew was going to clean up the accumulations before mining began. (Tr. 21, 24, 38).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

The only issue in this case is whether the accumulations were of a significant and substantial nature.

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the facts surrounding the violation, 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.

Wyoming Fuel Co., 16 FMSHRC 1618, 1625 (August 1994)(citation omitted). The Commission has established a four part S&S test, as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

There is no dispute that the first element of the Mathies test has been met, an underlying violation of a safety standard. I also find that the Secretary has established that a discrete safety hazard existed, the second step. It is well known that accumulations of coal and coal fines present a danger of a mine fire and explosion. C.W. Mining contends that the Secretary failed to establish the third step of the Mathies S&S test. The Secretary maintains that because the accumulations were highly combustible and potential ignition sources were present, it was reasonably likely that the hazard presented would result in an injury of a reasonably serious nature.

Inspector Baker testified that portions of the accumulations were extremely dry and combustible and that any nicks in the trailing cables of the equipment in the section would have provided an ignition source. (Tr. 16-17, 34). He further stated that there was a reasonable likelihood that the crew would suffer serious burns and smoke inhalation if the condition was allowed to continue. (Tr. 17-18). He testified that all that was necessary to ignite the accumulations was an ignition source. (Tr. 18).

Inspector Baker testified that there were a number of ignition sources in the area. First, he observed two nicks in the trailing cable for the continuous miner that exposed the insulated inner conductors. (Tr. 18). Second, he stated that the feeder breaker in the belt entry was no longer maintained in permissible condition. Id. Finally, he testified that the roof bolting machine was being used in the far right entry. Although he did not find any problems with it or with its trailing cable, he stated that it was a potential ignition source. Id.

C.W. Mining contends that the accumulations were not S&S. It maintains that most of the accumulations were sloughage from the ribs and mine floor. (Tr. 42). It argues that this sloughage occurred either at the end of the previous shift or just prior to the start of the day shift and the that the day shift crew was getting set to clean it up, prior to the start of mining, when the MSHA inspector arrived. Nathan Atwood, who was in charge of production on the day shift of January 11, 1994, testified that due to the tremendous amount of weight on the pillar section, the mine floor crumbled and coal was forced up in the center of the crosscut. (Tr. 43). He observed the subject accumulations and testified that they were ordinary rib sloughage and floor heave. (Tr. 45, 48). While he testified that some of the accumulations could have fallen off a shuttle car, he believed that very little, if any, of the accumulations fell from shuttle cars. (Tr. 49). Mr. Defa also testified that the accumulations were mostly rib sloughage and floor heave. (Tr. 56-58, 60).

He stated that rib sloughage and floor heave can accumulate very quickly, in a matter of minutes. (Tr. 59).[4]

I find that the Secretary did not establish the third element of the Mathies S&S test. The Secretary contends that these accumulations had existed for a considerable length of time and that mining had occurred while the accumulations were present. Inspector Baker relied heavily on his analysis of tire tracks he observed in the crosscut. He testified that he saw cat tracks from the continuous miner in the crosscut and "shuttle car haulage track indentations in the accumulation ... down to the feeder." (Tr. 25). He stated that the shuttle cars have an eight inch clearance. (Tr. 26). When questioned how a shuttle car with low clearance could run over accumulations that were up to twelve inches deep, he testified that the tires of the shuttle car pushed the accumulations aside, to the outside of the roadway. Id. Yet, he also testified that the accumulations were in the center of the crosscut. (Tr. 12, 14-15). Mr. Defa testified that the continuous miner had been moved into the crosscut at the beginning of the day shift but that shuttle cars has not been in the area. (Tr. 52-53). In addition, he stated that mining had not been conducted on the left side of the pillar entry for three or four shifts, so there would not have been any reason for shuttle cars to be in that area. (Tr. 53, 60-61).

I credit the testimony of Mr. Defa in this regard and find that the Secretary did not establish that the accumulations had existed for a long time. I find that the preponderance of the evidence establishes that the majority of the accumulations were the result of rib sloughage and floor heave and that, due to the heavy pressure, these conditions could have been created in a short period of time. The citation was issued at 9:45 a.m., the day shift started at about 6:30 a.m., and the preshift examination was conducted at about 4:30 a.m. (Tr. 29-30). The preshift books did not indicate the presence of coal accumulations. (Tr. 11-12). While that fact does not prove that the accumulations did not exist at 4:30 a.m., when considered along with the other evidence, it casts doubts on the inspector's estimation of the length of time the accumulations had existed.

The Secretary contends that three ignition sources could have ignited the accumulations. Although the roof bolting machine was operating, the inspector testified that his inspection of it and the trailing cable did not reveal any problems. He did not explain how this machine could have ignited the coal accumulations. As stated above, there was no methane present in the area. Inspector Baker also stated that the feeder breaker was not in permissible condition, it was not inby the last open

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[4] The parties do not dispute that the area had been rock dusted. The rock dust did not cover the accumulations. (Tr. 36). Mr. Defa testified that the area was rock dusted on the previous shift. (Tr. 59).

crosscut. There was no evidence, however, that it was energized or that it would have been energized before the area was cleaned up. Finally, he stated that there were two nicks in the trailing cable of the continuous miner. It is not disputed that this equipment had been moved while the accumulations were present. While this fact helps support the Secretary's argument, I find that it does not, by itself, establish that the violation was S&S. The evidence does not establish that it was reasonably likely that these nicks would propagate an injury-producing fire under the particular circumstances of this case.

There is no dispute that C.W. Mining was aware of the accumulations and was taking affirmative steps to clean them up before the inspector arrived on the pillar section. Inspector Baker believes that the accumulations should have been cleaned up at the end of the prior shift or the area dangered off at the beginning of the day shift. While it might have been prudent to danger off the area, the fact that C.W. Mining failed to do so does not establish the S&S nature of the violation.

The Commission has held that an evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC at 1130. In this instance, assuming continued normal mining operations, the accumulations would have been removed before mining was resumed. Thus, miners were exposed to accumulation hazards for a short period of time.[5]

III. CIVIL PENALTY ASSESSMENT

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. Based on this criteria, I assess a penalty of $225 for the violation. I find that C.W. Mining was issued 158 citations and orders in the 24 months preceding the inspection in this case. (Ex. G-1). I also find that C.W. Mining is a medium-sized operator that produced between 300,000 and 400,000 tons of coal in 1992. I find that the civil penalty assessed in this decision would not affect C.W. Mining's ability to continue in business. The violation was timely abated by C.W. Mining.

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[5] The forth element of the Mathies S&S test is whether it is reasonably likely that an injury would be of a reasonably serious nature. I find that if the accumulations did ignite and injure a miner, it is reasonably likely that such an injury would be of a reasonably serious nature.

I further find that the violation was serious, but that C.W. Mining's negligence was low. The negligence was low because the operator had already taken steps to clean up the accumulations before the inspector arrived.

IV. ORDER

Accordingly, Citation No. 3588362 is **VACATED.** Citation No. 3588361 is **MODIFIED** to delete the significant and substantial designation. As modified, the citation is **AFFIRMED** and C.W. Mining Company is **ORDERED TO PAY** Secretary of Labor the sum of $225.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 15 1995

TOPPER COAL COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 94-944-R
	:	Citation No. 4243301; 5/19/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 9 Mine
ADMINISTRATION (MSHA),	:	Mine ID 15-17326
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1052
Petitioner	:	A. C. No. 15-17326-03506 S
v.	:	
	:	No. 9 Mine
TOPPER COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, Pikeville, Kentucky, for Respondent.

Before: Judge Hodgdon

These cases are before me on a notice of contest and petition for assessment of civil penalty filed by Topper Coal Company, Inc. against the Secretary of Labor and by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Topper Coal, respectively, pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of Citation No. 4243301 to it on May 19, 1994. The Secretary's petition seeks a civil penalty of $8,500.00 for the violation alleged in the citation. For the reasons set forth below, I affirm the citation, as modified, and assess a penalty of $5,000.00.

The cases were heard on February 22 and 23, 1995, in Pikeville, Kentucky. MSHA Coal Mine Inspectors Howard Williams and Elmer Hall, Jr. and MSHA Coal Mine Safety and Health Specialist Cheryl S. McGill testified for the Secretary. Mr. Gary D. Fields, MSHA Coal Mine Inspector Jerry D. Abshire and MSHA Conference Litigation Representative Gerald W. McMasters testified on behalf of Topper Coal. The parties have also filed briefs which I have considered in my disposition of these cases.

FACTUAL BACKGROUND

The facts surrounding this case are not disputed. On May 19, 1994, Inspectors Williams, Hall and Ronald Honeycutt went to Topper Coal's No. 9 Mine to conduct a spot saturation inspection for smoking articles in the mine. Inspector Hall informed Mr. Fields, President and owner of Topper Coal, that the inspectors were present to conduct an inspection, although he did not inform Mr. Fields that they were looking for smoking materials. He also instructed Mr. Fields not to call into the mine to advise the miners underground that the inspectors were coming. Hall and Honeycutt then went underground and Williams remained in the mine office with Fields.

About 15 or 20 minutes after the inspectors had gone into the mine, Mr. Fields went to the mine telephone, picked it up and, without saying anything to Williams, called into the mine and said "James, there are two federal inspectors in there. Tell the men to watch out and be careful." (Tr. 177.) On hanging up, Fields told Williams that he was afraid the men underground would not see the inspectors and run over them with a shuttle car.

As a result of this call, Inspector Williams issued the citation in question. It alleged a violation of Section 103(a) of the Act, 30 U.S.C. § 813(a), and stated that: "Gary Fields - owner impeded a Saturation Spot Inspection (CAB) by calling underground on the mine phone notifying the miners [that] two Federal Inspectors [were] on their way inside, after being informed by Elmer Hall, Howard Williams and Ronald Honeycutt (federal inspectors) not to notify the miners underground of the inspectors' presence." (Jt. Ex. 1.)

No smoking materials were found. However, two citations for other violations were issued as a result of the inspection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 103(a) of the Act provides, as pertinent to this case, that:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . . . In carrying out the requirements of clause[ ] . . . (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four time a year . . . . The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary . . . or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

On reading this section of the Act, it is apparent that it does not explicitly prohibit impeding or interfering with an inspection. Nevertheless, it is evident from the legislative history that Congress intended this section to give "a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under" the Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 27 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 615 (1978).

While Section 108(a)(1)(B) of the Act, 30 U.S.C. § 818(a)(1)(B), provides that the Secretary may seek an "injunction, restraining order, or any other appropriate order" from a United States district court whenever an operator or his agent "interferes with, hinders, or delays the Secretary or his authorized representative . . . in carrying out the provisions of this Act," it is generally accepted that such conduct is also forbidden by Section 103(a). Thus, one treatise states "[i]n addition to seeking injunctive relief, the Secretary of Labor may issue citations for interference with the conduct of an inspection." 1 *Coal Law and Regulation* § 8.04 (1983). *See also* "103(a) Denials of Entry" I MSHA *Program Policy Manual* § 103(a) (1988) [instructing inspectors to cite operators under Section 103(a) for being "threatened or harassed" while making an inspection].

In *Waukesha Lime and Stone Co.*, 3 FMSHRC 1702 (July 1981), the Commission held that a refusal to permit an inspection violated Section 103(a) of the Act. In so doing, it rejected the company's argument that injunctive relief under Section 108(a)(1) provided the Secretary's sole remedy when an operator engaged in the activities set out in that section,[1] holding:

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[1] Section 108(a)(1) provides:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent--
>
> (A) violates or fails or refuses to comply with any order or decision issued under this Act,
>
> (B) interferes with, hinders, or delays the Secretary or his authorized representative . . . in carrying out the provisions of this Act,
>
> (C) refuses to admit such representatives to the coal or other mine,

(con't on next page)

> First, notwithstanding the absence of express statutory language, it is illogical to assume that Congress intended to mandate inspections and a right of entry for the Secretary's authorized representative pursuant to section 103(a), without viewing the operator's denial of entry as a dereliction of its duty under the Act. . . . Second, we reject the contention that a section 108(a)(1) injunction is the Secretary's sole remedy if an operator denies entry to his authorized representative. Rather, dual remedies exist: an administrative remedy under sections 104 and 110(a), and a civil injunctive remedy under section 108(a)(1). We believe that if Congress had intended injunctive relief to be the exclusive remedy, it would have stated so unequivocally.

Id. at 1704.

Subsequently, the Commission has continued to construe Section 103(a) broadly. In *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984), the Commission held that the failure to provide an inspector transportation to the site of an accident prevented him from inspecting the scene and was, therefore, a violation of Section 103(a). *Id.* at 1431. With more significance to this case, the Commission also held that the company's insistence on the presence of a company attorney at an interview during the investigation of the accident, without specifying when the attorney would be present, combined with the failure to produce an attorney, "had the effect of unreasonably delaying the accident investigation" and that this delay "impeded" the investigation in violation of Section 103(a). *Id.* at 1433.

> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine,
>
> (E) refuses to furnish any information or report requested by the Secretary . . . in furtherance of the provisions of this Act, or
>
> (F) refuses to permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of this Act.

In *Calvin Black Enterprises*, 7 FMSHRC 1151 (August 1985), the Commission found that when inspectors were told that they were trespassing and needed written permission from the operator to inspect they were effectively prevented from entering the mine. Stating that "MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect," the Commission affirmed a violation of Section 103(a). *Id.* at 1157.

In *Sanger Rock & Sand*, 11 FMSHRC 403 (Judge Cetti, March 1989), a Commission judge found a violation of Section 103(a) when the operator refused to cooperate in an inspection by delaying in furnishing records the inspector needed to see and by calling the inspector a "liar." Just recently, another Commission judge concluded, in another case involving an inspection for smoking materials, that calling into the mine after being instructed not to by MSHA inspectors was a violation of Section 103(a). *Cougar Coal Co.*, 17 FMSHRC 628 (Judge Amchan, April 1995).

Based on the legislative history and the case law, I conclude that the "broad right-of-entry" in Section 103(a) includes a prohibition against the operator impeding or interfering with the inspection. Consequently, I conclude that the citation in this case describes a violation of the Act.

Turning to the facts in this case, I find that Mr. Fields obstructed the inspection. As he admitted, he "thought [Hall] was just going in there and just sneak up on them [the miners underground] and just see what he could catch them doing." (Tr. 196-97.) He further admitted that he understood that the inspectors did not want him to call underground and let his men know that the inspectors were coming into the mine. (*Id.*) Knowing this, and without further questioning the inspectors or explaining to them any concerns he might have had about this plan, he proceeded to call into the mine and alert his men that "two federal inspectors" were coming into the mine. (Tr. 177.)

Fields claim that the call was made purely for safety reasons is not accepted. He did not express any such safety concerns when the inspectors initially explained to him what they wanted to do. He did not express any safety concerns to Inspector Williams when he decided to make the call. It appears

that his concern for safety was an attempt to rationalize the call after he made it. Furthermore, if he was only concerned that the inspectors not be run over, he did not have to identify the people entering the mine as "federal inspectors." Finally, he stated at the hearing that when he called into the mine, he "figured they were there," that is, that the inspectors were already on the section. (Tr. 199.) If he believed that, the safety claim makes no sense, since the miners would presumably have already observed the inspectors.

Based on this evidence, I conclude that Mr. Fields impeded the inspection. Accordingly, I conclude that Topper Coal violated Section 103(a) of the Act as alleged.[2]

Significant and Substantial

The violation in this case was declared to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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 (January 1984), the Commission set out four criteria that have to be met before a violation can be found to be S&S. The criteria are: (1) violation of a mandatory safety standard; (2) contribution to a safety hazard by the violation; (3) a reasonable likelihood that the hazard will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious

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[2] Respondent's arguments that the inspection was not conducted "within reasonable limits and in a reasonable manner," Resp. Br. at 9-10, has been considered and rejected as unpersuasive.

nature. *Id.* at 3-4. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., 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 Co.*, 9 FMSHRC 1007 (December 1987).

Rather than address this violation in terms of the *Mathies* criteria, the Secretary states that:

> It is the Secretary's position that where the operator denies or otherwise interferes with the Secretary's right of entry under section 103(a) of the Act, this violation should be presumed to be significant and substantial. The Secretary's right of entry is the mechanism by which the entire Act is enforced. If the Secretary is denied entry, directly or indirectly, he is unable to determine the number and the type of violative conditions which pose serious hazards to miners working underground and to ensure that these hazards are eliminated.

Sec. Br. at 10.

The Respondent, apparently following *Mathies*, argues that the violation is not "significant and substantial" because no smoking materials were found during the inspection and the mine does not have a history of methane liberation, "so there is no way that an explosion could have been reasonable likely to have occurred as a result of this violation." Resp. Br. at 11. The company also points out that when the inspector issued the citation in this case, he found that the violation was not "significant and substantial."

The problem with trying to assess this violation under the traditional criteria is that there is no way of knowing what the inspectors would have found if the miners had not been alerted to their presence. Since neither Mr. Fields nor the miners were

aware of the specific purpose of the inspection, the fact that no smoking materials were found does not necessarily indicate that those miners who did have smoking materials somehow disposed of them. On the other hand, the logical consequence of warning underground miners that inspectors are on their way underground would be for the miners to attempt to cover-up, dispose of, or even correct any violations of which they are aware.

Although there is no evidence that that happened in this case, there is also no evidence that violations were not covered-up. Generally speaking, I find that when an inspection is interfered with in this manner, it is reasonably likely that an S&S violation would have been discovered. Therefore, I conclude that when an inspection is impeded there is a presumption that the violation is S&S.

In this case, the Respondent has not presented any evidence that would rebut such a presumption. Accordingly, I find that the violation of Section 103(a) was "significant and substantial."

Degree of Negligence

A week after the citation was issued in this case, the degree of negligence was modified from "moderate" to "reckless disregard." Moderate negligence is defined in the Regulations as: "The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d)(Table VIII). Reckless disregard is defined as: "The operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* Reckless disregard is also the type of conduct which characterizes a finding of "unwarrantable failure" under Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1).[3] *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627

[3] Curiously, while the citation was modified from alleging a violation under Section 104(a), 30 U.S.C. § 814(a), to allege an "unwarrantable failure" under Section 104(d)(1) when the degree of negligence was modified, it was subsequently modified again back to a Section 104(a) violation.

(August 1994); *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

The Secretary argues that Mr. Fields actions constituted reckless disregard because he "deliberately disregarded the inspectors' instructions and telephoned underground personnel to warn them that inspectors were traveling to the section." Sec. Br. at 11. It is the Respondent's position that this conduct "did not constitute reckless disregard since the operator did not even know the purpose of this investigation prior to phoning underground." Resp. Br. at 11.

The fact that Mr. Fields did not know the specific purpose of the inspection does not reduce the degree of negligence in view of the fact that he did know that the inspectors did not want him to call into the mine and he understood their reason for directing him not to do so. However, the evidence does not support a finding that he exhibited a total absence of care. His concern for safety, even if expressed only in a last minute attempt to justify his actions, removes his conduct from the reckless disregard definition.

Fields' conduct is better described as that he knew of the violative condition or practice and there are no mitigating circumstances, which happens to be the definition of "high" negligence in the Regulations. 30 C.F.R. § 100.3(d)(Table VIII). This finding is also consistent with the Secretary's modification of the citation from one under Section 104(d)(1) to one under to one under Section 104(a). Consequently, I conclude that the degree of negligence for this violation was "high" rather than "reckless disregard" and will modify the citation accordingly.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $8,500.00 for this violation. The Respondent argues that if it did violate the Act, a penalty of $250.00 is appropriate. It is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section

110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

A computer printout of Topper Coal's violation history indicates that it was assessed 141 penalties in the two years preceding this violation, 115 of which were S&S. (Govt. Ex. 1.) Although the allied papers indicate that this is a small company (135,401 production tons per year) and a small mine (29,716 production tons per year), it cannot be said that this company's violation history warrants increasing the penalty.

The parties have stipulated that "[p]ayment of a reasonable penalty will not have an adverse effect on the ability of the operator to continue in business." (Jt. Ex. 2.) Since the proposed penalty was $8,500.00 when this stipulation was entered into, I conclude that a penalty of that amount is considered reasonable and will not have an adverse effect on the company's ability to continue operating.

Once committed, this violation could not be abated. I note, however, that there is no evidence that the either the company or any of its personnel had interfered with inspections before or since this violation, nor had the company been cited for any smoking violations. (Govt. Ex. 1.)

The gravity of this violation is very serious. The Secretary's right to inspect mines without obstruction or interference goes to the heart of the Mine Act and such actions cannot be permitted. Furthermore, the Respondent was highly negligent in this case and there are no factors which mitigate Mr. Fields' conduct.

Accordingly, taking all of this into consideration, including the reduction in the company's degree of negligence, I conclude that a penalty of $5,000.00 is appropriate for this violation and a company the size of Topper Coal.

ORDER

Citation No. 4243301 is **MODIFIED** to reduce the level of negligence from "reckless disregard" to "high" and **AFFIRMED** as modified. Topper Coal Company, Inc. is **ORDERED** to pay a civil penalty of $5,000.00 within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
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 15 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-78-D
ON BEHALF OF	:	VINC CD 94-10
RICHARD E. GLOVER AND	:	
LEON KEHRER,	:	
Complainants	:	Rend Lake Mine 11-00601
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for the Complainant;
Elizabeth Chamberlin, Esq., Pittsburgh, Pennsylvania for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Richard E. Glover and Leon Kehrer pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act". The Secretary alleges that the Consolidation Coal Company (Consol) transferred these complainants in violation of Section 105(c)(1) of the Act[1]

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[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

because of their activities as miners' representatives. In particular, it is alleged that the Complainants were removed from their jobs as "scooter barn" mechanics on June 21, 1994, because their "walkaround" duties performed under Section 103(f) of the Act purportedly interfered with the efficiency of the scooter barn area.[2] Indeed it is undisputed that Consol removed the Complainants from their jobs as scooter barn mechanics because of their activities as miners' representatives in order to make the scooter barn area more efficient.

A preliminary issue is whether the Complainants were in fact "representatives of miners" within the meaning of the Act during relevant times and, in particular on June 21, 1994, when they were transferred. Pursuant to the directive in Section 103(f) of the Act the Secretary in his regulations at 30 C.F.R. § 40.1(b) has defined representative of miners as "any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." Moreover, in *Utah Power and Light Company* v. *Secretary,* 897 F.2d 447, 455 (10th Cir. 1990) the circuit Court confirmed that any person or organization representing two or more miners is a miners' representative under Section 40.1(b).

In this case the Complainants both testified that prior to June 21, 1994, they were appointed as "safety committeemen" by an official of the local union in order to perform walkaround functions under the Act. Moreover, in each case, that appointment was confirmed by vote of the local union composed of miners at the Rend Lake Mine. It may reasonably be inferred from this undisputed evidence, therefore, that both Glover and Kehrer were, as of June 21, 1994, appropriately representing two or more miners at the Rend Lake Mine and were accordingly representatives of miners within the meaning of Section 103(f) of the Act.

Footnote 1 continued

employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify 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 this Act.

[2] Section 103(f) provides that "[s]ubject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."

Factual Background

Both Glover and Kehrer had worked as "scooter barn" mechanics at the Rend Lake Mine for many years prior to June 21, 1994. Glover had worked at the mine for 25 years and for 17 of those years had been a "scooter barn" mechanic. Kehrer had worked at the mine for 21 years. The scooter barn is located underground and on June 21, 1994, was situated about 150 feet from the bottom of the "B" shaft. It is a shop area 18 feet by 70 feet in size with rock walls, a beamed ceiling and a cement floor containing equipment including welders, drill presses, and grinders. One mechanic on each of the three shifts works out of the scooter barn and is ordinarily supervised only at the beginning of the shift. Glover worked primarily on rubber-tired equipment and occasionally worked outside the scooter barn on heavier equipment. Glover was then also a representative of miners serving as a "walkaround" with mine inspectors about two thirds of his work time. He later estimated that he and Kehrer (on the "C" shift) each spent four days out of five working as walkarounds.

According to Glover, at the end of his shift on Friday, June 21, 1994, he was told by his boss, Vernell Burton, that he would be taken out of the scooter barn because of his work as a walkaround. Burton also told him there was a possibility that if he would quit his walkaround activities he could stay at the scooter barn. When Glover returned to work on Monday, June 24, he was transferred to work as a mechanic on the 1-G Section. He again asked Burton if he would be permitted to stay at the scooter barn if he gave up his walkaround duties but Burton did not respond. At the end of his shift Glover and Complainant Leon Kehrer went to the mine superintendent's office. According to Glover, Superintendent Wetzel explained that the job transfer was made to increase productivity at the scooter barn. At this meeting, maintenance supervisor Wamsley offered the Complainants the option to quit their walkaround duties and remain in the scooter barn but Wetzel overruled him, stating that it was not an option. Glover acknowledged that Wetzel told him that he was doing a good job as a walkaround but they needed somebody full time in the scooter barn.

According to Glover, working on the section as an underground mechanic is significantly less desirable than working in the scooter barn and conditions on the section were more hazardous. Because of this Glover subsequently bid on a motorman job taking a $1.00-an-hour pay cut.

Billy Ray Sanders, a former inspector for the Illinois Department of Mines and Minerals, was performing an inspection at the Rend Lake Mine on June 21, 1994. He happened to be outside the office of Maintenance Supervisor John Moore when he overheard Moore tell Kehrer that they had a meeting and decided to remove

him from his job in the scooter barn because of his work as a "walkaround" for Federal and State Inspectors. Sanders heard Moore tell Kehrer that if he wanted to give up his walkaround duties he could remain as a scooter barn mechanic but otherwise he would be transferred to the section. Kehrer asked for Sanders' assistance to prevent his transfer but, upon checking with his legal department, Sanders found he could not help.

Kehrer heard about his possible transfer from the scooter barn because of his duties as a "walkaround" from one of his bosses, Randy Price. Assistant Maintenance Superintendent John Moore also told Kehrer that he was to be transferred from the scooter barn because of his walkaround activities. Scott Wamsley confirmed to Kehrer that he either had to quit his walkaround duties or lose his job as a scooter barn mechanic. Kehrer then met with Wetzel who repeatedly stated that "my official statement [reason] is to make the scooter barn more productive."

Kehrer testified that he was then transferred to the 3-F Section and initially had no supervisor, no tools and no work assignments. According to Kehrer the section mechanics perform more difficult and heavier work and are subject to more dangerous conditions than scooter barn mechanics. They work with A.C. power, and are exposed to dust, methane and potentially dangerous roof and rib conditions.

Kehrer also noted that the scooter barn mechanic on the B-shift was not a representative of miners and was not transferred to the sections unlike he and Glover. Kehrer conceded that there was, indeed, a transportation problem at the mine because the bad road conditions in the mine damaged equipment. He also noted that there were not enough mantrips in the mine in any event.

On behalf of Consol, Lead Maintenance Foreman Vernell Barton testified that during June 1994, he was in charge of the service and maintenance of the transportation equipment. He had a good working relationship with both Complainants and was not involved in the transfer decision. Barton had been told that Glover was transferred because the time he was missing on day shift left them short handed. They had to use a fill-in mechanic in the scooter barn in Glover's absence and initially the replacements were not as skilled. He was told several months before June 1994, that they needed to have someone at the scooter barn at all times because of the aging of the equipment and the increasing use of diesel equipment required increased maintenance.

John Robert Moore testified that he was an assistant to the master mechanic in June 1994, in charge of the transportation equipment. He too reported to Scott Wamsley. Moore was also

involved in the decision to transfer the Complainants. He recalled a staff meeting on June 11 to discuss various problems at the mine including inadequate transportation of the hourly employees to their work stations. Nine of the people attending the meeting raised this issue and the apparently related problem of not always having a mechanic available in the scooter barn. They wanted a mechanic to be available at the scooter barn 24 hours a day. Moore testified that he was told by Wamsley that it would be necessary to move the Complainants out of the scooter barn to have somebody available all the time. According to Moore they also needed someone trained to work on their new diesel equipment available all the time.

Moore testified that in June 1994, although there were nine or ten mechanics working on each of the three shifts and that any one of these could have worked on the section as mechanics, only one or two per shift were capable of working in the scooter barn as substitutes. Moore acknowledged, however, that the transportation problems they had in June 1994, were the same problems they had since 1989. Moore maintains that they did not have the people to train to fill in. Moore acknowledged that he told Kehrer that if he would give up his walkaround duties he could stay in the scooter barn.

Mine Superintendent Joseph Wetzel testified that he scheduled the management meeting on June 11, 1994, to "define roles and solve problems". According to Wetzel the subsequent transfer of the Complainants was not as punishment but was the result of transportation problems. Wetzel testified that someone suggested offering the Complainants a choice to resign as representatives of miners but he wanted them to continue in that capacity and therefore did not give them a choice. Wetzel also testified that since their transfer the maintenance staff had been increased but not sufficiently to allow for fill-ins at the scooter barn.

When the above essentially undisputed facts are distilled, what emerges is in essence a policy by Consol that effectively bars miners' representatives at the Rend Lake Mine from holding the position of scooter barn mechanic. It may also reasonably be inferred from the evidence that under this policy no one serving as a miners' representative could even be considered for the scooter barn job because of his activities as a miners' representative. Conversely, under the Consol policy no person presently holding the position of scooter barn mechanic could accept the duties as a miners' representative without fear of losing his scooter barn job and being transferred to less desirable and more hazardous work.

Analysis

Ordinarily it is essential in proving a case of discrimination under section 105(c)(1) of the Act that there be a determination of unlawful motive. The Act prohibits retaliatory conduct or discrimination that is motivated by a miner's exercising any protected right. Nevertheless, situations have arisen in which proof that adverse action was improperly motivated has not been required. The Supreme Court has permitted a showing of facial discrimination under section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(s)(3): "Some conduct . . . is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967)(citations omitted). Moreover, the Commission held in *UMWA and Carney v. Consolidation Coal Co.*, 1 FMSHRC 338, 341 (1979), that an operator's business policy was facially discriminatory. There, the Commission found that, under section 110(b) of the Coal Act (30 U.S.C. § 820(b)(1976) (amended 1977), the predecessor to section 105(c), a company policy requiring union safety committeemen to obtain permission from management before leaving work to perform safety duties was unlawful because it impeded a miner's ability to inform the Secretary of alleged safety violations. *See also Simpson v. FMSHRC*, 842 F.2d 453, 462-63 (D.C. Cir. 1988)(when mine conditions intolerable, operator motive need not be proven to establish constructive discharge). *Cf. Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1532-33 (1990)(held that operator's policy was not facially discriminatory.)

In *Swift et al. v. Consolidation Coal Company*, 16 FMSHRC 201, 206 (1994), the Commission held that in order to establish that a business policy is discriminatory on its face, a complainant must show that the explicit terms of the policy, apart from motivation or any particular application, plainly interferes with rights under the Act or discriminates against a protected class. The Commission further noted that once a policy is found to be discriminatory on its face, an operator may not raise as a defense the lack of discriminatory motivation or valid business purpose in instituting the policy.

When reviewing a claim of facial discrimination, the Commission has also stated:

> "The Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of [a challenged business program or policy] apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act." Our limited purpose is to

> focus simply on whether the [program] or enforcement of some component thereof conflicts with rights protected by the Mine Act.

Price and Vacha 12 FMSHRC at 1532 (citation omitted).

Within this framework of law it is clear that Consol's policy herein is, indeed, facially discriminatory. By effectively barring miners' representatives from holding the desirable job of scooter barn mechanic, by discouraging persons who might wish to work as scooter barn mechanics from becoming miners' representatives and by removing persons from such a position upon the assumption of activities as a miners' representative, Consol's policy unlawfully discriminates against the protected class of miners' representatives and those who would otherwise be willing to serve in that capacity. It is significant to note that this policy also effectively restricts miners' rights to select whom they wish to have represent them under Section 103(f) of the Act. See *Kerr-McGee Coal Corp. v. FMSHRC,* 40 F.3d 1257 (D.C. Cir. 1994), *petition for cert. filed,* 63 U.S.L.W. 3805 (U.S. Apr. 14, 1995) (No. 94-1685). Under the circumstances Consol's policy which led to the transfer of the complainants herein is facially discriminatory and in violation of the Act.

The policy at issue and the specific action by Consol in transferring the Complainants in this case for their activities as miners' representatives is also discriminatory under the customary analysis applied to discrimination cases. The Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413(1983) (approving nearly identical test under National Labor Relations Act).

There is no dispute in this case that both Complainants, as miners' representatives, were members of a protected class and

had engaged in protected activity prior to their transfer. It is also clear that the adverse action complained of (the transfer of the Complainants from their job as scooter barn mechanics to section mechanics) was motivated solely by their protected activity as miners' representatives (because of their time-consuming work in that capacity). Since this case does not therefore involve a "mixed-motive", discrimination under the Act is established and no further analysis under *Pasula* is necessary.

Consol cannot under the circumstances prevail with an affirmative defense that it based its transfer of Glover and Kehrer on unprotected activity alone since it admits that their transfer was based upon their activities as miners' representatives. Indeed, it cannot be disputed that the adverse action was solely motivated by the fact that the Complainants were performing their duties as representatives of miners. They were admittedly transferred because their walkaround duties detracted from the time devoted to their duties as scooter barn mechanics. The Secretary has in this manner, therefore, also proven discrimination under the *Pasula* analysis.

Even assuming, *arguendo,* that this case involves a "mixed motive" in the sense that Consol was also motivated in transferring Glover and Kehrer by business related concerns that their activities as miners' representatives was affecting mine productivity and efficiency, those concerns cannot prevail over the express Congressional intent to construe Section 105(c) "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 & 36 (1977) ["S. Rep."], *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 623 & 624 (1978) ["Leg. Hist."].

That Senate Committee also stated in that report as follows:

> "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation".

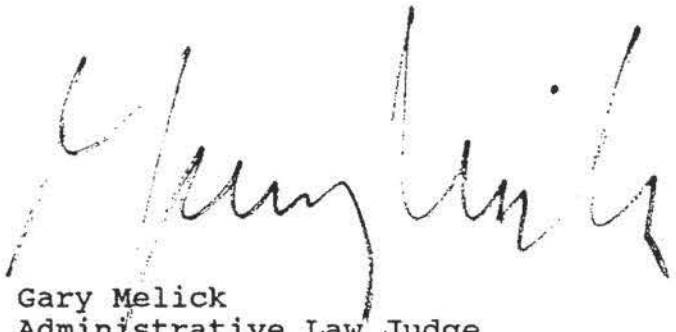
Moreover, in creating a protected class of miners' representatives under Section 103(f) of the Act, Congress expressly recognized that there would be related economic costs to the industry. Thus, while it may be true that Consol could operate more productively and efficiently by prohibiting miners' representatives from holding certain jobs, Congress has clearly

determined that such business reasons cannot be used to justify discrimination against them as Consol suggests herein.

Considering the serious impact Consol's actions herein would have on the willingness of persons to serve as miners' representatives and the intentional and obvious discriminatory nature of its actions in conjunction with other criteria under Section 110(i) of the Act, I find that a civil penalty of $10,000 is appropriate.

ORDER

In accordance with the damages requested by the Secretary, Consolidation Coal Company is hereby directed to (1) immediately restore the Complainants to their positions as scooter barn mechanics at the appropriate rate of pay for the position, and (2) post for a period of not less than 60 days a notice at Rend Lake Mine in a prominent place frequented by miners, which states its recognition of miners' statutory rights to file complaints of discrimination and to participate as miners' representatives with the Mine Safety and Health Administration; and its commitment to honor these rights, and not to interfere in any manner with the exercise of these rights. Consolidation Coal Company is further directed to pay civil penalties of $10,000 for the violations in this case.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 19 1995

BRUSHY CREEK COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 94-168-R
	:	Citation No. 4260292; 3/29/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 94-171-R
ADMINISTRATION (MSHA),	:	Citation No. 4260295; 3/29/94
Respondent	:	
	:	Docket No. LAKE 94-172-R
	:	Citation No. 4266730; 3/29/94
	:	
	:	Docket No. LAKE 94-173-R
	:	Citation No. 4266732; 3/29/94
	:	
	:	Docket No. LAKE 94-174-R
	:	Citation No. 4266773; 3/29/94
	:	
	:	Docket No. LAKE 94-175-R
	:	Citation No. 4260297; 3/29/94
	:	
	:	Docket No. LAKE 94-176-R
	:	Citation No. 4261610; 3/29/94
	:	
	:	Brushy Creek Mine
	:	Mine I.D. No. 11-02636
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 94-250
Petitioner	:	A.C. No. 11-02636-03864
v.	:	
	:	Docket No. LAKE 94-251
BRUSHY CREEK COAL CO., INC.,	:	A.C. No. 11-02636-03865
Respondent	:	
	:	Docket No. LAKE 94-459
	:	A.C. No. 11-02636-03866
	:	
	:	Brushy Creek Mine

DECISIONS

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner\Respondent; Karl F. Anuta, Esq., Boulder, Colorado, for Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern notices of contest filed by Brushy Creek Coal Company (Brushy Creek), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of seven (7) section 104(a) citations issued at the mine on March 29 and 30, 1994, in the course of a MSHA ventilation inspection. The civil penalty cases concern proposed assessments filed by the Secretary against Brushy Creek for the alleged violations. Consolidated hearings were held in Evansville, Indiana, and the parties filed post-hearing arguments that I have considered in the course of my adjudication of these matters.

Issues

The issues presented in these proceedings are whether the cited conditions or practices constituted violations of the cited safety standards, whether the alleged violations were "significant and substantial" ("S&S"), and the appropriate civil penalties to be imposed for the violations, taking into account the penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

2. Sections 104(d), 105(d) and 110(a) and (i) of the Act.

3. 30 C.F.R. §§ 75.332(a)(1), 75.334(a)(1), 75.370(a)(1), 75.380(f)(1), 75.503, and 75.507-1.

4. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Joint Exhibit-1; Tr. 10-12):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

2. Brushy Creek and its mines are subject to the Mine Act.

3. At all relevant times to these proceedings, Brushy Creek owned and operated the Brushy Creek Mine, a bituminous coal mine located in Galatia, Illinois.

4. Brushy Creek's operation affects interstate commerce.

5. The subject mine produced 1,123,941 tons of bituminous coal from January 1, 1993 through December 31, 1993.

6. Brushy Creek produced 2,614,239 tons of bituminous coal at all of its mines from January 1, 1993 through December 31, 1993.

7. The subject citations were properly served by duly authorized representatives of the Secretary of Labor upon agents of Brushy Creek on the dates indicated therein.

8. The subject citations may be admitted into evidence for establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

9. The exhibits to be offered by Brushy Creek and the Secretary are stipulated to be authentic but no

stipulation is made as to their relevance or the truth of the matters asserted therein.

10. The proposed penalties for each citation will not effect Brushy Creek's ability to continue in business.

11. Brushy Creek demonstrated good faith by abating the cited violations.

12. The certified copy of the MSHA Assessed Violations History (Joint Exhibit 3) accurately reflects the history of the subject mine for two years prior to March 29, 1994.

Discussion

Docket Nos. LAKE 94-168-R and LAKE 94-250

Section 104(a) "S&S" Citation No. 4260292, issued on March 29, 1994, by MSHA Staff Engineer Jeffery Wirth, cites an alleged violation of 30 C.F.R. 75.332(a)(1), and the cited condition or practice states as follows:

> Return air is flowing out of the old 5-B worked out panels/rooms and is traveling inby to the #5 unit producing continuous miner section, MMU-005. This air is flowing into the old 5-B worked out panels and continues on inby after exiting the worked out area to the producing section. This is the same split of air and is not intake air.

Docket Nos. LAKE 94-171-R and LAKE 94-251

Section 104(a) "S&S" Citation No. 4260295, issued on March 29, 1994, by Mr. Wirth, cites an alleged violation of 30 C.F.R. 75.507-1, and the cited condition or practice states as follows:

> The old 5-B worked out panel (return air) is being traveled with non-permissible equipment - golf carts, etc. Golf carts are present in the worked out area at the time of inspection. Air

quality in this worked out area was found to be as follows: methane 1.9% and oxygen at 18.8% in an area 4 entries wide and 23 X C long.

Docket Nos. LAKE 94-173-R and LAKE 94-250

Section 104(a) "S&S" Citation No. 4266732, issued on March 29, 1994, by MSHA Inspector James Holland, cites an alleged violation of 30 C.F.R. § 75.334(a)(1), and the cited condition or practice states as follows:

A worked out area was not ventilated to move methane into a return air course or to the surface. Evidence of 1.9% CH4 and 18.8% 0/2 was present.

Docket Nos. Lake 94-174-R and LAKE 94-459

Section 104(a) non-"S&S" Citation No. 4266733, issued on March 29, 1994, by Mr. Holland, cites an alleged violation of 30 C.F.R. § 75.380(f)(1), and the cited condition or practice states as follows:

The current of air used to ventilate the primary escapeway for the No. 5 unit located in Southwest Mains was not ventilated with intake air.

Docket Nos. LAKE 94-175-R and LAKE 94-250

Section 104(a) "S&S" Citation No. 4260297, issued on March 30, 1994, by Mr. Wirth, as a section 104(d)(1) citation, and subsequently modified on April 28, 1994, to a section 104(a) citation, cites an alleged violation of 30 C.F.R. § 75.370(a)(1), and the cited condition or practice states as follows:

The continuous miner was observed cutting/ loading coal from the working face with very little air movement behind the line curtain. The anemometer would not turn in all the area behind the line curtain indicating that the velocity was less than 50 feet per minute (fpm) in much of the area behind the line curtain. A velocity of 50 fpm would result in a volume of

about 1,000 cubic feet per minute at the end of the line curtain. With the machine mounted scrubber not in operation the blades on the anemometer would not turn at all. A methane test taken in this working place when mining ceased indicated methane present at a level of 0.4%. This producing section has been back in this area since 3/28/94. The operator pulled out of this producing section during April, 1993 due to large amounts of methane migrating through the bottoms from an abandoned mine located approximately 90 feet to 120 feet directly below this area. The ventilation plan approved by the district manager on 6/18/93 requires 6,500 cfm of air to be maintained at the end of the line curtain at all times the machine is cutting or loading coal on long cuts using remote control.

Docket Nos. LAKE 94-176-R and LAKE 94-250

Section 104(a) "S&S" Citation No. 4261610, issued on March 30, 1994, by MSHA Mining Engineer Michael A. Bird, as a section 104(d)(1) order, and subsequently modified on April 28, 1994, to a section 104(a) citation, cites an alleged violation of 30 C.F.R. § 75.370(a)(1), and the cited condition or practice states as follows:

The approved ventilation plan was not being complied with on the #5 unit (MMU-005). The ventilation plan states that on long cuts using remote control miners the line curtain will be maintained to within 40 feet of the deepest penetration of the face. The line curtain measured sixth-six feet from the deepest penetration in the number six entry were [sic] coal was being cut and loaded. When the miner operator was asked he stated that the maximum curtain was 40 feet. This producing section has been back in this area since 3/28/94. The operator pulled out of this producing section during April, 1993 due to large amounts of methane migrating through the bottoms from an abandoned mine located approximately 90 to 120 feet directly below this area.

MSHA's Testimony and Evidence

Jeffery Wirth testified that he has worked for MSHA for two years and seven months as a district staff mining engineer. He received a B.S. degree in mining engineering in 1982 from Southern Illinois University, Carbondale, and started working in mines upon graduation. He attended MSHA's 13-week training program at the Mine Academy in Beckley, West Virginia, attended additional classes in ventilation, and has had on-the-job training with MSHA. He is a member of the Society of Mining Engineers, has served as a district instructor in mine disasters, holds Kentucky mine foreman and shot firers papers, Illinois mine manager's papers, and has 10 years of mining experience (Tr. 34-40).

Mr. Wirth stated that his MSHA duties include assisting mine operators with ventilation plans, reviewing such plans, and conducting ventilation reviews. He also conducts mine site inspections on the average of two days a week and the inspections are usually ventilation oriented.

Mr. Wirth identified Citation No. 4260292, and explained that it was issued during a "ventilation saturation inspection" conducted by six MSHA inspectors (Tr. 45). He stated that there was a methane problem at the mine and that methane was liberating from the mine floor from an old sealed and abandoned Peabody No. 47 mine located 90 feet below and migrating through the Brushy Creek Mine (Tr. 46-47).

Mr. Wirth confirmed that the conditions described in the citation area were accurate, and he believed that it was reasonably likely that an injury or illness would occur for the following reasons (Tr. 48):

> A. Basically, because the air was entering an extensive worked-our area, and it wasn't being properly examined, and there was an area in this worked-out area that was approximately a third of a mile long, a body of methane present that we found upon walking this area that was hanging in there, and there was no air movement in that air area. It would be very easy for the contaminated

air in this worked-out area to enter the producing section.

Q. So, what hazard did you identify as being reasonably likely to contribute to an accident or an illness?

A. The fact that the Number 5 unit was not being ventilated with a separate split of fresh or intake air. In fact, the Number 5 unit was being ventilated with contaminated return air that was exiting the old 5-B worked-out panels.

Mr. Wirth explained that the gist of the violation is that air that was used to ventilate the old worked-out panels was then coursed out of those areas and was used to ventilate the coal producing faces on the section before going into the return air course and exiting the mine (Tr. 49-50). He further explained that clean ventilation air on a separate split should have been used to ventilate the producing section, rather than using the air that had swept over the old worked-out area (Tr. 50).

Mr. Wirth stated that he based his "S&S" determination on the fact that methane was being liberated from the old Peabody Mine and migrating through the respondent's mine, and the worked-out area was not being properly pre-shifted or examined weekly (Tr. 53-54).

Mr. Wirth stated that he made a finding of moderate negligence because the respondent was in the process of sealing up the worked-out area and knew that it was a worked-out area and not an air course. He stated that an air course is not sealed and a worked-out area is sealed because "you're pulling out of or have pulled out of that you have no intention of going back into" (Tr. 54). He defined a "worked-out area" as "an area where mining has been completed, whether pillared or nonpillared, and it does not include an intake or return air course," and also referred to the definition found in section 75.301 (Tr. 55-56).

Referring to a mine map of the cited area, referred to as the 5-b panel (Exhibit G-2), Mr. Wirth explained that an "active area," as opposed a worked-out area, "is where you're either

setting up mining equipment for a mechanized mining unit, you're recovering mining equipment, you're pulling out of the area, you still have the equipment you're recovering, or its a mechanized mining unit" (Tr. 59). He stated that when he traveled the cited area there was no coal production in progress, no coal producing equipment, no power, and no continuous mining unit in operation (Tr. 59-60).

Mr. Wirth pointed out the location where the seals were being constructed, and he stated that when he entered the area two seal forms had been constructed and were ready for pouring, and five men were working constructing additional forms to close off the entire area permanently (Tr. 61). He further explained as follows (Tr. 62):

> JUDGE KOUTRAS: If those seals had been completed before you got there, would we have this case?
>
> THE WITNESS: No.
>
> BY MS. KASSAK:
>
> Q. Why is that?
>
> A. Because this area would have been sealed up, and there is no access. Once an area like this is sealed up, there is no access to get back in here. The intake air would have flowed down this air course here, past thee seals which would have been required to be pre-shifted, then continuing on to the producing section right down here.

Mr. Wirth confirmed that coal was being produced on the No. 5 Unit. He confirmed that he walked the perimeter of the worked-out area to the areas of deepest penetration and found no dates, times, or initials, or evidence that a weekly examination was being conducted pursuant to section 75.364 and he issued a citation for that (Tr. 64).

Mr. Wirth stated that stoppings were present along the worked-out area where the panels had been roomed, and he observed a low area where permanent ventilation control devices were in

the process of crushing out. When the inspection party passed through a personnel door in a stopping, all of their methane and air monitoring testing instrument alarms went off indicating that there was a problem with low oxygen and high methane, and this was substantiated with bottle samples. Smoke tube tests indicated no air movement, with oxygen levels at 18.8 percent and methane levels up to 1.8 percent, and he marked these areas on the mine map (Tr. 66-67). The oxygen level was below normal and the methane level was higher than the 1.0 percent allowed in an active working section. There is no specific methane limit in a worked-out area, "until you get close to an explosive range, and then there is a problem with imminent danger" (Tr. 68). He would not have expected 1.8 methane if the area were properly ventilated (Tr. 70). He confirmed that it took approximately four and one-half hours to walk the worked-out area in question (Tr.73). He also confirmed that the respondent was required to examine the worked-out area weekly to the furthest point of mining in each area, and that would be in the corners. An intake air course is required to be pre-shifted pursuant to section 75.360 (Tr. 76).

Mr. Wirth defined "return air" as "air that has ventilated a worked-out area or has ventilated the last place in a working section" (Tr. 83). He confirmed that return air was flowing out of the old 5-B worked-out panels and rooms and was traveling inby to the No. 5 Unit producing continuous miner section MMU-005, and ventilating that area (Tr. 83-84). In his opinion, a separate split of intake air should have been used to ventilate the coal producing area, and the return air coming out of the worked-out panel should have been coursed out through an overcast across the intake entry (Tr. 84-85).

In further explanation of why he believed section 75.332(a)(1) was violated, Mr. Wirth stated as follows (Tr. 86-88):

> THE WITNESS: This is the case because the air that is entering the worked-out area is traversing through the worked-out area and is continuing on to the producing section. The producing section does not have a separate split of fresh intake air. It's being ventilated with return air that's coming out of the worked-out area.

JUDGE KOUTRAS: If that seal had been in place, then the working section and that working area and producing section would have been ventilated by the intake air coming in, correct?

THE WITNESS: Correct. If that had been sealed off --

JUDGE KOUTRAS: But since it was diverted and went through that area where they were constructing the seal was being used to ventilate that area, your position or MSHA's position is that that became return air.

THE WITNESS: Correct.

JUDGE KOUTRAS: And when it got back down and back coursed down in the working face, it was still return air.

THE WITNESS: That's right.

BY MS. KASSAK:

Q. Can return air ever become intake air?

A. No. Intake can become return but return can't become intake. It doesn't work that way.

* * * *

Q. And the only air to that working section was that coming out of the worked-out area?

A. The only air to ventilate those working faces on that unit was coming out of that worked-out area.

Q. You saw no split to provide for fresh intake air?

A. There were no splits present.

Mr. Wirth believed the cited condition was hazardous because in an area that is not examined, "you don't know what's going

on," and oxygen may drop and methane may rise, which was in fact the case. Also, a roof fall would cause permanent ventilation control devices to fail, and the air containing the methane would migrate to the coal producing faces where miners are working (Tr. 89). He confirmed that the methane levels he found would not result in a citation if the area were considered a worked-out area, but if it is considered an intake air course, methane in excess of 1.0 percent would be a violation (Tr. 94). He confirmed that a golf cart he observed in the work-out area was an ignition source, and he issued a citation for this (Tr. 95).

On cross-examination, Mr. Wirth confirmed that he was not aware that the cited 5-B area was there prior to the day of his inspection. He was told how the 5-B area was being ventilated while he was on the mine surface and was shown the mine map as it was that day and he knew where the area was when he arrived underground (Tr. 103-104). He explained his route of travel and confirmed that he was accompanied by company representative Gene Culpepper who was riding a golf cart. Mr. Culpepper was on one side of the permanent ventilation devices, and Mr. Wirth and the union walkaround representative were on the other side (Tr. 106).

Mr. Wirth stated that his methane detector did not go off while walking the area prior to going through the personnel door (Tr. 108-109). He confirmed that a stopping line ran through the area in question, even though it is not shown on map Exhibit G-2 (Tr. 111). Mr. Wirth confirmed that he has Illinois state mine manager papers, but was not current on the requirements of state law, and believed that an intake air course and return seals need to be examined 24 hours prior to a shift under state law (Tr. 112). He confirmed that there were no seals in the cited 5-B area, but they were being constructed at the mouth, and once completed, they were required to be pre-shifted prior to any work in that area (Tr. 113).

Mr. Wirth stated that as he entered the cited area with Mr. Culpepper, they passed through a pair of open air lock equipment doors. A scoop was being pulled through the doors and both sets were open because the scoop was too long, and Mr. Wirth commented to Mr. Culpepper, "aren't those doors supposed to be closed?" (Tr. 115). Mr. Culpepper replied, "yes," and closed the doors after the scoop passed through (Tr. 16).

Mr. Wirth stated that he noticed red reflectors while walking the area with Mr. Culpepper, and Mr. Culpepper told him that red reflectors indicated "return air," but stated that he did not know why they were in the area. Mr. Wirth observed no one changing any markers (Tr. 123). He further stated that Mr. Culpepper took the position that the cited area was an intake air course (Tr. 130).

MSHA Supervisory Mining Engineer Mark Eslinger testified that he reviewed Mr. Wirth's "S&S" findings in connection with Citation No. 4260292, and that he agreed with them (Tr. 135). He stated that he was in the mine nine months earlier in a different area and was concerned with the methane coming through the floor. When he was there with Mr. Wirth, it was only the second day of mining, and he was concerned that once mining started up again, methane would again come up through the floor. He also confirmed that he found methane in the worked-out 5-B floor area, and it could travel to the working section at any time (Tr. 134-137).

Mr. Eslinger stated that in approximately April, 1993, mining ceased in the 5-A active working area and the equipment was pulled back in order to mine the presently worked-out 5-B area. Mining then stopped in that area, the seal construction was started, and mining resumed in the 5-A area that was mined earlier in 1993 (Tr. 141).

Mr. Eslinger stated that .4 and .5 percent methane was found at the faces of the active coal producing area and there was sufficient air quantity sweeping those faces. The oxygen was sufficient and there was no evidence of any carbon monoxide (Tr. 145-146). He agreed that all of the air sweeping the working faces "was up to snuff," and even though the air was within legal limits, once it ventilates the worked-out area it is return air, and it can not be used to ventilate the working faces (Tr. 147).

On cross-examination, Mr. Eslinger could not recall if the mine was placed on a 5-day spot inspection schedule after January, 1994, and he stated that such scheduling is done by the MSHA field office (Tr. 152). He confirmed that his methane detector was set to go off at 2.5 percent methane, and when he went through the permanent stopping doors in the 5-B area, it sounded, but it did not do so prior to that time (Tr. 154). He

confirmed that the highest methane reading at the working face was five tenths (Tr. 155).

Mr. Eslinger stated that all of the air leaving the worked-out area would be return air that would be coursed out of the mine. Since the air had entered and ventilated the worked-out area, and was then used to ventilate the faces where mining was taking place, it was return air (Tr. 158). He stated that there was nothing in the mine ventilation plan that would allow the respondent to do what it was doing and that the mandatory sections of the regulations, and not the ventilation plan, are applicable in this case (Tr. 159).

Inspector Wirth confirmed that he issued Citation No. 4260295 (Tr. 162). He stated that the exceptions noted in section 75.507-1, paragraphs (b) and (c), do not apply to the cited conditions.

Mr. Wirth confirmed his gravity finding of "reasonably likely," and identified the hazard as the non-permissible golf cart driving through the worked-out area that was not being properly ventilated in that there was no air movement, and where a body of methane was present. Based on these conditions, he concluded that if work had been allowed to progress, it was very likely that an explosion would occur because the golf cart was an ignition source, and it would be driven into the methane, which constituted an odorless and tasteless fuel for an explosion. He identified the driver as Gene Culpepper, the respondent's representative who was accompanying him during his inspection.

Mr. Wirth confirmed that once he determined that the area was a worked-out area, he took action to keep the golf cart out (Tr. 165-166). He confirmed that the location of the golf cart when he observed it was outby the last open crosscut and he marked the location with a circled "GC" on the mine map (Exhibit 0-2). He confirmed that the golf cart area was being ventilated by return air, and stated that the golf cart is non-permissible per se and the respondent's counsel conceded that this was the case (Tr. 170). Mr. Wirth confirmed that he did not inspect the golf cart (Tr. 171).

On cross-examination, Mr. Wirth stated that in the course of his inspection, he observed two golf carts in the worked-out area at two different times, and he observed Mr. Culpepper on one of them at the end of the evening. He did not observe the vehicle serial number and did not know if Mr. Culpepper drove more than one cart (Tr. 174).

Mr. Wirth believe that Mr. Culpepper drove the golf cart out and he allowed him to do it after the cart was pushed out of the edge of the body of methane. Mr. Wirth tested the methane before the cart was started, and it was below the permissible limit (Tr. 177). He had not yet written the citation at that time and the golf cart was not taken out of service (Tr. 180).

Mr. Eslinger testified that he is employed by MSHA as a ventilation supervisor. He holds a college degree in civil engineering and is a registered engineer in the State of Indiana. His duties include the supervision of five ventilation inspectors and evaluating and approving mine ventilation plans. He also served on an MSHA committee that rewrote the ventilation regulations, including the ones in issue in these proceedings (Tr. 195-197).

Mr. Eslinger confirmed that he supervised a saturation and ventilation inspection of the mine and five inspectors were underground inspecting different mine areas. He accompanied Inspector James Holland during the evening shift inspection on March 29, 1994, and he identified a copy of Citation No. 4266732, issued by Mr. Holland. The citation reflects that there was 1.9 percent methane and 18.8 percent oxygen present in the cited worked-out 5-B area (Tr. 199). Mr. Eslinger stated that as he and Mr. Holland were leaving the 5-B area they went through a personnel door and their methane and air instrument CMX 270 detectors sounded and recorded the readings reflected in the citation. In addition, Mr. Eslinger used smoke tubes, and Inspector Wirth took bottle samples, to confirm their findings (Exhibit G-3; Tr. 200-201).

Mr. Eslinger confirmed that Mr. Holland cited a violation of section 75.334(a)(1), which requires worked-out areas to be ventilated so that methane air mixtures and other gases and dust fumes are continuously diluted and routed into a return air course or to the mine surface. He explained that "continuously

diluted" means that there is air movement that takes out gases to a return air course and to the mine surface. He confirmed that he could find no air movement in the area in question and when he used a smoke tube, "the smoke mushroomed up into the air and just stayed there; did not move" (Tr. 202). He further confirmed that he personally observed the conditions in question (Tr. 203).

Mr. Eslinger believed that the cited conditions presented a hazard because the lack of air movement indicated that the area was not being ventilated and the methane was building up and the oxygen was being depleted. The methane could rise to an explosive level and could be ignited, and it would also move towards the working section where mining was taking place. He agreed with Mr. Holland's "S&S" finding (Tr. 204-205).

Mr. Eslinger agreed with Mr. Holland's "moderate" negligence finding and he confirmed that he discussed the citation with Mr. Holland and agreed that it accurately reflects the conditions that he (Eslinger) personally observed (Exhibit G-5; Tr. 207).

On cross-examination, Mr. Eslinger explained what was done to terminate the cited conditions and indicated that certain man doors were opened up to allow air to circulate through the area in order to dilute the methane. He marked the locations of the doors on map Exhibit 0-2, as part of his explanation, and believed that more than five doors were opened (Tr. 214-220).

Mr. Eslinger described the ventilation in place as "a very unusual ventilation arrangement" in that when he initially saw it on a map be remarked that "we've got a worked-out area that's being ventilated and the air is going to the faces" and he also found that the neutral area was not ventilated (Tr. 222).

Mr. Eslinger confirmed that he found the poor quality of air in the area between the stoppings in the worked-out 5-B area. Since he detected no air movement there, he concluded that there was no continuous dilution and routing of the air into a return air course (Tr. 229-232).

Mr. Eslinger confirmed that he did not test the air in the bottom "bottle" shaped area surrounded by red stopping lines, as shown on Map Exhibit 0-2. However, after walking through the

area and passing "the neck of the bottle," he found that the air quality improved (Tr. 235-36).

Mr. Eslinger stated that the cited standard requires the air to be "continuously diluted," meaning "all of the time" in a worked-out area so as to continuously move the methane. He further stated (Tr. 241):

> Q. So, as long as you found one place, where there was no movement, as you've testified with the smoke tube and the cloud of smoke just hangs there, that's one place in the worked-out area where you know there was no air movement?
>
> A. Yes. We determined that throughout this one bottle, as I'm calling it, there was no air movement.
>
> Q. How much of an area is that bottle?
>
> A. Mr. Wirth alluded to it before, it's about one-third of a mile by 240 feet, 250 feet; whatever.

Mr. Eslinger confirmed that he took no anemometer readings because "it would not turn in that low velocity" (Tr. 243). He confirmed that the air exiting in the worked-out area in question has to pass by the working section to get out to the return air course and out of the mine (Tr. 244).

Mr. Eslinger confirmed that Citation No. 4266733 was issued by Inspector James Holland because the cited primary escapeway was ventilated with return air rather than intake air. (Mr. Holland was unavailable for the hearing because of a "severe back problem.") Mr. Eslinger accompanied him during his inspection (Tr. 9). Mr. Eslinger stated that the cited condition violated section 75.308(f)(1), and although there was another escapeway that was ventilated with intake air, since there was a belt in it, it could not be the primary escapeway.

Mr. Eslinger stated that mine management designates the primary and alternate escapeways and marks them with reflectors. He confirmed that he was with Mr. Holland and observed the

primary escapeway area and agreed that it was being ventilated with return air. He determined that the air was return air by walking the air course that was bringing air to the unit back to the point where it entered the worked-out area where the previous citations were issued, and "the air that was what the operator wishes to call intake was under our determination return air" (Tr. 258). Referring to a mine map, Exhibit G-2, he identified and located the "primary escapeway" as the "air course here on the right side of the main southeast main was designated as their intake escapeway, *** or I call it the intake; it's the primary escapeway" (Tr. 258).

Mr. Eslinger stated that the primary escapeway was designated with colored reflectors, it was required to be shown on the map of the unit, and employees should be instructed on the escape route (Tr. 259). He explained that he and Mr. Holland walked down the escapeway in the opposite direction from where mining was advancing and when they reached the old 5-B worked-out area, they turned into it. The markings in the worked-out area were a different color, but he could not recall the color (Tr. 261).

Mr. Eslinger believed that management intended to remove some stoppings once the seals at the worked-out area were completed, and this would allow travel "straight right out of the mine" (Tr. 261). However, at the time of the inspection, the seals were not installed and the stoppings were in place. Under the circumstances, the men would have to travel a circuitous three-and-one half mile route around the stoppings to get out of the mine (Tr. 262-265).

Mr. Eslinger agreed with Mr. Holland's "moderate" negligence finding. He also agreed with the non-"S&S" gravity finding (Tr. 265-266).

On cross-examination, Mr. Eslinger stated as follows (Tr. 269):

> Q. Thank you. You've heard the discussions here with respect to whether this is an intake air course or whether it's a worked-out area?
>
> A. Yes.

Q. If it's an intake air course, then this citation wouldn't stand; is that correct? Then, the primary escapeway would have been ventilated with intake air?

A. That's correct.

Q. But, if it's a worked-out area, I guess it would have to stand in your opinion?

A. That's correct, because they did not have an escapeway ventilated with intake air that didn't have a belt. The other one was intake air, but it had a belt.

Mr. Eslinger confirmed that after the seals were completed, the cited escapeway air course became intake air and the citation was terminated. Prior to the sealing, however, the escapeway was being ventilated with return air and this did not meet the definition of primary escapeway (Tr. 270).

Mr. Eslinger stated that he did not review the mine file and that the mine map he had on file in his office did not show the ventilation arrangement shown on the exhibit and the escapeways were not marked. He was not certain about the reflector colors, and stated that management was hoping to complete the seal work in two weeks and "we wouldn't catch it" (Tr. 274).

Mr. Eslinger stated that if anyone working at the face wanted to leave the mine by using the primary designated escapeway up one of the two entries shown on the map, they would have encountered the concrete block stopping walls and would have had to turn into the worked-out area and gone through several man doors to end up in the intake escapeway (Tr. 277).

Mr. Eslinger characterized the ventilated worked-out area as "a classic worked-out area." He stated that mining was completed (Tr. 282, 285). He confirmed that management did not submit a ventilation plan showing the method of ventilating the worked-out area as shown on the maps in question (Tr. 285). He reviewed the ventilation mine map at the time of the inspection and it showed mining taking place in the worked-out area and the ventilation scheme on that map was sufficient because it showed

that mining was going on (Tr. 286). He further explained as follows (Tr. 287):

> JUDGE KOUTRAS: Do you think by starting construction on that seal that it was the intent of the operator here to permanently seal that area and abandon it and never go back to mining there again?
>
> THE WITNESS: Right. They were never going to go back. And you only seal a worked-out area. It says a worked-out area has to be either sealed or ventilated. By their own admission, to me, when they built seals, they were admitting this is worked up, we're done, we're complete.

Inspector Wirth confirmed that he issued Citation No. 4260297, citing a violation of section 75.370(a)(1), and he explained as follows (Tr. 292-293):

> Q. Can you tell us the gist of the citation without reading the exact words of it, please?
>
> A. Sure. The gist of the citation is that the operator is required to have a certain quantity of air at the end of the line curtain at all times if they're producing, cutting, loading coal on the sections, and they did not have that required amount of air at the end of the line curtain.
>
> In fact, the vanes on the anemometer whenever I put the anemometer behind the line curtain in between the line curtain and rib, the vanes on the anemometer would not even turn.

Referring to two sketches depicting the conditions that he observed (Exhibits G-8 and G-9), Mr. Wirth further explained that the approved ventilation plan requires that 6,500 cubic feet of air per minute be maintained at the end of the line curtain at all times while coal is being cut and loaded (Joint Exhibit-2; Tr. 296). The specific ventilation plan requirement is found at page 1, Item C-2 (Tr. 298).

Mr. Wirth confirmed that he personally observed coal being cut and loaded, and also saw a coal hauler leaving the No. 6 entry fully loaded. He also observed the machine cutting at the face and the coal hauler pulled in and loaded another car. He then informed the machine operator that there was a violation. He took a methane reading at the last row of roof bolts and it was .4 percent and within the allowable limits (Tr. 300-301). He estimated that the air at the end of the line curtain was 1,000 cubic feet per minute (Tr. 302).

Mr. Wirth confirmed his "S&S" gravity finding, and stated that he based it on the presence of methane 100 feet below the cited area at the old Peabody works, a gap in the line curtain at the floor level, and the curtain was not maintained to within 40 feet of the face. He conceded the methane level he found was "way below" the allowable limit (Tr. 304). However, he believed that it was reasonably likely that the lack of air would result in a build-up of undiluted methane and present an explosion hazard (Tr. 306). He confirmed that mining in the cited area had discontinued for ten months because of excessive methane and had only resumed for 2 days prior to the inspection (Tr. 307-308).

Mr. Wirth confirmed that the respondent drilled bore holes to bleed out the methane and MSHA was aware of the fact that mining had started up again (Tr. 310). He confirmed that the respondent's prior experience with methane in the old Peabody works "very much so" influenced his "S&S" finding because management "is aware of the methane problems that they had in that area, and they are aware that the mine is still below them" (Tr. 311). He also considered the presence of some methane, no air, and the presence of operating equipment (Tr. 313).

Mr. Wirth confirmed that the mining machine was taking "long cuts" and that it was a remote controlled machine, and he believed the violation was "very obvious." The section foreman or mine operator should check the air at the end of the line curtain, and when the amount of air is less than that specified in the ventilation plan, production should cease until the air is restored (Tr. 312).

On cross-examination, Mr. Wirth explained his sketches, and he could not recall the crosscut number, but did remember the

entry (Tr. 315). His notes reflect the location as the No. 6 entry, and the crosscut is not identified (Tr. 317). He confirmed that Mr. Eslinger and Mr. Bird were with him in that entry (Tr. 319). He also stated that company representative Ed Hatcher came to the section with them "but refused to go to the face because he told us that he did not want to be responsible for what we might see" (Tr. 323).

In response to further questions, Mr. Wirth stated that he observed no evidence that the line curtain was ripped or partially torn down, and there was no line curtain lying on the mine floor in the entry. Although there was a gap at the bottom of the curtain and it did not go all the way to the floor, this would make no difference as long as the air was maintained at 6,500 cfm (Tr. 326).

MSHA Mining Engineer Michael Bird testified that he received a B.S. Degree in mining engineering from the University of Missouri in December, 1985, and after working in private industry became employed with MSHA in April, 1992. He holds State of Alabama mine foreman papers, and his present duties include the review and approval of mine maps and ventilation plans and conducting ventilation inspections (Tr. 337-339).

Mr. Bird confirmed that he issued Citation No. 4261610 and that Mr. Wirth was with him during the inspection. He explained that he observed that the line curtain was set back more than the required 40 feet, and that he measured the distance as 66 feet from the deepest penetration to the end of the curtain. Section C-2, page 1, of the ventilation plan concerning long cuts states that "using remote control miners, the line curtain will be maintained to within 40 feet of the deepest penetration of the face" (Tr. 340-341).

Mr. Bird stated that when he and Mr. Wirth walked into the No. 6 entry, he saw a loaded coal car leaving, and saw coal being loaded. He identified the operator of the remote control miner as Steve Burgess. He confirmed that the miner measured 36 feet from the bits to the tail, and the distance from the curtain to the last row of roof bolts was 30 feet. The point of "deepest penetration" would be at the coal face where the miner bits are cutting. The curtain must be up while coal is being cut or loaded (Tr. 342-344). He explained his "S&S" finding, and

confirmed that three miners were exposed to an ignition hazard (Tr. 345).

Mr. Bird stated that he based his "high negligence" finding on the fact that the cited condition was obvious. He explained that the miner operator knows that he can cut with the curtain within 40 feet of the face, and it was obvious in this case, where the miner "is sunk all the way into the last row of bolts, you're over 40 feet" (Tr. 346).

Mr. Bird stated he did not observe any line curtain on the ground or a shuttle car dragging a curtain away (Tr. 352). When asked why he initially determined that the violation was unwarrantable, Mr. Bird replied, "at the time I looked at that, know or should have known. It was right there," and coal was being continuously loaded (Tr. 354-355). He would not have issued a citation if the curtain had been dragged off and loading had stopped in order to hang it back up. However, he saw no evidence that this was the case (Tr. 355).

On cross-examination, Mr. Bird explained how he measured the curtain distance and what he observed in connection with the equipment operating and traveling through the entry in question, and the cutting and loading of the coal (Tr. 356-360). His notes reflected that the "remote control miner was cutting and loading coal in the number 6 entry" (Tr. 362). His notes also stated that "after the order was abated, the miner loaded one more ram car of coal to complete the cut" (Tr. 373).

Mr. Eslinger was recalled, and he stated that he arrived at the location in question before Mr. Bird and Mr. Wirth and as he walked up the entry a loaded shuttle car came through the curtain. As he watched it, another one came by and pulled in and he watched as it was being loaded. After it left, a third shuttle car pulled under the miner tail and loading started. He then pointed to it, and Mr. Wirth and Mr. Bird proceeded to make their measurements and mining was stopped (Tr. 375-376). Mr. Eslinger did not observe a ripped curtain or any curtain being dragged off by a shuttle car. The curtain was being hung off the floor and there were no nails in the roof header boards to indicate that it was hung up to the last full roof bolts (Tr. 378).

Mr. Wirth was recalled, and stated that as he walked through the curtain in the No. 6 entry, he observed a fully loaded ram car leaving the entry away from the miner outby to the feeder. He also observed another car come out of the crosscut and it was waiting for the car that was fully loaded. The empty car pulled in under the miner and it was in the process of starting to load when he walked in. He then "went to the end of the line curtain, attempted to take an air reading, informed the operator that there was a problem, there was a violation and they shut the machine off" (Tr. 380).

Mr. Wirth stated that he did not observe any torn curtain being dragged off by a shuttle car and observed no rips in the curtain or nails or nail holes in the header boards where a curtain could have been hung, and saw no evidence that there ever was a proper amount of curtain. He confirmed that after the miner was shut down, the face boss, Roy Wiggins, brought in a brand new line curtain, and it was not dirty, ripped or torn, and it was obvious that it was a new curtain that "had just come off a new roll" (Tr. 384).

Respondent's Testimony and Evidence

Paul Smock, respondent's superintendent of underground operations, testified that he has 28 years of mining experience and has worked for the respondent since 1980. He is a high school graduate and has conducted mine training and rescue classes at a local community college and vocational school. He confirmed that the mine is located above an old mine that liberates methane and which "has posed a problem for us for years." He confirmed that the active mine is on an exhaust ventilation system and that air is drawn in to the mine and pulled out. He identified Exhibit 0-2 as a mine map showing the mine workings as of March 29, 1994, and confirmed that it was prepared for the hearing in these matters. He explained the map markings and the air directions, including the intake and return air, and stated that once the air crosses the active working faces it becomes return air as shown by the map arrows with a dot on the shaft (Tr. 394-405).

Mr. Smock stated that the entire 5-B area up to the 5-A face area, as shown on the map, is an intake air course

and not a worked-out area. He defined a "worked out" area as follows (Tr. 406):

> A. A worked-out area is an area where mining has been completed. There is more to mining than just cutting coal. Rock dusting is mining, building stoppings is mining, making belt moves is mining. We have finished cutting coal in this area, but mining wasn't done because I had to get out of there. I had a building seals in there.

Mr. Smock stated that sometime previous to March, 1993, the 5-A face area was abandoned because of the methane and the unit was pulled back to the 5-B area. On or about March 25, 1993, coal removal was completed in the 5-B area, and the move back to the 5-A area would take two to three days. At the same time, work was in progress to reclaim and seal the 5-B area, and he stated that, "we wanted out of there as quickly as we could possibly get out of there" because of various gas bleeders and pillar squeezing (Tr. 408-411).

Mr. Smock stated that on March 29, he still had belt, framing drives, and power boxes in the room inby the area where the seals were being constructed in the 5-B area. He stated that, "this was my last room set up. That what is. When that was mined, I was through, and I was out" (Tr. 413). He further explained that the area was "troubled" before the inspection because the pillar squeezing "was messing up my ventilation system," and he still had to examine the entire 5-B area as an intake air course (Tr. 414).

Mr. Smock identified the red markings on map Exhibit 0-2, as permanent stoppings or permanent ventilation controls, and he characterized the areas between the markings as "neutral air." He explained how these areas were ventilated to keep the methane below the legal limit. He stated that the methane is blended with the air flowing through the neutral area and is diluted and is carried out of the mine (Tr. 416).

Mr. Smock stated that the seals were being constructed "just inby the 460 foot mark" as shown on Exhibit 0-2, and a stopping line was being established for an air course once the area was sealed. However, in order to travel in and out to

remove the equipment, wooden doors were constructed to allow for travel and to establish the air course. In order to keep the neutral area free of methane while all of this work was being done, he personally opened up three man doors and he marked the locations on the map exhibit with orange circles. He opened the doors to clean out any methane. He believed this was sufficient to dissipate the methane and he tested the area with his "checker," but took no bottle samples (Tr. 416-423).

Mr. Smock stated that his project man, Melvin Winters, was told to keep the doors open in order to ventilate the 5-B neutral areas, but that Inspector Wirth ordered the doors closed and the flow of air stopped, and this caused the methane to build-up and endangered everyone in the mine. Mr. Smock stated that "he had a fit" when he learned that the doors were closed by the inspector, but he was not present at the scene to discuss it with him (Tr. 424-426).

Mr. Smock stated that after pulling out of the 5-A area because of methane, and moving to the 5-B area, a bore hole was drilled and it took several months to bleed the methane out of the 5-A area. He confirmed that the violation was abated by opening the doors in the 5-B area to reduce the methane down below the one percent level. The doors were not the same ones that he had opened (Tr. 429-431).

Mr. Smock stated that the "old southeast" area of the mine is similar to the 5-B intake air course and both areas are inspected by mine examiners every shift as intake air courses (Tr. 436-438).

Mr. Smock stated that at no time did any methane in excess of one percent every reach the working faces, and at no time were miners at the working face ever exposed to excessive methane (Tr. 443).

On cross-examination, Mr. Smock explained the steps taken to address the methane problem in the 5-A area, and he stated that the old mine below that area is not full of water, but "we still get periodic gas bleeders in that area but nothing like what we had" (Tr. 448).

Mr. Smock confirmed that he had finished cutting coal in the 5-B area and that it consisted of panels and rooms and that no

more coal was going to be mined (Tr. 449). He agreed that the distance around the perimeter of the 5-B area was approximately two-and-one half to three mills, and confirmed that during March 29 or 30, 1994, he was in that area every day. In addition, mine examiners would have been there daily to examine the area of deepest penetration, the seal area where work was in progress, and the intakes for an air course (Tr. 452-453).

Mr. Smock confirmed that his mine examiners were required to walk the perimeter of the 5-B area weekly after all of the mining work was completed, and they were required to note this in a book and to place their initials on a date board (Tr. 456). Pre-shift examinations were conducted at the seal areas and the 5-B perimeter areas (Tr. 459).

Mr. Smock stated that when the seals were constructed, the only equipment left in the 5-B area was a belt line, a unit of equipment, high voltage, and a water line. He confirmed that he was in the process of building frames for the seven seals that would have sealed the 5-B area and only a couple of seal forms had been constructed at the time of the inspection, and none had been completed at that time.

Mr. Smock did not believe that he needed overcasts to carry the air from the 5-B area to the return air course. He explained that he had no reason to split the air because he only had one unit mining coal during the period in question. He explained that the neutral air in the 5-B area was ventilating the area where the seals were being constructed and that the air leaving the 5-B area was ventilating the coal producing unit at the 5-A area. The coal producing unit consisted of a cutting machine, loading machine, roof bolters, and a scoop, and the equipment used at the seal area was "probably a scoop, jeep," but he did not consider that to be a unit. He confirmed that he had a crew in the 5-B area doing seal and reclaim work, and a crew in the 5-A area mining coal (Tr. 475-477).

Mr. Smock confirmed that the source of the air used to ventilate the 5-B area was the air coming down the belt haulage-way, and after sweeping the perimeter of the 5-B area, the air continued down the haulage entry and swept across the 5-A faces (Tr. 478-482).

Mr. Smock did not dispute the 1.8 percent methane found by the inspectors in the 5-B area and he stated that "there had to be methane in there when he closed those doors. It had to build up" (Tr. 482).

Mr. Smock stated that once the seals were completed, the doors behind the seal area would have been removed and replaced with a stopping because a stopping line and an air course would be needed to sweep the seals (Tr. 493).

In response to further questions, Mr. Smock stated that the MSHA inspector who was in the 5-B area prior to March 29 and 30, knew about the work in that area. He could not identify any inspector by name, nor could he recall any specific conversations with any inspector (Tr. 498). He confirmed that the manner in which the 5-B area was being ventilated at the time of the inspection was not covered or authorized by the ventilation plan approved on June 17, 1993 (Joint Exhibit-2) (Tr. 499).

General Mine Manager Edward Hatcher testified that he has worked for Brushy Creek for 15 years and that he has 25 and 1/2 years of mining experience. He explained his education and training, and stated that he holds dust control and underground electrical certifications, mine manager, mine examiner and hoisting engineer's papers, and a coal mine EMT certificate from the State of Illinois (Tr. 508).

Mr. Hatcher stated that he visited the 5-B area on the morning of March 29, 1994, to check on the reclaiming work in progress. He stated that belt framing, belt lines, a piece of unhooked high voltage cable, and parts from a miner machine were in the area and were in the process of being removed, and he marked the mine map to show where the equipment was located (Tr. 510-511).

Mr. Hatcher stated that Illinois mining law prohibits any interference with air ventilation, including doors, without permission from the mine manager (Tr. 513). He stated that he found no methane in the 5-B area when he was there early on March 29, and believed that the methane found by the inspectors resulted from the closing of the doors at the mouth of 5-B, which shut off the air flow to the area where the methane was found (Tr. 515). He did not discuss this with the inspectors,

and did not discuss with Mr. Wirth about his instructions to Mr. Culpepper to shut the doors (Tr. 516-517).

Mr. Hatcher stated that the pre-shift examiner's report for the 8:00 a.m. to 4:00 p.m. shift on March 29, 1994, reflects that except for the places noted, the No. 5-B intake air course area was safe "in its entirety from the faces out" (Exhibit 0-3; Tr. 519-520). He confirmed the excessive methane citation was abated by opening certain doors, and at 8:00 a.m. on March 30, the methane was below one percent (Tr. 521).

Mr. Hatcher stated that he accompanied Mr. Eslinger and Mr. Wirth on March 30, during the abatement of several citations in the 5-B area. They then proceeded to the 5-A area and Mr. Hatcher left to call Mr. Smock to inform him about the abatements "in the old works" and Mr. Eslinger proceeded to the face. Mr. Hatcher denied that he told Mr. Eslinger that he did not wish to go to the face because he did not want to see what was going on, and he explained that he told Mr. Eslinger he could not accompany him because he had to call Mr. Smock (Tr. 526).

Mr. Hatcher stated that the line curtain and air citations were abated before the inspectors left the area (Tr. 528). He did not conference these citations with MSHA, "because they were written and they were abated and as far as I was concerned, it was over with" (Tr. 531).

On cross-examination, Mr. Hatcher confirmed that there was no separate split of air from the air intake area going into the 5-B area and a separate split of air going down to the 5-A working face (Tr. 534). He explained the use of doors for ventilation and stated that the doors in question were constructed to be used at a later date when a certain point was reached on the construction of the seals. The doors were built to be left open and were not to be used as part of the ventilation of the seal area (Tr. 538). He further indicated that the personnel doors were specifically opened in the area in question to dilute the methane (Tr. 540).

Mr. Hatcher stated that he was in the neutral 5-B area and not in the intake air course when he made his methane spotter tests. He stated that he entered both of the "bottle areas" and found no methane over one percent. He only activated a

smoke tube when he found .9 percent methane and "saw that I had movement. No problem" (Tr. 562). He believed that the methane citation was the direct result of the inspector ordering the closing of the two wooden doors (Tr. 562).

Mr. Hatcher confirmed that he did not conference the line curtain citation and that he was not present when it was issued (Tr. 565-566). He also confirmed that he did not observe the cited conditions concerning the line curtain. He did, however, accompany Mr. Eslinger to the face after the citations were issued and after returning to the area after speaking to Mr. Smock. He did not see any haulage cars pass by because he was away from the feeder area where the cars were heading (Tr. 577-578).

Shift Mine Manager Steve Reynolds testified that he accompanied Inspectors Holland and Eslinger during the March 29, 1994, inspection of the 5-A face area and the 5-B air course. They walked around the perimeter going outby the intake air outside of the stoppings and he observed two locations where Richard Doty had initialed and dated the inspection boards for March 29, and he pointed these out to Mr. Eslinger (Tr. 584-589).

Assistant Safety Inspector Roy Gene Culpepper has worked for Brushy Creek for 13 years, and has 23 years of mining experience. He stated that he accompanied Mr. Wirth and a union representative during the inspection on March 29, 1994. He met Mr. Wirth at the 5-B seal area, and he observed newly constructed wooden air lock doors in that area. A crew supervised by Melvin Winters had constructed the doors and they were doing reclaiming work and working on the seals (Tr. 589-592).

Mr. Culpepper stated that the doors were 30 to 35 feet apart and opened and there was a scoop half way through the inby door. He did not know whether the doors were supposed to remain open or closed, and Mr. Wirth instructed him to close the doors (Tr. 593). Mr. Culpepper stated that Mr. Wirth and the union representative walked along the outside perimeter of the intake area and he drove along the inside of the stoppings in the neutral area in a golf cart, and he would stop and speak with them periodically. He had his methane detector on the entire time and it never sounded (Tr. 595).

Mr. Culpepper explained his route of travel, and he stated that at one point Mr. Wirth told him that some areas were cut too deep, that the reflectors were going the wrong way, and that a citation would be issued because the 5-B unit was being ventilated by return air. Mr. Culpepper stated that he told Mr. Wirth that it was an intake air course and Mr. Wirth replied, "that's what I've been told to do, and that's what it is" (Tr. 596). Mr. Culpepper stated that his golf cart went dead and he left it on charge and he was picked up by walkaround Wendell Gary in his cart and they proceeded along the neutral area looking for the inspectors when he observed someone in the next entry flagging him. Mr. Culpepper got off the cart and started towards the individual and his methane detector started sounding. All of the inspectors, including Mr. Wirth, Mr. Holland, Mr. Bird, and Mr. Eslinger were there and the methane detector continued to sound. Mr. Culpepper was told that there was methane in the area and that he would be cited for having a non-permissible golf cart in the area (Tr. 598-603, Exhibit G-4). He offered to push the cart out of the area, and Mr. Eslinger advised him that he would check the methane and allowed him to drive the cart out and Inspector Holland went with him (Tr. 603).

Mr. Culpepper stated that he next traveled to the 5-A face area in a cart with Inspector Bird. He left Mr. Bird to find section foreman Roy Wiggins and found him at the back side of the feeder "cleaning up a pile of coal or something, I don't know. I didn't know he was back there working" (Tr. 605). Mr. Culpepper then proceeded to the face where he encountered Mr. Eslinger, Mr. Bird, and Mr. Wirth, and they informed him that they had issued a (d) citation and order for insufficient air at the face and a curtain that had been torn down (Tr. 606). Mr. Culpepper left to find Mr. Wiggins and found him coming from the feeder area dragging a piece of old curtain. He told Mr. Wiggins about the citation and order and returned to check on the abatements (Tr. 607).

Mr. Culpepper identified Exhibit 0-4 as a map or sketch of what he observed and the area where Mr. Steve Burgess stated Mr. Eslinger was standing (Tr. 609). Mr. Culpepper described what he observed, including the location of the curtain. He confirmed that he made a notation "curtain taken down by car" on the sketch because "that's what I thought," but he did not

see the car take the curtain, and he did not speak to the car operator (Tr. 611-613). He confirmed that he saw that a curtain was missing and down in the area, but did not know what happened (Tr. 614).

Mr. Culpepper stated that he was subsequently told by the miner operator Steve Burgess that he thought that a car had taken the curtain down (Tr. 615). Mr. Culpepper stated that the mining machine was shut off when he reached the face area, and he could not recall whether a buggy or ram car were there or coming out at that time (Tr. 617-618). Mr. Culpepper identified Exhibit 0-5 as a copy of the notes he made (Tr. 619).

On cross-examination, Mr. Culpepper stated that the reflectors in the 5-B area where he was riding while Mr. Wirth was walking were blue, and Mr. Wirth told them that the reflectors in the area that he was in were red, which "would have been significant for a return air course off the old unit down there" (Tr. 620).

Mr. Culpepper stated that he did not take an air reading at the end of the line curtain in question, and he confirmed that the sketches were made six months after the violations for use in this litigation and the information was taken from his notes (Tr. 621). He explained his sketches (Tr. 622-626). Mr. Culpepper took exception with the sketch of the location of the check curtain as drawn by the inspectors and his sketch and he stated as follows (Tr. 629-630):

> JUDGE KOUTRAS: I want to know the difference between the way you claim it was and the difference in the way the inspectors claim it was. Now, what you're telling me now is, the only difference is the position of the curtain on their diagram and the position of the curtain on your diagram, right?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Now, on your diagram, was that curtain more 40 feet from the working face?
>
> THE WITNESS: Yes, sir.

JUDGE KOUTRAS: It was. Isn't it required to be to within 40 foot of the face when the machine is cutting and loading?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: If the machine was cutting and loading, that would be a violation, wouldn't it, even by your diagram?

THE WITNESS: Yes, sir.

David H. Pait, Safety and Human Resources Manager, testified that he has served in that position since December 1991. He has a B.S. degree, with a vocational education major, and a masters degree in business administration. He has all MSHA certifications, except electrical instructor, and has Kentucky mine and surface mine manager's papers, and Illinois mine manager papers (Tr. 662-663).

Mr. Pait stated that his duties include the writing of ventilation plans, and he confirmed that he wrote the plan that is Joint Exhibit-2 (Tr. 664). He stated as follows (Tr. 665):

A. On the night of the 29th when Mr. Eslinger was getting ready to leave 5-A section and walk the intakes, he informed me that he was going to walk the intakes and that if what he thought was true, I was going to get a bunch of violations. And I asked why and he said, 'Because you're airing this section with return air.'

Q. What did you tell him?

A. I couldn't believe it. I said, 'What do you mean, return air?' He said, 'Well, that's off of old works, so it's return air.' I said, 'Those are intake air courses.' That was my position.

Mr. Pait stated that the ventilation plan did not prohibit the ventilation configuration in use on the perimeter of the 5-B area on March 29, 1994. He stated that MSHA reviews such plans every six months and that the word "neutral" appears in the

plan. He identified ventilation plan drawing AO715-1, titled "Typical Room and Pillar Mining Plan Evaluation Point," and he explained the legend and markings that appear on the drawing, including the designated evaluation points that are examined by the mine examiners. He further explained that the 5-B area did not have stated definite evaluation points and that the preshift examiners would initial "at the point of deepest penetration or somewhere within that area between the beginning and the end to indicate that they had, indeed, traveled -- made the route in its entirety" (Tr. 670). He stated that Mr. Doty inspected the 5-B area on the second shift the day the inspectors were there, and he believed it was regularly inspected (Tr. 670-671).

Mr. Pait identified the area where the seals were being constructed, and where the two wooden ventilation air lock doors were located in the neutral travel road. The doors were approximately 20 feet wide and 5 feet high, constructed of plywood and timbers and coated with fire-proofing material, and they were made to open for machinery to pass through. It was also intended that air pass through the doors into the neutral area (Tr. 674).

Mr. Pait also identified the metal personnel doors that Mr. Smock testified about, and the purpose in opening all of these doors, including the wooden equipment doors, was to establish and pull the air down the neutrals to keep them clear. All that was required was some air movement or trickling through the neutrals around the perimeter of the 5-B area (Tr. 676).

Mr. Pait stated that the 5-B intake air perimeter area would have been a designated primary escapeway beginning on March 28, but Mr. Smock informed him that the unit had moved to the 5-A area, and Mr. Pait advised the second shift that the intake escapeway needed to be reestablished by changing the reflector colors, but only a portion of the work area was completed (Tr. 677-678).

Mr. Pait confirmed that he was familiar with the cited standard, section 30 C.F.R. § 75.332(a)(1), and he stated as follows (Tr. 679):

> A. Mr. Eslinger is of the opinion that's it's a worked-out area. I'm of the opinion that it was an

intake, and the reason and the rationale I gave him at the time and that I still believe is, that in part 75.300, the definition of a worked-out area excludes returns, the belt and entries and intake air courses. And this was an intake air course after that unit moved back in the straights. From my perceptive, that's the way it is. He holds a different opinion.

Q. So, in your view, it's either intake air or return air, and if it's either of those, it's not a worked-out area?

A. Yes, sir.

Q. And in his view it's worked-out area and, therefore, it can't be intake?

A. Yes, sir.

Mr. Pait confirmed that map Exhibits G-2 and 0-2 show the same approximate areas, but that G-2 was completed after April 11, 1994, and shows several "sealed" 5-B areas and does not include all of the relevant stoppings or permanent ventilation devices that existed on March 29, 1994 (Tr. 680-683). He explained the prior mining difficulties and methane problems encountered in early April, 1993, and the efforts made to address the problem. While the methane was being bled off the 5-A area, mining moved to the 5-B area, and when that was finished, it moved back to the 5-A face area (Tr. 687).

Mr. Pait stated that he had no personal knowledge or information about the ventilation curtain citations and he confirmed that he was on the surface when Mr. Culpepper called him and advised him that a (d) citation and (d) order were being issued because "the curtain is back 66 foot and there is no air on the miner" (Tr. 687).

Mr. Pait was not cross-examined by the petitioner. However, in response to certain bench questions, Mr. Pait stated that he saw nothing wrong with the intake air sweeping the perimeter of the 5-B area and then exiting down the entry, around the 5-A working faces, and out of the mine. He stated that there

was 39,000 cubic feet of air flowing out and only .3 percent methane on the section. He confirmed that this was his first experience with the new regulation and that he and Mr. Eslinger had a difference of opinion (Tr. 691). Mr. Pait believed that it was management's prerogative to establish intake air and to designate where it would go when it writes its ventilation plan. He confirmed that if a designated area is a worked-out area it can not be an intake, and if it is determined that the 5-B area was worked-out on March 29, 1994, it would be a violation (Tr. 692).

Roof bolter operator Steve Burgess testified that he was operating the continuous miner machine at 5-A face on March 29, 1994. He stated that he was making a straight remote cut in the No. 6 entry, and he was standing on the right side of the entry away from the machine. He explained the cutting sequence, and stated that when he first saw the inspectors he was through cutting coal and was backing the machine up to clean the place up so that it could be roof bolted. He did not consider cleaning up coal to be cutting or loading coal because, "I'm not cutting any coal. I'm just cleaning up loose coal on the ground where I have already made a cut" (Tr. 640-643).

Mr. Burgess stated that he checks the line curtain before starting the cuts, but does not take an air reading because he does not have an anemometer, and the face boss takes the reading. He stated that Roy Wiggins checked the air volume. When the inspectors appeared, Mr. Wirth checked the air "and there wasn't any air there because all of our curtain wasn't there" (Tr. 644).

Mr. Burgess explained that he had cut the left side of the entry when the car that was leaving hooked the curtain and took out the bottom skirting and "I knew he wouldn't have any air there," because the remaining curtain was four feet off the ground (Tr. 645). He stated that he saw the curtain come down and leave (Tr. 645). He further stated that approximately 30 feet of the 70 foot long curtain was torn down, and there was no skirting on the last five or six feet of the curtain toward the face (Tr. 646-647). He did not cut or load any coal after the curtain was torn down (Tr. 648).

On cross-examination, Mr. Burgess stated that when the inspectors arrived he was backing the cutting machine out and

he was heading into the face area to clean it up. He stated that there was approximately three-quarters of a ram car of coal to be cleaned up, and that it is loaded into the car. When asked if he loaded the coal immediately prior to the arrival of the inspectors, he replied, "I didn't clean the place up, no. They stopped me" and "there wasn't a car there yet, but I wasn't ready to clean up yet whenever I saw them walking up" (Tr. 650). He further explained (Tr. 650-651):

> A. I was still backing the machine out, ready to position it on the right side of the cut to clean up.
>
> Q. Had you loaded any coal from this area from any prior clean-up?
>
> A. I had just cut a 35-foot remote cut in that place.
>
> Q. Where did the coal go from that cut?
>
> A. I'm not sure what you're asking me.
>
> JUDGE KOUTRAS: After you took that 35-foot cut, what happened to the coal?
>
> THE WITNESS: It was dumped in the ram cars and hauled out to the belt tail and dumped on the belt.

Mr. Burgess stated that approximately a year ago while he was preparing to clean up a place that he had cut, an inspector told him that he did not have to maintain the air while he was cleaning up and "since that time I was under the impression, right or wrong, that you evidently didn't have to have 6500 feet of air behind your line curtain to clean a place up" (Tr.655-656). Abatement was achieved by obtaining a curtain from a roof bolting machine nearby, and he stated that, "we had gotten the curtain off there earlier to hang in there to start with" (Tr. 657). He confirmed that the curtain was new and was not yet up to replace the missing curtain, and the old piece was used as skirting (Tr. 660). He stated that he told Mr. Wirth that the curtain had been torn down by a dump car. After the order was terminated, he cleaned up the place and loaded the coal out of the face (Tr. 661).

Mr. Eslinger was called in rebuttal by MSHA and he confirmed that the two escapeway citations referred to by Mr. Pait have been vacated by MSHA as part of a settlement. He stated that the only indication he had that management was treating the 5-B area as an intake air course were the statement by Mr. Smock, Mr. Pait, Mr. Hatcher, and Mr. Culpepper. He found no evidence of any preshift examinations being made as required by section 75.360(b)(6). He confirmed that his opinion that the 5-B area was a worked-out area and not an intake air course, is the position of MSHA in this matter. He explained that the new regulations had been in effect for less than two years, and in anticipation of litigation, he presented the facts in this case to a gathering of MSHA district ventilation supervisors and coordinators at a meeting in Beckley, West Virginia, in August and they all agreed that the 5-B area was a worked-out area and that "he should have no problem" in establishing this (Tr. 696-702).

Mr. Eslinger stated that he would consider the 5-B area to be an abandoned area "because they weren't mining it" (Tr. 704). He stated that there was not much difference between an abandoned area and a worked-out area that is now defined in the new rule. With regard to the contention by management that they were still recovering equipment from the 5-B area, Mr. Eslinger pointed out that section 75.332(a)(1) requires a separate split of intake air where equipment is being removed and that the same air ventilating such an area can not simultaneously be coursed through an active working section. It must be done separately. His position is that the air used to ventilate the 5-B area became return air and was used to ventilate the 5-A working faces (Tr. 705).

Mr. Eslinger agreed that the 5-B and 5-A ventilation methods in use at the time of the inspection were not a normal mining practice, and he explained as follows (Tr. 706):

> THE WITNESS: This is not normal mining practice, right, and I agree with that when mining ceased here because of the gas in the 5-A area, that they had to go somewhere with the unit. So, they backed up and they went here. Like Mr. Smock said, to go off the intake side, they would have preferred to go out the return side.

I think the key thing here is that they should have made preparations for coming out of here and built overcasts to split the air or when they recovered this equipment, wait a period of time until this area was sealed and then go back in here. If they had waited until this was sealed and not started mining down here, we would not have written the citations that we did.

Mr. Smock alluded to the problems of ventilating this area. He talked about taking the belt area in here and dumping it into the air course so they were getting belt air to the face. There were ventilation problems that were occurring because of the sequence of events that happened, whether they called intake or worked-out. They set themselves up into a series of violations. We said that this is a worked-out and subsequently wrote the violations that we did.

Mr. Eslinger confirmed that when the 5-B area was being mined it was ventilated by intake air, and that "when the air passed the last working place on the unit, then it became return air" (Tr. 707). He agreed that interruption of mining at the 5-A face area because of the methane, and the withdrawal to the 5-B area presented a unique case (Tr. 709). He also agreed that there were no methane levels or lack of oxygen that would have endangered miners on March 29 and 30, 1994, and stated that, "I never saw any methane levels in the working section that were above the accepted levels" (Tr. 709).

Mr. Eslinger expressed concern about the curtain violations because of the prior methane problems that were addressed by the drilling, and his concern was that there was still a potential for encountering methane again. He did not believe the closing of any wooden doors in the 5-B area caused the methane buildup in that area (Tr. 711). He did not believe that the cited missing curtain was ever installed, and stated that he stood back in the crosscut watching the mining when Mr. Wirth took his air reading. He also watched a full car load, and a second car starting to load, and there was no curtain reaching up to near the tail of the mining machine (Tr. 713).

On cross-examination, Mr. Eslinger stated that he saw no evidence that examiner Doty walked or drove the entire perimeter of the 5-B area. He confirmed that he did not check each of the 40 or 43 examination places, but looked at some of them and saw no examination dates, times, or initials (Tr. 715-717). Referring to a UMWA letter of March 21, 1994, that prompted the inspections in question (Exhibit ALJ-1), Mr. Eslinger stated that there is nothing illegal about ventilating sealed mine areas with intake air that is then used to ventilate a working section (Tr. 720). He confirmed that improvements were made in the mine ventilation and he "found more air per unit than I had ever seen in the history of Brushy Creek Mine" (Tr. 721).

Mr. Eslinger stated that on March 30, 1994, he found only .4 and .5 percent methane at the 5-A face area and improved ventilation, but he was still concerned about the fact that mining was taking place where the methane had come through the mine floor (Tr. 724). He confirmed that he could have anticipated that mining would take place in the 5-B area, but did not raise this with mine management (Exhibit 0-6; Tr. 726-728).

Findings and Conclusions

Citation No. 4266730 (LAKE 94-172-R; LAKE 94-251)

This citation was issued by Inspector Holland on March 29, 1994, and he cited a violation of 30 C.F.R. § 75.503, after observing a non-permissible golf cart operating in the last open crosscut between the No. 5 and 6 entries. Section 75.503 requires that all electric face equipment taken into or used inby the last open crosscut be maintained in permissible condition.

The parties agreed to settle this violation and MSHA filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. In support of the motion, MSHA's counsel stated that the initial negligence and gravity levels determined by the inspector remain unchanged, and counsel agreed that Brushy Creek demonstrated good faith in abating the cited condition. However, in view of the fact that the number of persons affected by the violation has been reduced from seven to three, counsel asserted that a reduction from the initial proposed penalty assessment of $595 to $310 in settlement of the violation was warranted (Tr. 16-18).

Pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, the proposed settlement was approved from the bench (Tr. 17-18). My decision in this regard is herein **AFFIRMED** and the settlement **IS APPROVED**.

Citation No. 4260292 (LAKE 94-168-R; LAKE 94-250)

Brushy Creek is charged with a violation of 30 C.F.R. 75.332(a)(1), because the inspector believed that the air leaving the 5-B "worked-out" area, after ventilating that area, was return air that continued traveling inby where it was used to ventilate the active 5-A working faces where coal was being mined before it exited the mine through the return. He concluded that both of these areas were being ventilated by the same split of return air, and that the active face area was not being ventilated by a separate split of intake air as required by the cited standard, which provides as follows:

> § 75.332 Working sections and working places.
> (a)(1) Each working section and each area where mechanized mining equipment is being installed or removed, shall be ventilated by a separate split of intake air directed by overcasts, undercasts or other permanent ventilation controls.

Citation No. 4260295 (LAKE 94-171-R; LAKE 94-251)

Brushy Creek is charged with a violation of 30 C.F.R. § 75.507-1, because the inspector observed a non-permissible golf cart traveling in the 5-B "worked-out" area. The inspector concluded that this area was a return air course, and since the golf cart was non-permissible (this is not disputed), he cited a violation. The cited standard provides as follows:

> § 75.507-1 Electric equipment other than power-connection points, outby the last open crosscut; return air; permissibility requirements.
>
> (a) All electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible except as provided in paragraphs (b) and (c) of this section.

Citation No. 4266732 (LAKE 94-173-R; LAKE 94-250)

Brushy Creek is charged with a violation of 30 C.F.R. § 75.334(a)(1), because the inspector found 1.9 percent methane and 18.8 percent oxygen levels in the 5-B "worked-out" area. He concluded from this that the area was not ventilated so as to continuously dilute and route methane to a return air course. The cited regulation provides as follows:

> § 75.334 Worked out areas and areas where pillars are being recovered.
>
> (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.

The parties agreed that the critical issues here are whether the cited area was in fact a worked-out area, and the interpretation and application of the regulatory words "continuously diluted" (Tr. 251). MSHA's position is that the intent of the regulation is to insure that all worked-out areas are ventilated so as to continuously dilute and move all methane into the return. Since the inspector found 1.9 percent methane and 18.8 percent oxygen levels in the cited worked-out "bottle" area that has been characterized by Brushy Creek as "neutral" air, MSHA concludes that the ventilation was not doing the job by continuously diluting methane and moving it out of the area. Even though the air that eventually found its way to the active 5-A mining faces was clear of methane, which indicates that it has been diluted at that point, MSHA nonetheless argues that the methane found at the cited location was not diluted and carried away, and if left undetected and unabated could continue to accumulate to hazardous levels (Tr. 245-247).

Citation No. 4266733 (LAKE 94-174-R; LAKE 94-459)

In this citation Brushy Creek is charged with a violation of 30 C.F.R. § 75.308(f)(1), for failure to ventilate a primary escapeway with intake air. Section 75.380(f)(1) provides, in relevant part, as follows:

§ 75.380 Escapeways; bituminous and ignite mines.

(a) Except in situations addressed in § 75.381, § 75.385 and § 75.386, at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section.

* * * *

(f)(1) Primary escapeway. One escapeway that is ventilated with intake air shall be designated as the primary escapeway. In areas of mines developed after November 15, 1992, the primary escapeway shall not contain diesel equipment, electrical equipment described in § 75.340(a) and § 75.340(b)(1), or compressors described in § 75.344, except-

(i) Equipment necessary to maintain the escapeway in safe, travelable condition; and

(ii) Haulage equipment other than belt and trolley haulage, necessary for the transportation of persons and materials. (Emphasis added)

Subsection (a) of § 75.380 requires a mine operator to designate at least two separate and distinct travelable passageways as escapeways that meet the requirements of the regulation. Subsection (f)(1) requires that one of the escapeways be designated as the primary escapeway. The designation of the primary escapeway depends on how it is ventilated. In order to meet the requirements of the regulation, the designated primary escapeway must be ventilated by intake air. If it is ventilated by return air it may not serve as a designated primary escapeway.

The parties are in agreement that the controlling issue with respect to Citation Nos. 4260292, 4260295, 4266732, and 4266733 is the interpretation to be placed on the terms "worked-out area," "return air," and "intake air" pursuant to the newly

promulgated ventilation regulations published in the May 15, 1992, Federal Register, Volume 57, No. 95, pages 20868-20929.

MSHA's ventilation regulations, Subpart D, 30 C.F.R. § 75.301, provides the following relevant definitions:

> Worked out area. An area where mining has been completed, whether pillared or non-pillared, excluding development entries, return air courses, and intake air courses.
>
> Intake air. Air that has not yet ventilated the last working place on any split of any working section, or any worked-out area, whether pillared or nonpillared. (Emphasis added).
>
> Return air. Air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or non- pillared. If air mixes with air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For the purposes of existing §75.507-1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air.

The Dictionary of Mining, Minerals, and Related Terms, U.S. Department of the Interior, 1968 Edition, defines "worked-out area" as "[a] mine or large section of a mine from which all mineable coal has been taken."

MSHA's Arguments

MSHA asserts that Brushy Creek does not contest the fact that mining was completed in the 5-B area, and that its witnesses admitted there was no coal production going on in that area, that the continuous miner had been squeezed out of the area and was moved to the 5-A area where coal was being produced.

MSHA states that Brushy Creek's witnesses further admitted that the 5-B area had no power, that this area had been previously roomed and paneled, that they had "retreated out" and that

none of the crew would have to go into the 5-B area because "there was nothing left in there for them to get," that one work crew was in the process of building seals, and that approximately two (2) weeks from the date of the subject citations, the 5-B area would have been completely sealed.

In reply to Brushy Creek's assertion that the 5-B area was an intake air course and would remain so until the area was completely sealed, MSHA maintains that Brushy Creek failed to show that it treated this 5-B area as an intake air course by performing the required examinations for such air courses, and instead admitted that much of the 5-B area was "squeezing." In light of this, MSHA concludes that passage into certain of this area's points of deepest penetration were inaccessible for any such required examinations.

In response to Brushy Creek's assertion that the 5-B "intake air course" area, by definition, can not be a "worked-out" area, MSHA argues that Brushy Creek took no affirmative action to treat the 5-B area as an intake air course, and that Safety Manager Pait admitted that most of the 5-B area was still marked as a return air course because the color patterns on the reflectors located there had not yet been changed. Further, MSHA states that despite its knowledge of the examination requirements and its promises to the contrary, Brushy Creek presented no proof at hearing of conducting the pre-shift examinations required for an intake air course, presented no evidence to rebut the MSHA inspector's credible testimony that he did not observe any examiner's initials in the 5-B area points of deepest penetration, and Mine Manager Hatcher referred to the 5-B area as the "old works."

MSHA cites my decision in Zeigler Coal Company, 2 FMSHRC 304, 324 (February 1992), affirming a violation of 75.507, for locating non-permissible golf carts in return air. In that case, I found that intake air which had initially passed two working faces was return air when it continued to sweep additional faces where the cited golf carts were located. MSHA asserts that the new ventilation regulations parallel my Zeigler holding, and that § 75.301 added definitions for "intake air" and "return air" to characterize the air current by whether the air has ventilated a working place or a mined out area.

MSHA states that under the final rule, and in conformance with established distinctions made throughout the mining industry, if air has ventilated either the last working place or any worked-out area, then this air is considered to be "return air." MSHA argues that the definition of "return air" also makes clear that if intake air mixes with air that has ventilated either working places or "worked-out" areas, then this air is considered return air. MSHA maintains that the air which flowed through the 5-B "worked-out" area was destined to ventilate the 5-A working face, and despite Brushy Creek's assertion that it had the "prerogative" to define its air courses, the regulations provide a codified definition to which it must adhere.

MSHA argues that its interpretation of the regulation is consistent with the language and purpose of the Act and deserves substantial deference. In support of this conclusion, MSHA states that the legislative history of the Act demonstrates Congress' intention to prevent, and not merely to minimize, violative conditions, particularly with respect to ventilation regulations that are aimed at eliminating ignitions and fuel sources for explosions and fires. Citing several court decisions, MSHA concludes that courts have recognized the great deference due an agency's interpretation of the law it administers and enforces.

MSHA asserts that the proper standard of review when considering the validity of a regulation is whether or not it is consistent with, and reasonably related to, the statutory provisions under which it was promulgated and is not in conflict with other statutory provisions. MSHA concludes that in the instant cases, the only interpretation that promotes the protection of the miners at the Brushy Creek Mine, who are exposed to air which has coursed through an un-examined mined-out area with all of that area's consequent contaminants, among them methane, is the interpretation it has advanced. In support of this conclusion, MSHA relies on the testimony of Mr. Eslinger regarding the definition of "worked-out area" and the intent of the regulations.

MSHA points out that Mr. Eslinger confirmed that its interpretation of the term "worked-out area" applies to the 5-B area of the mine. MSHA concludes that its interpretation

is reasonable and would better protect the miners working in the 5-A area than the interpretation proposed by Brushy Creek.

MSHA asserts that even if Brushy Creek mistakenly believed that the 5-B area was an intake air course, the Mine Act provides for liability without fault. Citing the Commission's decision in Ideal Cement Company, 12 FMSHRC 2409, 2415 (November 1990), MSHA argues that the test as to whether Brushy Creek violated the standard is whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized that air which traveled through an extensive area, known to be gassy, then mixed with air coming off the belt haulageway before it ventilated the working face in the 5-A area would be considered "return air."

Disputing Brushy Creek's assertions to the contrary, MSHA takes the position that the subject definition contained in the regulations at 30 C.F.R. § 75.301 is not necessarily circular, vague, or overly broad. Citing Alabama By-Products Corporation, 4 FMSHRC 2128, 2130 (December 1982), MSHA states that, "[b]roadness is not always a fatal defect in a safety and health standard. Many standards must be simple and brief in order to be broadly adaptable to myriad circumstances."

Finally, MSHA points out that Brushy Creek is not a new, inexperienced mine operator, and that its familiarity with the mining industry and with MSHA's regulations, the purpose of which is to protect miners, should have made it aware that the 5-B area would be considered "return air." MSHA concludes that Brushy Creek can not, in good faith, allege that it believed that MSHA would permit potentially dangerous conditions resulting from the cited conditions to exist without penalty merely because it chose to label this air course "intake air."

Brushy Creek's Arguments

Brushy Creek agrees that the common issue with respect to Citation Nos. 4260292, 4260295, 42266732, and 4266737 is whether the cited 5-B area was a "worked-out area" as defined by section 75.301. Brushy Creek takes the position that the definition of a "worked-out" area is circular and therefore can not be applied to turn an intake air course into something else.

In support of its argument, Brushy Creek states that the section 75.301 definition of "intake air" reveals that it is defined with reference to "worked-out area," and that intake air does not include air which has ventilated a worked-out area. Brushy Creek concludes from this that the inartful definition of a worked-out area circles back upon itself and leaves no choice other than to conclude that an intake air course can not be a worked-out area.

Based on the regulatory "worked-out area" definition, Brushy Creek asserts that developing entries, return air courses, and intake air courses must be excluded from a worked-out area, and if any of these three is present an area is not a worked-out area. Brushy Creek believes that since the 5-B area was separated from other entries by stoppings or other ventilation control devices, it met the regulatory definition of an "air course." Since the air passing through that air course had not yet ventilated the last working place, Brushy Creek concludes that the air in that air course was intake air. Since this was the case, Brushy Creek believes that the physical area which contained the intake air course could not be a worked-out area, and that this area either contained an intake air course which directed air over the 5-A face or it contained a return air course. In either case, Brushy Creek does not believe it was a worked-out area since the definition of such an area excludes both return air courses and intake air courses.

Brushy Creek asserts that the difficulties in understanding the meaning of "worked-out" justifies its reliance upon its understanding of the term in relation to the terms describing other underground mine areas. With regard to Mr. Eslinger's testimony that there is little difference between an abandoned area and a worked-out area, Brushy Creek takes the position that the 5-B intake air course was being regularly inspected and ventilated, and thus did not meet the statutory definition of "abandoned area" or the Mining Dictionary definition of "abandoned workings."

Brushy Creek maintains that the air course around the perimeter of the 5-B area met all of the practical requirements as an intake air course in that the entries were separated from the neutral entries by ventilation control devices, and that the only connection between the air course and the neutral entries

was through metal personnel doors used to allow methane in the neutral areas to "trickle" into the air course so as to be diluted and carried away.

Brushy Creek states that the concept of an air course around a neutral area is shown in the mine ventilation plan that was examined by Mr. Eslinger and Mr. Wirth before their inspection, and that a map of the 5-B area showing the perimeter air course around the neutral entries dated September 21, 1993, was also examined by Mr. Eslinger when it was filed with MSHA. In addition, Brushy Creek asserts that the air course was examined as an intake air course, and that it was in the process of marking the air course an intake air course primary escapeway at the time of the March 29, 1994, inspection, and that MSHA insisted it was necessary to mark the entire perimeter as a means of abating two other escapeway citations issued during the inspection.

In comparing its mine map, Exhibit O-2, with MSHA's mine map, Exhibit G-2, both of which were prepared for this litigation, Brushy Creek points out that MSHA's map fails to show the permanent ventilation controls which created the intake air course. Conceding that its designation of an area as an intake air course may not, of itself, establish the area as such, Brushy Creek nonetheless concludes that it has always been its prerogative to adopt a ventilation plan which fits the unique circumstances at its mine.

Brushy Creek concedes that there was no coal production equipment in the air course at the time of the inspection, but takes the position that nothing in the regulations states that removal of the equipment or seal construction magically transforms an intake air course into a worked-out area. Brushy Creek concludes that any dissatisfaction regarding the length of the air course or the specific conditions found did not give MSHA the authority to arbitrarily reclassify an intake air course as a worked-out area. Brushy Creek further concludes that the inspectors could have cited it for an improperly inspected intake air course, or for other regulatory violations, but instead focused on the "worked-out area" newly promulgated regulation "written" by Mr. Eslinger, and having made the choice, the citations stand or fall on this definition.

Citing the testimony of Mr. Eslinger at Tr. 705-709, Brushy Creek states that while the 5-B area was being mined the air course delivered clean intake air to the face, and the contaminated return air was carried away in the air course. As the location of the face changed, the classification of the air course changed, depending on whether it carried "intake" or "return" air. When mining ceased in the 5-B area on Friday, March 25, 1994, the air course up to the face was an "intake air course" and beyond the face was a "return air course."

Brushy Creek points out that according to Mr. Eslinger when the equipment moved back to the 5-A face on Monday, March 28, 1994, the entire 5-B area became "a worked-out area" and the air course became a return air course. In short, Brushy Creek concludes that what had been an acceptable intake air course became, for no stated reason, an unacceptable worked-out area, and although Brushy Creek was permitted to run fresh air through the area on Friday, it was not permitted to do so on Monday, even though the air at the 5-A face never exceeded acceptable levels.

Brushy Creek states that reduced to its simplest terms, MSHA's claim is that intake air entered the 5-B area, moved with the atmosphere in this "worked-out" area, then exited as return air sweeping the 5-A face. However, Brushy Creek points out that permanent ventilation controls existed which met MSHA's definitions and created an air course around the 5-B area. Further, the intake air does not mix with the atmosphere in any worked-out area. Intake air stays in the intake air course and does not ventilate a work area. Even if it did mix, the air would have picked up the air bubble discovered in the neutral.

Brushy Creek points out that the intake was always clear of excessive methane, and no one ever found "bad air" in the form of high methane or low oxygen at any place in the air course or at the faces. Brushy Creek states further that the parties agree that the air in the No. 5 air course was intake air up to the point where the seals were under construction at the 5-B entry area, and if the seals had been in place, the air would have had a direct flow to the 5-A face and there would have been no violation.

Brushy Creek concludes that nothing occurred to the air in the 5-B intake air course which could change the "intake" air

into "return" air. The air did not become contaminated with methane or lose its oxygen content, there was no coal production equipment present, there was no working face or working places, the only working place in that area of the mine on March 29 was the 5-A face, there were no power sources, and the only equipment present was miscellaneous belt structures and other equipment which was being recovered, none of which was "mechanized mining equipment" requiring a separate split of air pursuant to section 75.332(a)(1).

Brushy Creek asserts that if the permanent stoppings were not in place throughout the 5-B area, as represented in MSHA's map, Exhibit G-2, then the entire area would be classified as a "worked-out area." However, because the permanent ventilation controls were in place, the entries separated by those permanent controls remain classified as an air course pursuant to the definition of that term in section 75.301. Since it was an air course, and was utilized as an intake air course, Brushy Creek concludes that by definition, it can not be a worked-out area.

Citing the Zeigler decision, supra, Brushy Creek states that return air may have different meanings for different standards, and for the purpose of Subpart D, Part 75, it means "air that has ventilated the last working place." Brushy Creek takes the position that the air passing along the 5-B intake air course did not ventilate the "last working place" until it reached the 5-A face.

Brushy Creek asserts that before going underground on March 29, 1994, Mr. Wirth and Mr. Eslinger had apparently concluded that the 5-B area fit Mr. Eslinger's definition of "worked-out" (Tr. 144). Mr. Wirth was familiar with the area and told Mr. Culpepper shortly after they started that the air course contained return air (Tr. 596), and that before starting into the air course from the other end, Mr. Eslinger told Mr. Pait that the air was "off old works, so it's return air" (Tr. 665). Brushy Creek suggests that since Mr. Eslinger had supposedly superior knowledge in regard to MSHA's interpretation of the "worked-out area" provisions of the new ventilation regulations, and had previously been to the mine and was familiar with the ventilation plan and mine maps of the 5-B area, he was obliged to point out any hazards to Brushy Creek, rather than playing a game of "gotcha."

Brushy Creek states that if the 5-B air intake is a "worked-out" area, then the four citations must be considered separately and either vacated or modified. With regard to Citation No. 4260292, Brushy Creek believes that the essence of the alleged violation is that it should have had clean air ventilating the producing section, and that it was "S&S" because of the possibility of methane from below or from the lengthy air course. However, Brushy Creek points out that during the two inspection days in question, the air in the air course and at the face was clean and there was no methane levels in the working section that were above acceptable levels. Brushy Creek concludes that, at most, this citation results from a reasonable disagreement as to the classification of 5-B air course resulting from the difficulty of the definition. It concludes that the citation should be vacated, and, if not, reduced to non-"S&S" with no negligence.

With regard to Citation No. 4260295, Brushy Creek states that the time noted for the issuance of the citation is wrong, and that only one golf cart was present. Although the citation was marked "S&S" and "reasonably likely" to result in a permanently disabling injury, Brushy Creek points out that the operator was allowed to start the cart and give one of the inspectors a ride out, and it concludes that no danger would have been present if Mr. Wirth had not taken it upon himself to change the air flow. Brushy Creek believes the citation should be vacated and, if not, reduced to non-"S&S" with no negligence.

With regard to Citation No. 4266732, Brushy Creek points out that MSHA acknowledged that "management was compelled by circumstances beyond their control to change ventilation that may have permitted the cited condition to exist." Further, while the citation alleges that the neutrals (the "worked-out area") "was not ventilated," Mr. Eslinger admitted that the air quality on the working section was satisfactory (Tr. 245). Under the circumstances, Brushy Creek concludes that the methane in the area was continuously diluted within the intent of the standard, and it believes that the citation should be vacated or reduced to non-"S&S" with no negligence.

With regard to non-"S&S" Citation No. 4266733, Brushy Creek argues that it was in the process of changing the escapeway markers when the inspection team arrived, and at MSHA's

direction, to abate the citation, the entire 5-B intake air course was marked, even though Mr. Eslinger admitted he would take a shorter way out (Tr. 264). Brushy Creek maintains that MSHA's prosecution of this citation is inconsistent since if it is sustained, it is an acknowledgment that the primary escapeway which MSHA required to be marked was ventilated with intake air. If this citation is sustained, Brushy Creek suggests that consistency requires that the other three must be dismissed.

The 5-B area in question was a rather extensive area containing entries, rooms, and panels from which coal had been extracted. Mr. Smock estimated that it was approximately two and one half to three miles around the perimeter of the area, and Mr. Wirth stated that it took four and one half hours to walk around the area (Tr. 73, 450).

In the instant proceedings, if access to the 5-B area had been sealed at the time of the inspection, the intake air would have continued down the intake air entry directly to the 5-A face area where it would have swept and ventilated the faces before exiting the mine through the return. In that scenario, there would be no violation because the intake air traveled directly to the face area without first migrating and traveling through the 5-B area. However, by coursing the air through the 5-B area where the sealing work had not been completed, and allowing that air to mix with the air ventilating the neutral area before exiting the area where it was again used to ventilate the 5-A working faces, the respondent ran afoul of the cited ventilation standards.

As noted earlier, "intake air" is defined by section 75.301 as (1) air that has not yet ventilated the last working place on any split of any working section or (2) air that has not yet ventilated any worked-out area. "Return air" is defined in relevant part as (1) air that has ventilated the last working place on any split of any working section, or (2) air that has ventilated any worked-out area. In short, air that has not ventilated any worked-out area is considered intake air, and air that has ventilated any worked-out area is considered return air. The controversy with respect to the four disputed violations in question is focused on the interpretation of the section 75.301 definition of the phrase "worked-out area" and its interpretation and application to the terms "intake" and "return" air.

The phrase "worked-out area" is defined, in relevant part, by section 75.301, as "an area where mining has been completed, ... excluding developing entries, return air courses, and intake air courses."

Inspector Wirth testified that during his inspection of the 5-B area there was no coal production in progress, no continuous mining unit or coal producing equipment, and no electrical power. He also observed that some of the permanent ventilation stoppings were crushing out, and the only work that he found in progress was the work to complete the sealing of the area (Tr. 59-65).

Inspector Eslinger characterized the 5-B area as "a classic worked-out area" where mining had been completed (Tr. 282, 285). Although Mr. Eslinger believed that the ventilation method used at the time the area was being mined, as shown on the mine maps, was sufficient, he confirmed that management did not submit a ventilation plan showing the method of ventilation used in the 5-B area at the time of the inspection (Tr. 282, 285). Since Brushy Creek was in the process of sealing the 5-B area, Mr. Eslinger concluded that Brushy Creek tacitly admitted that mining was completed in that area and it never intended to go back to mine coal (Tr. 287).

Mr. Smock agreed that a "worked-out area" is one where mining has been completed, and he conceded that at the time of the inspection, "we had finished cutting coal in this area, but mining wasn't done because I had to get out of there" (Tr. 406). Conceding that there was no electrical power on the 5-B area, Mr. Smock suggested that because of the sealing work in progress, and the presence of some equipment in one of the rooms (belt, framing drives, and power boxes), which had not been removed from the area, the area was not "worked-out" (Tr. 412-412, 467-468). General Mine Manager Hatcher identified similar equipment that was in the area (Tr. 510-511).

During closing arguments at the hearing, Brushy Creek's counsel stated that, "we haven't contested the fact that mining was completed in that area" (Tr. 741). Indeed, in its post-hearing brief, Brushy Creek concedes that there was no coal production equipment in the 5-B area at the time of the

inspection, and it does not dispute the fact that there was no power on the 5-B area.

I conclude and find that the evidence here establishes that at the time of the inspection in question, the mining of coal had been completed in the 5-B area, there was no power, and the area was in the process of being sealed. I further conclude and find that the fact that the sealing had not been totally completed, and that certain pieces of equipment had not yet been removed from the area, does not detract from the fact that the area was for all intents and purposes "mined-out." Under the circumstances, I conclude and find that the 5-B area was a "worked-out area" as that term is defined by section 75.301.

With regard to the exclusion of return air courses and intake air courses from the definition of "worked-out area," I cannot conclude that the 5-B area contained any clearly defined intake air course that qualifies for a "worked-out area" definitional exclusion.

For the reasons which follow, and notwithstanding the fact that the 5-B perimeter area was separated by ventilation stoppings, I can not conclude that it constituted a de facto intake air course that would exclude the 5-B area as a worked-out area.

In support of its assertion that the perimeter of the 5-B area constituted an intake air course, thereby excluding the 5-B physical area as a "worked-out area," Brushy Creek maintains that the ventilation stoppings constituted an "air course" as defined by section 75.301, and that since the air in that air course had not yet ventilated the last working place, it was intake air.

Brushy Creek argues that the 5-B perimeter air course met all of the practical requirements as an intake air course in that the entries were separated from the neutral entries by the stoppings and ventilation doors that allowed methane in the neutral area to "trickle" into the air course, that the concept of an air course around a neutral area is shown in ventilation plan Drawing AO717-01 (Exhibit JE-2), that the air course was examined as an intake air course, and that it was in the process of marking the air course as an intake air course primary escapeway when the inspectors appeared on March 29, 1994.

I conclude and find that the fact that a ventilation plan sketch depicts a "concept" for an air course around a neutral area does not support any conclusion that the respondent's ventilation method in use at the time of the inspection was covered or authorized by the approved plan. In fact, the testimony is to the contrary.

Conceding that simply designating an area as an intake air course does not ipso facto establish it as such, Brushy Creek maintains that it has always been its prerogative to adopt a ventilation plan which fits its unique circumstances. However, Mr. Eslinger testified credibly that there was nothing in the mine ventilation plan allowing Brushy Creek to do what it was doing (Tr. 159). Further, although Mr. Pait testified that the mine ventilation plan did not prohibit the ventilation configuration for the 5-B perimeter area (Tr. 666), Mr. Smock testified that the ventilation plan did not cover or authorize what was being done at the time of the inspections on March 29 and 30, 1994 (Tr. 499).

Brushy Creek's assertion that it considered the 5-B area to be an intake air course because it regularly inspected the area as such is not well taken, and its conclusion in this regard is rejected for lack of any supporting probative or credible evidence. The only written documentation produced by Brushy Creek to support its assertion that the 5-B area was being regularly inspected as an intake air course is a preshift mine examiner's report signed by Richard Doty for an inspection of the "#5 intake" on March 29, 1994 (Exhibit P-0-3). Mr. Doty was not called as a witness and Brushy Creek introduced no further examination reports from its mine records.

Brushy Creek's Shift Manager Reynolds, who walked part of the 5-B perimeter with Inspectors Holland and Eslinger on March 29, 1994, testified that he observed two locations where Mr. Doty had initialed and dated March 29 on the inspection boards, and he marked the locations on Exhibit 0-2 (Tr. 588). However, no records documenting these examinations were forthcoming and one can only speculate as to whether one of these locations was the one documented by the aforementioned Doty report.

Although Underground Superintendent Smock testified that he had to examine the entire 5-B area as an intake air course, and that his mine examiners "would have been there daily" to examine the area of deepest penetration, the seal work area, and "the intake for an air course" (Tr. 414, 452-459), no documentation in the form of examination records were produced, and none of the examiners who purportedly conducted the examinations were called to testify.

Safety Manager Pait testified that the 5-B area did not have definite examination points, and he asserted that examiners would initial "at the point of deepest penetration or somewhere within that area between the beginning and the end" (Tr. 670). Although Mr. Pait believed the area was regularly inspected, the only specific examination he could identify was the one by Mr. Doty on March 29 (Tr. 670). Brushy Creek confirmed that it could not find any examination records for the 5-B area other than the one it produced (Tr. 695).

Inspector Wirth testified that the 5-B area was not being properly pre-shifted or examined weekly as required by sections 75.360 and 75.364, and that when he walked the perimeter of the 5-B area to the point of deepest penetration, he found no dates, times, initials, or evidence to indicate that these examinations were being conducted. Under the circumstances, he cited Brushy Creek with a violation for not conducting these examinations (Tr. 48, 53-54, 76).

Inspector Eslinger was aware of only one entry in the 5-B area that was examined and marked "safe," but he did not believe that Brushy Creek was examining all of the entries and rooms throughout the entire area as required by section 75.360(b)(6), and he disputed Brushy Creek's contention that it considered the 5-B area to be intake air because it was being examined as an intake air course (Tr. 284).

After careful consideration of all of this evidence, I conclude and find that, at most, Brushy Creek may have conducted sporadic and cursory examinations of the 5-B area while working and preparing to seal the area before the inspections in question, but I can not conclude that it was regularly inspecting or treating the area as an intake air course.

Mr. Wirth testified credibly that intake air can become return air, but that return air can not become intake. He further testified that when he inspected the 5-B area with Mr. Culpepper be observed that it was marked with red reflectors, and that Mr. Culpepper informed him that these markings were used to identify return air (Tr. 84-85, 122-123). Mr. Pait testified that at the time of the inspection most of the 5-B area "was still marked as a return because that's what those had been a week before ..." (Tr. 677-688).

The definition of "air course" found in section 75.301 states, in relevant part, that the separation of an entry or entries by stoppings or other ventilation control devices is so that any mixing of air currents between each is limited to leakage. The evidence here reflects that the mixing of the 5-B neutral air and the perimeter air was more than leakage or confined to "a trickle."

The respondent's assertion that the 5-B "intake air" did not mix or ventilate any worked-out area and stayed in the "intake air course" is not supported by the evidence and testimony, and it is rejected.

Mr. Smock confirmed that the 5-B neutral area was being ventilated in order to keep any methane below the legal limits. In order to facilitate the flow of air through that area, stopping blocks were removed, and the air that was used to ventilate this area blended in with the rest of the air in the air course that was exiting the 5-B area (Tr. 414-416). He further confirmed that air was coursed into the neutral areas by stopping doors to allow the air to circulate and ventilate the neutral area. The air would then exit through these doors and into the air course (Tr. 423). He also testified that air from the belt haulageway was used to ventilate the area that was being sealed, and that it traveled the perimeter of the 5-B area, through the neutral area, and out into the air course that then swept the 5-A working faces before exiting the mine through the return (Tr. 477-478).

The evidence establishes that the mine is an extremely gassy mine. Indeed, the mining that had previously taken place at the 5-A area was suspended and moved to the 5-B area because of high levels of methane migrating through the 5-A floor from

an old abandoned mine below that area. Mining resumed in the 5-A area after the methane was cleared up after bore holes were drilled to bleed it off.

Mr. Wirth testified credibly that the worked-out area included the neutral area between the stoppings where methane was detected in an area where there was no air movement (Tr. 147). He also observed 5-B areas where the stoppings were crushing out and where below normal oxygen levels were discovered, as well as methane levels up to 1.8 percent. Mr. Eslinger testified that his methane detector, which was set at 2.5 percent methane, sounded when he walked through a stopping door into the 5-B neutral area. Underground Superintendent Smock candidly admitted that he "wanted out of there as soon as possible" because of pillar squeezing and the presence of gas bleeders. He also admitted that the 5-B area was "troubled" before the inspection because of the squeezing that was "messing up" the ventilation system.

Mr. Wirth acknowledged the presence of permanent and temporary ventilation controls and stoppings while he was traveling the 5-B area during his inspection (Tr. 106-107, 111). He confirmed that the air ventilating the 5-A face area where mining was taking place was the same air that had ventilated the 5-B area, and that both areas were being ventilated by the same split of air and not separately. Although Mr. Wirth acknowledged that the air entering the section was initially intake air, he concluded that once it was coursed through the 5-B area, it became return air, regardless of whether it remained in the perimeter area or in the "neutral area" (Tr. 85). Since the air ventilating the 5-A area was not on a separate fresh air intake split, he concluded there was a violation of section 75.332(a)(1).

Mr. Wirth testified that the last working place on the section for the purpose of applying the definition of return air was the 5-A working place where coal was being produced (Tr. 98). He agreed that by definition, the air must first pass by that working place before it can be considered return air pursuant to section 75.301. However, since the air had already ventilated the "worked-out" area before reaching the last working place, he concluded that it was return air by that same definition (Tr. 99).

Mr. Eslinger considered the entire 5-B area, including the "neutral areas" between the stopping lines, to be worked-out areas (Tr. 147). He conceded that the air that exited the 5-B area and was used to ventilate the 5-A face area would have been within the legal limits of intake air, but for the section 75.301 definition of return air that defines such air as air that has been used to ventilate a worked-out area (Tr. 147).

Although I agree with Brushy Creek's assertion that the definition of "worked-out area" is circular, confusing and inartfully drafted, I am not persuaded that Brushy Creek was totally ignorant of the prohibitions against using air which has ventilated a worked-out area to ventilate the working face area in question. Nor can I ignore the hazards associated with potential methane ignitions and explosions that may occur as a result of ventilating active face areas with air that was used to ventilate other worked-out areas before exiting the mine through the returns. I find that the promulgation of the ventilation standards found at sections 75.332, 75.334, and 75.380, was clearly intended to address, remedy, or prevent these potential hazards to miners working underground.

After careful consideration of all of the evidence in these proceedings, I conclude and find that MSHA has the better part of the argument. I can not conclude that Brushy Creek has established that the 5-B perimeter area that it has characterized as an intake air course was in fact a clearly identifiable separate air course delivering un-mixed air directly to the 5-A working faces without first ventilating the 5-B worked-out areas. Since the evidence establishes the 5-B perimeter air mixed with the air from the belt haulageway that was used to ventilate the 5-B neutral worked-out areas, I conclude and find that the air did in fact ventilate worked-out areas before reaching the 5-A working faces. Under the circumstances, I further conclude and find that this air was return air as that term is defined by section 75.301.

The parties agreed that the principal issue with respect to the citations in question is whether the cited 5-B area was a "worked-out area" as defined by section 75.301 (Tr. 281, 505, 692; Respondent's Post-hearing Brief, pg. 9). They further agreed that if I should find that the cited 5-B area was a worked-out area, the violations should be affirmed. Under the

circumstances, Citation Nos. 4260292, 4260295, 4266732, and 4266733 **ARE AFFIRMED.**

Citation No. 4260297 (LAKE 94-175-R; LAKE 94-250)

In this citation, Brushy Creek is charged with a violation of mandatory safety standard 30 C.F.R. 75.370(a)(2), for failing to follow its approved ventilation plan requiring a minimum of 6,500 cfm of air at the end of a ventilation line curtain at all times while the miner machine is cutting or loading coal (Ventilation plan, pg. 1, paragraph C.(2) (Exhibit JE-2)). Section 75.370(a)(1) requires a mine operator to develop and follow its approved plan, and, in this case, the inspector found less than the required amount of air at the cited face ventilation curtain in question while coal was being cut and loaded.

Inspector Wirth's credible and unrebutted testimony clearly establishes that there was little or no air movement at the end of the cited line curtain in question. The respondent's approved ventilation plan requires that 6,500 cubic feet of air per minute be maintained at the end of the line curtain at all times while coal was being cut and loaded. Mr. Wirth's testimony establishes that the available air was insufficient to even turn the vanes of the anemometer that he used to test the air.

Mr. Wirth's testimony that he observed coal being cut and loaded at the face of the No. 6 entry where the cited curtain was located was corroborated by the credible testimony of Inspector Bird who testified that when he and Mr. Wirth walked into the entry, he observed coal being loaded, and a loaded car leaving the area. Mr. Bird's inspection notes reflected that the remote control miner was cutting and loading coal in the No. 6 entry. Mr. Eslinger testified credibly that he arrived at the cited location shortly before Mr. Bird and Mr. Wirth and observed a loaded shuttle car leaving. He then watched as other shuttle cars pulled in and were loaded with coal.

I find no credible testimony or evidence to rebut the observations made by Mr. Bird, Mr. Wirth, and Mr. Eslinger in support of the violation. Mine Manager Hatcher confirmed that he did not observe the cited conditions and was not present when the citation was issued. Assistant Safety Inspector

Gene Culpepper testified that when he went to the face area he found Mr. Eslinger, Mr. Bird, and Mr. Wirth there and they informed him that a citation had been issued because of insufficient air at the face. Mr. Culpepper confirmed that when he arrived in the area, the mining machine was shut off and he did not take any air readings at the end of the cited line curtain.

Safety Manager Pait confirmed that he had no personal knowledge of the line curtain violations and that he was on the surface when Mr. Culpepper called him to inform him that the citation was being issued.

The only relevant testimony by the respondent in defense of the violation was that offered by miner operator Steve Burgess. He testified that he did not take an air reading before starting his cuts because he had no anemometer. He confirmed that Mr. Wirth checked the air and found none because part of the curtain was missing.

Mr. Burgess claimed that when he first observed the inspectors he was through cutting coal and was backing the machine up to clean up so that he could begin bolting the roof. He took the position that he was simply cleaning up the loose coal that was on the ground and suggested that he was not cutting or loading coal. I reject this testimony as a less than credible defense to the violation. Even if I were to accept as true that Mr. Burgess was cleaning up loose coal when he first observed the inspectors, they testified credibly that when they were observing the work at the face, coal was being cut and loaded, and shuttle cars were coming and going from the face areas with loaded coal that had been cut at the face by Mr. Burgess.

On cross-examination, Mr. Burgess confirmed that he had not cleaned up any loose coal when the inspectors appeared at the face areas and that he had just made a 35 foot cut of coal that was dumped in the ram cars and hauled away. He further confirmed that he cleaned up the place and loaded the coal out after the violation was abated and terminated.

I conclude and find that the petitioner has established by a preponderance of the credible and probative evidence that the requisite amount of air was not being maintained at the end of

the ventilation line curtain while coal was being cut and loaded. Brushy Creek's failure to maintain the air as required constitutes a violation of its approved plan, and its failure to follow the plan constitutes a violation of section 75.370(a)(1). Accordingly, the citation **IS AFFIRMED**.

Citation No. 4261610 (LAKE 94-176-R; LAKE 94-250)

Brushy Creek is charged here with a violation of mandatory safety standard 30 C.F.R. 75.370(a)(1), for failing to follow its approved ventilation plan requiring the cited ventilation line curtain to be maintained within 40 feet of the deepest penetration of the face while coal is being cut and loaded (Ventilation Plan, pg. 1, paragraph C.(2) (Exhibit JE-2)). Here the inspector found that the curtain measured 66 feet from the deepest penetration where coal was being cut and loaded.

The credible testimony of Inspector Bird establishes that the cited ventilation line curtain was not maintained to within 40 feet of the face as required by the approved mine ventilation plan. The applicable plan provision when remote control miners are in use requires the ventilation line curtain to be maintained to within 40 feet of the deepest penetration of the face.

Mr. Bird determined that the line curtain was not maintained to within 40 feet of the face by measuring the distance between the miner bits cutting at the face to the tail of the miner, and the distance from the line curtain to the last row of roof bolts. Based on these measurements, he concluded and found that the line curtain was being maintained at a distance of 66 feet from the point of deepest penetration where coal was being cut and loaded at the face. Mr. Eslinger, who was present at the scene, testified credibly that after he pointed out that coal was being cut and loaded, Mr. Bird proceeded to make his measurements, and that mining was stopped.

Brushy Creek's Safety Inspector Gene Culpepper, who made a sketch of the curtain, including a notation that it was "taken down by a car," confirmed that he based this notation on what he "thought" had happened, and he admitted that he did not see any car tear the curtain down and did not speak to any car operator. Although he claimed that he saw that the curtain was missing, he

conceded that he did not know what happened. He further stated that miner operator Burgess told him that he "thought" that a car had torn down the curtain. Mr. Culpepper confirmed that he made his sketch six months after the citation was issued, and although he took exception with the curtain sketches made by the inspectors, he admitted that even on his sketch the curtain is shown as more than 40 feet from the face, and that this would be a violation.

Miner operator Burgess claimed that he saw the curtain being torn down, but indicated that only 30 feet of the 70 foot curtain was torn down and that the last five or six feet of curtain skirting towards the face was missing. He confirmed that abatement was achieved by hanging a new curtain that had been stored in a roof bolting machine nearby, and he testified that this new curtain was intended to replace the old curtain.

Inspector Wirth testified credibly that he saw no evidence that the curtain had been ripped down and he saw no curtain lying on the mine floor. Although he did observe a gap at the bottom of the curtain, he did not believe this was significant as long as the air was maintained as required by the ventilation plan.

Inspector Bird, who was also at the scene with Mr. Wirth, did not observe any curtain on the ground or a car tearing it down. He testified that he would not have issued the citation if the curtain had been torn down and loading was stopped to hang it back up. However, he saw no evidence that this was the case.

Inspector Eslinger testified that he observed no ripped curtain or any curtain being dragged off by a shuttle car, and he saw no evidence that the curtain had been hung up to the last full roof bolts.

The respondent's suggested defense that the curtain was not maintained to within 40 feet of the face because it was torn down by a shuttle car leaving the area is rejected. Mine operator Burgess' testimony that the new curtain stored on the roof bolter was intended to be hung earlier "to start with," suggests that part of the curtain may have been down sometime prior to the arrival of the inspectors, and that mining continued on with no action taken to install the new curtain until after the citation

was issued. Under the circumstances, I can not conclude that this excuses the violation.

I conclude and find that the petitioner has established by a preponderance of the credible and probative evidence that the cited violation line curtain was not maintained to within 40 feet of the deepest penetration while coal was being cut and loaded, as required by the mine ventilation plan. Brushy Creek's failure to maintain the required curtain distance as required by its approved plan constitutes a violation of section 75.370(a)(1). Accordingly, the citation **IS AFFIRMED**.

Brushy Creek's counsel suggested that the inspectors were mistaken as to the location of the cutting machine, as well as the depths of the cuts, and he advanced the argument that the machine operator was "strictly cleaning up after completing some cuts" and was not cutting or loading coal (Tr. 382-393). Counsel further asserted that Brushy Creek was charged with two separate line curtain violations rather than one and he voiced his displeasure with MSHA's "double barrel" enforcement action (Tr. 393-394).

I find no credible or probative evidence to support any conclusion that the inspectors were mistaken as to the location of the violations. Even if they were, I find no prejudice to Brushy Creek in defending the citation. I further find no evidence to support a conclusion that the inspector mistook the depths of the cuts. I find the inspector's unrebutted measurements in support of the violation to be credible.

With regard to Brushy Creek's "duplicate violation" argument, while it is true that the two line curtain violations resulted from a single episode, the evidence supports two distinct violations and the Act requires a penalty assessment for each violation, 30 U.S.C. 820(a). However, I have taken all of this into consideration in assessing the penalties for the violations in question.

Significant and Substantial Violations

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

and effect if a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated as 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 order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is "S&S" must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2006 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations.

National Gypsum, 3 FMSHRC 327, 329 (March). Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

In the Texasgulf, Inc. case, supra, the Commission affirmed the judge's non-"S&S" finding in connection with a permissibility violation and commented that in order for an ignition or explosion to occur, "there must be a confluence of factors, including a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources," 10 FMSHRC 501.

Citation No. 4260292

Mr. Wirth based his "S&S" finding on the fact that the 5-A face area where mining was taking place was not being ventilated by a separate split of fresh intake air, and was instead being ventilated by air that had circulated through and ventilated the worked-out 5-B area. He concluded that it was reasonably likely that an injury would occur because the 5-B area was not being properly examined, there was a body of methane present in the neutral worked-out area, with no air movement sufficient enough to dilute and move out that methane, and he believed that contaminated air from this area would easily find its way to the coal producing area. He also considered the fact that methane was being liberated from an old mine and was migrating through Brushy Creek's mine.

Mr. Wirth further believed that low oxygen levels and high methane levels may go undetected in areas that are not properly examined, and that roof falls could result in the failure of permanent ventilation control devices. Mr. Eslinger confirmed that he reviewed Mr. Wirth's "S&S" finding and agreed with it. Since it was only the second day of mining, Mr. Eslinger was concerned that methane could again come through the mine floor, and he found methane in the 5-B area and believed that it could travel to the working 5-A face at any time.

I conclude and find that Mr. Wirth's testimony in support of his "S&S" finding is general and somewhat speculative. Although I have found that the failure to ventilate the 5-A working face area with a separate split of intake air constitutes a violation of section 75.332(a)(1), on the specific facts of this case, I cannot conclude that in the course of continued mining the cited

condition would reasonably likely result in an accident or injuries of a reasonably serious nature.

The evidence establishes that no active mining was taking place in the 5-B worked-out area and there was no power on the area. Except for some miscellaneous belt structures, all of the electrical equipment used to mine coal had been removed from the worked-out area. Except for the area where sealing work was being conducted, there is no evidence that miners were regularly working in other worked-out areas. Although Mr. Wirth concluded that it was "very easy" for any contaminated air exiting the worked-out area to enter the 5-A producing section, Mr. Eslinger confirmed that there was sufficient air quantity and oxygen at the working 5-A faces, and there was no evidence of any carbon monoxide. Indeed, Mr. Eslinger characterized the air sweeping the faces as "up to snuff" (Tr. 147). Mr. Eslinger also testified that he found no methane levels or oxygen levels that would have endangered miners on March 29 and 30, 1994 (Tr. 709).

In view of the foregoing, I conclude and find that the evidence does not support the inspector's "S&S" finding, and his finding in this regard **IS VACATED**. The citation **IS MODIFIED** to a non-"S&S" citation.

Citation No. 4160295

Inspector Wirth cited the nonpermissible golf cart that was driven into the area where he found 1.9 percent methane and 18.8 percent oxygen. Brushy Creek conceded that the cart was non-permissible. Mr. Wirth believed that it was reasonably likely that an explosion would occur if work had been allowed to continue because the cart was driven into an area where he found the methane and low oxygen levels. Although he did not inspect the golf cart, he believed that the cart batteries, and the motor, which sparks and arcs, the battery terminals, and the headlight all constituted ignition sources.

After careful review of all of the evidence and testimony with respect to this violation, I cannot conclude that it was "S&S." Although the evidence establishes that the golf cart was non-permissible, the inspector conceded that he did not inspect it and there is no evidence that any of its components were defective. Further, the evidence establishes that no active

mining was taking place in the 5-B area, there was no power on the section, and all of the mining equipment had been removed.

The evidence reflects that Mr. Culpepper was initially driving a cart in the neutral area behind the stoppings while the inspector he was with was on the other side. Mr. Culpepper had operated the cart without incident or inspector complaints for most of the inspection. However, when the battery went dead, Mr. Culpepper abandoned the cart and was picked up by another cart driven by the walkaround representative. When Mr. Culpepper subsequently got off the cart and started walking in the direction of an entry from where he was being flagged by someone, his methane detector sounded in the presence of all of the inspectors who had apparently just stepped through a stopping door and detected the presence of methane. At that point in time, Mr. Culpepper was informed that he would be cited for driving the golf cart into the area where methane was detected.

Inspector Wirth conceded that the cart was not taken out of service, and that he allowed it to be driven from the area after it was pushed out of the area where the methane was detected. However, before the cart was started again, Mr. Wirth tested for methane and found that it was below the allowable limit. This indicates to me that the condition was immediately abated. I also note Mr. Wirth's testimony that prior to entering the neutral area through the personnel door, his methane detector never sounded (Tr. 108). He also testified that the methane level he found would not in itself warrant a citation for the worked-out area in question (Tr. 94).

Based on the facts and evidence presented, I conclude and find that the methane level that caused the detectors to sound was an isolated event of very short duration, and with rather instant abatement. In the context of continued mining operations, I cannot conclude that it was reasonably likely that a methane ignition or explosion would have occurred. The only work in the 5-B area was the sealing work, and there is no evidence that miners would normally be working in the neutral area behind the stoppings where the cart was being driven at the time of the inspection, nor is there any evidence of any methane or golf carts being otherwise operated in the sealing work area as part of any normal mining operation. Under all of these circumstances, the "S&S" finding by the inspector **IS VACATED**, and the citation **IS MODIFIED** to a non-"S&S" citation.

Citation No. 4266732

Inspector Holland issued this citation after finding 1.9 percent methane and 18.8 percent oxygen in the cited worked-out area. He did not testify. However, based on the narrative description of the cited condition, it would appear that Mr. Holland concluded that the area was not sufficiently ventilated to move out the methane that he found.

Mr. Eslinger testified that he observed the conditions that gave rise to the citation and he agreed with Mr. Holland's "S&S" finding. Mr. Eslinger concluded that the lack of air movement, coupled with the high methane and low oxygen levels indicated that the available air was not moving out the methane. He further concluded that in the normal course of mining, it was reasonably likely that methane would continue to build up to an explosive level, and it could be ignited or moved towards the active working faces. He was also concerned that the low level of oxygen could cause depleted oxygen levels that would be insufficient for breathing.

For the reasons stated with respect to my non-"S&S" findings in connection with Citation No. 4260295, I conclude and find that the evidence does not support the inspector's "S&S" finding associated with Citation No. 4266732. In addition to those reasons, I have considered Mr. Wirth's testimony that there is no specific methane limit for worked-out areas, and that the methane level he found would not result in a citation for the cited worked-out area (Tr. 68, 94). Under the circumstances, and on the facts of this case, I cannot conclude that the evidence supports any conclusion of a reasonable likelihood of an accident or injury if work were allowed to continue in the 5-B area. Accordingly, the inspector's "S&S" finding **IS VACATED** and the citation **IS MODIFIED** to a non-"S&S" citation.

Citation No. 4260297

With regard to this citation, issued by Mr. Wirth for inadequate air behind the ventilation line curtain, he testified that he based his "S&S" finding on the fact that mining had only resumed in the 5-A area two days prior to his inspection after it had been discontinued for ten months because of the high levels

of methane leaking through the mine floor from an old abandoned mine. Conceding that the methane level he found at the time of the inspection was below the allowable limit, and that Brushy Creek drilled bore holes to bleed out the methane, Mr. Wirth nonetheless was concerned that a build-up of methane could again occur in the absence of adequate air ventilation at the face curtain area where mining was actively going on and where mining equipment was in operation. He concluded that a build-up of undiluted methane was reasonably likely in the absence of ventilation, and that this would pose an explosion hazard.

Citation No. 4261610

With respect to the citation issued by Mr. Bird for not positioning the ventilation line curtain to within 40 feet of the face, he testified that he based his "S&S" finding on the fact that methane had in the past been freely liberated through the mine floor, and in the presence of the ignition sources that were present, he believed fire and ignition hazards were present and that three miners who he observed working in the area were at risk. If an explosion had occurred, he believed it was reasonably likely that the miners would suffer fatal injuries.

Although it is true that the air ventilating the active 5-A area faces was not contaminated with high levels of methane at the time of the inspection, some methane was detected. Given the fact that mining had only recently resumed in that area after it had been discontinued for approximately ten months because of excessive methane liberation through the mine floor from an old abandoned mine, I conclude and find that the lack of adequate air flow at the face, and the positioning of the ventilation curtain approximately 66 feet from the face, rather than the required 40 feet, presented a discrete safety hazard in that methane could have been liberated and accumulated while the miner was cutting and loading coal at the face area. Indeed, Mr. Smock confirmed that periodic gas bleeders are still encountered in the 5-A area (Tr. 448). Further, the continuous miner, as well as the other mining equipment that was operating in the area, constituted potential ignition sources while coal was being cut and loaded. Under the circumstances, I conclude and find that in the course of continued mining at the cited face area, it was reasonably

likely that a methane ignition, fire, or explosion would have occurred.

I further conclude and find that in the event of a face ignition, fire, or explosion, it would be reasonably likely that the miners who would be present would suffer injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violations associated with Citation Nos. 4260297 and 4261610 were "S&S", and the findings of the inspectors in this regard **ARE AFFIRMED**.

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

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

History of Prior Violations

An MSHA computer printout listing Brushy Creek's compliance record for the period March 29, 1992 through March 28, 1994, reflects that it paid civil penalty assessments in the amount of $96,028 for 549 violations, 337 of which were "single penalty" non-"S&S" violation. Except for one section 104(d)(1) citation, all of the listed violations were issued as section 104(a) citations. There are 29 prior violations of section 75.370(a)(1) (failure to follow the ventilation plan), and 55 violations of section 75.503 (electric face equipment permissibility).

Although I cannot conclude that the respondent's history of prior violations is particularly good, for an operation of its size, I cannot conclude that it warrants any increases in the civil penalty assessments which I have made for the violations which have been affirmed.

Good Faith Abatement

The parties stipulated that Brushy Creek abated all of the violations in good faith.

Gravity

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

Negligence

The inspectors found that Citation Nos. 4240292, 4260295, 4266732, and 4266733 resulted from a moderate degree of negligence on the part of Brushy Creek. The "moderate" negligence finding for Citation No. 4266732 was subsequently modified to "low" negligence by MSHA in the course of a conference (Tr. 208-213).

Citation Nos. 4260297 and 4261610 were initially issued with findings of "high" negligence. However, they were subsequently modified to reflect a "moderate" degree of negligence.

I agree with the negligence findings, as modified, and I conclude and find that all of the violations were the result of Brushy Creek's failure to exercise reasonable care.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
4260292	3/29/94	75.332(a)(1)	$150
4260295	3/29/94	75.50701	$ 75
4266732	3/29/94	75.334(a)(1)	$100
4266733	3/29/94	75.380(f)(1)	$ 50
42660297	3/30/94	75.370(a)(1)	$600
4261610	3/30/94	75.370(a)(1)	$400

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. Section 104(a) "S&S" Citation Nos. 4260292, 4260295, and 4266732 **ARE MODIFIED** to section 104(a) non-"S&S" citations.

2. Brushy Creek shall pay a civil penalty assessment of $310, in settlement of section 104(a) "S&S" Citation No. 4266730, March 29, 2994, 30 C.F.R. 75.503.

3. Brushy Creek shall pay civil penalty assessments in the amounts shown above for the remaining citations that have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of these decisions and orders, and upon receipt of payment, these matters are **DISMISSED**.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

JUN 19 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 93-85-M
	:	A.C. No. 42-00023-05521
v.	:	Docket No. WEST 93-285-M
	:	A.C. No. 42-00023-05522
AMERICAN STONE, INC., Respondent	:	Docket No. WEST 93-424-M
	:	A.C. No. 42-00023-05523
	:	Docket No. WEST 93-527-M
	:	A.C. No. 42-00023-05524
	:	Aragonite Mine

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner
Scott E. Isaacson, Esq., King & Isaacson, Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

These consolidated civil penalty proceedings are before me upon petitions 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., (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charged the operator of the Aragonite Mine with 18 violations of safety standards set forth in Part 56, Title 30, Code of Federal Regulations.

The Respondent filed a timely answer contesting the violations. After due notice to the parties the consolidated cases were heard in Salt Lake City, Utah.

Citation No. 2653512 the only citation in Docket No. WEST 93-85-M charges that the operator failed to notify the nearest subdistrict office when closing the Aragonite Mine. At the hearing the Secretary vacated the citation along with its proposed $50.00 penalty based upon the fact that Respondent produced billing statements for August, September and October 1992 which

satisfactorily demonstrated that the mine was open and not closed at all times for which the citation was issued.

All the remaining citations, except for two [1] which are not contested, are for alleged violations at the Aragonite crushing mill which is located approximately four miles from the mine. The crushing mill had been operated only sporadically. The mill is enclosed in a metal building and has no permanent source of electrical power. When it is operated, electrical power is provided by a portable diesel generator.

Respondent American Stone states that when the citations were issued the mill had been shut down for approximately nine months. American Stone states that just before the inspection it had moved the portable diesel generator from another site to the mill, but had not yet hooked the generator up.

American Stone states that at the time of inspection it was in the process of cleaning, repairing and setting up the mill. The inspector was told that the mill was shut down and had not been operated for approximately 9 months but the inspector, nevertheless, insisted on inspecting the mill at that time.

Respondent contends that when there is no electrical power to the mill, there is no risk of electrical injuries and that it did not and would not have operated the mill in the condition it was in at the time of inspection. It is on this basis that American Stone requested that the citations be vacated or at least the penalties be reduced to a more appropriate level.

At the hearing the parties negotiated a settlement agreement and requested approval of the agreement. Under the proffered settlement Respondent withdraws its contest to Citation Nos. 2653598, 2653665, 2653666, 2653674, 2653662, 2653663, 2653664, 2653669, 2653671 and 2653670 and agrees to pay in full the MSHA proposed penalty of $50.00 for each of these citations, for a total penalty of $500.00 for these 10 uncontested citations.

In support of the reduction of penalties for the remaining eight (8) citations the Secretary states that preparation for hearing discloses the following:

There were fewer employees (one rather than 4) exposed to the hazards posed by the violations set forth in Citation Nos. 2653599 and 26533600 and 104(b) Order 4120245.

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[1] The other two citations are Citation No. 2653664, the horn on a front-end loader was not functional and Citation No. 2653669, the falling object protection structure on a forklift was not functional.

The injury which would reasonably result from the conditions set forth in Citation Nos. 2653672, 2653661 and 2653668 would be permanently disabling rather than fatal.

The injury which would reasonably result from the conditions set forth in Citation Nos. 2653667 and 2653675 would cause lost workdays or restricted duty and not permanent disability.

The negligence exhibited by Respondent with regard to Citation No. 2653673 and the corresponding 104(b) Order No. 4120246 was "low" rather than "moderate". (The bagger conveyor belt was seldom operated.)

In view of the foregoing, Petitioner agrees to amend the proposed penalties on the remaining eight (8) citations as follows:

Citation/Order No.	Initial Proposed Penalty	Amended Proposed Penalty
2653599	$ 147.00	$100.00
2653672	102.00	80.00
2653661	102.00	80.00
2653667	81.00	50.00
2653668	102.00	80.00
2653600	1,000.00	750.00
4120245 (104(b) Order)		
2653673	300.00	200.00
4120246 (104(b) Order)		
2653675	81.00	50.00

In addition Respondent states that it will no longer operate the crushing mill in question and that it intends to remove the structure from the site. If Respondent places a portable mill at the Aragonite Mine it will notify MSHA at least three business days prior to placing the portable mill at the Aragonite Mine and will, at the time of notification, provide information regarding the anticipated length of time Respondent plans to operate the portable mill at the Aragonite Mine.

Respondent will also notify MSHA at least three business days prior to the time it anticipates having employees present at the Aragonite Mine to conduct mining operations and will, at that time, provide information regarding the anticipated length of time Respondent plans to have employees present at the Mine.

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

ORDER

In view of the foregoing it is ordered that:

1. Citation No. 2653512 is **VACATED** and the proposed $50.00 penalty is set aside.

2. The motion to approve the settlement is **GRANTED**; this includes the modification of certain citations as agreed and shown above.

3. Respondent shall pay the approved penalties totaling $1,890.00 to the Secretary of Labor within 40 days of the date of this decision and order.

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 0 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-357-D
ON BEHALF OF SAMUEL KNOTTS,	:	
Complainant	:	MORG CD 94-3
v.	:	
	:	Coalbank Fork No. 12
TANGLEWOOD ENERGY, INC.;	:	
FERN COVE, INC.;	:	
RANDY BURKE, AND RANDALL KEY,	:	
Respondents	:	

DECISION

Appearances: James V. Blair, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Complainant;
Paul O. Clay, Jr., Esq., Fayetteville, West Virginia, for Respondents.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the complaint by the Secretary of Labor on behalf of Samuel W. Knotts under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that Mr. Knotts was discharged by the respondents on January 28, 1994, in violation of section 105(c)(1) of the Act. The Secretary seeks back wages and interest for Mr. Knotts as well as civil penalties against the respondents. Respondents maintain that Knotts was not discharged in violation of the Act, but rather was discharged because of his involvement in an allegedly unprotected 2 hour conversation with an outside mining engineer representing the land owners that respondents perceived to be negative and inflammatory in nature.

Pursuant to notice, an evidentiary hearing was held at Fairmont, West Virginia on January 19-20, 1995. Subsequently, both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record and considering the contentions of the parties, make this decision.

STIPULATIONS

The complainant and respondents have stipulated to the following:

1. The Coalbank Fork No. 12 Mine is a coal mine and is operated by Fern Cove, Inc.

2. Fern Cove, Inc. is a successor in interest to Tanglewood Energy, Inc. at the Coalbank Fork No. 12 Mine.

3. The products of the Coalbank Fork No. 12 Mine enter commerce and the Coalbank Fork No. 12 Mine is therefore subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter "the Mine Act").

4. The administrative law judge has jurisdiction to hear and decide this case.

5. The assessed violation history report may be used in determining an appropriate civil penalty.

6. For purposes of the assessment of civil penalties the violation history of Tanglewood Energy, Inc. at the Coalbank Fork No. 12 Mine shall be considered to be the violation history of Fern Cove, Inc. and vice versa.

7. Fern Cove, Inc. and Tanglewood Energy, Inc. are jointly and severally liable for all civil penalties assessed against either by the Federal Mine Safety and Health Review Commission relative to the Coalbank Fork No. 12 Mine.

8. Complainant Samuel Knotts was discharged by respondent on January 28, 1994.

9. Complainant Samuel Knotts was discharged because of respondent's belief that he spoke with mine engineer J. Randy Campbell for over 2 hours on January 27, 1994.

10. At the time of his discussion with mine engineer J. Randy Campbell on January 27, 1994, Complainant Samuel Knotts was the only representative of the respondents on the surface of the Coalbank Fork No. 12 Mine.

11. On September 1, 1993, Complainant Samuel Knotts testified on behalf of the Secretary in the case of Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc.

12. On January 25, 1994, Administrative Law Judge Arthur Amchan issued a decision ordering respondent to pay Perry Poddey over $9,000 in back wages as a result of the respondent's violation of section 105(c) of the Mine Act.

13. A news story about Perry Poddey's reinstatement with back pay appeared in the January 26, 1994 edition of the Clarksburg Telegram.

14. A news story about Perry Poddey's reinstatement with back pay appeared in the January 26, 1994 edition of USA Today.

15. Complainant Samuel Knotts engaged in protected activity under the Mine Act when he testified in the case of Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc.

16. Complainant Samuel Knotts engaged in protected activity under the Mine Act to the extent that he assisted mine safety and health inspectors in locating violations.

17. Complainant Samuel Knotts received $3,640 in unemployment benefits from the State of West Virginia since his termination by respondent on January 28, 1994.

18. Complainant Samuel Knotts is presently employed by the West Virginia Department of Highways and has been so employed since July 1, 1994, working 40 hours per week at a rate of $7.85 per hour. Prior to his full-time employment Mr. Knotts worked part time for the Department of Highways for 2 months.

19. At the time of his discharge by respondents, complainant was working 40 hours per week at the rate of $10.00 per hour plus occasional overtime at time-and-a-half.

FINDINGS OF FACT

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, relevant, and probative evidence establishes the following findings of fact:

1. Complainant Samuel William Knotts was employed as an outside man for the respondent, Tanglewood Energy, Inc. and Fern Cove, Inc. for approximately 3 1/2 years at the Coalbank Fork No. 12 Mine prior to his discharge on January 28, 1994.

2. Respondent Randy Burke is President of Fern Cove, Inc. and of Tanglewood Energy, Inc.

3. Respondent Randall Key is a part owner and officer of Fern Cove, Inc. and Vice-President of Tanglewood Energy, Inc.

4. Inspector Kenneth W. Tinney testified concerning two citations written in November of 1992, and another on January 6, 1993, for a repeat violation concerning a discharged cylinder on the belt fire suppression system. He discussed these violations with Knotts and Key, and after the November citations Knotts asked him not to use his name in discussing violations with the company anymore "because they 'kind of' blamed him for getting the citations." Key stated that he did not recall Tinney at any time mentioning an employee's name during discussions of safety violations, but Key admitted that he probably discussed the violations with Knotts because certain actions needed to be taken to correct the same and Knotts was the individual with the responsibility for checking the cylinder and had the responsibility to report any problems to Key.

5. Inspector Reed testified that on one occasion in July of 1993, when MSHA inspectors were having trouble reconciling training certificates with an outdated list of certified employees that was kept in the mine office, Knotts suggested they compare the training certificates to current time sheets that he pointed out to them. This resulted in Inspector Reed coming up

with four employees that had not received their training, for which he wrote a withdrawal order. Reed also testified that Knotts told him later on a return visit that he "got pretty well chewed out over the training records."

6. On August 10, 1993, Knotts made a verbal complaint to Inspector Reed of unsafe electrical practices that led to an electrical inspection of the mine. The electrical inspection resulted in a number of violations being issued. There was, however, no testimony that the respondents knew that the electrical inspection was a result of a complaint originating with Knotts.

7. Respondents were generally aware, however, that Knotts was particularly helpful in assisting mine safety and health inspectors in locating violations.

8. On September 1, 1993, Knotts testified on behalf of the Secretary in the case of Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc., 15 FMSHRC 2401 (ALJ) (1993). He gave testimony that directly supported the testimony of Perry Poddey, the complainant in that case, concerning who bore responsibility for repairing certain equipment. In his November 29, 1993 decision finding respondent Tanglewood Energy, Inc. guilty of violating section 105(c) of the Mine Act, Judge Amchan specifically cited Knotts' testimony as supporting his finding against the respondent on this issue, which Judge Amchan described as "[p]ossibly the most critical issue in th[e] case." Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc., 15 FMSHRC 2401, 2410-2411 (ALJ) (1993). On January 25, 1994, 3 days before Knotts was fired, Judge Amchan issued a Decision on Damages ordering Tanglewood Energy, Inc. to pay Perry Poddey over $9,000 in back wages and interest as a result of the respondent's violation of section 105(c) of the Mine Act.

9. A news story about Poddey's reinstatement with back pay appeared in the January 26, 1994 edition of the Clarksburg Telegram, and the January 26, 1994 edition of USA Today. The story was also reported on television.

10. Mine engineer J. Randy Campbell arrived at the Coalbank Fork No. 12 Mine on January 27, 1994, to conduct an inspection as a representative of the land owners of the property, or in his words "to investigate whether or not the operators were efficiently mining the coal and concerning their production."

11. Campbell's inspections, which generally lasted from 1 to 4 hours, usually included asking questions of rank and file miners like Knotts because he felt the information he obtained from rank and file miners tended to be more specific and more accurate. He would also usually ask rank and file miners about morale at a mine because of its correlation to production.

12. There is a lot of contention in the record concerning the length of the conversation between Campbell and Knotts on the morning of January 27, 1994. Respondents produced a lot of evidence that, if found credible, would tend to establish the conversation went on for 2 hours. On the other hand, the two participants to the conversation contend it was for no longer than 45 minutes, and was conducted, at least for a part of the time, while Knotts busied himself with other tasks around the mine office. During this time, they discussed the mine's violation history, the condition of the batteries on the ram cars; the bypassed electrical components on the mantrips, including the three-wheelers and four-wheelers and the fact that a lot of them were junk or needed substantial work to be repaired. They discussed morale issues generally, and they talked about management and problems with management, vacations, and the lack of vacation pay, as well as the fact that Messrs. Key and Burke were involved at other mines and that Key had not been working at this mine until the recent past few months. More particularly, they discussed Key and Burke's management style and Burke's new truck. The truck's relevance stems from the notion that if Burke could afford a new truck, he could also afford to give miners a paid vacation, which they had not had for the last 2 years. Apparently, the truck had become a "morale" issue at the mine, and Knotts thought it appropriate to pass that information to Campbell.

Interestingly, both Campbell and Knotts testified that Knotts stated at the time that he could be fired if management could hear his comments to Campbell. Mr. Key did hear those

comments via an open mike telephone line and as he predicted, Knotts was fired the next day. In order to resolve the timing issue, I find as a fact that the Knotts/Campbell conversation on January 27, 1994, lasted from 1 hour 15 minutes to 1 hour 30 minutes. In so finding, I have given the greater credibility to the disinterested witnesses. First of all, Mr. Campbell stated that he arrived at the mine between 7:30 a.m. and 8:30 a.m., and that at least 45 minutes elapsed after his arrival before he began his conversation with Knotts. He also stated that he finished his conversation with Knotts and left the mine somewhere between 9:00 a.m. and 9:30 a.m. Operating at the extremes of those limitations, I deduce the conversation could have been as long as 1 hour and 15 minutes. Secondly, Mr. Young, although he seemed uncertain and confused about some of the details of that morning, has the advantage of no longer working for the respondents and seemingly "has no dog in this fight." He estimated the time during which Key listened into the conversation on the open line telephone as "at least an hour and a half."

13. The decision to terminate Knotts was made by Key and agreed to by Burke. He was actually discharged at a meeting held in Key's office on January 28, 1994.

DISCUSSION AND CONCLUSIONS

The principles guiding the Commission's analysis of discrimination under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case in this manner, he nevertheless may defend affirmatively by proving that he also was motivated by the miner's unprotected activity and

would have taken the adverse action in question for the unprotected activity alone. 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

It is stipulated that Knotts engaged in protected activity under the Mine Act when he testified in the case of Secretary ex rel Perry Poddey v. Tanglewood Energy, Inc. and also to the extent that he assisted mine safety and health inspectors in locating violations. Furthermore, I find that his discussion with Campbell on January 27, 1994, also constituted protected activity under the Mine Act to the extent that Knotts made safety-related complaints to Campbell concerning the condition of equipment at the mine. I also find that the complaints were truthful. In fact, much of the mine equipment was in poor condition. The company had five golf carts (or four-wheelers) and none were operable at the time of Knotts' discharge. At the time of Campbell's visit, there was no ride available to bring him underground, a condition that had occurred at least once before. The ram cars had been brought over from another mine and had old worn out batteries that would not hold a charge. A number of vehicles were observed to have been rewired so that essential safety components were either bypassed or disconnected.

State Safety Instructor Thomas Bass and MSHA Inspector Virgil Brown testified at length as to the possible dangers these conditions posed, and Knotts himself described problems he and other employees had experienced with faulty equipment.

While the complainant need not possess any specific intent in making statements regarding safety or health in order for his statements to be considered protected activity, it is clear here that the complainant had a specific intent when relating certain information to Campbell. The complainant reasonably perceived Campbell to be an agent of the land owners who he thought would or could exert pressure, either directly or indirectly, on the respondents to improve safety at the mine. When the complainant was asked at the hearing what his purpose was in telling Campbell about the repeated electrical violations, the complainant responded that he thought the mining conditions would improve as a result of his having spoken up and that the working conditions at the mine would in turn become safer for the men. I find that

the complainant was motivated by the fact that he reasonably thought Campbell's communication with the land owner could positively influence safety at the mine.

The adverse action in this case was, of course, the discharge. It is stipulated in this record that the reason for the discharge was his conversation with Campbell. Thus, there is a clear nexus between one of the instances of protected activity and the adverse action. The nexus between the other two instances of protected activity and the adverse action is less clear. I find a very fragile connection, if any; perhaps I would liken it to background noise that maybe set the scene for Knotts' discharge. The earlier incidents involving MSHA inspectors are very remote in time to complainant's discharge and are not more than peripherally relevant or material to the discharge itself. With regard to his testimony in the Poddey case, it also is relatively remote in point of time. He testified on September 1, 1993, and the decision on the merits was issued November 29, 1993.

In any event, Knotts' discharge was motivated at least in part by his protected activity and therefore, I find that the complainant has made out a prima facie case of discrimination under the Mine Act. I also find that the respondents are unable to rebut this prima facie case by showing that no protected activity occurred or that adverse action was in no way motivated by the protected activity. The preponderance of the evidence is clearly to the effect that Knotts' engaged in protected activity and that his discharge was motivated at least in part by that protected activity.

When a prima facie case is established, a respondent may defend affirmatively by showing that it was also motivated by an unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Of course, the respondent bears the burden of proof with regard to this affirmative defense. Haro v. Magma Copper, 4 FMSHRC 1935 (1982).

Respondents here argue that complainant's discussion with Campbell contained both protected and unprotected aspects and that complainant was discharged for the unprotected aspects, alone.

There are two distinct problems the respondents had with this conversation. First, it was too long. And secondly, it was personally slanderous to both Key and Burke, at least in part.

With regard to the first, I have found it was 75 to 90 minutes long. The Secretary makes an excellent point in his brief to the effect that however long it was, respondent Key condoned that activity. He stated that the underground phone could have been used to call the surface at any time during the conversation. According to his testimony, he easily could have pressed down the button on the phone after the first 5 minutes of the discussion, and told the complainant to get back to work. Key's inaction is no different than if he was on the surface, saw Knotts talking to Campbell and did nothing to terminate the conversation. Moreover, for whatever amount of time he spoke to Campbell, the complainant was essentially doing his job. He was the only employee on the surface at the time Campbell visited the mine and his job duties included answering questions of more or less "official" visitors, like Campbell. It was Campbell who initiated the discussion with complainant, as he had done on previous occasions. He began questioning complainant because respondents had not been able to provide him with a ride underground, he was not satisfied that he had received sufficient information from respondents over the phone to prepare his report, and because he believed that complainant was as knowledgeable about mine operations as anyone else at the facility. And most of what the complainant stated was in the form of embellished responses to questions put to him by Campbell.

Turning to the content of the conversation, it is true that certain portions of what Knotts was passing on to Campbell could be characterized as "gossip" and inflammatory language at that. However, I find that in the context of the coal mining industry this was pretty mild stuff compared to many other cases which come before the trial judges of this Commission. I therefore conclude that the unprotected portions of the Knotts/Campbell conversation could not reasonably have formed the basis for Knotts' discharge without more.

On balance, I find that the respondents did not meet their burden of proving the affirmative defense.

Accordingly, I conclude that respondent terminated complainant's employment on January 28, 1994, in violation of section 105(c) of the Mine Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Within 15 days of this decision, the parties shall confer in an effort to stipulate the amount of complainant's back pay due, interest on that amount, and litigation costs as well as a reasonable civil penalty for the violation found herein, considering the six statutory criteria contained in section 110(i) of the Mine Act. Such stipulation as to damages shall not prejudice respondent's right to seek review of this decision. If the parties agree on damages, the Secretary shall file a stipulated proposed order on damages within 30 days of this decision. If the parties do not agree, the Secretary shall file a list of mutually agreed upon trial dates for a further hearing on the issue of damages, including the civil penalty to be assessed herein.

2. Respondents shall expunge any reference to his January 28, 1994 discharge from Mr. Knotts' personnel file maintained by the company.

3. This decision will not become final until a subsequent order is issued concerning damages and penalty.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 21 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 95-1-D
on behalf of	:	MSHA Case WILK CD 94-01
WILLIAM KACZMARCZYK,	:	
Complainant	:	Ellangowan Refuse Bank
v.	:	No. 45
	:	
READING ANTHRACITE COMPANY,	:	
Respondent	:	

DECISION ON THE SECRETARY OF LABOR'S MOTION TO ENFORCE THE ORDER OF TEMPORARY REINSTATEMENT

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for Respondent.

Before: Judge Amchan

Background

On October 15, 1993, Complainant, William Kaczmarczyk, was transferred from a light duty position at Respondent's mine to workers compensation status. He filed a complaint with the U.S. Department of Labor alleging that this action was taken in retaliation for his activities as a walkaround representative during an MSHA inspection that was completed on October 14, 1993.

The Secretary filed an application for temporary reinstatement with the Commission. Respondent requested a hearing on this application and, on September 12, 1994, I ordered Complainant temporarily reinstated. In my order I stated that "Mr. Kaczmarczyk's position, including financial compensation and benefits, must be no worse than it would be had he not been placed on compensation status on October 18 (sic), 1993," 16 FMSHRC 1941, 1947.

I further stated, in a footnote, that, "[r]espondent could not, for example, recall Complainant to work and require him to perform tasks which he is incapable of doing," 16 FMSHRC 1941, 1974, n. 7. On April 26, 1995, prior to the issuance of my decision in the discrimination proceeding, the Secretary filed an emergency motion to enforce the temporary reinstatement order. That motion alleges that between April 17 and 20, 1995, Complainant was assigned tasks that were beyond his physical limitations in violation of my September 12, 1994 order.

The motion further alleges that Mr. Kaczmarczyk left the mine site on April 20, 1995, because he was unable to continue to work due to the stress to which he was subjected by being repeatedly ordered to perform work that was beyond his physical capabilities (Secretary's motion page 4, paragraph No. 5). The Secretary contends that Respondent constructively suspended[1] Mr. Kaczmarczyk on April 20, 1995.

A hearing was held on the Secretary's motion on May 19, 1995, at which the undersigned and the parties concluded that I would retain jurisdiction over the Secretary's motion to enforce the temporary reinstatement order after issuance of my decision on the discrimination complaint. A decision on the liability portion of the discrimination complaint was issued on May 24, 1995. In that decision, I concluded that Complainant's October 15, 1993, transfer was discriminatory. The matter is pending before me on the questions of damages and the assessment of a civil penalty.

Findings of Fact

One of the buildings at Respondent's facility is a scale house. This is a two story structure, one above ground and one below ground. The lower level is adjacent to a rectangular area that lies beneath a large scale used to weigh loaded trucks before they leave Respondent's wet silt processing plant (Tr. 10-17, Sec. Exhs. EM-1, EM-2).

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[1]At the time the motion was filed Complainant was still off of work. He returned to work on May 1, 1995, after missing 6-1/2 days, for which he has not been paid (Tr. 146-47).

In early spring of 1995, Respondent decided to repair the scale. The week before April 17, Complainant accompanied a repairmen who went underneath the scale. They found several inches of water on the floor beneath the scale which they pumped out. They also found mud on the floor around the concrete pillars that support the steel rods of the weighing mechanism. At least one of these rods was broken (Tr. 37-48).

On the morning of April 17, 1995, Foreman David Kerstetter, acting upon instructions from Respondent's General Manager, Frank Derrick, ordered Complainant to clean the mud out from underneath the scale so that Respondent's repairman would have a clear accessway to the broken components (Tr. 214-19, 266-74). Complainant told Kerstetter that the task was beyond his physical capabilities (Tr. 52)[2].

Kerstetter described that mud as a fine coating of 1 to 2 inches in thickness, covering parts of an area approximately 15 feet wide, and 25 to 30 feet in length (Tr. 270-75). Kaczmarczyk described the mud as being generally 2 to 4 inches in depth and covering an area 12 to 15 feet in width and 50 to 60 feet in length (Tr. 37-39, 48). The two men agree that the mud would have to be shoveled into 5-gallon buckets and carried up the stairs to ground level on numerous trips (Tr. 52-54, 274-75, 228 [Prior to April 20, General Manager Derrick envisioned the mud being brought outside in buckets]).

Upon Kaczmarczyk's refusal to perform the task, Kerstetter consulted General Manager Frank Derrick and Safety Director David Wolfe. Wolfe instructed him to tell Kaczmarczyk to do whatever he was capable of doing (Tr. 255-56).

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[2]Kaczmarczyk's physical limitations are indicated in the Secretary's Exhibit No. 5 introduced at the Temporary Reinstatement Hearing. He underwent a cervical spinal fusion in late 1991, and also has lower back pain (See e.g., Exh. R-6). In January 1992, his physician indicated that occasional bending, squatting, stooping, kneeling, crouching, pushing, pulling, and handling are within Complainant's physical capabilities. Lifting and carrying up to 20 lbs are also within his limits. Other physical demands were not evaluated.

On Wednesday, April 19, 1995, Kaczmarczyk and Robert Sabaday, another light duty employee, were assigned to clean up the mud below the scale (Tr. 66-67, 178). They pumped water out of the lower level of the scale house, cleaned the steps, and then attempted to clear mud from a passageway leading to the room beneath the scale (Tr. 69-72). Sabaday tried to shovel the mud into buckets but found this too difficult (Tr. 183). He then shoveled a path through the mud, placing it in piles (Tr. 188). Kaczmarczyk used a broom to sweep the path behind him and also used a dryer on the path (Tr. 185).

Foreman Kerstetter visited this area twice on the morning of April 19. He admitted to Sabaday that he did not realize how much mud there was underneath the scale, and in the passageway leading to it (Tr. 187). Sabaday told Kerstetter that it was too difficult to carry the mud out in buckets (Tr. 187, 191); Kerstetter instructed the two miners to do what they were able to do (Tr. 187).

On Wednesday, after observing Complainant and Sabaday, Kerstetter informed Respondent's General Manager, Frank Derrick, that cleaning the mud from under the scale was a difficult job (Tr. 225). Respondent then abandoned its attempt to remove all the mud from under the scale (Tr. 158, 284), and decided to concentrate on clearing an area in front of the broken scale components (Tr. 284-85). Derrick decided that on Thursday, Respondent would have to accomplish this scaled-down task by means other than carrying the mud out from under the scale in buckets (Tr. 225-26).

Derrick decided to use a grade-all, a large construction vehicle, to clean the mud out from under the scale (Tr. 226). He instructed Kerstetter to assign Mr. Kaczmarczyk to clean papers and wood in the scale house office on the building's upper floor (Tr. 226-27). Mr. Sabaday was given an unrelated assignment for April 20.

On April 20, 1995, miner Paul Houser drove the grade-all to the scale. Kaczmarczyk guided Houser over the scale and Houser dug a hole alongside the scale with his equipment (Tr. 308). This hole was intended to facilitate the removal of mud and water from below the scale (Tr. 88-93).

Shortly thereafter Foreman Kerstetter arrived. Kerstetter told Kaczmarczyk to shovel the dirt left by Houser's machine off the scale. This dirt was 2 to 3 inches in height and extended the length of the scale, possibly a distance of 60 feet. Kaczmarczyk told Kerstetter that this task was also beyond his physical limits (Tr. 94-98). Houser cleaned the dirt off the scale with the grade-all(Tr. 313-14).

Kaczmarczyk then went down the steps to the lower level of the scale house to continue sweeping (Tr. 98-99). Kerstetter followed him and asked him to make a path to the scale components with a shovel (Tr. 100). Kerstetter took a shovel and demonstrated to Kaczmarczyk how he thought this task should be accomplished (Tr. 101-104)[3]. Complainant took offense to this

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[3]Kerstetter denies that he ordered Kaczmarczyk to shovel mud under the scale on April 20, 1995, and contends that he demonstrated how Complainant should shovel on April 19, not April 20 (Tr. 288-291). I credit Complainant's testimony on these matters over that of Foreman Kerstetter.

Although Kerstetter may not have ordered Kaczmarczyk to work underneath the scale, I find that he did join Complainant at the lower level of the scale house on April 20. After watching the grade-all, Kerstetter concluded that the mud could not be removed by this machine (Tr. 289). Having been told by Derrick to have a path cleaned underneath the scale and having no other means of accomplishing this task, I conclude that Kerstetter renewed his request of Complainant that he shovel a path through the mud.

As to the shoveling demonstration, I rely on the fact that Kerstetter admits to making such a demonstration (Tr. 291-93), that Kerstetter's contemporaneous log for April 19 mentions no such demonstration (Tr. 304), while Kaczmarczyk's contemporaneous notes for April 20 do mention the incident (Tr. 165-66). Additionally, Mr. Sabaday, who was with Kaczmarczyk and Kerstetter on April 19, recalls no such event (Tr. 201). Moreover, a demonstration of April 20 is consistent with a turn of events in which Kerstetter's only available means of making a path to the broken parts was to have Complainant make one with a shovel since Sabaday was no longer present to do the shoveling.

request and the manner in which it was made (Tr. 101-02). Kaczmarczyk told Kerstetter that Kerstetter was harassing him, and that he would file "charges" against him (Tr. 104-105).

Kerstetter left the area and Complainant called his wife (Tr. 105-07). He told her that because of the harassment he was subjected to he was unable to eat (Tr. 106-110). After another phone call, Complainant decided that he should leave the worksite (Tr. 110, 172-74). He did not return until May 1, 1995.

Respondent violated the terms of the temporary reinstatement order on April 17 and April 19, 1995

I conclude that the assignment given to Kaczmarczyk on April 17 and 19, 1995, was beyond his physical capabilities and violated the temporary reinstatement order. Kerstetter's testimony that on April 19 Respondent abandoned the goal of cleaning the entire area beneath the scale (Tr. 284), and had decided to clean up only a 4-foot by 4-foot area, confirms Complainant's assertion that the task assigned on the 17th and the morning of the 19th was far more extensive (see Sabaday's testimony at Tr. 187-92, 199-200).

Mr. Kaczmarczyk is prohibited from doing repetitive bending and twisting, particularly while carrying weight such as wet mud on a shovel (Tr. 265). Mr. Sabaday's testimony confirms that the task, as originally assigned, was beyond Kaczmarczyk's physical capabilities (Tr. 187-191).

Up until Kerstetter talked to Sabaday on the morning of April 19, Respondent contemplated having the mud carried up to

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fn. 1 (continued)

Finally, I simply do not believe that Kaczmarczyk made up a story about discussing shoveling with Kerstetter on the lower level of the scale house on April 20. Something occurred precipitating Kaczmarczyk's departure from the mine site on that morning. I conclude that it is more likely that his departure was caused by a dispute over the mud beneath the scale, which was likely to recur, than over the dirt on top of the scale which would not likely be an issue in the future.

ground level and outside the scale house in 5-gallon buckets (Tr. 228). Although I credit Respondent's witnesses that they continually told Kaczmarczyk to do only what he could do, I conclude that such advice was essentially meaningless in the context in which it was given. There was no way that Complainant could reasonably expect to accomplish the task assigned by doing only what he was capable of doing.

General Manager Derrick instructed Kerstetter to have the mud cleaned up. Although Derrick testified there was no hurry (Tr. 216-17), the record does not indicate that anybody conveyed to Complainant that he had an infinite amount of time to accomplish this task. Indeed, Sabaday was given the impression that the area had to be cleaned right away so that the scale could be repaired (Tr. 199).

Thus, I conclude that Kaczmarczyk was fully justified in regarding the admonitions to just do what he could as a subterfuge to pressure him to do tasks beyond his restrictions. Moreover, it is doubtful that a person with Complainant's restrictions could have tolerated the extensive number of trips up the stairs of the scale house with small buckets of wet mud that were needed to accomplish the task as originally assigned.

Complainant was not constructively discharged or suspended on April 20, 1995

On April 20, 1995, Kerstetter again asked and pressured Kaczmarczyk to shovel wet mud, albeit from a much smaller area than on the previous two days and possibly by pushing it out of the way, rather than by picking it up. He may also have suggested that Complainant shovel the mud in buckets because after Kerstetter realized the grade-all could not remove the mud from underneath the scale, he had no alternative means of accomplishing the task given to him by General Manager Derrick.

For purposes of this decision, I conclude it is unnecessary to determine exactly what Kerstetter told Kaczmarczyk to do on April 20. As on April 17 and 19, Complainant never performed any of the tasks to which he objected (Tr. 153). Moreover, he was never threatened with any form of discipline for not doing these tasks (Tr. 153). Although Mr. Kaczmarczyk has availed himself of his union's grievance procedure on several occasions, and has

represented other miners in processing grievances, he did not file a grievance regarding his dispute with Respondent over his ability to clean the mud under the scale (148-50).

Complainant was clearly very upset by the events of April 17-20, 1995. He contends that he was so upset that he could not eat and left work on April 20, due to what he perceived was constant harassment.

The issue in the instant case is not whether Mr. Kaczmarczyk was sufficiently upset to leave work, but whether conditions were so intolerable that a reasonable miner would have felt compelled to leave work, Secretary on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2210 (November 1994); Simpson v. FMSHRC, 842 F.2d 453, 461-63 (D.C. Cir. 1988).

In analyzing the instant case, I have paid particular attention to a decision by the United States Court of Appeals for the Third Circuit in Clowes v. Allegheny Valley Hospital, 991 F.2d 1159 (3d Cir. 1993), cert. denied 114 S. Ct. 441, 126 L. Ed. 2d 374. I do so not only because of the analogous factual situation, but because the instant case also arises in the Third Circuit.

In Clowes the court reversed an award entered in a case arising under the Age Discrimination in Employment Act, finding insufficient evidence to establish constructive discharge. Clowes, a nurse for 30 years at Allegheny Valley Hospital, alleged that excessive supervision by a new and much younger supervisor caused her to become so depressed that she resigned. The court of appeals opined that unfair and unwarranted treatment does not necessarily constitute a constructive discharge and that an employee's subjective perception does not control the resolution of a constructive discharge claim.

As in the instant case, Clowes was never threatened with discharge or any other adverse action. She never advised the hospital that she would resign if conditions did not change and never filed a grievance under her collective bargaining agreement.

As the court notes, such factors may not be necessary to establish a constructive discharge in all cases. However, in the instant case, I conclude that a reasonable miner in

Mr. Kaczmarczyk's situation, who had not been threatened with discipline and who regularly avails himself of the grievance procedure, would not leave work on April 20, 1995, and refuse to return to work until May 1.

In reaching this conclusion, I am influenced by the fact that several less drastic alternatives were available to Complainant. He could have filed a grievance and continued to refuse to do work beyond his physical capabilities. Moreover, Complainant could have petitioned the undersigned for an order enforcing the temporary reinstatement order without leaving work.

Respondent requested that Complainant shovel mud on three days. Foreman Kerstetter may have been less than pleasant in responding to Kaczmarczyk's refusals to do so. However, Kerstetter did not stand over Complainant and continually berate him. At worst, he made an uncomplimentary remark and left the area in which Kaczmarczyk was working. I conclude that the working conditions to which Complainant was subjected were not intolerable.

In conclusion, I find that Respondent did violate the terms of the temporary reinstatement order by ordering Complainant to shovel mud under the scale on April 17 and 19, and bring it to ground level by carrying it up a flight of stairs in buckets. It may have also violated the terms of the order on April 20. However, conditions were not intolerable for a reasonable miner in Complainant's situation. Therefore, I conclude that Mr. Kaczmarczyk was not constructively suspended.

ORDER

Having found that Respondent did not constructively suspend Complainant on April 20, 1995, I find that Complainant is not entitled to any relief for the violations of the temporary reinstatement order that occurred.

Arthur J. Amchan
Administrative Law Judge

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JUN 2 2 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-16
Petitioner	:	A. C. No. 36-01301-03685
v.	:	
	:	Dunkard Mine
DUNKARD MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

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 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $1949 to $780 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

CITATION NO.	INITIAL ASSESSMENT	PROPOSED SETTLEMENT
9952804	$ 309	$ 124
3672157	168	67
3672159	168	67
3672160	220	88
3672363	267	107
3672364	267	107
3672365	204	82
3672366	168	67
3672367	178	71
TOTAL	$ 1949	$ 780

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $780 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

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JUN 22 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-216
Petitioner	:	A.C. No. 46-01453-04117
v.	:	
	:	Docket No. WEVA 94-328
	:	A.C. No. 46-01453-04128
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Humphrey No. 7 Mine

DECISION

Appearances: Elizabeth Lopes, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). Docket No. WEVA 94-216 involves a proposed civil penalty of $2596 for two 104(a) citations that were designated as significant and substantial. With respect to Docket No. WEVA 94-328, the Secretary has proposed a civil penalty of $21,500 for a 104(d)(1) citation and two 104(d)(1) orders allegedly attributable to the respondent's unwarrantable failure. Thus, the total proposed civil penalties in these matters is $24,096. As noted below, the parties have agreed to settle these proceedings for a total civil penalty of $11,445.

These matters were heard on May 11 and May 12, 1995, in Washington, Pennsylvania. At the commencement of the hearing,

the parties informed me that they had settled the two citations in Docket No. WEVA 94-216 and 104(d)(1) Citation No. 3305270 in Docket No. WEVA 94-328.

Docket No. WEVA 94-216

The settlement motion presented on the record reflects that Citation No. 3304293 was issued on January 24, 1994, for a violation of the mandatory safety standard in section 75.333(b)(4), 30 C.F.R. § 75.333(b)(4), This standard requires separation of the primary escapeway from the belt and trolley haulage entries. The citation was issued because of alleged defective permanent stoppings between the primary escapeway and the trolley haulage entry. The settlement terms include deletion of the significant and substantial designation from this citation because it was unlikely that smoke contamination would occur in the primary escapeway in the event of a fire given the conditions observed by the issuing MSHA inspector. Thus, the parties agreed to a reduction in the proposed penalty from $1,298 to $507.

Citation No. 3304294 was issued on January 24, 1994, for an alleged inadequate preshift examination in violation of section 75.360(a), 30 C.F.R. § 75.360(a). The parties agreed to a reduction in civil penalty from $1,298 to $794 due to a reduction in the gravity associated with this violation. Consequently, the parties seek to reduce the total proposed civil penalty in Docket No. WEVA 94-216 from $2,596 to $1,301.

Docket No. WEVA 94-328

At the beginning of the hearing the parties informed me that the respondent has agreed to pay the $6,000 proposed penalty for 104(d)(1) Citation No. 3305270. 104(d)(1) Order Nos. 3305280 and 3305605 were issued between 10:30 a.m. and 12:30 p.m. on January 10, 1994, for violation of section 75.370(a)(1), 30 C.F.R. § 75.370(a)(1), as a result of the respondent's alleged failure to follow its approved ventilation plan, and, for alleged impermissible accumulations of coal dust in violation of section 75.400, 30 C.F.R. § 75.400. Both citations were issued shortly after the respondent had noted these violative conditions in its preshift examination book sometime before 7:00 a.m. on the morning of January 10, 1994.

After the presentation of the Secretary's direct case with respect to Order No. 3305605, I expressed concern regarding the issue of unwarrantable failure in situations where Mine Safety and Health Administration (MSHA) inspectors observe violative conditions during the shift immediately following the notation of such conditions by the preshift examiner. Obviously, an operator is subject to a citation if a mine inspector observes a violation shortly after the condition is noted by the preshift examiner. However, in such circumstances, an operator must be afforded a reasonable period of time to correct conditions observed during the preshift examination before the failure to take remedial action can be construed as the requisite "inexcusable" or "unjustifiable" conduct necessary to sustain an unwarrantable failure charge. See Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987).

For example, in the instant case, the respondent commenced cleanup of the coal dust accumulations at approximately 10:30 a.m. after notations made in the preshift examination book at approximately 7:00 a.m. The testimony did not establish the cleanup was motivated by the presence of the MSHA inspector on mine property. Moreover, there was no evidence that these accumulations had been ignored in that the preshift report reflected the area had been rock dusted on Friday, January 7, 1994, the preceding production shift prior to the pertinent Monday, January 10, 1994, preshift examination.

In addition, the thrust of the Mine Act's 104(d) unwarrantable failure provisions is to discourage repetition of an operator's high negligence by placing the operator on a probationary chain buttressed by the threat of a withdrawal order. Greenwich Collieries, 12 FMSHRC 940, 945 (May 1990). Thus, the withdrawal of miners pursuant to a 104(d) order is a consequence of the operator's repeated high degree of negligence rather than the existence of an extremely hazardous condition. In fact, operators responsible for violations cited in 104(d) orders would normally be permitted a reasonable abatement period without the necessity to withdraw or otherwise cease mining operations if the violative condition was cited under section 104(a) of the Act. Thus, 104(d) withdrawals must be distinguished from withdrawal orders under the imminent danger

provisions of section 107(a) of the Act that relate to extremely hazardous conditions.

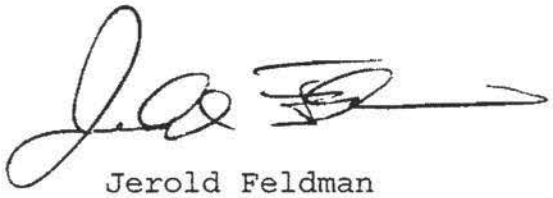
In this case, the absence of malfunctioning rollers, inoperable dust suppression water sprays, hot embers, or, an identifiable source of ignition in close proximity to the cited accumulations, are mitigating circumstances that do not add up to reckless continued mining operations in the face of an extreme danger. MSHA's use of the 104(d) withdrawal of personnel as evidence of a dangerous condition indicative of high negligence is the functional equivalent of the tail wagging the dog as a 104(d) withdrawal, alone, is not evidence of exigent circumstances warranting the immediate withdrawal of miners. Neither is the 2 1/2 hour delay in attempting to remove the accumulations necessarily indicative of aggravated conduct on the part of the respondent.

Upon expressing concerns regarding the applicability of the unwarrantable failure findings in this case, the parties were invited to confer for the purposes of settlement during a brief recess. Upon reconvening, the parties advised that they had reached an agreement on the remaining two orders. The parties agreed to retain the significant and substantial designations for the cited violations. However, the parties agreed to modify Order Nos. 3305280 and 3305605 to 104(a) citations thus removing the unwarrantable failure charges. Consequently, the parties seek to reduce the civil penalty from $6,500 to $2,072 for each of these modified citations.

ORDER

This decision formalizes the approval of the parties' settlement motion with respect to all of the matters in issue. The motion was approved because the settlement terms are consistent with the civil penalty criteria contained in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, **IT IS ORDERED** that the respondent, Consolidation Coal Company, pay a total civil penalty of $11,445 comprised of a civil penalty of $1,301 in Docket No. WEVA 94-216 and $10,144 in

Docket No. WEVA 94-328. Payment shall be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, these docket proceedings **ARE DISMISSED**.



Jerold Feldman
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 23, 1995

D. H. BLATTNER & SONS, INCORPORATED, Contestant	:	CONTEST PROCEEDING
	:	Docket No. CENT 95-121-RM
	:	Mine ID 29-00233
v.	:	
	:	Continental Pit
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On February 17, 1995, the contestant filed a notice of contest alleging it was given a verbal order by an inspector of the Mine Safety and Health Administration (hereafter referred to as "MSHA"), to comply with 30 C.F.R. § 41.20 or be shut down. The regulation requires operators to file a notification of legal identity with the appropriate MSHA district manager. The contestant argues that because it is an independent contractor, the regulation should not be applied to it. According to the contestant, it is a party in other cases now on appeal before the Commission which present the same issue. Those cases involve a different mine and operator.[1]

On March 9, 1995, an order was issued directing the Solicitor to file a response to the notice of contest. On April 6, 1995, the Solicitor filed a motion to dismiss, denying that a verbal order had been issued for failure to file a legal identity report. The Solicitor further asserts that on January 10, 1995, MSHA issued a citation to the contestant under section 104(a), 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 41.20. The Solicitor states that the contestant did not seek review of the citation and that this contest is an attempt to confer jurisdiction upon the Commission with respect to it. The instant complaint however, makes no mention of the January 10 citation. After receiving the Solicitor's motion to dismiss, the contestant filed a brief alleging that it had not been served with such a citation.

With respect to the alleged January 10 citation, it is noted that section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides an operator with dual avenues of relief. An operator may within

[1] Docket Nos. WEST 93-123, WEST 93-286, and WEST 94-5-M.

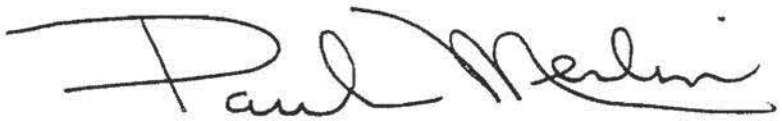
30 days of the receipt thereof contest the issuance or modification of any order or citation. 29 C.F.R. §§ 2700.20, 2700.21. In addition or as an alternative, the operator may wait until the Secretary notifies it of a proposed penalty assessment for the alleged violation and then file a notice of contest. 29 C.F.R. §§ 2700.25, 2700.26. In this case if a penalty assessment is proposed with respect to the January 10 citation, the operator can challenge the citation and the assessment at that time and raise the issue of service.

The Commission has no jurisdiction to review the alleged verbal order issued on January 18, 1995, by an MSHA inspector requiring it to obtain a legal identity number or be shut down. Section 104 of the Act, supra, sets forth the conditions under which the Secretary may issue citations to operators for violations of the Act and thereafter issue orders of withdrawal. Citations are expressly required to be in writing and it is clear the Act contemplates that orders issued after the citations also be in writing. The legislative history of the Act demonstrates that citations and orders are treated the same. S. Rep. No. 461, 95th Cong., 1st Sess. 47 (1977), reprinted in, Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1325 (1978). Section 109 of the Act, 30 U.S.C. § 819, provides, inter alia, that orders and citations be posted on a bulletin board at the mine. Also, Commission regulations require that a legible copy of the contested citation or order be attached to the operator's notice of contest and that if a legible copy is not available, the text of the citation or order be set forth in the notice of contest. 29 C.F.R. § 2700.20(e). To comply with the posting and filing provisions, the citation or order must be in writing.

Accordingly, even assuming the operator received a verbal order as it alleges, such an order would be of no effect because it was not in writing. No penalty assessment can be based upon an oral communication. If the operator disagrees with an inspector's verbal communications, it may wait until the inspector completes and serves a written order. Then it can abate the order to avoid the effects of a withdrawal order and seek review before the Commission. If the operator decides not to abate, in which case the withdrawal order takes effect, it may seek expedited review before the Commission. Section 105(d), supra; 29 C.F.R. §§ 2700.20, 2700.52. An administrative agency is a creature of Congress and cannot exceed the jurisdiction given to it by Congress. Lyng v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993). The Commission has followed this principle. Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). Under section 105(d), supra, the operator can seek review of an order

or citation issued under section 104 and the Commission is directed to afford an opportunity for a hearing under 5 U.S.C. § 554. Since any order or citation issued under section 104 must be in writing, the Commission's jurisdiction extends only to such orders and citations.

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



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 26 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-190-M
Petitioner	:	A.C. No. 47-00792-05508
v.	:	
	:	Cedar Lake Sand & Gravel Pit
CEDAR LAKE SAND & GRAVEL,	:	
Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Petitioner;
Bruce Gilbert, President, Cedar Lake Sand & Gravel Co., Hartford, Wisconsin, for the Respondent.

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of a Penalty filed by the Secretary of Labor alleging a violation by Cedar Lake Sand & Gravel Company, Incorporated ("Cedar Lake") of 30 C.F.R. § 56.16006 and 30 C.F.R § 56.2003(a). Pursuant to notice, the case was heard in Milwaukee, Wisconsin, on May 31, 1995.

Findings of Fact and Discussion

Violation of 30 C.F.R. § 56.16006

On June 22, 1994, Robert Taylor, an MSHA Inspector [1], inspected the Cedar Lake Sand and Gravel Pit (Cedar Lake Pit), a

[1]Taylor retired as an MSHA Inspector on December 31, 1994.

sand and gravel operation located in Washington County Wisconsin. Taylor observed a compressed gas cylinder that was attached to a portable cart, and located outside adjacent to a shack where gas and grease were stored. The cylinder was not covered. Taylor issued a citation alleging a violation of 30 C.F.R. § 56.16006, which provides as follows: "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use."

Cedar Lake did not present any testimony to impeach or contradict the testimony of Taylor that the cylinder was not covered. Further, the parties stipulated that the cylinder "was being stored," (Joint Stipulation 1, Paragraph 8(a)). Clint Gerlach, Cedar Lake's Foreman, testified that in the past MSHA inspectors only examined those cylinders located in a storage facility to see if they were covered. He said that the cylinder at issue was set up for use, and that to the best of his recollection cylinders are used daily. He could not remember when the cylinder at issue had last been used prior to June 22, 1994. He indicated that when a cylinder is put to use, a regulator is installed. The cylinder at issue had such a regulator. Gerlach indicated that in his more than 18 years experience he had not been aware of the need to cover cylinders that had regulators installed on them.

Based upon the uncontradicted testimony of Taylor, I find that the cylinder in question was not covered. Further, the parties have stipulated that it was being stored, and there is no evidence that it was in use. Indeed, Gerlach could not recall when it was last used. I thus find that Cedar Lake did violate section 56.16006, supra. I note Respondent's allegation that MSHA in the past had not cited Cedar Lake for not covering its cylinders that were not stored in the storage area. I find this allegation not to be a defense to the violation of Section 56.16006, supra (see U.S. Steel Mining Co., Inc., 15 FMSHRC 1541, 1546-1547 (1993)).

Taylor explained that should the valve of the cylinder be knocked off as a consequence of its not being covered, the cylinder then would become like a missile, and could cause serious injuries, a fire, or an explosion. However, the gravity of the violation is mitigated to some degree by the fact that the cylinder was secured to a cart. Also, I find credible Gerlach's

testimony that until the instant citation was issued, he, in good faith, was not aware that cylinders not stored in the storage area had to be covered. I thus find Cedar Lake's negligence to have been mitigated somewhat. Considering these factors, as well as the remaining factors set forth in Section 110(i) of the Act as stipulated to by the parties, I conclude that a penalty of $200 is appropriate.

Violation of 30 C.F.R § 56.20003(a)

On June 22, 1994, as Taylor continued his inspection, he climbed up a flight of stairs to a catwalk (walkway) that led to a sizing screen. A handrail was located on one side of the walkway. There was a toe plate approximately 2 inches high on the edge of the walkway. Taylor testified that he observed a buildup of rocks on the walkway. According to Taylor, the rocks and the accumulated rocks were 8 inches deep, and covered the entire walkway.

Taylor issued a citation which initially alleged a violation of 30 C.F.R. § 56.11001, but which was amended on June 27, 1994, to instead allege a violation of 30 C.F.R. § 56.20003(a). Section 56.20003(a), supra, provides that at all mining operations, "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." Gerlach, who was present with Taylor, testified regarding the accumulation of rocks as follows: "I don't think it was quite 8 inches" (Tr. 90). He opined that, due to the presence of a 2 1/2 inches high toe plate on each side of the edge of the walkway it was not likely that the material accumulated 8 inches. However, since Gerlach indicated that he was not on the walkway on the day the citation was issued, I find that his testimony is inadequate to impeach or dilute the testimony of Taylor based upon his actual observations. I thus find that, based upon Taylor's testimony, the walkway did have an accumulation of rocks. According to Gerlach and Tony Wagner, the crusher plant operator, no one works on the walkway when the plant is in operation. However, the walkway is the means of access to the sizing screen. A miner uses the walkway once a day to access the screen in order to grease it and observe its condition. Also, the walkway provides access to the screen, when its cloth has to be changed. I thus find that the walkway, which is the means of access to the screen, is a passageway as that term is commonly understood. In

this connection, I note the following definition of the term passageway as set forth in Webster's Third New International Dictionary (1986 edition): "[a] way that allows passage to or from a place or between two points." Since the walkway is considered a passageway, and since it contained an accumulation of rocks to the extent testified to by Taylor, I conclude that Cedar Lake did violate Section 56.20003(a), supra.

Taylor noted footprints in the dust on the floor of the walkway. He also noted dust on the accumulated rocks. He opined that the accumulation of rocks had existed for at least a day. On the other hand, Wagner testified that each morning he checks the screen, and cleans the walkway. Gerlach testified that earlier in the day Wagner had told him that when Taylor had issued his citation, clay had covered up the holes on the screen causing the materials on the belt feeding the screen to fall on the walkway. Also, Gerlach indicated that, in general, crushers produce dust which extends about 1000 feet from the crushers. In this connection, he noted that the walkway at issue was located approximately 15 feet from two crushers. Based upon this essentially uncontradicted testimony, I find that the level of Cedar Lake's negligence to have been mitigated to some degree. According to Taylor, a person walking to the screen on the walkway while carrying tools or other materials could have tripped on the accumulated rocks causing a sprain or a bruise. I thus find the violation was only of a moderate degree of gravity. I find that a penalty of $150 is appropriate for this violation.

ORDER

It is ORDERED that Cedar Lake pay a civil penalty of $350 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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Bruce Gilbert, President, Cedar Lake Sand & Gravel Co., Inc., Route #2, Hartford, WI 53027 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 27 1995

SOUTHMOUTAIN COAL, INC.	:	CONTEST PROCEEDINGS
	:	
AND	:	Docket No. VA 93-108-R
	:	Citation No. 4257501; 5/26/93
WILLIAM RIDLEY ELKINS,	:	
Contestants	:	Docket No. VA 93-109-R
	:	Order No. 4257502; 5/26/93
v.	:	
	:	Docket No. VA 93-110-R
SECRETARY OF LABOR,	:	Order No. 4257503; 5/26/93
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 93-111-R
Respondent	:	Order No. 4257504; 5/26/93
	:	
	:	Docket No. VA 93-112-R
	:	Order No. 4257505; 5/26/93
	:	
	:	Docket No. VA 93-113-R
	:	Order No. 4257506; 6/26/93
	:	
	:	Docket No. VA 93-114-R
	:	Order No. 4257507; 5/26/93
	:	
	:	Docket No. VA 93-115-R
	:	Order No. 4257508; 5/26/93
	:	
	:	Docket No. VA 93-116-R
	:	Order No. 4257509; 5/26/93
	:	
	:	Docket No. VA 93-117-R
	:	Order No. 4257510; 5/26/93
	:	
	:	Docket No. VA 93-119-R
	:	Order No. 4257512; 5/26/93
	:	
	:	Docket No. VA 93-124-R
	:	Order No. 4257517; 5/26/93
	:	
	:	Docket No. VA 93-125-R
	:	Citation No. 4257518; 5/26/93
	:	
	:	Docket No. VA 93-131-R
	:	Citation No. 4257524; 5/26/93
	:	
	:	Docket No. VA 93-132-R
	:	Order No. 4257525; 5/26/93

	:	Docket No. VA 93-133-R
	:	Citation No. 4257526; 5/26/93
	:	
	:	Docket No. VA 93-134-R
	:	Citation No. 4257527; 5/26/93
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	:	Docket No. VA 93-135-R
	:	Citation No. 4257528; 5/26/93
	:	
	:	Docket No. VA 93-137-R
	:	Order No. 4257530; 5/26/93
	:	
	:	Docket No. VA 93-138-R
	:	Order No. 4257531; 5/26/93
	:	
	:	Mine No. 3 I.D. No. 44-06594
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. VA 93-165
	:	A.C. No. 44-06594-03522
	:	
v.	:	Docket No. VA 93-166
	:	A.C. No. 44-06594-03523
SOUTHMOUNTAIN COAL, INC.,	:	
Respondent	:	No. 3 Mine

ORDER LIFTING STAYS/DECISION APPROVING SETTLEMENT AND ORDER OF DISMISSAL

In a motion to dismiss these proceedings the Secretary states as follows:

> In accordance with a plea agreement and sentencing in related criminal proceedings and because the respondent Southmountain Coal Company (Southmountain) has paid a substantial civil penalty for the violations involved in these proceedings. In support of this motion, the Secretary offers the following information and explanation.
>
> (1) As a result of criminal prosecution against both respondents, the United States District Court for the Western District of Virginia accepted guilty pleas from Southmountain and Ridley Elkins. A provision of those guilty pleas required the Secretary to move to dismiss these proceedings upon payment of the proposed civil penalties totalling $436,732.
>
> (2) On May 17, 1995, in accordance with the guilty pleas, United States District Judge Samuel Wilson sentenced Southmountain to pay the above-enumerated monetary amount to the Mine Safety and Health Administration, in addition to

criminal fines and restitution totalling an additional $1,563,268.

(3) On May 31, 1995, Judge Wilson ordered Apple Coal Company, the parent company of Southmountain, to pay the amounts charged against Southmountain. This payment by Apple Coal Company was pursuant to an agreement made by Apple in front of Judge Wilson.

(4) The amount to be paid to the Mine Safety and Health Administration has been remitted in accordance with Judge Wilson's orders.

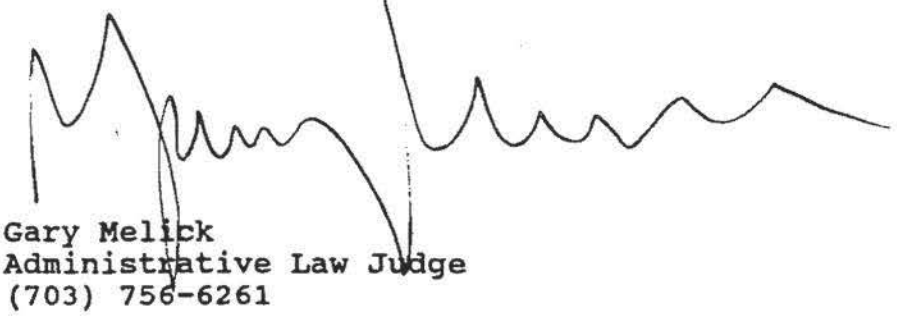
(5) The Secretary sought the civil penalties in this case against Southmountain and Mr. Elkins, as jointly and severally liable for the violations. By payment of the total proposed amount by Apple, the monetary liability of both respondents has been satisfied. In addition, the findings of criminal conduct serve as significant deterrents to further such violations.

Therefore, in light of the payment of substantial civil penalties and criminal sentences in the related criminal proceedings, the Secretary moves that these civil penalty proceedings be dismissed.

The Secretary's motion is deemed in part to constitute a motion for settlement in which Respondent has agreed to pay and has, in fact, paid the proposed penalty of $436,732 in full. 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 Stay Orders in the captioned cases are lifted, and the settlement in the civil penalty proceedings is approved. Furthermore, the captioned contest proceedings are dismissed as now moot.



Gary Melick
Administrative Law Judge
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/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 9 1995

KELLYS CREEK RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. SE 92-122-R
v.	:	Citation No. 3380190; 1/7/92
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. SE 92-123-R
	:	Citation No. 3380191; 1/7/92
	:	
Respondent	:	Docket No. SE-92-124-R
	:	Citation No. 3380192; 1/7/92
	:	
	:	Docket No. SE-92-125-R
	:	Citation No. 3380193; 1/7/92
	:	
	:	Docket No. SE-92-126-R
	:	Citation No. 3380194; 1/7/92
	:	
	:	Docket No. SE-92-127-R
	:	Order No. 3380195; 1/7/92
	:	
	:	Docket No. SE-92-128-R
	:	Citation No. 3380196; 1/7/92
	:	
	:	Docket No. SE-92-129-R
	:	Order No. 3380197; 1/7/92
	:	
	:	Docket No. SE 92-130-R
	:	Order No. 3380198; 1/7/92
	:	
	:	Docket No. SE 92-131-R
	:	Order No. 3380199; 1/7/92
	:	
	:	Docket No. SE 92-147-R
	:	Order No. 2805080; 1/10/92
	:	
	:	Docket No. SE 92-148-R
	:	Order No. 2804581; 1/10/92
	:	

	:	Docket No. SE 92-150-R
	:	Order No. 2804583; 1/10/92
	:	
	:	Docket No. SE 92-171-R
	:	Order No. 339509; 1/21/92
	:	
	:	Docket No. SE 92-176-R
	:	Order No. 3395711; 1/10/92
	:	
	:	Docket No. SE 92-177-R
	:	Order No. 3395712; 1/10/92
	:	
	:	Docket No. SE 92-180-R
	:	Order No. 3395715; 1/10/92
	:	
	:	Mine No. 78
	:	ID No. 40-02934
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-322
Petitioner	:	A.C. No. 40-02934-03529
v.	:	
	:	Docket No. SE 92-339
KELLYS CREEK RESOURCES, INC.,	:	A.C. No. 40-02934-03530
Respondent	:	
	:	Docket No. SE 93-584
	:	A.C. No. 40-02934-03540
	:	
	:	Mine No. 78

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner.
G. Christopher Van Bever, Esq., Wyatt, Tarrant & Combs, Louisville, Kentucky, for the Respondent.

Before: Judge Weisberger

I. History of these cases

These Contests and Civil Penalty Proceedings are before me based on Notices of Contest filed by Kellys Creek Resources Inc., ("Kellys Creek") challenging the issuance by the Mine Safety and Health Administration ("MSHA") of 44 citations and/or orders alleging violations of various mandatory safety standards. The Secretary of Labor ("Secretary") filed three Proposals for Assessment of Civil Penalty alleging violations of various mandatory standards. Pursuant to Notice, these cases were heard on January 18 and 19, 1995.

The parties stipulated to the facts of the violations, including the degree of negligence and gravity, and the findings of significant and substantial and unwarrantable failure as set forth in the citations and orders at issue. The Secretary stipulated to the good faith exhibited by Kellys Creek in attempting to achieve compliance after notification of the violations at issue.

In its brief, Kellys Creek challenges the issuance of one of the citations[1], and two of the orders[2] at issue on the ground that the Secretary issued multiple citations for multiple violations of the same standard in violation of MSHA policy. Also, it is argued that the imposition of penalties would violate the Double Jeopardy Clause of the Fifth Amendment. Further, Kellys Creek argues that penalties were erroneously assessed by the Secretary using criteria and procedures not in effect at the time of the accident at issue. Lastly, Kellys Creek seeks a reduction in penalties, and requests that the Secretary be directed to recalculate the penalties taking into consideration its financial status.

---

[1]Citation No. 3380194

[2]Order Nos. 3380195 and 3380196

II. Discussion

A. Whether the Secretary, in violation of his policy, erroneously issued multiple citations for multiple violations of the same standard.

In January 1992, Kellys Creek was engaged in retreat mining, i.e., the removal of coal pillars from areas of the mine that had previously been mined. The sequence in which various pillar blocks were to be cut was governed by Kellys Creek's Roof Control Plan ("Plan") on January 1, 1992, a roof-fall occurred, fatally injuring two miners, and seriously injuring a third. MSHA Inspector Daniel Johnson issued one citation and two orders based upon the failure of Kellys Creek to follow the sequence set forth in the Plan. Citation No. 3380194 sets forth a failure to follow the proper sequence in mining pillar block No. 3. Order No. 3380195 sets forth the failure to follow the proper sequence in mining pillar block No. 4, and Order No. 3380196 sets forth a failure to follow the proper sequence in mining pillar block No. 6. Approximately 20 feet separated the pillar blocks designated as Nos. 3, and 4, and approximately 60 feet separated the pillar blocks designated as Nos. 4 and 6. Johnson indicated that the pillar blocks designated as Nos. 3, 4, and 6 were in the "same general area" of the mine (Tr. 57) and in the same section, i.e., third left.

Kellys Creek argues that the citation and orders at issue were improperly issued as they all cited a violation of 30 C.F.R. § 75.220 in the same area of the Mine. In support of its position, Kellys Creek relies on the following language in MSHA's Program Policy Manual ("PPM"):

> However, where there are multiple violations of the same standards which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation and one citation should be issued. (Resp. Ex. 2, P. 15).

Johnson indicated that all three cited acts occurred in the same general area of the mine and that the same standard was violated. I note, however, that in his testimony Johnson explained that there was not only one violation covering all three pillars at issue because "these are three separate and distinct areas of being violated (sic)" (Tr. 46).

On cross-examination, Johnson testified as follows relating to the cited situations: "Pillars 3, 4 and 6 were three separate, distinct acts (sic). They were mining in three different places, not complying with the roof control plan in three different locations at the same time." (Tr. 70).

The Plan, as supplemented in September 1991, provides a detailed cutting sequence for the removal of coal from pillar blocks (Government Exhibit No. 18). The removal of coal from each pillar block constitutes a separate and distinct operation. I thus find that, although the three cited pillar blocks were in the same general area, the operation at each block was distinct, and hence each pillar block constituted a "distinct area." Thus, the issuance of three separate citations/orders by Johnson was consistent with the PPM. Although the PPM precludes the issuance of multiple citation of violations of the same standard relating to "the same area of the mine," it mandates that, "separate citations shall be issued for: ... identical violations in distinct areas of a mine" (Resp. Ex. 2, P. 15). Further, Johnson's action herein was fully consistent with Section 110(a) of the Federal Mine Safety and Health Act of 1977 ("the Act") which provides, as pertinent, as follows: "[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

I conclude that it was not improper for Johnson to have issued three citations/orders herein.

B. Assessment of penalties by the Secretary based on criteria not in effect at the date of the accident at issue

The accident that precipitated the assessment of the civil penalties in question occurred on January 1, 1992. On Friday, January 24, 1992, MSHA published a final rule setting forth new procedures for proposing civil penalties under the Act, and increasing the maximum penalty from $10,000 to $50,000 (57 Fed.

Reg. 2968, January 24, 1992). The effective date for the new penalty assessment criteria was set for March 1, 1992.

Essentially it is Kellys Creek's position that the Secretary's assessment of penalties herein in excess of $10,000, was based on a retroactive application of the final rule, and as such was in error. Kellys Creek seeks an order directing the Secretary to recalculate the penalty assessments in accordance with the regulatory limit of $10,000 that was in effect on the date of the accident (30 C.F.R. § 100(3)(g)(1991)).

I find Kellys Creek's argument to be without merit, and the requested relief is denied for the reasons that follow. Under the Act, the Secretary proposes and the Commission assesses civil penalties for violations of the Act. (See 30 U.S.C. § 815(a) & (d) and 820(a) & (i)). If an operator contests the Secretary's proposed assessment, the Commission's jurisdiction attaches and, pursuant to Section 110(i) of the Act, the Commission is authorized to assess civil penalties.

Assessment of penalties by the Commission is strictly de novo. See Youghiogheny & Ohio Coal Co., ("Y & O"), 9 FMSHRC 673, 678 (April 1987) . In Y & O, supra, at 678-679, the Commission elaborated as follows:

> We have consistently rejected assertions that, in serving our separate and distinct function of assessing appropriate penalties based on a record developed in adjudicatory proceedings before the Commission, we are bound by the Secretary's regulations, which are intended to assist him in proposing appropriate penalties. See, e.g., Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 737 F.2d 1147 (7th Cir. 1984); Black Diamond Coal Mining Co., 7 FMSHRC 1117 (August 1986); U.S. Steel Mining Co., 6 FMSHRC 1148 (May 1984).

In Y & O, supra, the Commission held that once a hearing has been held, a determination by a Commission Judge that the Secretary did not comply with Part 100 in proposing a penalty

"... does not require affording the Secretary a further opportunity to propose a penalty. Rather, in such circumstances the appropriate course is for the Commission or its judges to assess an appropriate penalty based on the record." Y & Q, supra, at 679.

In Y & Q, supra, at 679, the Commission set forth the basis for its holding as follows:

> The Commission possesses explicit, statutory authority to independently assess an appropriate penalty assessed on the record evidence pertaining to the statutory criteria specified in section 110(i), 30 U.S.C. § 820(i), developed before it. The record developed in an adversarial proceeding concerning the statutory penalty criteria invariably will be more complete, current and fairly balanced than the information that is normally available to the Secretary at the pre-hearing stage when he must unilaterally determine and propose a penalty. Further, because the Commission is itself bound by proper consideration of the statutory criteria and its penalty assessments are themselves subject to judicial review under an abuse of discretion standard, no compelling legal or practical purpose would be served by requiring the Secretary to undertake again to propose a penalty where a preferable record already has been developed before the Commission.

I conclude that this rationale and the holding of the Commission in Y & Q, supra, applies with equal force to the case at bar. I find that a proposed assessment by the Secretary based on a retroactive application of a final rule does not mandate reassessment, nor does it preclude a de novo assessment of a penalty after a hearing.

C. Penalty

1. Docket No. SE 93-584

As a consequence of a roof fall on January 1, 1992, which resulted in two fatalities, MSHA issued five citations under Section 104(a) of the Act, one Section 104(d)(1) citation, and five Section 104(d)(1) orders. Kellys Creek does not contest

the violations. Also, Kellys Creek does not contest the findings of significant and substantial, gravity, unwarrantable failure, and level of negligence set forth in these citations and orders.

a. Citation Nos. 3380190, and 33801991, and Order No. 3380194

On their face, Citation Nos. 3380190, 3380191 and 3380194 appear to cite violative conditions that could have been most directly responsible for the roof fall that caused two fatalities. Accordingly, these violations were of the highest level of gravity. Further, I note that Kellys Creek has not contested the findings of high negligence relating to Citation No. 3380190, and reckless disregard relating to Citation No. 3380194. In assessing a penalty for these violations, considering the fact that two miners were killed as a result of these violations, the elements of gravity and negligence are accorded the most weight.

However, the penalties to be assessed are reduced a slight degree due to their effect on the ability of Kellys Creek to continue in business.[3] In this connection, although there is no evidence that Kellys Creek has dissolved, the Secretary has stipulated that the former has ceased operations (Secretary's Brief p.31 n.3). Kellys Creek had net revenue of $843,200 in the fiscal year ending May 31, 1994, but a loss of $45,749.[4] More importantly, at the end of fiscal year 1993 Kellys Creek's assets were only $47,306. In April 1995, Kellys Creek had assets of less than $5,000 and liabilities in excess of $130,00.

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[3]Kellys Creek alleges error on the part of the Secretary in not considering the impact of proposed penalites on its ability to continue in business. Kellys Creek requests an order directing the Secretary to properly recalculate the proposed penalty . This request is denied for the reasons set forth above, (II(B), infra).

[4]According to Kellys Creeks' tax return, the loss amounted to $60,717. However, I find that this loss should be reduced by $14,923, the accumulated depreciation taken as a deduction from income.

Considering all the above, I find the following to be the proper penalties for the following citations/orders: 3380190-$45,000, 3380191-$45,000 and 3380194-$45000.[5]

b. Citation Nos. 3380192 and 3380193, Order Nos. 3380195, 3380196, 33801197, 3380198, 3380199, and Citation No. 3380422.

Based on the levels of gravity and negligence set forth in these citations and orders not contested by Kellys Creek, and considering the impact of a penalty on the ability of Kellys Creek to continue in business, I find that the following penalties are appropriate for the violations established by the following citation/orders: 3380192-$4,500, 3380193-$2,700; 3380195-$4,500, 3380196-$4,500, 3380197-$2,700, 3380198-$2,700, 3380199-$2,700, and 3380442-$20.

2. Docket No. SE 93-322

These citations and orders were not issued as a result of the fatal roof fall on January 1, 1992. Based on the levels of gravity and negligence set forth in these citations and orders not contested by Kellys Creek, and considering the impact of a penalty on the ability of Kellys Creek to continue in business, I find that the following penalties are appropriate for the violations established by the following citation/orders: 2804581-$200, 2804583-$200, 2805080-$200, 3395509-$200, 3395711-$150, and 3395712-$150.

3. Docket No. SE 92-339 (Order No. 3395715)

This order was not issued as a result of the fatal roof fall on January 1, 1992. Based on the levels of gravity and negligence set forth in this order, not contested by Kellys Creek, and considering the impact of a penalty on the ability of

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[5]My authority to make a de novo assessment of a penalty in excess of $10,000 for an established violation is based on the Omnibus Reconciliation Act of 1990, effective November 5, 1990 (Pub.L. 101-508, Title III, § 3102) which amended 30 U.S.C. § 820(a).

Kellys Creek to continue in business, I find that a penalty of $200 is appropriate for this violation.

D. Whether the imposition of penalties for the cited violations are precluded by the Double Jeopardy Clause of the Fifth Amendment

On July 23, 1992, the United States Attorney for the Eastern District of Tennessee issued a three count Bill of Information charging that Kellys Creek and Hollis Rogers, as president, violated certain mandatory health and safety standards for underground coal mines. Kellys Creek subsequently plead guilty to the three count Bill of Information and received a penalty of $5,000. The $5,000 penalty was comprised of a $2,000 penalty for Count 1; a $2,000 penalty for Count 2; and a $1,000 penalty for Count 3. Essentially, it is Kellys Creek's position that since the Bill of Information encompasses Citation/Order Nos. 3380192, 3380193, 3380195, and 33801198, that the Secretary's attempt to impose penalties for these citations/orders violates the Double Jeopardy Clause by subjecting Kellys Creek to a punishment for the same conduct for which it was previously punished in a prior criminal proceeding. Kelly Creek relies solely on United States v. Halper, 490 U.S. 435 (1989), which held as follows: "[U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." (490 U.S., supra, at 448-449).

For the reasons that follow, I find that U.S. v. Halper, supra, is not applicable to the Commission's authority under Section 110(i) of the Act to assess civil penalties where violations of the Act have been established in Commission proceedings.

In U.S. v. WRW Corp., 986 F.2d 138 (6th Cir. 1993), the Sixth Circuit was presented with the issue of whether the imposition of civil penalties under Section 110 of the Act following criminal convictions under Section 110 of the Act was a violation of the Double Jeopardy Clause. The Court took cognizance of Halper, supra, but followed the previously established framework to determine whether a Civil Proceeding

was punitive or remedial.[6] The Court referred to United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-63, where the Court applied the following test for determining whether a civil proceeding is criminal and punitive, or civil and remedial:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other... . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. (quoting United States v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980)) (citations omitted).

In WRW, supra, the Court applied this test to penalties imposed under Section 110 of the Act as follows:

> In this case, it is obvious that Congress has intended the penalties under 30 U.S.C. § 820(a) to be civil. Not only is the statute so labeled, but the civil provisions are somewhat broader in scope than the criminal provisions. Whereas "willful" violations can be "punished" by a criminal fine or imprisonment under 30 U.S.C. § 820(d), civil penalties may be assessed regardless of fault. 986 F.2d, supra, at 141.

The Court, in WRW, supra, next analyzed the purpose of the civil penalties provided for in Section 110(i) of the Act, and concluded that it is remedial, rather than a form of punishment. In reaching this conclusion, the Court, in 986 F.2d, supra, at 141-142, stated as follows:

> We emphasize that the civil penalty imposed does not involve an affirmative disability or restraint, has not been historically regarded as a punishment, and does not require a finding of scienter. The defendants

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[6]Kennedy v. Mendoza Martinez, 372 US 144 (1963) first set forth the factors to be assessed in determining whether a sanction is civil or criminal.

> argue that the imposition of a civil penalty promotes the aims of retribution and deterrence, given the various factors used to determine the amount of the civil penalty. However, even though the application of these factors to a given case may result in a penalty which is punitive, we conclude that imposing a civil penalty for health and safety violations which varies in amount based upon the severity of the violation and the operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety. Although the defendants further argue that their behavior was already a crime under 30 U.S.C. § 820(d), as pointed out above the civil penalty provisions cover a broader range of conduct than the criminal provisions under the Act and are not co-extensive with the criminal provisions. Moreover, it is clear that "'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.'" One Assortment of 89 Firearms, supra, 465 U.S. at 365, 104 S.Ct. at 1106-1107 (quoting Helvering v. Mitchell, 303 U.S. 391 399, 58 S.Ct.630, 633, 82 L.Ed. 917 (1938)).

Finally, in WRW, supra, the Court analyzed whether the civil penalty appeared excessive in relation to a remedial purpose[7]. Specifically, the Court analyzed whether the civil penalty was excessive in relation to the Government's expenses. In support of this analysis, the Court, in WRW, 986 F.2d, supra, at 142, quoted from Halper, supra, at 449 as follows:

> [T]he precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain ... . Similarly, it would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment. In other words, ... the

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[7]This analysis is the last of the factors set forth in Mendoza v. Martinez, supra. It also was the focus of the court's attention in Halper, supra.

process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice.

In the instant case, according to the Affidavits filed with the Secretary's Brief, costs for the hours worked by inspectors, investigators and attorneys on the respective civil and criminal cases, and the costs for their respective meals, lodging and travel during the course of these investigations, inspections, and hearings amounts to $47,149.50. This figure does not reflect the total costs to the government, which also included the use of government vehicles, the costs of assessing the penalties, the costs of clerical and other support staff within MSHA, the Office of the Solicitor or the United States Attorney's Office in Chattanooga, Tennessee, and does not include any amounts for the ancillary cost of benefits, e.g., retirement and health insurance, paid to the employees involved.

Based on the holding and rationale set forth in WRW, supra, I find that the penalty provisions set forth in Section 110(i) of the Act are remedial and civil in nature, and not criminal. Further, I find that the costs to the government exceed the total penalty of $16,200, which I found to be proper for the violations established for Citation No. 3380192 and Order Nos. 3380193, 3380195, 3380198[8], which, in essence, correspond to the acts pleaded to in the Bill of Information. I thus conclude that the assessment of a penalty, infra, for these orders/citation does not subject Kellys Creek to a second punishment in violation of the Double Jeopardy Clause.

ORDER

It is ORDERED that Kellys Creek pay a total penalty of $160,420 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

[8]II(C)(1)(b), infra.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGE
2 SKYLINE, 10TH FLOOR
5203 LEEBURG pIKE
FALLS CHURCH, VIRGINIA 22041

JUN 1 2 1995

BERWIND NATURAL RESOURCES, CORP.,	:	CONTEST PROCEEDINGS
KENTUCKY BERWIND LAND COMPANY,	:	
KYBER COAL COMPANY,	:	Docket No. KENT 94-574-R
JESSE BRANCH COAL COMPANY,	:	through KENT 94-797-R
Contestants,	:	
v.	:	and
	:	
SECRETARY OF LABOR	:	KENT 94-862-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	AA & W Coals, Inc.
Respondent	:	Elmo No. 5 Mine
	:	
	:	Mine I.D. No. 15-16856

ORDER DENYING MOTION IN LIMINE

On April 24, 1995, I issued an Order and Notice of Hearing in these cases. In the order, I denied the Secretary's motion for summary decision with respect to all of the Contestants (17 FMSHRC 684 (April 1995)).

I granted the Contestants' motion for summary decision with regard to two of the Contestants: Berwind Natural Resources Corp. (Berwind) and Jesse Branch Coal Company (Jesse Branch). I stated:

> [T]he undisputed material facts establish that Jesse Branch and Berwind did not substantially participate in the control or supervision of the day-to-day operations of the mine or have the authority to do so (17 FMSHRC at 717).

I also denied the Contestants' motion with regard to Kentucky Berwind Land Company (Kentucky Berwind) and Kyber Coal Company (Kyber). I stated:

> I cannot find the undisputed material facts establish that Kyber and Kentucky Berwind

> substantially participated in the control or supervision of the day-to-day operations of the mine or had the authority to do so. Nor can I find such facts establish they did not so participate. Additional evidence is needed about the mining projections and the relationships between AA&W, Kyber and Kentucky Berwind as they relate to the projections and to the day-to-day operations at the mine. Additional information also is needed regarding the interpretation and implementation of the provisions in the Kyber-AA&W contract that relate to production (17 FMSHRC 716-717).

In order to afford the parties the opportunity to augment the record with the necessary additional evidence, I noticed the cases for hearing and stated, "at the hearing the parties should be prepared to offer evidence regarding the particular issues specified above," i.e., the issues stated regarding Kyber and Kentucky Berwind (17 FMSHRC at 717).

In response to the notice of hearing, the parties, as directed, have exchanged lists of exhibits, witnesses and synopses of testimony. As a result, counsel for the Contestants has moved in limine for an order precluding the Secretary from offering certain testimony and evidence at the hearing. Counsel states that the parties' prehearing preparations reveal the Secretary's intent to present evidence beyond the scope of the issues that remain in the cases.

Counsel for the Secretary opposes the motion stating, in effect, that all issues are open for litigation ("The denial of summary decision only signifies that there are facts in dispute. As a result, all issues raised in the motions are open to litigation" (Response to Motion in Limine 4).). As set forth more fully below, I do not agree with counsel for the Secretary, although I decline to grant the Contestants' motion outside a hearing and without proffers, where necessary, from counsel for the Secretary.

Generally, when a case is not fully adjudicated upon a motion for summary decision, the judge may ascertain what material facts are controverted or are yet to be ascertained and

may enter an order accordingly. Upon trial of the action, the facts shall be deemed established and the decision rendered (See Fed. R. Civ. P. 56(d)). If the judge denies the motion and does not specify those facts that are not controverted or at issue, all of the issues, as framed in the pleadings, are open for trial. However, when the judge specifies the facts needing resolution, trial is only necessary on those issues required for a decision (See Moore's Federal Practice, ¶ 56.20 [2](1995)). In such instances, contrary to the Secretary's contention, all issues are not open for litigation.

In my view, the order and notice of hearing of April 24 1995, contemplated that to resolve the remaining issues the hearing should be limited to evidence regarding whether Kyber used mining projections substantially to control day-to-day mining at the Elmo No. 5 Mine (17 FMSCHRC at 707), whether Kyber exercised control over the day-to-day operations of the mine through the Kyber-AA&W contract provisions relating to production (17 FMSCHRC at 709) and whether Kentucky Berwind used its involvement with mining projections substantially to control the day-to-day mining at the Elmo No. 5 Mine (17 FMSCHRC at 714). On May 1, 1995, I stated this view in a letter to Stephen D. Turow, counsel for the Secretary.

Counsel for the Contestants requests that I exclude proposed expert or factual testimony on 13 issues in the Secretary's May 26, 1995 letter to Timothy M. Biddle, counsel for the Contestants. I decline to do so in the abstract and outside the context of the hearing. However, while the ruling sought by the Contestants is **DENIED**, the Secretary is on notice that I intend to conduct the hearing consistent with my view of the issues remaining to be resolved.

David F. Barbour
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 22, 1995

SECRETARY OF LABOR,	:	**CIVIL PENALTY PROCEEDING**
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	**Docket No. KENT 95-210**
Petitioner	:	**A. C. No. 15-17216-03528**
	:	
v.	:	**Cardinal #2**
ROBERTS BROTHERS COAL	:	
COMPANY, INCORPORATED,	:	
Respondent	:	

ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

On February 21, 1995, the Solicitor filed a penalty petition in this case. The petition was accompanied by a brief motion to accept the late filing of the petition. On March 24, 1995, the operator filed an answer together with a motion in opposition to the late filing contending that the Solicitor provided no facts to support her motion.

Thereafter, on April 24, 1995, an order was issued directing the Solicitor to submit information to justify the late filing of the penalty petition. On May 12, 1995, the Solicitor filed a response. The Solicitor advises that a new procedure had been instituted in June 1994 for the processing of penalty contests whereby the operator's contest is faxed from MSHA's office in Arlington, Virginia to the appropriate MSHA district office. Following the receipt of the fax, the district office makes copies of the citations and assembles packets which are mailed to the operator, the Regional Solicitor's Office and the Commission. According to the Solicitor, in the instant case the MSHA district office has no record of receiving the operator's contest on January 10, 1995, the date it was supposed to have been faxed by MSHA's Arlington office. When the Arlington office did not receive a packing list confirming that the files were sent to the Regional Solicitor an inquiry was made by Arlington to the district office. At that time it was determined that the district office had no record of receiving the contest and the contest was again faxed on February 13, 1995. The Solicitor asserts that the delay in filing was due to the problems in implementing the new system for handling cases, and that procedural safeguards for tracking cases were not firmly established. Moreover, the Solicitor's states that the operator has not been prejudiced by the 22 day delay.

As stated in the April 24 order, late filings of penalty petitions have been allowed when the Solicitor gives adequate reason to justify the tardiness. Long Branch Energy, 16 FMSHRC 2192 (October 1994), See Also, Salt Lake County Road Department,

3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1993); M. Jamieson Company, 12 FMSHRC 901 (April 1990); S & L Coal Company, 14 FMSHRC 403 (Feb. 1992); Wharf Resources USA Incorporated, 14 FMSHRC 1964 (Nov. 1992); Power Operating Company, 15 FMSHRC 931 (May 1993). In Long Branch Energy, supra, I accepted a penalty petition that was 52 days late involving similar circumstances. The delay in this case is much shorter. Therefore, I find that the Solicitor has demonstrated adequate cause for the delay in filing the penalty petition.

The operator in its motion in opposition states that the delays in the receipt of the petition have been prejudicial to the operator. However, the operator offers no specific showing of prejudice beyond its general assertion. I do not find that the operator was prejudiced by the short delay involved.

In light of the foregoing, it is ORDERED that the late filed penalty petition be ACCEPTED.

It is further ORDERED that this case be assigned to Administrative Law Judge T. Todd Hodgdon.

All future communications regarding this case should be addressed to Judge Hodgdon at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
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Paul Merlin
Chief Administrative Law Judge

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