SEPTEMBER 1991

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

SEPTEMBER 1991

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

Secretary of Labor, MSHA v. Aloe Coal Company, Docket No. PENN 91-40, PENN 91-41. (Judge Maurer, July 25, 1991)

Amos Hicks v. Cobra Mining Company, et al., Docket No. VA 89-72-D. (Judge Weisberger, August 7, 1991)

Secretary of Labor, MSHA v. LJ's Coal Corporation, Docket Nos. KENT 90-356, etc. (Judge Weisberger, August 14, 1991)

Peabody Coal Company v. Secretary of Labor, MSHA, Docket Nos. KENT 91-340-R, etc. (Judge Melick, August 21, 1991)

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

Secretary of Labor, MSHA v. Western Labs and Engineering, Docket No. WEST 90-378-M. (Judge Morris, August 28, 1991)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 3, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 89-186
LANHAM COAL COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), involves the issues of whether 30 C.F.R. § 77.1710(g) provides adequate notice of its applicability to the circumstances at issue and, consequently, whether the judge erred in concluding that the Secretary of Labor established a violation of the standard, and whether the Secretary abused her discretion by citing Lanham Coal Company, Inc. ("Lanham") for a violation of section 77.1710(g) allegedly committed by its independent contractor, Caney Creek Trucking Company ("Caney"). [1] Commission Administrative Law Judge James A. Broderick determined that a violation of the standard had occurred, and that the Secretary had not abused her discretion by citing Lanham. 12 FMSHRC 879, 882-83 (April 1990)(ALJ). The Commission granted Lanham's petition for discretionary review of the issue of whether the Secretary abused her discretion by citing Lanham and granted sua sponte review of the issues of whether Lanham had received adequate notice of the standard's applicability and

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[1] 30 C.F.R. § 77.1710, entitled "Protective clothing; requirements," provides in pertinent part:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * *
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

whether a violation had been established. For the reasons that follow, we vacate the judge's decision and remand this case to the judge for further consideration.

I.

The essential facts are undisputed. Lanham owns and operates Lanham No. 1, a surface coal mine located in Daviess County, Kentucky. On January 23, 1989, Gazi Bokkon, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), and MSHA inspector and accident investigator Harold Utley investigated an accident that had occurred at the mine. They interviewed Tony Lanham, then acting as a foreman for Lanham, and Gregory Weinstein, an employee of Lanham, regarding the circumstances surrounding the accident.

Mr. Weinstein told the inspectors that while he was driving a load of spoil to a dump area on December 29, 1988, he saw Charles Daugherty, the owner of Caney and also a truck driver for Caney, standing on his truck and unrolling a tarp. The truck was parked in a section of the mine set aside for "tarping trucks." After he dumped his load of spoil, Weinstein drove back by the truck but did not see Daugherty. Weinstein told the inspectors that because "something just didn't feel right," he stopped his truck, and leaned out to see if he could find Daugherty. Tr. 31-32. Weinstein saw Daugherty lying on the ground. Weinstein contacted Tony Lanham by radio, and Daugherty was subsequently taken to the hospital. On January 22, 1989, the day prior to the investigation, Daugherty died. Lanham and the Secretary acknowledged in their briefs that Daugherty died for reasons unrelated to his fall from his truck. S. Br. at 2; L. Br. at 3.

As part of their investigation, Inspectors Bokkon and Utley examined the area of the mine set aside for tarping trucks. The area was level and located approximately two to three hundred feet away from the pit from which the coal was extracted. The area also was used at night to park other equipment. The inspectors did not observe any structures that indicated that safety lines or other means could be used by the truck drivers for tarping trucks. Tr. 33.

The inspectors determined that "[a]s [Daugherty] was unrolling the tarpaulin toward the rear of the trailer, he apparently slipped and fell to the ground, a distance of approximately 10 feet." G. Exh. 3. They concluded that Daugherty was not wearing a safety belt or line at the time of his fall. Tr. 9-10. Based upon their investigative findings, the inspectors issued a citation to Lanham pursuant to section 104(a) of the Mine Act, alleging a violation of section 77.1710(g), which citation states that, "[a] contractor (truck driver) was working in an elevated area and was not wearing a safety belt and lines where there was a danger of falling." G. Exh. 2. The inspectors also found the violation to be significant and substantial. Id. The citation was terminated on February 14, 1989, because trucks were being tarped at another location rather than on mine property. Tr. 20. No citation was issued to Caney.

At the evidentiary hearing Lanham challenged the violation and the Secretary's decision to cite it rather than Caney. The judge determined that

the Secretary had not abused her discretion by citing Lanham, citing Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986), and concluded that in cases in which independent contractors commit violations of mandatory safety standards, the Secretary has discretion "to cite production operators as [s]he sees fit." 12 FMSHRC at 882. The judge found that a coal truck driver is in danger of falling when fastening a tarp to a truck while standing on a load of coal. 12 FMSHRC at 883. The judge concluded that because Daugherty was not wearing a safety belt or line while he was tarping his truck, a violation of the standard had been established. Id. The judge also found that the violation did not result from Lanham's negligence, stating:

> Until MSHA was notified of the contractor truck driver's death, neither Lanham nor the inspector considered the standard applicable to the tarping of trucks. The inspector never observed safety belts or lines used in such situations in more than 40 years of mining experience. MSHA had no standards or guidelines concerning this practice. Lanham had no specific notice that the practice violated the standard. It would be absurd under these circumstances to conclude that the violation resulted from Lanham's negligence.

12 FMSHRC at 883. The judge assessed a civil penalty in the amount of $250 against Lanham, rather than the penalty of $2,500 proposed by the Secretary. Id. The Commission subsequently granted Lanham's petition for discretionary review challenging the judge's finding that the Secretary had not abused her discretion by citing Lanham and granted sua sponte review on the issues of "whether 30 C.F.R. § 77.1710(g) provides adequate notice of its applicability to the circumstances at issue and whether the judge erred in concluding that the Secretary established a violation of the cited standard."

II.

Section 77.1710(g) is not detailed but rather is of the type made "simple and brief in order to be broadly adaptable to myriad circumstances." See, Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981); Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982). Nevertheless, such a broad standard must afford reasonable notice of what is required or proscribed. U.S. Steel Corp., 5 FMSHRC 3, 4 (January 1983). The safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); see also, Phelps Dodge v. FMSHRC, 681 F.2d 1189, 1192 (9th Cir. 1982).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). "In order to afford adequate notice and pass constitutional muster, a mandatory 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.'" Id., quoting Alabama By-Products Corp., 4 FMSHRC at 2129 (citations omitted).

Although the judge considered the question of prior notice when determining Lanham's degree of negligence, it appears that he did not apply the reasonably prudent person test when determining whether Lanham had notice of the specific requirements of section 77.1710(g). 12 FMSHRC at 883. Accordingly, we are remanding this proceeding to the judge so that he may determine, through application of the reasonably prudent person test, whether Lanham had fair notice that section 77.1710(g) required the use of safety belts or lines under the circumstances of this case. We do not reach the other issues raised in this case.

For the foregoing reasons, we vacate the judge's decision and remand this proceeding for further consideration by the judge.

Richard V. Backley, Acting Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 88-202-M
IDEAL CEMENT COMPANY	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), is before the Commission a second time. This case involves a dispute between the Secretary of Labor and Ideal Cement Company ("Ideal") concerning 30 C.F.R. § 56.9002 (1988), a former mandatory safety standard applicable to surface metal and nonmetal mines, requiring that "[e]quipment defects affecting safety shall be corrected before equipment is used." The Secretary cited Ideal under section 56.9002 for operating a front-end loader without side screens. In his original decision in this matter, Commission Administrative Law Judge John J. Morris vacated the citation on the basis that section 56.9002 did not give Ideal adequate notice that the absence of side screens constituted an "equipment defect affecting safety." 11 FMSHRC 1776 (September 1989)(ALJ).

The Commission granted the Secretary's petition for discretionary review of the judge's original decision. In its earlier decision, the Commission had determined that the absence of the side screens amounted to an "equipment defect" within the meaning of the standard and reversed the judge's conclusion to the contrary. With respect to whether the absence of side screens "affect[ed] safety," the Commission determined that the judge had incorrectly analyzed whether the standard provided adequate notice under the circumstances of the conduct prohibited. The Commission remanded the case so that the judge could resolve the issue pursuant to the "reasonably prudent person test." Ideal Cement Co., 12 FMSHRC at 2409 (November)(1990) ("Ideal I"). In his decision on remand, the judge, upon application of the reasonably prudent person test, determined that the standard did apply to the circumstances in issue and that the Secretary had established a violation of the standard. 13 FMSHRC 359 (March 1991)(ALJ). We granted Ideal's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

Factual Background and Procedural History

The facts in this matter have been amply set forth in Ideal I (12 FMSHRC at 2409-12), and are summarized here. On October 20, 1987, Tom Bertagnolli, an employee of Ideal, was involved in a fatal accident inside a kiln while operating a modified front-end loader without side screens. The uni-loader had been modified for certain tasks, including kiln work, in the following respects: (1) the bucket was replaced by a jack hammer attachment; (2) the side screens were removed; (3) the standard wheels were replaced by high-pressure, narrow wheels; (4) the Rollover Protective Structure ("ROPS") was lowered; and (5) a screen and a plywood shield were placed in the front of the uni-loader. At the time of the accident, Mr. Bertagnolli was using the jack hammer attachment on the uni-loader to remove worn brick from the kiln's ceiling.

An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Darrel Woodbeck, and an inspector for the State of Montana, Robert Stinson, investigated the accident. They concluded that Bertagnolli had been crushed between the uni-loader's side arms and the ROPS, that the uni-loader must have been running at the time of the accident for the arms to have raised, and that Bertagnolli must not have been wearing his seatbelt. Tr. 357, 375-76. Inspectors Woodbeck and Stinson stated their belief that if the side screens had been in place on the vehicle, it would have been impossible for Bertagnolli to place himself in a position to be so injured. Tr. 257, 357. Inspector Woodbeck issued a citation to Ideal pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 56.9002. The inspector noted that the citation was terminated when the side screens were subsequently replaced on the uni-loader.

The Secretary thereafter filed a proposed assessment of civil penalty in the amount of $10,000 against Ideal for the alleged violation. Following an evidentiary hearing, Judge Morris vacated the citation because he concluded that section 56.9002 did not give Ideal adequate notice that the absence of side screens constituted an "equipment defect affecting safety." 11 FMSHRC at 1783, 1786-88. The judge acknowledged that equipment defects within the scope of the standard are not limited to components affixed to the equipment but also may take the form of missing components. The judge determined, however, that a defect affecting safety must impair the actual functioning or operation of the equipment. 11 FMSHRC at 1785. He found that the missing side screens did not constitute such a defect. Id.

The Commission granted the Secretary's petition for discretionary review of Judge Morris' original decision. On review, the Commission determined that the judge erred in construing the standard to support a finding of violation only when a defective or missing component effectively impairs the operation of the equipment. 12 FMSHRC at 2414-15. The Commission held that a missing piece of safety equipment may be as much a "defect" as a malfunctioning operational component, and thereby satisfy the first element of a two-pronged analysis of whether a condition constitutes an "equipment defect" that

"affect[s] safety." 13 FMSHRC at 2415. The Commission concluded that the absence of the side screens amounted to an equipment defect within the meaning of the standard and reversed the judge's decision to the contrary. Id.

With respect to whether the operator had sufficient notice that the absence of the side screens affected safety, the Commission determined that the judge erred when he applied a test that required Ideal to have received explicit prior notice that the standard required attachment of the side screens. 12 FMSHRC at 2415-16. The Commission concluded that the issue was properly addressed through application of the reasonably prudent person test. Id. Accordingly, the Commission remanded the case to the judge to consider "whether a reasonably prudent person, familiar with the mining industry and the protective purpose of section 56.9002, would have recognized that the missing side screens on the uni-loader 'affect[ed] safety' within the meaning of the regulation and would have remedied that defect prior to any further use of the equipment." 12 FMSHRC at 2416. The Commission provided the following guidelines for such analysis:

> The judge should examine the evidence in the context of the modified condition in which the uni-loader was being used at the time of the accident. The judge should examine and set forth findings and conclusions based on the evidence of record including but not limited to: (1) the testimony of the Ideal employees and the inspectors regarding whether operating the uni-loader in the kiln without side screens affected safety, taking into account the proximity of the side arms to the operator's cab; (2) any evidence regarding whether the presence of the side screens impeded the equipment operator's vision with respect to the work area; (3) any evidence regarding whether Ideal's safety policies prohibited removal of the screens; and (4) any evidence of industry or manufacturer's policy regarding the removal of the side screens and the circumstances, if any, under which the side screens could be removed without impairing safety....

Id.

In his decision on remand, the judge concluded that a violation had been established. The judge determined that, under the circumstances presented, a reasonably prudent person would have recognized that the absence of the side screens affected safety within the meaning of the standard. The judge found that safety would be affected in the context of the kiln work in two ways: bricks could fall through the area of the missing side screens onto the uni-loader operator and the operator could be pinched by the uni-loader's sidearms. 13 FMSHRC at 364.

In reaching the conclusion that a violation had occurred, the judge considered each of the four factors suggested by the Commission in Ideal I, supra. With respect to the first factor the judge found that: (1) the

inspectors had concluded that the side screens were designed to prevent contact with the lifting arms and that Bertagnolli would not have been able to place himself in a position to be crushed if the side screens had been in place; (2) there was evidence that the purpose of the side screens is to "keep your arms out from underneath the loader while you are operating it" and to prevent brick from falling on the uni-loader operator's lap (Tr. 404); (3) evidence indicated that when an operator sits in the uni-loader "everything is pretty close" (Tr. 171), and photographs "confirm[ed]" this testimony; and (4) the total distance between the sidearms at mid-point was 45.4 inches. 13 FMSHRC at 360, 362-63.

With respect to the second factor listed by the Commission -- whether the presence of the side screens impeded vision -- the judge noted evidence that the screens had a tendency to impede side vision when the uni-loader was backed down a ramp and out of the kiln, and that some employees attached the side screens while others did not. 13 FMSHRC at 361, 363. The judge determined that the vision impediment existed only when the uni-loader was being backed out of the kiln and that such a problem could be rectified by using a wider ramp. The judge further found that, in any event, Bertagnolli was not engaged in backing up the uni-loader at the time when he was crushed. 13 FMSHRC at 363-64.

With respect to the third factor -- whether Ideal's safety policies prohibited removal of the screens -- the judge noted that Ideal's supervisors did not require or prevent the use of the side screens, that Ideal's safety policies did not prevent the removal of the side screens, but that Ideal's safety manual contains a provision stating, in part, that "[g]uards shall not be removed except for making repairs, cleaning, dressing, oiling or adjusting and then only by authorized persons when machines are stopped...." 13 FMSHRC at 361-63.

Concerning the fourth factor -- industry practices -- the judge stated that the record contained "no evidence of any industry or manufacturer's policy regarding the removal of the side screens and the circumstances under which the side screens could be removed without impairing safety." 13 FMSHRC at 367.

The judge thus concluded that inasmuch as the Commission had determined that the missing side screens constituted an equipment defect and, in light of his new determination that their absence affected safety, a violation of the standard had been established. He assessed a civil penalty of $8,000. 13 FMSHRC at 365.

II.

Disposition of Issues

The essential issue presented on review is whether substantial evidence of record supports the judge's conclusion in this case that, upon application of the reasonably prudent person test, the missing side screens affected

safety within the meaning of section 56.9002. [1] Ideal contends that the evidence reveals: that the presence of the side screens would not have prevented the uni-loader operator from being hit with bricks falling through the front of the loader; that had Bertagnolli been wearing his seat belt, as allegedly required by Ideal's safety policies, he would not have been able to lean out of the uni-loader; that MSHA inspectors had previously observed the uni-loader being operated without side screens but had not issued any citations; and, that Ideal's employees did not consider it unsafe to operate the uni-loader without side screens because, if they had, they could have red-tagged the uni-loader and removed it from service or installed the side screens. I. Br. at 9, 14, 16 n. 11.

The phrase "affecting safety" in the standard has a wide reach and the "safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." Ideal I, 12 FMSHRC at 2415, citing Allied Chemical Corp., 6 FMSHRC 1854, 1858 (August 1984). The first safety effect found by the judge was the danger of falling brick. Although brick could have fallen through the front of the uni-loader, as pointed out by Ideal, Ideal's employees acknowledged that the side screens were used to keep

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[1] Ideal argues that the judge's conclusion of violation is not supported by a "preponderance" of the evidence. Section 113(d)(2)(A)(ii)(I) of the Mine Act provides that the Commission's review is based on whether the judge's findings are supported by substantial evidence. See, e.g., Secretary v. Michael Brunson, 10 FMSHRC 594, 598 (May 1988).

Ideal has raised additional arguments. Ideal argues that the absence of the side screens does not constitute an "equipment defect" and maintains that the Commission retroactively determined that the absence of the side screens was a "per se violation of this broadly worded standard." I. Br. at 5. The Commission did not hold that the absent side screens constituted a "per se violation" of the standard but determined that the first element of the two-pronged analysis had been established. The Commission remanded the remaining safety-effect issue to the judge. 12 FMSHRC at 2415. We choose not to re-examine this issue further.

Ideal also contends that the judge improperly relied upon uncorroborated hearsay and speculation to reach his conclusion that "the absence of the side screens resulted in the accident." I. Br. at 15. The Commission has determined that hearsay evidence is admissible in its hearings, so long as it is material and relevant. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135 (May 1984). However, even if we were to conclude that the judge's finding that the "absence of the side screens resulted in the accident" was not supported by substantial evidence, it would not be determinative of whether a violation of the standard occurred. Lone Star Industries, Inc., 3 FMSHRC 2526, 2529 (November 1981). The judge did not find a violation because the "absence of the side screens resulted in an accident." Rather, he found that a violation was established because the missing screens affected safety in that they allowed the uni-loader operator to lean out of the cab or get his arms caught or pinched by the lifting arms, or allowed bricks to fall into the operator's lap. 13 FMSHRC at 364.

brick from falling on the uni-loader operator. Stephen Carey, an Ideal heavy equipment operator, testified:

> I came out on a B shift, and the side screens were off at that time, and I knew the machine, and, when you're knocking brick out, you always had a chance of catching a brick coming into your lap or whatnot, and I knew the machine, I think, a lot better than most people did, and so I went down ... and got the screens and ... put them on myself....

Tr. 88. Mr. Carey also stated that the purpose of the side screens was to prevent brick from falling onto the uni-loader operator's lap. Tr. 115. Bert Todd, an Ideal yard foreman, testified that the purpose of the side screens was to prevent "falling rock [from] coming down when you are loading" and "to keep your arms out from underneath the loader while you are operating it." Tr. 404.

The judge also found that the absence of side screens could allow a uni-loader operator to be pinched or crushed by the side arms. The judge noted that Stanley Veltkamp, an Ideal employee, testified that "everything is pretty close" inside the uni-loader (Tr. 171). Such testimony is corroborated by the photographs of the uni-loader. E.g., Exhs. R-2, P-6, 8-12, 16-18. Inspector Stinson testified that the purpose of the side screens was to prevent the uni-loader operator from contacting the uni-loader sidearms. Tr. 253-54. Inspector Woodbeck testified that Bertagnolli had been crushed between the sidearms of the uni-loader and the ROPS. Tr. 357. He explained that, if the side screens had been present on the uni-loader, it would not have been physically possible for Bertagnolli to place his body over the sidearms. Id.

The foregoing testimony and other evidence constitutes substantial evidence to support the judge's conclusion that a reasonably prudent person, familiar with the mining industry and the protective purpose of section 56.9002, would have recognized that under the circumstances in which the uni-loader was being used, the missing side screens affected safety within the meaning of the standard.

We reject Ideal's argument that it is not liable for any violation in this case because of Bertagnolli's failure to wear a seat belt (as allegedly required by Ideal), which would have prevented him from leaning out of the uni-loader. Under the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct. See, e.g., Asarco, Inc.- Northwestern Mining Dept. v. FMSHRC and AMC, 868 F.2d 1195, 1197-98 (10th Cir. 1988), and authorities cited. Moreover, this case does not involve a seatbelt violation, but rather, whether the missing side screens affected safety.[2]

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[2] We note the importance of seatbelts, which are required to be worn under current Mine Act regulations. See, e.g., 30 C.F.R. § 56.14130(g) (Present mandatory safety standard for surface metal and nonmetal mines).

We find similarly unpersuasive Ideal's argument that it did not receive adequate prior notice of the standard's requirements because MSHA had not previously cited Ideal for operating the uni-loader without side screens. Relying on settled Commission precedent, we reject Ideal's assertion that equitable estoppel should be applied against the Secretary. See, King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421-22 (June 1981).

For the foregoing reasons, we affirm the judge's decision.[3]

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

[3] Chairman Ford did not participate in the consideration or disposition of this matter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 89-143
BULK TRANSPORTATION SERVICES, INC.	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

DECISION

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)("Mine Act" or "Act"). It presents the issues of whether Bulk Transportation Services, Inc. ("Bulk") is an "operator" within the meaning of section 3(d) of the Mine Act; if so, whether it was liable for a violation of 30 C.F.R. § 77.807-3 committed by its subcontractor, James Krumenaker; and whether the Secretary of Labor abused her discretion by citing Bulk, rather than Mr. Krumenaker. [1] Commission Administrative Law Judge George A. Koutras determined that Bulk was an independent contractor-operator within the meaning of the Mine Act, that the Secretary had not abused her discretion by citing Bulk rather than Krumenaker,

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[1] Section 3(d) of the Mine Act, 30 U.S.C. §802(d), provides:

> "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine....

The original citation alleged a violation of 30 C.F.R. § 77.807-2. P-Exh. 1. That citation was amended at the hearing to allege a violation of 30 C.F.R. § 77.807-3, which provides:

> When any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than that specified in § 77.807-2 for booms and masts, such powerlines shall be deenergized or other precautions shall be taken.

that a violation of section 77.807-3 had been established, and that the violation was of a significant and substantial nature. 12 FMSHRC 772 (April 1990) (ALJ). The Commission granted Bulk's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

Factual Background and Procedural History

In 1986, Bulk entered into a five-year contract with Bethlehem Steel Corporation, BethEnergy Division ("BethEnergy"), to transport both raw and clean coal from BethEnergy's Mine No. 33, in Cambria County, Pennsylvania, to the Homer City Generating Station ("Generating Station"), about 40 miles away in Homer City, Pennsylvania. R-Exh. 1. The Generating Station is jointly owned by Pennsylvania Electric Company and New York State Electric & Gas Corporation. Bulk is the exclusive transporter of coal from BethEnergy's Mine No. 33 to the Generating Station (Tr. 110) and performed its contractual obligations to BethEnergy through subcontractors, one of which was Krumenaker. In the subcontract, Krumenaker agreed to lease Bulk a truck and driver.

Bulk has three employees: Charles Merlo, president of the company, a dispatcher, and a bookkeeper. None of these employees works at the Mine No. 33 site. Typically, Bulk's dispatcher completes a work roster for the following day by calling the mine and determining the number of coal loads that need to be transported to the Generating Station. Bulk's subcontractors call the dispatcher to see if there is work for them the following day; however, there is no contractual requirement that Bulk provide work to each subcontractor who requests it. The next morning, each scheduled subcontractor travels to the mine, its truck is loaded with coal by BethEnergy miners, and the subcontractor transports the coal to the Generating Station.

On January 4, 1989, Nevin Davis, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), went to BethEnergy's Mine No. 33 after being informed that the power and fans were off at the mine. Inspector Davis discovered that the power outage had been caused when Krumenaker raised the bed of his truck in order to clear the ice and snow from it before receiving a load of coal. The bed touched the energized 46KV powerline above the truck. Although eight of the truck's tires were blown, Krumenaker jumped from the truck and was not injured.

Inspector Davis observed that Krumenaker's truck had a "Bulk" sign on it, and assumed that Krumenaker was employed by Bulk. The inspector obtained BethEnergy's list of independent contractors, required to be maintained pursuant to 30 C.F.R. § 45.4, and noted that Bulk's name was on the list and that Krumenaker's name was not.

Based upon his observations, Inspector Davis issued Bulk a citation alleging a violation of section 77.807-2. (see n. 1 supra). Inspector Davis found the violation to be of a significant and substantial nature because he believed that the driver could have suffered fatal injuries when the truck bed made contact with the powerline. The citation was terminated after BethEnergy's plant foreman instructed Krumenaker, and the other truck drivers,

to be aware of the powerline. BethEnergy, subsequent to the incident, also posted warning signs. Inspector Davis did not cite BethEnergy for the violation because he determined that the powerlines were at a proper height and believed that it was difficult for BethEnergy to exercise control over truck drivers when raising their truckbeds.

Following an evidentiary hearing, the judge found that Bulk was an independent contractor-operator subject to liability under the Mine Act, and that the Secretary had not abused her discretion by citing Bulk rather than Krumenaker. 12 FMSHRC at 789-98. The judge noted that in Otis Elevator Co., 11 FMSHRC 1896 (October 1989)("Otis I"), and Otis Elevator Co., 11 FMSHRC 1918 (October 1989)("Otis II"), the Commission had held that whether an independent contractor is a statutory operator depends, in part, on the independent contractor's relationship to the extraction process and the extent of its presence at the mine. 12 FMSHRC at 791. Applying the Commission's Otis test, the judge reasoned:

> Although it is true that Bulk does not own any of the coal haulage trucks, and that the drivers are not employed by Bulk, the fact remains that Bulk provides and performs services for the mine operator BethEnergy at the mine, albeit through the use of subcontractor and owner/operator truck drivers. Under the terms of the contract, Bulk was obligated to pick up the coal at the mine site and have it delivered and unloaded at the customer destinations designated by BethEnergy. The coal is loaded by BethEnergy's miners. Although Bulk chose to use subcontractors to transport and deliver the coal, with BethEnergy's blessings, Bulk was nonetheless legally obligated for the performance of the services called for under the contract. BethEnergy had no direct dealings with the subcontractors, and it looked to Bulk to provide its coal transportation needs. Given the large volumes of coal required to be transported by Bulk, and the fact that Bulk had the exclusive right to transport all of BethEnergy's coal to [the Generating Station], I conclude and find that Bulk was performing an essential service for BethEnergy which was closely related to the mine extraction process and was indeed an essential ingredient of that process. BethEnergy is obviously in the business of marketing its coal, and without the means for transporting it to its customers through the services provided by Bulk, it would not remain in business very long.

12 FMSHRC at 792-93. Subsequent to the judge's decision, the Commission's Otis decisions were affirmed by the United States Court of Appeals for the District of Columbia Circuit. Otis Elevator Co. v. Secretary & FMSHRC, 921 F.2d 1285 (1990).

The judge further concluded that the Secretary did not abuse her

discretion by citing Bulk, rather than Krumenaker. The judge found no evidence that Krumenaker was a bona fide independent contractor and determined that Bulk, contrary to its assertions, did exercise control over its subcontractors. 12 FMSHRC at 795-98. Finally, the judge determined that a violation of section 77.807-3 had occurred and that the violation was significant and substantial. 12 FMSHRC at 794, 798-99. He assessed a civil penalty of $25 against Bulk. 12 FMSHRC at 801.

II.

Disposition of Issues

A. Whether Bulk is an independent contractor-operator

Section 3(d) of the Mine Act expanded the definition of "operator" previously contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("Coal Act"), to include "any independent contractor performing services or construction at such mine." The legislative history of the Mine Act demonstrates that the goal of Congress in expanding the definition of "operator" was to broaden the enforcement power of the Secretary to reach a wide range of independent contractors, not just owners and lessees. The Report of the Senate Human Resources Committee explained that the definition of operator was expanded in order to "include individuals or firms who are ... engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process...." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978)("Legis. Hist."). The Conference Report likewise explained that the expanded definition "was intended to permit enforcement" of the Act against independent contractors "performing services of construction" and "who may have a continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. at 1315. The Commission has consistently recognized that the inclusion of independent contractors in the statutory definition reflects a Congressional purpose to subject such contractors to direct MSHA enforcement under the Mine Act. Otis I, 11 FMSHRC at 1900, and authorities cited therein.

The Commission, in its Otis decisions, concluded that an independent contractor performing elevator maintenance and repair operations at underground coal mines was an operator within the meaning of the Act. The Commission, however, indicated that "not all independent contractors are operators under the Mine Act, and that 'there may be a point ... at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.'" Otis I, 11 FMSHRC at 1900-01, quoting Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979).

In its opinion affirming the Commission's Otis decisions, the D.C. Circuit held that section 3(d) of the Act "does not extend only to certain 'independent contractor[s] performing services ... at [a] mine; by its terms, it extends to 'any independent contractor performing services ... at [a] mine.'" Otis, 921 F.2d at 1290 (emphasis in original). The Court noted that

it "need not confront" the issue of whether there is a point at which an independent contractor ceases to be an operator because its contact with a mine was so infrequent or de minimis because, in Otis, the contractor had conceded that it performed "limited but necessary" services at the mines. 921 F.2d at 1290 n.3.

In the present case, the judge determined that Bulk was an independent contractor-operator within the meaning of section 3(d) of the Act because Bulk performed an essential service for BethEnergy, transportation of mined coal, which the judge found was closely related to the extraction process, and because Bulk had a continuing presence at the mine. 12 FMSHRC at 792-93. We conclude that the judge's determination that Bulk is a statutory operator is amply supported by the record.

Bulk does not dispute that it is an independent contractor and that it has been assigned an MSHA independent contractor identification number pursuant to 30 C.F.R. § 45.3. Rather, it argues that it is not an independent contractor-operator within the meaning of the Mine Act and its regulations because it was merely a "transportation broker" and, accordingly, was not engaged in the extraction process, did not have a continuing presence at the mine, and did not substantially participate in the mine's operations. The judge examined the nature of Bulk's services as though Bulk were the party actually hauling coal, rather than serving merely as a transportation broker. We agree with the judge that, under the facts of this case, Bulk cannot avoid liability through the use of subcontractors rather than employees, after contractually obligating itself to be BethEnergy's exclusive hauler of coal from Mine No. 33 to the Generating Station. The fact that Bulk chose to perform its obligations through the use of subcontractors rather than employees did not modify Bulk's position as BethEnergy's exclusive coal hauler at the No. 33 Mine. [2]

Nor are we persuaded by Bulk's argument that it does not maintain a physical presence at the mine. Each of Bulk's subcontractors drives under Bulk's Pennsylvania Public Utility Commission number and places a Bulk nameplate on its truck. Tr. 23, 73, 97. Bulk maintains that its subcontractors do so only to comply with Pennsylvania law. B. Br. at 21. Whatever may be the legal relationship between Bulk and its subcontractors, the fact remains that these subcontractors could not perform the relevant coal haulage services at the mine without Bulk's authority. Those subcontractors could not maintain an independent physical presence at the mine for the relevant services because Bulk had the exclusive contract for coal haulage from the mine to the Generating Station.

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[2] Our focus is on the actual relationships between the parties, and is not confined by the terms of their contracts. Reference to the contractual relationships between the parties is made because the contracts are evidence of the parties' actual relationships. Moreover, the determination of whether a party is properly designated to be within the scope of section 3(d) of the Act is not based upon the existence of a contract, nor the terms of such a contract.

Further evidence supports the judge's determinations that Bulk's services were essential and closely related to the extraction process and that Bulk had a sufficient presence at the mine. 12 FMSHRC at 792-93. Merlo testified that "there is a constant flow of truck drivers in and out ... working for us," and that they generally haul four to five days per week. Tr. 85, 107. Under its contract with BethEnergy, Bulk agreed to transport approximately 30,000 tons of raw coal and 20,000 tons of clean coal per month to the Generating Station. R-Exh. 1, sections 1.1, 1.2. Given the undisputed fact that Bulk was BethEnergy's exclusive coal hauler between Mine No. 33 and the Generating Station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process. 12 FMSHRC at 792.

Accordingly, we affirm the judge's holding that Bulk is an independent contractor-operator within the meaning of the Mine Act. We note, however, that our holding is limited to the haulage services context of this case, where the violative conduct occurred at a mine.

B. Whether Bulk should be held liable for the acts of Krumenaker

Bulk argues in the alternative that, even if it is considered an operator, it is not an "owner-operator" and, therefore, should not be held liable for a violation committed by its subcontractor. Quoting Cyprus Industries v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981), Bulk argues that owners or production-operators are held liable for violations caused by independent contractors because "they are generally in 'continuous control of conditions at the entire mine.'" B. Br. at 9 (emphasis in Court's decision). Bulk contends that it did not exercise control over its subcontractors or have responsibility for safety over an identifiable part of the mine. B. Br. at 9-11. We reject such a narrow reading of Cyprus. In Cyprus, the Court stated that one policy reason for holding owners liable for the violations committed by independent contractors is that an owner is "generally in continuous control of conditions at the entire mine." 664 F.2d at 1119. The Court did not state or imply that this was the only reason why owners should be held liable for acts of their contractors or that, if for some reason, an owner did not exercise such general control over the entire mine, it could not properly be held liable for the acts of its contractors.

To the contrary, settled liability law under the Mine Act clearly demonstrates that the basis for holding an owner-operator liable for the violative conduct of another is its general system of liability. The Commission and various courts have recognized that the Mine Act (as well as its predecessor, the Coal Act) sets forth such a scheme of liability without fault. See, e.g., Bituminous Coal Operators' Association v. Secretary of Interior, 547 F.2d 240, 246-47 (4th Cir. 1977)("BCOA"); Cyprus, 664 F.2d at 1119; Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); International Union, United Mine Workers of America v. FMSHRC, 840 F.2d 77, 83-84 (D.C. Cir. 1988); Asarco, Inc. -- Northwestern Mining Dept. v. FMSHRC & AMC, 868 F.2d 1195, 1197-98 (10th Cir. 1988); and Western Fuels-Utah v. FMSHRC, 870 F.2d 711, 713 (D.C. Cir. 1989). Thus, an owner is held liable for the acts of its contractor not merely because the owner has continuous control of the entire mine but, rather, because the Act's scheme of liability provides that an operator, although

faultless itself, may be held liable for the violative acts of its employees, agents, and contractors. Because Bulk is a statutory operator, it may be held liable for the violative acts of its subcontractor, Krumenaker.

C. Whether the Secretary abused her discretion by citing Bulk rather than Krumenaker

Bulk argues that the Secretary abused her discretion in citing it rather than Krumenaker. Bulk argues that the enforcement action taken against it was contrary to the provisions of MSHA's "Enforcement Policy and Guidelines for Independent Contractors," set forth in MSHA's Program Policy Manual ("Policy Manual"). These guidelines provide that enforcement action may be taken against an operator principal for the violative acts of its independent contractor in any of the four following contexts: the principal contributed to the violation; the principal contributed to the continued existence of the violation; the principal's employees were subjected to the hazard created by the violation; or the principal has control over the condition requiring abatement. III Policy Manual Part 45, at 6. Bulk argues that none of these circumstances apply to it. B. Br. 28-29.

In instances of multiple operators, the Secretary may, in general, proceed against either an owner-operator, its contractor, or both, for a violation. Cyprus, 664 F.2d at 1119; Old Ben Coal Co., 1 FMSHRC 1480, 1483 (October 1979). If Krumenaker is not an "operator," clearly, the Secretary did not abuse her discretion by failing to cite him. We conclude, however, that even if it is assumed that Krumenaker constitutes a statutory operator, the record supports a conclusion that the Secretary did not abuse her discretion by citing Bulk.

Preliminarily, the Secretary's citation of Bulk was not inconsistent with the Policy Manual criteria. The guidelines states that enforcement action may be appropriate in any of the four described situations. III Policy Manual Part 45, at 6. Bulk had substantial control over the condition requiring abatement, which satisfies the fourth criterion. Although BethEnergy later posted warning signs and instructed Krumenaker and the other drivers to take precautions around the powerlines (Tr. 30-31), BethEnergy also looked to Bulk to ensure safe practices among its drivers. Merlo testified that whenever BethEnergy has a safety complaint about one of Bulk's drivers, it contacts the subcontractor "on the site," and eventually notifies Bulk by letter so that Bulk can inform the drivers and correct the safety problems. Tr. 114-15. Bulk then passes BethEnergy's complaint on to the subcontractor involved, usually by including BethEnergy's letter in the subcontractor's pay voucher. Tr. 91. (The inspector's contemporaneous investigative notes contain a statement that BethEnergy had informed Bulk of the violation and that Bulk had warned its drivers accordingly. See P-Exh. 2, p. 5.) We also note that Bulk's contract with BethEnergy provides that Bulk is responsible for violations of law and inspecting the haulage trucks "to assure safe movement ... in compliance with any law...." R-Exh. 1, section 5.1. In any event, as held by the D.C. Circuit in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538-39 (1986), the Secretary's criteria are merely expressions of general policy and are not binding regulations that the Secretary is required to observe.

Significantly, the record shows that Bulk has a continuing relationship with BethEnergy and may be in the best position to influence the safety practices of all its drivers. Bulk chooses its drivers and may refuse to retain those drivers who cause safety violations. Tr. 101-103. We believe that it is unreasonable to require the Secretary to pursue each of Bulk's 70 to 100 subcontractors.

The judge's conclusion that the Secretary did not abuse her discretion in citing Bulk, rather than Krumenaker, is supported by applicable precedent, which clearly establishes that the Secretary has wide enforcement discretion. See, e.g., Consolidation Coal Company, 11 FMSHRC 1439, 1443 (August 1989); Cathedral Bluffs, 796 F.2d at 537-38; Old Ben, 1 FMSHRC at 1481-86. [3]

Accordingly, for the reasons set forth above, we affirm the judge's decision. [4]

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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[3] Bulk also argues that it has been subjected to inconsistent enforcement action by the Secretary because, in the past, MSHA vacated citations issued to Bulk on the basis that the citations should have been issued to one of Bulk's subcontractors who actually committed the violations. B. Br. at 29. Under the Mine Act, as we have held, equitable estoppel does not generally apply against the Secretary. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981).

[4] Chairman Ford did not participate in the consideration or disposition of this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 1991

DRUMMOND COMPANY, INC.,	:	
	:	
v.	:	Docket No. SE 91-10-R
	:	SE 91-11-R
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), concerns a dispute between Drummond Coal Company ("Drummond") and the Secretary of Labor ("Secretary") over the issuance of a section 104(d)(1) citation for accumulations of combustible materials in belt line conveyor areas in violation of 30 C.F.R. § 75.400.[1] Drummond filed a notice of contest on October 24, 1990, and moved for expedited hearing. A hearing was held on November 14-15, 1990, before Administrative Law Judge Avram Weisberger.

The parties filed post hearing briefs and proposed findings of fact and conclusions of law. Judge Weisberger's decision modified the section 104(d)(1) citation by vacating the unwarrantable failure finding. The Commission granted the Secretary's petition for discretionary review appealing the judge's determination that the violation was not unwarrantable. For the reasons that follow, we vacate the judge's conclusion that the violation was not unwarrantable and remand the issue of unwarrantability for reconsideration.

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[1] Section 75.400, entitled "Accumulation of combustible materials," is a statutory provision:

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

I.
Factual Background and Procedural History

Drummond operates an underground coal mine, the Mary Lee No. 2 Mine, in Alabama. The mine is a thin seam coal deposit varying in thickness from approximately 34 to 52 inches. It utilizes belt haulage to transport coal to the surface. One section of the mine contains several interconnected belt lines including the belt line and associated machinery at issue in this case.[2] MSHA Inspector Walter Deason examined this interconnected system of belt lines during the period October 2-4, 1990. He issued several citations for accumulations of combustible materials, including the citation and finding of unwarrantable failure at issue herein.

Inspector Deason's examinations proceeded toward the mine face. Early in the morning of October 2, he examined the Slope Belt and found accumulations of combustible materials, approximately thirteen inches deep and thirty feet long, in violation of section 75.400. A section 104(a) citation was issued. In addition to the excess accumulations at the Slope Belt, Inspector Deason found that shift inspectors were not placing dates or their initials in areas required to be inspected, suggesting the possibility that no examinations were being made. The record shows that Deason told Carl Ware, the owl shift mine foreman on duty at the time, that inspections must be made and that the initials of the fire bosses must be recorded to verify the inspections.

Deason returned to the mine the next afternoon and continued examining the conveyor belts. He was accompanied by John Busby, Drummond Safety Inspector, and Sam Hunt, Alternate UMWA Safety Committeeman. Deason found accumulations of coal under the belt line drive and the take-up unit of the 40 North No. 1 Conveyor Belt. These accumulations were approximately thirty-four inches deep and between fifty and sixty feet long. Again, a citation was issued alleging a violation of section 75.400.

On October 4, Inspector Deason returned to the 40 North Belt Line and related section conveyor lines with Sidney Hill, International UMWA Representative, and Sam Hunt. Deason noted accumulations of coal approximately twelve inches deep and thirty feet long beneath the belt drive and a take-up unit of the 40 North No. 3 Conveyor Belt and noted that the belt was rubbing the accumulations. A citation charging a violation of section 75.400 was issued.

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[2] This system of interconnected belts contains six belt lines and operates in the following manner: Coal mined from the face is placed on the 4315 Section conveyor drive and the 4050 Section conveyor drive. The 4315 Belt Line carries coal to the 430 line, which in turn proceeds to the 40 North Belt. The 40 North Belt, because of its length, is divided into three belt sections. The 430 line dumps its coal onto the 40 North Belt at the No. 2 belt, which is the middle belt of the 40 North Belt conveyor system. The 4050 section conveyor drive deposits its coal directly onto the 40 North Belt Line at the No. 3 belt. The 40 North Belt transports coal to the 10 West Belt, which connects to the Slope Belt. The Slope Belt brings the coal to the surface.

Thereafter, he proceeded to the 40 North No. 3 Belt and found accumulations of coal thirteen inches deep and between twenty and thirty feet long from the end drive rollers to the discharge rollers of the 4050 Section Conveyor Drive. The accumulations were relatively large, and consisted of small particles of coal rather than large lumpy coal usually associated with spills. 13 FMSHRC at 72.

Inspector Deason then proceeded to the 4315 Section conveyor belt and there he found float coal dust, extending a distance of nearly 500 feet. A citation was issued charging a violation of section 75.400, which was designated significant and substantial. Inspector Deason testified that an examination of the source of the dust disclosed that the 4315 header was running in the coal dust and flipping it into the air. On further examination of the area, Deason found coal dust accumulations in the area of the header and the take-up unit as well as under the belt. There was also a roller missing near the area of the take up unit, which allowed the belt to rub against the metal frame. In addition, the belt was running in the accumulations and area guards and other guards were missing from the side of the belt line.

Based on these findings, Inspector Deason cited Drummond, pursuant to section 104(d)(1)[3], for a violation of section 75.400, alleging accumulations of combustible materials at the 4315 Section Belt Line. The section 104(d)(1) citation stated:

> Float coal dust was allowed to accumulate beneath the take up carriage on the 4315 section conveyor drive 19 inches deep. The take up roller and belt was running in the said accumulations. Also coal was beneath the drive units from half way of the belt to the tight side end of the drives. Also coal was on the tight side up to 16 inches deep.
>
> This is the 5th conveyor belt unit written at this mine in the past 4 days.

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[3] Section 104(d)(1) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. Section 814(d)(1).

> The pre-shift fire boss books indicate that the headers was [sic] OK.

In addition to indicating that the citation was significant and substantial and that Drummond's failure to maintain clean belt lines was unwarrantable, Deason also charged that the citation involved high negligence.

Before the judge, the Secretary argued that Drummond's actions were unwarrantable on three grounds. First, the Secretary argued that Drummond knew or should have known of the accumulations because inspections and specific discussions regarding other belts in close proximity to the 4315 Belt line placed Drummond on a heightened alert for accumulations. The Secretary also argued that Drummond made a conscious decision not to clean up accumulations until the idle shift because it did not want to stop production. Finally, the Secretary argued that Drummond's suggestions that the standard permits a reasonable time lapse between accumulation and clean up contravenes clear Commission authority to the contrary. Citing Old Ben Coal Co., 1 FMSHRC 1954 (1979), the Secretary highlighted Commission review of the legislative history of the Act, emphasizing Congressional intent to prohibit accumulations.

Drummond argued that it had demonstrated good faith in cleaning up the accumulations, that abatement effort is the most important factor and, that based on Utah Power & Light Company v. Secretary, 12 FMSHRC 965 (May 24, 1990), such efforts can be sufficient to prevent a finding of unwarrantable failure. Drummond noted evidence that a miner was cleaning coal from under the belt line at the time of the inspection. 13 FMSHRC at 76.

In discussing the evidence of unwarrantability, the judge reviewed the history of the accumulations at the conveyor belts, the length of time the coal was allowed to accumulate, and the visibility of the accumulations. Although the judge did not specifically find that there was a history of accumulations, the judge examined the three-day review by Inspector Deason. He found that, at each step, the inspector had noted significant accumulations. The judge emphasized the strength of this evidence, especially evidence of accumulations at each of the belt lines cited prior to reaching the 4315 Belt Line. Based on the testimony of Inspector Deason and Sidney Hill, the judge found that the accumulations at the 4315 Belt Line had gradually accumulated over a period of time prior to the citation. 13 FMSHRC at 74. The judge noted the testimony of several witnesses that the conditions were readily visible, or would have been, if viewed through the screens protecting the sides of the belt line. Busby, the operator's own safety inspector, testified that the roller areas are susceptible to spillage and demand closer scrutiny than other areas of the belt. Id.

The judge concluded that the weight of evidence established that Drummond "did not use due diligence in inspecting for accumulations in the area in question." Id. Again, the judge concluded that the weight of evidence "specifically" established that, if careful inspection had been made, the accumulations would have been noticed and that "[d]ue to the extent and depth of the accumulations ... it is highly likely that they existed at least 4 hours

earlier when the preshift examination was made."[4] 13 FMSHRC at 75.

The judge found, however, that the record did not support a conclusion of unwarrantable failure. He rejected the Secretary's assertion that the operator had actual knowledge of the conditions at the 4315 conveyor, finding that "the record fails to establish such knowledge on the part of Contestant of the specific accumulations at the specific locations in issue, i.e., the 4315 conveyer belt." (Emphasis in the original). Id. In reaching this conclusion, he found that Inspector Deason had not discussed the problem of accumulations at the belt lines prior to citation.

The judge also relied on Drummond's efforts to clean up the accumulations. The judge credited testimony that a miner was shoveling coal at a distance 200 to 250 feet inby the cited area and that shoveling had occurred at the header and 25 to 30 feet inby on the tight side of the belt. Id.

After reviewing the history of the accumulations, the length of time coal had been allowed to accumulate and the visibility of the accumulations, the judge focused on whether the operator actually knew of the violations and the efforts made by the operator to clean up the accumulations. Based on those considerations, he found the record insufficient to support a conclusion of unwarrantable failure.

II.
Disposition of Issues

On review, the Secretary challenges the judge's finding that the violation was not the result of Drummond's unwarrantable failure. She asserts that the judge failed to apply correctly the Emery test of unwarrantability and erred by expressly limiting the scope of aggravated conduct to actual knowledge of the specific violative conditions. She asserts that proper application of Emery and its progeny demands recognition that the required knowledge can also be established by a showing that the operator should have known, or had reason to know, of the violative conduct and that the evidence establishes that Drummond had every reason to know of the conditions and chose to do nothing about them.

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, supra. 9 FMSHRC at 2001. This determination was also based on the purpose of

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[4] In this case the judge found that Drummond's failure to conduct adequate pre-shift examinations was unwarrantable with respect to this very same belt line.

unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and on judicial precedent. Id.

The judge, in rejecting the Secretary's assertion that Drummond knew of the violation, found that Drummond did not know "of the specific accumulations at the specific locations in issue, i.e., the 4315 section conveyor belt." 13 FMSHRC at 75. The Secretary argues that the judge was incorrect in requiring advance notice to Drummond of the accumulations before issuance of a citation. The Secretary cites the following language from the decision as indication that the judge imposed such a requirement:

> There is insufficient evidence that Deason had any discussion with any of Respondent's personnel prior to the issuance of the Citation in issue, with regard to problems with accumulations at the belt lines.... A plain reading of this testimony reveals that it does not establish that Deason informed Busby of the need either to take care of accumulations in general on belt lines, or to be aware of such problems in the area in question.
>
> * * * * *
>
> There is no evidence that respondent was informed by Deason of the need to make a thorough inspection of the area in question. Thus, the fact that Deason found accumulations after he spoke to Ware and Busby does not, per se establish aggravated conduct.

13 FMSHRC at 75.

We agree that the Secretary is not required to give advance notice to operators of violative conditions before issuance of a section 104(d) citation. Such rationale would contravene fundamental notions of miner safety and operator responsibility upon which the Mine Act rests, see S. Rep. No. 181, 95th Cong., 1st Sess. 17-18 (1977), reprinted for the Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong. 2d Sess., 605-06 (1978). It would also severely weaken the unwarrantable failure provisions of section 104(d) by establishing a standard that would allow an operator to avoid sanction by claiming that MSHA had not provided advance notice that certain violative conduct would result in section 104(d) enforcement action.

It is well settled under Commission precedent that actual knowledge of a violative condition is not a necessary element to establish aggravated conduct for an unwarrantable failure finding. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991). In Eastern, the Commission reviewed unwarrantable behavior based on an operator's constructive knowledge of a continuing hydraulic oil leak problem at a hoist tipple. The Commission rejected the necessity of actual knowledge on the part of the operator and the notion that nonfeasance on the part of mine personnel might insulate the operator from imputed knowledge. The Commission stated:

> A lack of actual knowledge by Eastern's management of the apparently continuing leak does not necessarily bar an unwarrantable failure finding. In Pocahontas Fuel Co., 8 IBMA 136, 148-49 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), failure of a rank-and-file preshift examiner to detect a violation was found to be imputable to the operator for unwarrantable failure purposes. Even assuming that Eastern's preshift and onshift examiners did not record any continuing problem, that consideration does not necessarily preclude an unwarrantable failure finding. Emery makes clear that unwarrantable failure may stem from what an operator "had reason to know" or "should have known." 9 FMSHRC at 2003. Eastern Associated Coal Corporation, 13 FMSHRC at 187.

The record indicates that Drummond had reason to know of the conditions at the 4315 Belt Line. The evidence is uncontested that during the period of October 2-4, Inspector Deason conducted a systematic, step-by-step, inspection of the conveyor belt system, proceeding toward the 4315 Belt Line. Indeed, findings of fact with regard to the extent and course of the inspections and the accumulations found in those areas prior to the citation at issue here demonstrate that Drummond was on notice that accumulations were, in fact, being found at each step along the way toward the 4315 Belt Line. As a result Drummond should have been on heightened alert, see Youghiogheny & Ohio Coal Co., supra. and Eastern Associated Coal Corporation, supra., for accumulations of combustible materials, which the judge found had been there since at least the preshift examination. 13 FMSHRC at 74.

Also Drummond's own safety inspector testified at trial, and the judge so found, that the belts in the subject section required closer scrutiny. 13 FMSHRC at 74. The evidence establishes that the accumulations in question would have been noticed upon a careful inspection. 13 FMSHRC 74, 75. Drummond's own witness, John Busby, testified that the area in question under the take-up unit at the 4315 Belt Line was not clean and that he would have seen the accumulations if he had looked through the screens. 13 FMSHRC at 74. Inspector Deason testified that the accumulations would have been visible to a person walking by them. Id.

In addition, Drummond was warned on the first day of the inspections that no initials or dates appeared at the Slope Belt, suggesting that no preshift inspections had taken place. Inspector Deason reminded Carl Ware, mine foreman, that inspections had to be made. Moreover, the judge's recognition of the fact that "some" cleanup effort had been made suggests that the judge believed that Drummond knew of the accumulations. We conclude that Drummond knew or had reason to know of the accumulations.

We next address whether Drummond's conduct was unwarrantable, i.e. aggravated conduct, constituting more than ordinary negligence. The judge, in finding that the operator's conduct was not unwarrantable, rejected the Secretary's assertion that Drummond had made a conscious decision to delay

cleanup until the owl shift. He relied on Drummond's mitigation efforts and found that the operator had "made some efforts to clean up the accumulations." 13 FMSHRC at 74. The Secretary argues that Drummond's abatement efforts were not sufficient to mitigate unwarrantability and furthermore that the judge's decision is inconsistent in the following respects: first, the significant accumulations problems together with the unwarrantable failure to conduct an adequate inspection is inconsistent with good faith mitigation; second, vacation of the unwarrantability finding with respect to this violation is inconsistent with the finding of unwarrantability in the preshift examination violation; and, third, the judge's conclusion that the operator unwarrantably failed to inspect is inconsistent with his finding that the operator had no reason to know of the accumulations. We agree that there are inconsistencies in the judge's opinion.

On remand, the judge, in determining whether the violation arose as a result of Drummond's unwarrantable failure, should weigh the evidence in light of Drummond's actions in the context that it had reason to know of the accumulations, not in the context of actual knowledge.

On remand the judge should also consider whether Drummond's mitigation efforts were sufficient to deal effectively with the accumulation problems given the undisputed evidence that the belt was actually running in contact with the accumulations and over a portion of the metal frame where a roller was missing, and whether the miner could have completed the necessary abatement in an expeditious manner. He should consider these efforts in light of his previous findings that Drummond lacked due diligence in inspecting for accumulations and that accumulations remained during preshift examinations.

III.

Accordingly, we vacate the judge's finding of no unwarrantable failure and remand this matter to him for reconsideration of Drummond's actions in light of the legal standards enunciated herein.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 1991

GATLIFF COAL COMPANY, INC.	:	
	:	
v.	:	Docket Nos. KENT 89-242-R, etc.
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act"), we are called upon to determine whether a means of emergency communication that existed at the time of an accident constituted an established and maintained emergency communication system under 30 C.F.R. § 77.1701. Commission Administrative Law Judge Gary Melick vacated the section 104(d)(1) order issued in connection with the alleged violation. 13 FMSHRC 368 (March 1991)(ALJ). For the reasons set forth below, we reverse the judge's conclusion that the standard was not violated and remand the case to the judge for further proceedings.

I.

Factual and Procedural Background

The facts of this case are largely undisputed. Gatliff Coal Company, Inc. ("Gatliff") owns and operates a surface strip coal mine located in Whitley County, Kentucky known as Gatliff No. 1, Job 75. At about 3:20 a.m. on August 1, 1989 a truck driven by Gatliff employee Boyd Fuson went off an elevated roadway on the mine property and tumbled down a 120 foot embankment. In response to the accident, two Gatliff employees, Donald Hopkins and Richard Gibbs, drove from the mine property to the nearest telephone, which was about two miles away, in order to summon help. There was no telephone at Job 75. Fuson died as a consequence of the accident.

In the investigation that followed, MSHA inspector James Payne issued a 104(d)(1) order charging a violation of 30 C.F.R. § 77.1701, because there was no company radio at Job 75 at the time of the accident. [1] Tr. 49. According

---

[1] The standard provides:

§ 77.1701 Emergency communications; requirements.

to James Meadors, Gatliff's day shift foreman at the time of the accident, each mine site typically has three company radios. The company radios are two-way 40 watt radios with sufficient range to reach the Gatliff mine office and are located in the foreman's truck, the mechanic's truck and the lube truck. Tr. 151. On the night of the accident, however, there was no company radio on site at Job 75. Tr. 156. Meadors testified that he had taken the foreman's truck off the Job 75 site, that the lube truck was at another Gatliff mine site "roughly three miles away, maybe a little more," and that the mechanic's truck had been taken home. Tr. 150, 154, 156. At the time of the accident, there was, however, a citizen band radio ("CB radio" or "CB") belonging to the day shift operator of the bulldozer being operated by Mark Hopkins.

John Blankenship, Gatliff's safety director, testified about the operator's emergency notification procedures. He acknowledged that under normal circumstances those procedures consisted of communication via one of the two-way radios back to the mine office, where there was a telephone. Tr. 216. Blankenship's signed statement of Gatliff's company policy regarding emergency communications was read into the record:

> ... Gatliff Coal Company, Inc. has a standard operating procedures (sic) of the company's radio communication to be provided on the job in case of emergency. This provides for the job to contact base and base then calls for assistance, base being the guard shack. And this has always been our standard operating procedure. [2]
>
> Tr. 222.

> (a) Each operator of a surface coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.
>
> (b) The emergency communication system required to be maintained under paragraph (a) of this section may be established by telephone or radio transmission or by any other means of prompt communication to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of paragraph (a) of this section.

[2] We note that, although Blankenship signed the statement under protest, his protest was not because of any claim that the statement was inaccurate, but because he felt that signing it was tantamount to stating that Gatliff did not have the procedure in place. Tr. 221-223.

Thus, Gatliff conceded that its standard emergency communication procedure involved using 40 watt two-way radios and that there were no such two-way radios at Job 75 on the night of the accident. However, before the administrative law judge Gatliff took the position that, although no 40 watt two-way radio was present at Job 75 at the time of the accident, CB radios were present, which would have enabled the miners to link up with a different, but nearby, Gatliff mine site (Job 74) that did have such a two-way radio on the lube truck. Foreman Meadors testified that miners routinely communicated by CB radios between the two sites.
Tr. 150, 154.

Safety Director Blankenship stated that the miners at Job 75 could have reached the lube truck at Job 74 by using the CB, but he acknowledged that the miners were never told to use the CBs. Tr. 217. In response to questions from the court, Blankenship testified as follows:

> Q. Well, how do you get in touch with the lube truck if you're 3 miles away?
>
> A. With the CB.
>
> Q. Do you understand why these people did not use it?
>
> A. No, I don't.
>
> Q. Were they told to use the CBs?
>
> A. They were never per se told to use the CBs except, you know, they would have radio communication there and someone would get on the company radio and call. Now, how they got ahold of one another to use the company radio to call the guard that was pretty much left to their own discretion.

Tr. 217.

Blankenship testified that, since the accident, miners have been told to communicate for help the "fastest possible way" and that they have been told to use CBs. Prior to the accident, however, the miners had not been specifically told to use a CB radio or to walk to the mechanic's truck. Blankenship assumed that in an emergency the miners would find the quickest way to get help. Tr. 220.

Mark Hopkins testified that, although there was a CB radio on the bulldozer he was operating the night of the accident, it never entered his mind to use it to summon help. Tr. 158, 162. ALJ decision at 13 FMSHRC 373. The CBs were used by the miners to give directions, to keep each other company, to communicate with other job sites, and to use if there was something wrong. Tr. 163-165. When asked why he did not use the CB to reach another Gatliff job site the night of the accident, Hopkins stated he was

"just scared." Tr. 165. He further stated that he was trained, in the event of an emergency, to use either the foreman's truck or the lube truck to make a call for help. Tr. 164.

Inspector Payne testified that a CB radio could be used for emergency communication under the standard if there were someone monitoring it on the other end. Tr. 53. He noted that the CBs were owned by the employees and that during his investigation no one told him that there was an alternate emergency communication system. Tr. 54, 55, 61.

In his decision the judge noted the undisputed testimony of Inspector Payne that the only radio at Job 75 at the time of the accident was the CB in Hopkins' bulldozer and that this radio had insufficient range to reach either the mine office or medical or police assistance. 13 FMSHRC at 373. The judge further found that the CB at Job 75 could have reached the lube truck at Job 74 and that the lube truck had a radio sufficiently powerful to reach the mine office. On this basis, the judge concluded that the Secretary had failed to prove a violation because the CB radio on the bulldozer at Job 75 was capable of reaching the lube truck radio, which in turn could communicate with the mine office, where a telephone was located. 13 FMSHRC at 374.

The Secretary filed a petition for discretionary review challenging the judge's determination that the emergency communication system existing at the time of the accident satisfied the requirements of the standard.

II.

Disposition of Issues

The Secretary contends that 30 C.F.R. § 77.1701 is violated when a mine's established means of emergency communication is removed from a mine site. The Secretary argues that the established means of communication at Job 75 was the two-way radio in the foreman's truck and not the CB system. The miners knew only of the two-way radio as the emergency communication system; CB radios were personal, not company, equipment and were brought to work by some miners so that they could talk with other equipment operators. To underscore her contention that the CBs were not part of an "established" system the Secretary observes that, when the emergency in this instance arose, the miners did not use their CBs, but instead went in search of a telephone.[3]

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[3] The Secretary asserts as a separate basis for error that a CB radio could not be a substitute for the two-way radio system because it entailed unnecessary multiple-step emergency communication procedures, which were more time consuming and less reliable than the two-way radio. The Secretary did not assert before the administrative law judge that unnecessary multiple-step emergency communication systems were prohibited by the standard. The issue first appears in the Secretary's Petition for Discretionary Review and again, in amplified fashion, in her brief before the Commission. Gatliff responded to the issue in opposing the Secretary's Petition for Discretionary Review and noted that "[t]he judge made his determination based on the regulations, not on some obscure implication now

Gatliff argues that the communication system did not fail on the date of the accident, it simply was not used. Gatliff contends that the CB system constituted an established alternate method of emergency communication, which it originally established and installed. At one time Gatliff supplied its miners with CB radios at the site but discontinued the practice due to thefts. It continued to provide cable and antennae to those miners who brought their own CBs. The fact that the miners did not use the CB system in the emergency should not be confused or equated with the separate concept of whether the system was established and maintained. It notes that the miners knew that CBs were available and that Gatliff knew they were being used. Gatliff argues that the CBs constituted an alternate system satisfying § 77.1701.

There is substantial evidence in the record to support the judge's findings that CB communication from Job 75 to the lube truck at Job 74 was technically possible on the date of the accident, and that the lube truck's two-way radio could have reached the mine office, which was equipped with a telephone. The issue in this case, however, is whether this alternate system satisfies 30 C.F.R. § 77.1701. On its face the standard makes clear that the onus is upon the operator, not its employees, to establish and maintain the emergency communication system.

> "Establish" means "to make secure or firm ... to cause to be recognized or accepted ... to introduce and enforce.
>
> "Maintain" means "to preserve or keep in a given existing condition, as of efficiency or good repair."

Webster's II New Riverside University Dictionary (1984).

Gatliff has acknowledged that its standard procedure was to have a company two-way radio on the job as its emergency communication system and that this system worked by having the job site make contact with the base, which in turn called for assistance. Tr. 216. Gatliff also acknowledges that their standard (two-way radio) procedure was not in place at Job 75 on the night of the accident. Tr. 156. Gatliff Br. at 8, 9. It agrees that its standard operating procedure involved having at least one vehicle with such a two-way radio at each mine site and admits that this procedure was not followed when the foreman's truck left the Job 75 site at the start of the

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suggested by the Secretary." Statement in Opposition to the Secretary's Petition for Discretionary Review at 4.

Section 113(d)(2)(A)(iii) of the Mine Act provides: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." Not having been presented before the judge, this issue of law is not properly before the Commission and we decline to entertain it. See Union Oil Company of California, 11 FMSHRC 289, 301 (March 1989), Climax Molybdenum Co., 1 FMSHRC 1499, 1500 (October 1979).

shift on July 31. Id. at 8. Thus the two-way radio system was clearly not maintained as required by section 77.1701. However, Gatliff asserts that the alternate "CB system" was also its established and maintained system.

The CB system was undeniably a voluntary system adopted by the miners utilizing their personal CB radios. Tr. 54, 154, 162, 219. The operator initially introduced CBs but effectively abandoned their use in favor of two-way radios. Tr. 219. The operator did not enforce the use of CBs and there is no evidence that the operator told employees that the CB system was an alternate emergency system. During Inspector Payne's investigation no one suggested that there was an alternate emergency communication system. Tr. 61. Blankenship admitted that the miners had never been told "per se" to use the CBs, but after the accident they were instructed to use them. Tr. 217, 220. This failure to instruct miners in the use of the CB radios as an emergency communication system weighs against a conclusion that the alternate system was established and maintained.

The fact that the CBs were the miners' personally owned equipment, not Gatliff's, and that miners were free to decide whether to bring CBs to work, is also inconsistent with the standard's requirement that the emergency communication system be operator established and maintained. That the operator knew that its employees were routinely using CBs, did not disapprove of their use, and aided this practice to the extent of providing cable and antennae for them does not amount to sufficient involvement to constitute operator establishment and maintenance of the system.

In conclusion, we hold that because the CB system was neither operator established, nor operator maintained, it did not satisfy the requirements of section 77.1701. Accordingly, we reverse the administrative law judge's determination that no violation occurred. We remand the case to him for resolution of any remaining issues, including whether the violation

resulted from the operator's unwarrantable failure, whether it was significant and substantial, and for the assessment of an appropriate civil penalty. [5]

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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[5] Chairman Ford did not participate in the consideration or disposition of this matter.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 4, 1991

BRENT ROBERTS, Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 91-896-R
v.	:	Cassette Nos. 46295881, et al.
	:	
	:	Peabody Coal Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 15-02709 Camp No. 1 Mine

DECISION

Appearances: Michael T. Heenan, Esq., Lynn M. Rausch, Esq., Smith, Heenan and Althen, Washington, D. C. for the Contestant; James Crawford, Esq., Robert C. Snashall, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: **Judge Merlin**

This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), (hereafter referred to as the "Act" or "Mine Act") seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The Secretary has filed a motion to dismiss accompanied by a supporting brief and contestant has filed a brief in opposition. Oral argument was heard on August 22, 1991.

The Act requires each mine operator to continuously maintain an average concentration of respirable dust in the mines at or below prescribed limits. 30 U.S.C. § 842(b), 30 C.F.R. § 70.100. Operators must take accurate dust samples and submit them to the Secretary for analysis. 30 U.S.C. § 842(a), 30 C.F.R. § 70.201-70.210. Respirable dust sampling can only be done by a person who has passed a test on sampling given by the Mine Safety and Health Administration (hereafter referred to as "MSHA") and who has been certified by the Secretary to take the required dust samples. 30 C.F.R. § 70.2(c) and 30 C.F.R. § 70.202(a) and (b); 30 C.F.R. § 71.2(c) and § 71.202(a) and (b); and 30 C.F.R. § 90.2 and § 90.202(a) and (b).

Contestant in the present matter is a person certified by the Secretary to take dust samples in accordance with the procedures outlined above. On April 18, 1991, MSHA wrote contestant that information gathered during an investigation showed that he

failed to properly collect or ensure proper collection of respirable dust samples. Attached to the letter was a list of cassettes where samples allegedly were collected by contestant and the weight of the dust sample allegedly had been altered as indicated by abnormal white centers. The letter advised that MSHA was proposing to revoke contestant's certification to collect respirable dust samples and, if applicable, his certification to maintain and calibrate respirable dust sampling devices. Contestant was given 30 days to provide any information he believed might affect the proposed decision to revoke.

On May 15, 1991, the instant action was filed. But, on May 20, 1991, MSHA again wrote contestant stating that MSHA only needed to know if he intended to contest the revocation. Contestant was given 60 days to advise whether he intended to contest the revocation and was told that in the meantime within 30 days MSHA would send him information on procedures to be followed for certification revocation.

At this point it must be noted that on April 4, 1991, the Secretary issued 4,710 citations under section 104(a) of the Act, 30 U.S.C. § 814(a), to 508 mine operators involving 874 mines, alleging violations of 30 C.F.R. § 70.209(b), 71.209(b) and 90.209(b), on the ground that the weight of respirable dust cassettes submitted by operators to fulfill the sampling requirements had been altered and that a portion of the dust in the filters had been removed. Operators have filed more than 3,000 notices of contest with the Commission under section 105(d) challenging these citations. These cases, now pending before an administrative law judge of this Commission, are in the early stages of discovery. In re: Contests of Respirable Dust Sample Alteration Citations, (Master Docket No. 91-1). However, apparently because of a plea bargain with the United States Attorney in criminal proceedings no citations were issued to contestant's operator regarding contestant's cassettes and therefore, there are no operator notices of contest with respect to them. (Hearing Transcript, pp. 27-28).

Most recently, on June 27, 1991, MSHA wrote contestant's counsel to advise that MSHA had determined to stay all pending revocation proceedings. MSHA's letter referred to the notices of contest filed by operators and further stated that there were several active criminal investigations involving abnormal white centers although no specific cases were identified. According to the letter the stay would remain in effect until further notice, but individual cases might be activated. Contestant was told that if the stay was lifted in his case he would be given 60 days to respond and revocation procedures would be given to him at that time.

The sequence of MSHA's letters to contestant demonstrates a retreat from the taking of immediate action against him. However, this in no way means that the Secretary has ceased activities of potential harm to contestant. The reference in the June 27 letter to the ongoing notices of contest filed by operators (Master Docket No. 91-1) is an acknowledgment that at the very least, issues and matters of general application arising in those contests may well be relevant to the continued status of contestant as a certified person.[1] As already noted, no citations were issued to contestant's operator, and no operator initiated contests exist with respect to his cassettes. Therefore, contestant would appear to be a stranger to the 3,000 operator suits. If contestant cannot take part in those contests, at some point the question will arise how he can be bound by any of the findings and conclusions reached therein. Also, of concern is how contestant could be affected by the plea bargain between his operator and the Government regarding his cassettes. Martin v. Wilks, 490 U.S. 755, 761-762 (1989); Gilbert v. Ben-Asher, 900 F.2d 1407, 1410 (9th Cir. 1990). In general, one would expect every effort would be made to avoid duplicative litigation, particularly in these dust cassette cases where so many persons and suits are involved.

In determining what other recourse, if any, is available to contestant, the nature of the rights arising from his certification must be ascertained. Contestant's certification may be likened to a form of license from the Secretary to perform his tasks and is therefore, akin to many other situations where individuals have been afforded safeguards against arbitrary deprivation. See e.g., driver's licenses: Mackey v. Montrym, 443 U.S. 1, 10 (1979); Dixon v. Love, 431 U.S. 105, 112 (1977); Bell v. Burson, 402 U.S. 535, 539 (1971); Scott v. Williams, 924 F.2d 56, 58 (4th Cir. 1991); horse trainer license: Barry v. Barchi, 443 U.S. 55, 64 (1979); day care center license: Chalkboard v. Brandt, 879 F.2d 668, 672 (9th Cir. 1989); horse owner license: Gamble v. Webb, 806 F.2d 1258, 1261 (5th Cir. 1986); warehouse license: Delahoussaye v. Seale, 788 F.2d 1091, 1094 (5th Cir. 1986); pilot license: Pastrana v. United States, 746 F.2d 1447, 1450 (11th Cir. 1984). Contestant's certification also is analogous to a form of public employment where due process must be accorded before adverse action is taken. Federal Deposit Insurance Corporation v. Mallen, 486 U.S. 230, 240 (1988); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); Crain v. Board of Police Commissioners, 920 F.2d 1402

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[1] Even where a contestant's operator has filed a notice of contest, MSHA's letter apparently contemplates a two-track approach whereby the individual would do nothing until his operator's case is decided. However, such an individual could seek to intervene in the operator's suit. 29 C.F.R. § 2700.4.

(8th Cir. 1990); Derstein v. State of Kansas, 915 F.2d 1410 (10th Cir. 1990). The foregoing decisions set forth what process is "due" in various situations in accordance with a balancing test which weighs private interests, risk of erroneous deprivation and the Government's interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In some instances a pre-termination hearing is constitutionally required. Logan v. Zimmerman Brush Co., supra, at 433-434, 436; Bell v. Burson, supra, at 541-542. In others it is not. Mackey v. Montrym, supra, at 19; Dixon v. Love, supra, at 115. But there must be some form of opportunity to respond before the property right is either infringed upon or taken away. Mathews v. Eldridge, supra, at 333. Accordingly, the Secretary's certification of contestant undoubtedly constitutes a property right entitled to appropriate constitutional protections.

Insofar as the pleadings and briefs filed by the parties in this case are concerned, it appears that the Secretary has not adopted any procedures regarding decertification. It should be noted that the regulations do not expressly give her that authority. The proposed final rule contained such a provision, 42 Fed. Reg. 59294, 59296 (November 16, 1977), but the final rule did not, although the comments asserted the Secretary's right to decertify. 42 Fed. Reg. 23990, 23996 (April 8, 1980). However, certification of qualified individuals has been recognized as essential to the integrity of the dust sampling program. Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, 824 F.2d 1071, 1087 (D.C. Cir. 1987); American Mining Congress v. Marshall, 671 F.2d 1251, 1259 (10th Cir. 1982); Consolidation Coal Company, 8 FMSHRC 890, 901 (June 1986). If the sampling program is to work, the Secretary must have the power to decertify. I believe she has that authority. Janik Paving and Construction v. Brock, 828 F.2d 84, 91 (2d Cir. 1987); West v. Bergland, 611 F.2d 710, 720-723 (8th Cir. 1979); Touche Ross Securities and Exchange Commission, 609 F.2d 570, 579-580 (2d Cir. 1979).

Contestant's present position is, however, untenable because the Secretary has not come forward with any procedures whereby he can protest the proposed decertification. In his brief and at the hearing the Solicitor offered the assurance that once revocation proceeds, contestant will be given an opportunity for a pre-revocation hearing and for a full post-revocation hearing. (Solicitor's brief p. 19) (Hearing Transcript pp. 24-25, 29-30).

In light of the foregoing, the Mine Act must be examined to see if it can be found to afford contestant any relief with respect to his constitutionally protected rights. In their briefs the parties make extensive reference to the penalty provisions of the Act. After first contending that the Secretary has no authority to decertify, a position which as set forth above I reject, contestant asserts in the alternative that certain enforcement actions such as withdrawal orders may be

considered a form of civil penalty which can be contested pursuant to the Act. Under this theory contestant suggests that a proposed decertification is a proposed penalty which he is entitled to challenge before the Commission. (Contestant's brief pp. 6-8, 11-13). The Secretary's position is that the proposed revocation letter is not a civil penalty under the Act. (Solicitor's brief pp. 11-13).

It is clear that generically the term "penalty" includes punishments and sanctions which are non-monetary as well as monetary. Webster's Third New International Dictionary (1988), p. 1688. However, the pertinent inquiry here is not the various meanings of "penalty" permissible under general usage but how that term is used in the Mine Act. The antecedent of the present penalty provisions in sections 105 and 110 of the Mine Act is to be found in section 109 of the 1969 Coal Act. Both Senate and House Reports for the Coal Act explained the civil penalties, then being introduced into the law, solely in monetary terms. Every reference to civil penalties in the reports described them as fines of specified dollar amounts. S. Rep. No. 411 and H.R. Rep. No. 563, 91st Cong., 2d Sess., reprinted in Legislative History, Federal Coal Mine Health and Safety Act, (hereafter referred to as "Legislative History") at 39, 92-93, 568-569, 594 (1970). Similarly, floor debate in both houses, regardless of the precise issue being discussed, e.g., mandatory nature of civil penalties or criteria to be used in fixing amounts, was always in terms of dollars. Legislative History, supra, at 463-464, 509-510, 659, 717. After conference between the House and Senate, the Statement of the Managers on the Part of the House, delineated civil penalties in the same manner. Legislative History, supra, at 1033. Nowhere in the legislative history of the Coal Act is there any indication that anything other than monetary fines were being adopted.

In 1977, the original Senate and House Bills, amending the 1969 Coal Act, contained a provision entitled a "civil penalty closure order." S. 717 and H.R. 4287 95th Cong., 2d Sess., reprinted in Legislative History of the Federal Mine Safety Act of 1977 (hereafter referred to as "1977 Legislative History") at 136, 141, 159, 214, 219 and 237 (July 1978). This additional closure authority which was to be reserved for the most serious cases would have been proposed by the Secretary and assessed by the Commission after an opportunity for hearing in the same manner as monetary civil penalties. 1977 Legislative History, supra, at 85-86. However, after Committee hearings, both House and Senate bills omitted this provision and the Committee reports do not refer to it. In floor debate, Senator Schweiker explained that the civil penalty closure order had been deleted as too heavy handed and had been replaced with a provision for a notice followed by closure orders where an operator has a pattern of significant and substantial violations, 1977 Legislative History, supra, at 1071-1074. Both House and Senate Committee reports

describe civil penalties under the 1977 Amendments as adopting the same monetary penalties that had been in effect under the Coal Act. H.R. 312 and S. 181, 95th Cong., 2d Sess., 1977 Legislative History, supra, at 365, 629. Civil penalty provisions were extended to non-coal mines and administrative procedures including the creation of this independent Commission were improved, but the reports make clear that only monetary fines are involved. 1977 Legislative History, supra, at 375-376, 628-634. As in 1969, floor debate in 1977 demonstrated that civil penalties meant only monetary fines. 1977 Legislative History, at 906-907, 921-922, 1014, 1211-1212. The Joint Explanatory Statement of the Committee of the Conference similarly explained that only monetary fines are involved. 1977 Legislative History, supra, at 1335-1336.

In light of the foregoing, it is clear that the proposed decertification of contestant cannot be interpreted as a punishment falling within the civil penalty provisions of the Act. As set forth above, in 1977 Congress considered and rejected a civil penalty closure order. Instead, it left in place and reaffirmed the statutory distinction between civil penalties which are only monetary in nature and other sanctions such as withdrawal orders. Consequently, the penalty provisions of the Act afford no relief to contestant.

There remains for consideration whether contestant can challenge the proposed decertification under the general review provisions of the Act. Section 105(d) of the Act, 30 U.S.C. § 815(d), sets forth the parameters of Commission review of Secretarial actions as follows:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing... and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.... The rules of procedure prescribed by the Commission shall provide

affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.

The Commission has adhered strictly to the terms of the statute in determining its jurisdiction. It has held that a representative of miners cannot contest a citation because the Act gives that right only to mine operators. U.M.W.A. v. Secretary of Labor, 5 FMSHRC 807 (May 1983). In the same vein the Commission also held that miners and their representatives do not have the statutory right to contest the vacation of orders because section 105(d) does not confer that right upon them and Congress demonstrated in other provisions of the Act that it was fully aware of the discrete meaning of vacating an order. U.M.W.A. v. Secretary of Labor, 5 FMSHRC 1519 (September 1983). As the Commission stated, section 105(d) is clear and unambiguous in setting forth the extent to which miners and their representatives can institute challenges to the Secretary's enforcement of the Act. 5 FMSHRC at 1520.

Contestant recognizes the limited scope of review under section 105(d) as interpreted by the foregoing Commission decisions. However, he argues that those decisions are distinguishable from this case because they involved actions against operators, whereas here contestant himself may be the subject of enforcement action in the form of decertification. (Contestant's brief p.18). These contentions notwithstanding, I am bound by the Commission's consistent fidelity to the precise terms of the statute. Kaiser Coal Company, 10 FMSHRC 1165 (September 1988). The Mine Act, following the scheme first presented in the Coal Act, establishes a system whereby orders, citations and penalty assessments are issued to operators and pursuant to which operators may obtain administrative review of them. 30 U.S.C. § 814 and 820. Legislative History, supra, at 36-38, 565-566, 588-590, 713-714, 1029-1032; 1977 Legislative History, supra, at 635-637. Whenever administrative review is available to someone other than an operator, the law carefully delineates to whom and under what circumstances such relief is available. The term "operator" is explicitly defined in the Act, 30 U.S.C. § 802(d), and contestant recognizes he does not fall within that definition. (Contestant's brief pp. 7-8). In addition, there is no basis to hold that any of MSHA's letters to contestant regarding decertification can be construed as a citation under the Act. The terms and conditions under which citations are issued are plainly spelled out in the Act and none of them exist here. 30 U.S.C. § 814.

It is not for the Commission or one of its judges to legislate a system of administrative review under the Mine Act which has no foundation in the law or legislative history. As explained above, contestant has significant rights which are entitled to due process protections, but implementation of those

protections must be found elsewhere. The review provisions of the Mine Act do not represent the only possible avenue of relief against every action the Secretary may take in the field of mine health and safety. And the Secretary's failure to provide appropriate remedies at this time does not endow the Commission with powers it does not otherwise possess. An administrative agency may not exceed the bounds legislated by Congress. As the Supreme Court has stated:

> However, the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.

Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 322, (1961).

In light of the foregoing, this case must be and is hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 4, 1991

PAUL COTTON, Contestant	:	CONTEST PROCEEDING Docket No. KENT 91-897-R Cassette Nos. 46268665, et al.
v.	:	Peabody Coal Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 15-14074 Martwick UG
AND	:	
STEVE LITTLE, Contestant	:	CONTEST PROCEEDING Docket No. KENT 91-898-R
v.	:	Cassette Nos. 46268661, et al.
	:	Peabody Coal Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 15-14074 Martwick UG
AND	:	
SYDNEY POE, Contestant	:	CONTEST PROCEEDING Docket No. KENT 91-992-R
v.	:	Decertification Letter
	:	Peabody Coal Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 15-07166 Sinclair UG #2
AND	:	
ROBERT BENNETT, Contestant	:	CONTEST PROCEEDING Docket No. LAKE 91-478-R
v.	:	Cassette Nos. 46267776, et al.
	:	Peabody Coal Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 11-02440 Marissa Mine
AND	:	

AND	:	
	:	
SHARELL CLARK,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1331-R
v.	:	Cassette Nos. 46216752, et al.
	:	
	:	Eastern Associated Coal Corp.
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 46-04332
ADMINISTRATION (MSHA),	:	
Respondent	:	Light Foot No. 1 Mine
	:	
AND	:	
	:	
JAMES F. MATICS,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1332-R
v.	:	Cassette Nos. 46277778, et al.
	:	
	:	Peabody Coal Company
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Harris No. 2 Mine ID 46-01270
ADMINISTRATION (MSHA),	:	Harris No. 1 Mine ID 46-01271
Respondent	:	
	:	
AND	:	
	:	
ROBERT E. PERSINGER,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1333-R
v.	:	Cassette Nos. 46138254 et al.
	:	
	:	Peabody Coal Company
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Montcoal No. 7
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 46-01495
	:	
AND	:	
	:	
JIMMY HAYWORTH,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1525-R
v.	:	Decertification Letter 4/30/91
	:	
	:	Eastern Associated Coal Corp.
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Harris No. 1
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 46-01271

AND	:	
	:	
REGGIE PHILYAW,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1926-R
v.	:	Cassette Nos. 46239627, et al.
	:	
	:	Peabody Coal Company
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Kopperston No. 1
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 46-01537
	:	

DECISION

Appearances: Michael T. Heenan, Esq., Lynn M. Rausch, Esq., Smith, Heenan and Althen, Washington, D. C. for the Contestant; James Crawford, Esq., Robert C. Snashall, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: **Judge Merlin**

The parties have agreed that the decision in Brent Roberts v. Secretary of Labor, Docket No. KENT 91-896-R is controlling in the above-captioned cases.

A decision has been entered this day dismissing the complaint in Roberts.

Accordingly, it is **ORDERED** that these cases must be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

BENNY JOHNSON, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 91-934-R
v.	:	through KENT 91-936-R
	:	Citation No. 9858643; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	through 9858645; 4/4/91
	:	Island Creek Coal-W Kentucky
	:	Hamilton No. 2 Mine
	:	Mine ID 15-02706

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d)of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Island Creek Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss which contestant has opposed, stating he relies upon the brief submitted on his behalf in Docket Nos. KENT 91-937-R through KENT 91-955-R.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's brief in KENT 91-937-R etc., points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party to the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Enclosure

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

BENNY JOHNSON, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 91-937-R
v.	:	through KENT 91-955-R
	:	
	:	Citation No. 9858650; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	through 9858668; 4/4/91
	:	Island Creek Coal-W Kentucky
	:	Ohio No. 11
	:	Mine ID 15-03178

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Island Creek Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party to the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

JAMES JACK, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 91-503-R
v.	:	through LAKE 91-529-R
	:	
	:	Citation No. 9859697; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	through 9859723; 4/4/91
	:	Consolidation Coal Company
	:	Powhatan No. 4 Mine
	:	Mine ID 33-01157

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party in the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

JOHN S. BIBY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 91-530-R through LAKE 91-605-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9858333; 4/4/91 through 9858408; 4/4/91
	:	Zeigler Coal Company
	:	Spartan Mine
	:	Mine ID 11-00612

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued to contestant's operator, Zeigler Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging each of the citations issued to it. Contestant may wish to consider the possibility of becoming a party to the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

LARRY FLYNN, Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 91-538-R
v.	:	Decertification Notice
	:	Lad Mining, Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 35 Mine
	:	Mine ID 40-02839

DECISION

Before: Judge Merlin

This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The instant notice relates to citations which the Secretary issued to contestant's operator, Lad Mining, Inc., for allegedly tampering with dust cassettes. The Secretary has filed a motion to dismiss.

In opposing the motion to dismiss, contestant first raises the Secretary's failure to answer within 30 days. The Secretary's answer was only three days late and the delay was non-prejudicial. Equally without merit is contestant's assertion regarding the Secretary's failure to plead jurisdiction. This omission could be easily corrected by an amended answer, but I deem it unnecessary to do so because there is no prejudice and based upon the submissions of the parties the matter is ripe for disposition at this time.

Contestant relies upon and incorporates by reference the arguments contained in the brief filed by the contestant in Little v. Secretary, Docket No. KENT 91-898-R. The parties in Little have agreed that the decision in Roberts v. Secretary, Docket No. KENT 91-896-R, is controlling in that matter.

On September 4, 1991, I held in Roberts that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision which is determinative of Little is dispositive of this matter.

It is noted that contestant's notice of contest represents that the operator here, unlike the operator in Roberts, has filed notices of contest challenging each of the citations issued to it and that contestant has filed a notice of intervention in those cases.

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

Paul Merlin
Chief Administrative Law Judge

Enclosure

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

KIMMIE NOAH, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. SE 91-544-R
v.	:	through SE 91-655-R
	:	Citation No. 9860517; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	through 9860628; 4/4/91
	:	Consolidation Coal Company
	:	Matthews Mine
	:	Mine ID 40-00520

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protection. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party to the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

PATRICK HENRY FLUTY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1193-R through WEVA 91-1218-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9862149; 4/4/91 through 9862174; 4/4/91 Mine No. 1 Mine ID No. 46-05978

DECISION

Before: Judge Merlin

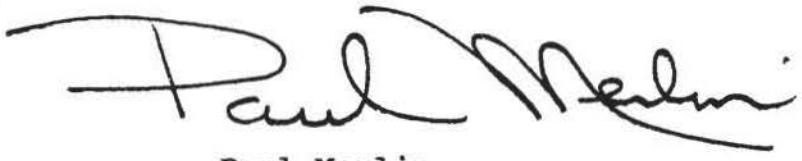
These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued to contestant's operator, Eastern Mingo Coal Company, for allegedly tampering with a dust cassette. The notices of contest set forth that contestant is the operator's safety supervisor. The Secretary's motion to dismiss advises that the operator has contested these citations.

By letter received August 23, 1991, contestant's counsel advises that contestant has no objection to the decision in Roberts v. Secretary, Docket No. KENT 91-896-R, where oral argument was heard on August 22, 1991, being dispositive of this matter. By letter dated August 23, 1991, the Secretary similarly states that the decision in Roberts is controlling.

On September 4, 1991, I held in Roberts that an individual such as contestant has rights arising from his certification which are entitled to due process protection. However, I further held that I had no jurisdiction to entertain the suit or grant relief. Those conclusions obtain here as well.

As noted above, the operator here, unlike the operator in Roberts, has filed notices of contest. Contestant here may wish to consider the possibility of seeking to become a party in the operator's suit. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**



Paul Merlin
Chief Administrative Law Judge

Enclosure

Distribution:

Gregory J. Campbell, Esq., Suite 200, Morrison Building, 815 Quarrier Street, Charleston, WV 25301 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

EVERETTE E. BALLARD, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 91-1385-R
v.	:	Decertification letter dated 4/18/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Birchfield Mining Company Mine No. 1
	:	Mine ID 46-07273

DECISION

Before: Judge Merlin

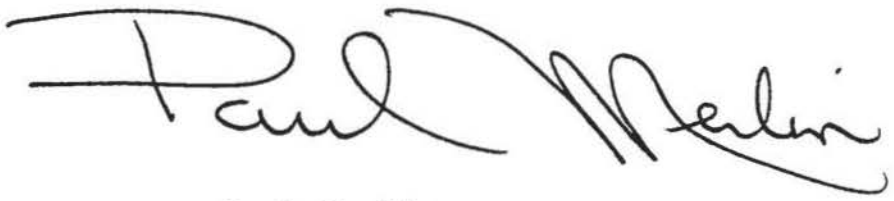
This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The Secretary has filed a motion to dismiss and contestant has submitted a brief in opposition.

Contestant's brief is virtually identical to the one filed in Roberts v. Secretary, Docket No. KENT 91-896-R. The Solicitor has submitted a letter dated August 23, 1991, stating that a determination in Roberts would be controlling. Upon review of the instant file I find that the issues presented here are the same as those in Roberts and that therefore, the decision in that case governs.

On September 4, 1991, I held in Roberts that an individual such as contestant has rights arising from his certification which are entitled to due process protection. However, I further held that I had no jurisdiction to entertain the suit or to grant him relief. Those conclusions obtain here as well.

It should be noted, however, that by letter dated August 27, 1991, the Solicitor advised that a penalty petition has been filed against the operator with respect to the matters involved herein and that the operator has answered. (Docket No. WEVA 91-1719). Contestant may wish to consider the possibility of becoming a party in the penalty suit. (See Footnote 1, page 3 of the Roberts decision).

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



Paul Merlin
Chief Administrative Law Judge

Enclosure

Distribution:

Martin J. Glasser, Esq., Webster J. Arceneaux, III, Esq., Lewis, Ciccarello & Friedberg, Suite 700, One Valley Square, Charleston, WV 25301 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

DANIEL SERGE,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1386-R
v.	:	Cassette No. 46347258
	:	
	:	Consolidation Coal Company
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Osage No. 3
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 46-01455

DECISION

Before: Judge Merlin

This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

By letter dated August 23, 1991, counsel for contestant advised that the decision in Roberts v. Secretary, Docket No. KENT 91-896-R, would govern the outcome of this case. Similarly, by letter also dated August 23, 1991, the Secretary agreed that the decision in Roberts would be controlling here.

On September 4, 1991, I held in Roberts that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The facts here are the same as those in Roberts[1] and the conclusions reached there obtain here as well.

---

[1] The file does not indicate why no citation was issued to the operator with respect to the cassette in this matter, whereas the operator was cited for sixteen other cassettes involving contestant.

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

Robert B. Allen, Esq., King, Betts & Allen, 1300 Charleston National Plaza, P. O. Box 3394, Charleston, WV 25333-3394 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

SANDRA EASTHAM, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1414-R through WEVA 91-1435-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9861529; 4/4/91 through 9861562; 4/4/91 Consolidation Coal Company Robinson Run No. 95 Mine Mine ID 46-01318

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from her certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant her relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party in the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

KEVIN TUSTIN, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1436-R through WEVA 91-1447-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9861681; 4/4/91 through 9861692; 4/4/91
	:	Docket No. WEVA 91-1448-R through WEVA 91-1493-R
	:	Citation No. 9861694; 4/4/91 through 9861739; 4/4/91
	:	Consolidation Coal Company
	:	Blacksville No. 2 Mine
	:	Mine ID 46-01968

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party in the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

DANIEL SERGE, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 91-1494-R
v.	:	through WEVA 91-1509-R
	:	
	:	Citation No. 9861603; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	through 9861618; 4/4/91
	:	
	:	Consolidation Coal Company
	:	
	:	Osage No. 3 Mine
	:	
	:	Mine ID 46-01455

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum of law in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protection. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party to the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

STEVEN PERKINS, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1510-R through WEVA 91-1524-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9861581; 4/4/91 through 9861595; 4/4/91 Consolidation Coal Company Ireland Mine Mine ID 46-01438

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of seeking to become a party in the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is **ORDERED** that these cases be and are hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

Robert B. Allen, Esq., King, Betts & Allen, 1300 Charleston National Plaza, P. O. Box 3394, Charleston, WV 25333-3394 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1991

DONALD CASE,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-1614-R
v.	:	Decertification Letter
	:	
	:	Terry Eagle Coal Co.
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Warren Eagle No. 2
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 46-04758

DECISION

Before: Judge Merlin

This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The Secretary has filed a motion to dismiss and contestant has submitted a brief in opposition.

Contestant's brief is virtually identical to the one filed in Roberts v. Secretary, Docket No. KENT 91-896-R. Also, the Solicitor has submitted a letter dated August 23, 1991, stating that a determination in Roberts would be controlling. Upon review of the file I find that the issues presented here are the same as those in Roberts and that therefore, the decision in that case is dispositive.

On September 4, 1991, I held in Roberts that an individual such as contestant has rights arising from his certification which are entitled to due process protection. However, I further held that I had no jurisdiction to entertain the suit and grant any relief. Those conclusions obtain here as well.

It should be noted, however, that by letter dated August 27, 1991, the Solicitor advised that a penalty petition has been filed against the operator with respect to the matters involved herein. (Docket No. WEVA 91-1732). Contestant may wish to consider the possibility of becoming a party to the penalty suit. (See Footnote 1, page 3 of the Roberts decision.)

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

Martin J. Glasser, Esq., Webster J. Arceneaux, III, Esq., Lewis, Ciccarello & Friedberg, Suite 700, One Valley Square, Charleston, WV 25301 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/gl

FEDERAL MI SAFETY AND HEALTH REVIEW OMMISSION

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

September 5, 1991

FREEMAN UNITED COAL MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 91-746-R
	:	Citation No. 3218200; 8/8/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Crown II Mine
	:	Mine ID 11-02236

DECISION

Appearances: Richard R. Elledge, Esq., Gould & Ratner, Chicago, Illinois for Contestant.
Lisa Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;

Statement of the Case

This case is before me based on a Notice of Contest filed by Freeman United Coal Mining Company (Contestant), contesting the issuance of Citation No. 3218200 which alleges a violation of 30 C.F.R. § 75.321. Contestant also filed a Motion for Expedited Hearing, and in a conference call initiated by the undersigned on August 16, 1991, with counsel for both parties, counsel presented oral argument on the merits of this motion. The motion was granted,[1] and the Secretary (Respondent), did not object to Contestant's request that a hearing be held in Arlington, Virginia.

A hearing was held in Falls Church, Virginia, on August 19, 1991. At the hearing Lonnie Deon Conner, Tim Yakus, Kenneth Fox and Charles Dana Campbell testified for Respondent, and Patrick J. Peterson, Harry A. Schum, and Kenneth E. Miller testified for Contestant. The parties waived their right to submit written Post Hearing Briefs, and in lieu thereof presented closing arguments at the conclusion of the evidentiary hearing.

---

[1]In order to expedite the decisional process, the reporting service contracted to transcribe the hearing, was required to file the transcript within 3 days after the hearing. The transcript was not filed until September 3, 1991.

Findings of Fact and Discussion

On June 15, 1991, the only fan providing ventilation at Respondent's underground Crown II mine stopped during a thunderstorm. It is uncontested that all persons were not withdrawn from the mine as a consequence of the stoppage of the fan.

On August 8, 1991, Lonnie Deon Conner, an MSHA Inspector issued Citation No. 3218200. The Citation alleges that "based on information obtained from the main fan pressure recording gauge chart, the main fan was stopped for more than 15 minutes during the evening of June 15, 1991, between 6:00 p.m. and 7:00 p.m." The citation alleges a violation of Section 75.321 supra, which in essence, requires an operator to adopt a plan to provide "...that when any mine fan stops," (emphasis added), immediate action shall be taken by the operator to withdraw all persons from the working sections. In this connection, the revised fan stoppage plan (the Plan) in effect in June 1991 provides, as pertinent, as follows: "All persons shall be withdrawn from the mine to the surface after a fan stoppage of 15 minutes or longer." (Joint Exhibit No. 2, page 2). The sole issue for resolution herein is whether Respondent has proven that during the evening of June 15, 1991, there was "a fan stoppage" of 15 minutes or longer. For the reasons that follows I conclude that Respondent has not met this burden.

The testimony adduced at the hearing is not sufficiently convincing to establish the time the fan stopped, and the time it restarted. Kenneth Fox, a miner operator, was working underground on June 15, 1991. He indicated that he was wearing a watch and noted that the power went off a little before 6:15 p.m. He did not testify specifically as to the time that the fan went off. Neither Fox, nor Tim Yakus Respondent's other witness who was working in the hoist building on the shift in question on June 15, 1991, convincingly established that the fan went off the same time the power went off and not later. Yakus in this connection testified that the lights went off, but did not explicitly say that the fan went off at the same time. I find more convincing the explicit testimony in this regard by Contestant's witnesses. Harry Schum a maintenance foreman testified that when he was at the bottom shop the power went off, but that he could hear the fan as there is a "tremendous" amount of air drawn there past a stopping and "it's whistling very loud" (Tr. 206). Kenneth E. Miller, Contestant's shift mine manager testified that at 6:00 p.m. on June 15, 1991, he was told that there was no power underground. He then went to the power box and discovered that the fan was off, as there was no air being drawn at the stopping.

According to Fox when he heard Yakus tell Miller that the fan had restarted, he looked at his watch and it was 6:35 p.m.

However, as noted above, he did not state explicitly the time according to his watch when the fan stopped working. Yakus who was only 15 to 20 yards away from the fan, noted when the fan stopped, as he heard the alarm go off. He also heard the fan restart. However, he was not wearing a watch at the time, and had no personal knowledge of the time of the stoppage of the fan. Yakus testified that he asked Tom Crays who was present with him on June 15, 1991, the time when the fan stopped, and Crays told him 6:20 p.m., and he reported this to Miller. Also Yakus testified that when the fan restarted he asked Crays the time, and Crays told that it was 6:40 p.m. I find this hearsay testimony inherently unreliable to establish the time of the stoppage of the fan, as Crays did not testify and thus the record does not contain any basis to evaluate the probative value of the out of court conclusionary declarations he made to Yakus when asked the time.

Respondent also relies on the pressure recording gauge chart of the fan as interpreted by Charles Dana Campbell an MSHA Senior Mining Engineer, and who is a professional engineer, and works in a ventilation division technical support group. The chart was made by a Bristol Babcock serial 500 pressure recorder (the recorder) which is designed to record negative air pressure created by the exhaust fan in question over a 7 day period. As the chart rotates indicating a passage of time, pressure is recorded by way of an ink stylus. It thus is possible to correlate the negative pressure created by the fan, to a specific hour in a 7-day cycle (See Government Exhibit No. 1).

Campbell examined a copy of the chart, and with the use of a protractor located the center of the chart. He calculated the angle of the arc denoting the distance on the chart between the point in time on Saturday, June 15, when the pressure started to go down, to the point in time where the pressure returned to the level it was at before the fan lost power. He then translated the degree of this angle into minutes, and arrived at a figure of 19.6 minutes, with a margin of error of plus or minus 2.8 minutes. He opined that once the fan is re-energized it would take 1 or 2 seconds to regain its operating negative pressure.

According to the plan the key element for analysis is the time of the fan's "stoppage". This would appear to call for a measurement of the time interval during which time the fan had stopped. Patrick J. Peterson, a Senior Mining Engineer employed by Contestant, testified that he observed the stylus on the recorder to take several minutes to go from 0, its position when the fan is not on, back to negative 6. I place more weight on his testimony in this regard rather than that of Campbell, inasmuch as it was based on his observations, whereas Campbell never observed the recorder in operation. Also, Peterson testified that, by comparing the regular upward slope of the stylus from zero up to maximum pressure, to the upward stroke in

that direction indicated on the chart for Saturday, June 15, it can be seen that the latter stroke did not follow the regular slope. According to Peterson this indicates that the return to maximum pressure once the fan was restarted took more time than it took to go from maximum pressure to zero when the fan was turned off by the storm.

Further, Peterson indicated that it takes less time for the pressure to go down to zero once the fan is shut off, then it does for the pressure to go back to the maximum level once the fan is turned on, as in the former situation there are three sources for air to enter to stabilize the pressure (the fan shaft, man and material shaft, and track slope shaft), whereas when the fan restarts only the man and material shaft and track slope shaft are available, and hence the quantity of air entering is less.

Also, as testified to by Peterson, due to the small scale of the chart, the width of the ink line makes it very difficult to perform precise measurements, and is thus inherently unreliable.

Peterson also indicated that the recorder is not designed to chart the loss of power to a fan.

In the main, Peterson's testimony has not been rebutted or impeached and I accept it. I find his opinions to be well supported.

Taking into account all of the above I conclude that Respondent has failed to establish, by way of convincing evidence that, on June 15, 1991, there was a stoppage of the fan in question that lasted for more than 15 minutes. Accordingly the Notice of Contest is sustained.

ORDER

It is **ORDERED** that Citation No. 3218200 be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

Lisa Gray, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Richard R. Elledge, Esq., Gould & Ratner, 222 North LaSalle Street, Suite 800, Chicago, IL 60601 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 10 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 91-172
	:	A.C. No. 36-04281-03718
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

At hearings Petitioner requested approval to withdraw its civil penalty petition in the captioned case on the grounds that there is insufficient evidence of a violation. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 10 1991

BETH ENERGY MINES, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 91-1334-R
v.	:	Citation No. 3486330; 7/9/91
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 91-1335-R
	:	Citation No. 3486331; 7/9/91
	:	
	:	Cambria Slope Mine No. 33
	:	Mine ID 36-00840

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant; John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Melick

These expedited contest proceedings were filed by Beth Energy Mines, Incorporated (Beth Energy), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge a citation and withdrawal order alleging violations of mandatory standards. The general issue before me is whether Beth Energy violated those standards, and, if so, whether the violations were "significant and substantial" and the result of "unwarrantable failure".

Citation No. 3486330 issued pursuant to section 104(d)(1) of the Act alleges a violation of the mandatory standard at 30 C.F.R. § 75.202(a) and charges as follows: [1]/

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[1]/ Section 104(d)(1) of the Act reads as follows: If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger; such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety

The ribs on the tight side of the 3 left conveyor belt was [sic] not supported or otherwise controlled to protect persons who have to work along this conveyor shoveling coal spillage and changing belt rollers. This area is required to be examined by pre-shift and on-shift examiners and they should have seen these loose unsupported ribs. The following areas of loose ribs needs supported [sic] or taken down: 10' inby the #1 Rectifier sign along the 3 left track belt entry, a 15' long 3 feet high 12" thick. Between the 1st & 2nd x-cut outby this sign a 12' long, 3' high rib rock exist [sic]. Between the 3rd & 4th x-cut a gapped open 3' high 20' long rib rock exists. Between the 4th & 5th x-cut outby this sign, a gapped open 3 1/2 foot by 25' long rib rock exists. Between the 4th & 5th x-cut outby this sign a 2 1/2' high 10' long loose rib rock also exists. A 2 1/2' x 2 1/2' loose rib rock exists on the inby corner of the 7th x-cut from this sign, it needs [sic] supported or taken down. At the inby end of the 10th x-cut from this sign outby a 3' high 10' long rib rock exist [sic] that is broken and is only supported partially by coal that is slouthing [sic] away. All of these ribs mentioned were broken loose at the top and sides and were only partially supported with coal under these areas. These conditions existed in an area from 10 feet inby the Rectifier sign along the tight side rib outby to survey station # 6815.

The cited standard, 30 C.F.R. § 75.202(a), provides that: "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs, and coal or rock bursts."

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footnote 1 (continued)
standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

Withdrawal Order No. 3486331 issued pursuant to section 104(d)(1) of the Act (see footnote 1) alleges a violation of the mandatory standard at 30 C.F.R. § 75.303(a) and charges as follows:

> An adequate pre-shift examination was not conducted along the 3 left belt/track entry for the dayshift on 7-9-91. Loose hazardous unsupported ribs exist along the tight side of this conveyor belt entry from 10' inby a sign marked #1 rectifier outby survey station # 6815 along this belt/track entry. This examination was conducted for the dayshift by Thomas Korber on 7/9/91 and this hazardous condition was not mentioned in his report on the pre-shift examiners report.

The cited standard, 30 C.F.R. § 75.303(a), provides as follows:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall

indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No persons, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons. [2]/

In essence, Beth Energy is charged in Citation No. 3486330 with failing to support or take down certain areas of loose rib and is charged in Order No. 3486331 with failing to have discovered the cited ribs during the preshift examination and to have reported in the preshift examination book the rib conditions noted in Citation No. 3486330.

Beth Energy notes in its posthearing brief that the cited standards must be reviewed in light of the reasonably prudent person test i.e. whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standards, would have recognized the hazardous conditions that the standards seek to prevent. Canon Coal Co., 9 FMSHRC 667 (1987), Ozark-Mahoning Co., 8 FMSHRC 190 (1986). Under this standard of review the reasonably prudent person is also charged with knowledge of, and familiarity with, the factual circumstances surrounding the allegedly hazardous conditions. See Secretary v. Alabama By-Products Corp., 4 FMSHRC 2128 (1983). More particularly, this case involves the 3 Left area of the "C"

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[2]/ Beth Energy argues that this standard does not require testing of roof or ribs in travelways. While the language of the standard may not be the most artful in all respects it is quite clear in its requirements for the preshift examination for hazards in "active roadways [and] travelways." In light of this clear language there is no need to resort to other secondary rules of statutory /regulatory construction.

coal seam located between the 4 West Mains area and the 6 West Mains area of the Cambria Slope No. 33 Mine. One entry of the three designated as 3 Left contains both track and a conveyor belt. The entry is approximately 23 feet wide and slopes slightly down across the entry with the track being located on the higher side. There is approximately 7-1/2 feet between the higher rib and the track. The rails of the track are 3 feet apart and approximately 4 feet from a row of timbers, which separate the track and belt and which are spaced 5 feet apart throughout the entry. A row of timbers has also been installed next to the rib on the high side along the length of the entry. The belt conveyor is hung from the roof on chains and its assembly is 4-1/2 feet wide. There is approximately 3 feet between the tight side rib and the belt. The entry itself is approximately 6-1/2 feet high, the lower 40-45 inches of which is coal. The lower or return portion of the belt is approximately 12 inches off the mine floor.

Federal Mine Safety and Health Administration (MSHA) Coal Mine Inspector Leroy Niehenke testified that during the course of a July 9, 1991, regular inspection of the No. 33 Mine, accompanied by his Supervisor Paul Bizich, he observed as they proceeded along the tight side of the 3 Left conveyer belt entry, a rib roll some 15 to 20 feet long and 2-1/2 feet thick blocking the walkway. Niehenke testified that from that location he could observe areas of loose unsupported rib. Shifting to the track side of the entry, he observed additional areas of loose unsupported rib extending from an area 10 feet inby the rectifier sign along the tight side rib outby approximately 1000 feet to spad 6815. According to Niehenke there were seven to eight unsupported areas 10 to 20 feet long in this area. Niehenke testified that the conditions were "very obvious" in that you could see a definite separation between the roof and rib. It is not disputed that the area had been rock dusted some 3 to 4 weeks before and was white or gray in color, while the separations showed as a distinct black line against that white-gray color. The area of rib that had fallen had also been rock dusted thus indicating that it had been present for at least 3 weeks. None of these conditions had been reported in the preshift exam book.

Inspector Niehenke also testified that General Mine Foreman Fedorko told him regarding the ribs that "they knew they had a problem in this area on the tight side" and because of that they had been concerned about people working on the tight side. They were also "thinking about elevating this belt away from the bottom" to enable shoveling of rib material from under the belt. Fedorko could not recall this conversation, but did not clearly deny it. Particularly under these circumstances, I give the testimony of Inspector Niehenke on this significant point considerable weight.

Niehenke concluded that the condition was reasonably likely to cause a fatality to persons who might be shoveling, replacing rollers, splicing the belt, or performing similar work on the tight side of the belt. There is no dispute that such work, as well as repairs to the water valves, is in fact periodically performed from the tight side and that if a miner were struck with a rib roll such as found in this case he would be killed.

On exiting the mine, Niehenke found no report in the preshift examination book concerning either the cited hazardous rib conditions or the rib roll. It is not disputed that no such report had been made and that since the shift had begun at 6:30 that morning the preshift examination should have been completed the preceding 3 hours. Niehenke opined that particularly under these circumstances involving the cited rib hazards, such an inadequate preshift examination could result in a fatality. He observed that there had been increasing problems at the cited mine and indeed with the specific coal seam at issue, with roof falls and roof pressure.

Supervisory Coal Mine Inspector Paul Bizich accompanied Niehenke on his July 9 inspection and also observed the loose rib material. It was about 15 feet long and covered the water line. He noted that the cited separated ribs were so readily visible that "any other certified person traveling in that area, especially the preshift examiner, should have seen it." There was "no doubt" in his mind that the condition would likely have resulted in a fatality.

Within the framework of evidence presented at hearing, I am satisfied that the Secretary has sustained her burden of proving the violations charged and that those violations were "significant and substantial" and the result of Beth Energy's "unwarrantable failure." A violation is properly designated "significant and substantial" if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

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

> We have explained further that the third element of the Mathies formula " requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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

The third element of the 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" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989).

In addition, in Emery Mining Corporation, 9 FMSHRC 1997 (1987) and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987), the Commission held that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. The Commission stated that while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

The credible testimony of experienced Inspector Niehenke which is fully corroborated in essential respects by Supervisory Inspector Bizich is sufficient in itself to prove these elements. In applying the reasonably prudent person test to the citation and order at bar it is also important to note that the circumstances include the knowledge that shortly before these violations i.e., between April 23, 1991 and June 5, 1991, MSHA found and cited five other violations of the roof and rib control standard (30 C.F.R. § 75.202(a)) at this mine and that management admitted that they were aware of rib problems and concerned about workmen on the tight side. Mine officials and the preshift examiner in particular should therefore have been on heightened notice of the potential for dangerous rib and roof conditions and of the likelihood of injuries to miners at the time of the July 9, preshift examination. This evidence also supports a finding of aggravated negligence and "unwarrantable failure." The evidence that a large rib roll had obstructed the tight side walkway in the cited area for at least 3 weeks -- and had even been covered by rock dusting -- and that this condition also had never been reported in the preshift examination books further warrants the aggravated negligence findings in regard to the performance of preshift examinations and the failure to properly perform the preshift examination at issue.

In reaching my conclusions herein, I have also considered the testimony of Thomas Korber the Beth Energy Mine Examiner responsible for the preshift examination before the day shift on July 9, 1991. Korber testified that when he returned to the cited area on the following day, he observed cracks in the ribs with not more than 1 inch of separation, and that there was indeed some rib sloughage. He learned during abatement that at least one of the cited rib areas had been brought down with a bar. Korber also acknowledged that such rib separations should be tested to determine whether the ribs are solid or separated. He maintains that he did not see any of the gaps between the rib and roof during his preshift examination on July 9, but admitted that the rib on the tight side was not "my priority."

I have also considered the testimony of General Mine Foreman Edward Fedorko that he also observed during the abatement process coal sloughage along the cited rib area and 1/2 inch separation of the ribs. He acknowledged that such a separation warranted further examination of the rib and if it needed work it should be reported in the preshift examination books.

Steven Horvath, a graduate mining engineer and underground mine superintendent, took photographs after the abatement from various positions in the cited area and noted that ribs throughout had been scaled and taken down. This evidence indeed

tends to corroborate the extent of the cited hazard and its "significant and substantial" nature. Horvath also agreed that when certain cracks appear in the rib along the roof line they should be further tested by sounding and close observation.

It should be noted, however, that the Beth Energy witnesses are entitled to but little weight in expressing "reasonably prudent person" opinions because, aside from their obvious self-interest, there is no evidence that they considered the awareness of management of pre-existing problems with the tight side ribs and of its express concern for miners working in that cited area.

Considering that Beth Energy had five prior violations of the standard at issue herein over the preceding 4 months, that Beth Energy management admittedly knew that they had a rib problem in the same area cited herein, the undisputed testimony of Inspector Niehenke and Supervisory Inspector Bizich that the black rib separations were particularly visible against the gray-white background of the rock dust, the existence of another violative condition involving a rib roll obstructing the tight side walkway which had existed unreported in the preshift books for 3 to 4 weeks, the admission of belt-foreman Boyer that there was no need to closely inspect the tight side in spite of the potential fatal hazard to persons working there, the testimony of shift-mine foreman and preshift examiner Thomas Korber that the ribs on the tight side were not given a high priority during the examination process, and in light of the serious hazard presented by the separated ribs, I conclude that the failure to have observed, corrected, and reported these conditions in the preshift examination report constituted aggravated and gross negligence amounting to "unwarrantable failure." Emery Mining Corporation, supra; Youghiogheny & Ohio Coal Company, supra.

In addition, based upon the undisputed evidence that miners would be required to periodically work on the tight side of the belt, the clear evidence of rib separations of up to 1 inch, the evidence (particularly noted from the photographs in evidence taken after abatement) that many of the ribs in the cited area had been taken down or fallen and the evidence that a miner hit by a rib roll while working in the tight side would likely be killed, the failure to have supported or taken down the cited ribs and the failure to have properly examined and reported those conditions in the preshift examination process, constituted a "significant and substantial" violation. National Gypsum, supra, Mathies Coal Co., supra, U.S. Steel Mining Co., Inc., supra. Under all the circumstances the citation and order must be affirmed.

ORDER

Citation No. 3486330 and Order No. 3486331 are **AFFIRMED** and the contests of those are **DISMISSED.**

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 11 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-127-M
	:	A.C. No. 20-02849-05501 GUL
v.	:	
	:	SOV Pioneer
YERINGTON CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Lisa R. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
John S. Yerington II, President, Yerington Leasing Company, on behalf of Respondent, Yerington Construction Company.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the, "Act," to challenge two citations issued by the Secretary of Labor, for violations of regulatory standards. The general issue before me is whether Yerington Construction Company (Yerington) violated the cited regulatory standards as alleged, and, if so, what is the appropriate civil penalty for such violations.

Citation No. 3618745 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 56.14100(a) and charges as follows:

> The foreman failed to perform a pre-shift examination of the dozer prior to use on the mine site. The foreman stated he was the first to use it at this site. It was discovered that the service brakes of this Case 450 dozer, serial No. 3071733 were not functional. A person can be seriously injured if unaware of defects to equipment due to the lack of an

equipment safety inspection prior to use. The foreman was acting as a contractor to Yerington Leasing Company.

The cited standard provides that "self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

Citation No. 3618746 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 56.14100(c) and charges as follows:

> The employee of the Case 450 dozer, serial No. 3071733 did not remove from service the equipment when he knew the service brakes were not functional. The dozer was in use on a stockpile 20 feet above the pit floor. A person can suffer serious injury if involved in a [sic] accident due to a safety defect involving service brakes.

The cited standard, 30 C.F.R. § 56.14100(c), provides as follows:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

The Respondent does not dispute the violations as charged nor the special findings associated therewith, but argues that the cited equipment was rented from a company named Maple Rapids Aggregate, and therefore that company was responsible for the violations. Respondent argues alternatively that in any event he, as job manager, never authorized his employees to put themselves in dangerous positions. According to Mr. Yerington, it would follow therefore that the employee alone was responsible for his own actions.

Under section 3(d) of the Act, however, an "operator" of a mine is "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." From the record herein it is clear that Yerington was, at a minimum, supervising operations at the cited mine and was an independent contractor performing services at the mine. Accordingly, Yerington is an "operator" under the Act charged with the responsibility for conforming with the Act and legally promulgated regulations including the inspection and safe

operation of its equipment whether owned or leased. It is also noted that the violations in this case were personally committed by the operator's foreman and agent.

According to Federal Mine Inspector Gerald Holeman, on the date of the citations, September 10, 1990, Yerington Construction Company had a separate federal identification number based on a legal identity report filed in that name. During his inspection of the portable crushing plant, he observed only two employees at the work site and both were employees of Yerington Construction Company. He saw one employee operating the bulldozer cited in this case who identified himself as Steve Harman, the foreman. Harman reportedly told Inspector Holeman that Yerington Leasing Company owned the equipment and that he was an employee of Yerington Construction Company, hired to operate the equipment. As Inspector Holeman was questioning foreman Harman, another employee, Bernie Knodl, began operating the bulldozer. Later during the course of his inspection, Knodl was asked about the condition of the brakes. Knodl admitted that the brakes on one side did not work at all, and demonstrated this fact to the inspector.

According to Holeman, the hazard of operating the bulldozer on a 20 foot stockpile without functional service brakes on one side was serious. Since the brakes on only one side of the bulldozer operated you could only turn in one direction. Under the circumstances, there would be limited ability to negotiate the terrain, the equipment could therefore strike other employees and equipment and could roll off the stockpile. Inspector Holeman therefore concluded that it was reasonably likely for an accident to occur and that such an accident was reasonably likely to be fatal. Accepting this undisputed evidence, I find the violations to be indeed serious and "significant and substantial" Mathies Coal Company, 6 FMSHRC 1 (1984). Harman also conceded that he had not preshifted the cited equipment, and that he was the first employee to operate it on that shift. The violations were therefore clearly the result of operator negligence.

Considering the absence of any prior history of violations by this mine operator and its small size but also considering the seriousness of the violation and the fact that an agent of the operator, the foreman, was actually committing the violations, it is apparent that the proposed civil penalty of $68 for each violation is appropriate.

ORDER

Citation Nos. 3618745 and 3618746 are affirmed. Yerington Construction Company is hereby directed to pay civil penalties of $136 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 16 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 91-50-M
	:	A. C. No. 21-02722-05503
v.	:	
	:	Docket No. LAKE 91-51-M
DUININCK BROTHERS, INC., Respondent	:	A. C. No. 21-02845-05504
	:	KK004 & KK003 Crushing Unit

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary of Labor (Secretary);
Paul A. Nelson, Esq., Willette, Kraft, Walser, Nelson & Hettig, Olivia, Minnesota, for Duininck Brothers, Inc. (Duininck).

Before: Judge Broderick

The Secretary seeks civil penalties for two alleged violations of 30 C.F.R. § 56.5050(b). Pursuant to notice, the case was called for hearing in Minneapolis, Minnesota on August 13, 1991. Roy Shrake, Diane Brayden, and Richard Goff testified on behalf of the Secretary. John Davis, Virgil Gerdes, Harris Duininck, and Rick Maursetter testified on behalf of Duininck. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. At all time pertinent hereto, Duininck was the owner and operator of the sand and gravel mine known as the KK 004 and KK 003 Crushing Unit.

2. During the calendar year preceding the issuance of the citations involved in this case, 11,973 hours of work were performed at the subject mines.

3. On May 9, 1990, Federal Mine Inspector Roy Shrake issued a citation citing a violation of 30 C.F.R. § 56.5050(b) because a tractor operator was exposed to noise in excess of that permitted by the standard. On July 18, 1990, Inspector Shrake issued a

citation citing a violation of 30 C.F.R. § 56.5050(b) because a bulldozer operator was exposed to noise in excess of that permitted by the standard. Respondent agrees that the two miners were exposed to noise in excess of the maximum noise level prescribed by the standard.

4. The parties agree that the evidence offered at the hearing with respect to Citation No. 3445314 (the tractor operator - Docket No. LAKE 91-51-M) is applicable to Citation No. 3619333 (the dozer operator - Docket No. LAKE 91-50-M).

5. The tractor operator was wearing adequate personal hearing protection at the time the citation was issued.

6. There are no feasible administrative controls applicable to the condition involved in the citation.

7. The tractor operator was operating a 1980 Model TD 25 International tractor. Noise was coming from the engine and the tracks. The unit did not have a cab, and no other engineering controls were being utilized to reduce the noise exposure.

8. The noise level to which the tractor operator was exposed was equivalent to 102 db for an 8 hour period.

9. The personal hearing protection worn by the miner, namely ear plugs, is designed to reduce the noise level by 28 decibels. This is under laboratory conditions. In fact, under field conditions, the reduction varies from 0 to 25 db.

10. At the present time, a tractor of the kind involved in this case would cost approximately $250,000, without a cab. An enclosed cab with an air conditioner would cost an additional $8,500 to $9,000. To lease such a unit would cost approximately $10,000 a month depending on its age.

11. The present value of a 1978 or 1979 unit is between $16,000 and $18,000. A 1985 or 1986 unit has a present value of approximately $75,000. To retrofit a cab on one of these units would cost about $10,000 including an air conditioner. The market value of the unit would not be increased by the addition of a cab.

12. The tractors such as are involved here have a useful life of about 20 years before they are retired. Duininck estimates that the tractor involved here (manufactured in 1980) will be used for 5 more years. When it is replaced will depend on the maintenance record and cost.

13. In 1988, Duininck attempted, with MSHA guidance, to modify a tractor such as the one involved here by installing a windshield, and floor and ceiling sound suppressants, but discontinued the program when MSHA determined that enclosed cabs were required if other sound suppressant devices were not sufficient to bring the machine into compliance.

14. An enclosed full cab with proper acoustical treatment can be expected to lower the noise level in a tractor such as that involved here by 6 to 15 decibels. Cabs have been retrofited on tractors under MSHA's supervision and have reduced noise levels from 6 to 15 decibels. In only one instance was it reduced to the level permitted by the standard. Where it did not, personal hearing protection would still be required.

15. The citation was terminated when the cited equipment was removed from the mine property.

REGULATION

30 C.F.R. § 56.5050(b) provides as follows:

> When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

ISSUE

Whether an enclosed cab retrofited on the equipment involved herein is a feasible engineering control mandated by the standard?

CONCLUSIONS OF LAW

It is conceded that the employees' noise exposure in these cases exceeded the maximum limit of 90 decibels per 8 hours. It is conceded that engineering controls were not used to reduce the noise exposure. The evidence established that engineering controls are technically feasible and would reduce the noise exposure. The narrow issue here is whether such engineering controls are economically feasible.

In the controlling Commission decision, Callanan Industries, Inc., 5 FMSHRC at 1990 (1983), the Commission said at page 1909:

> ". . . we hold that the economic feasibility of the control is to be determined by consideration of whether the economic costs of the control are wholly out of proportion to the expected benefits, i.e., whether

given the reduction in noise level to which a miner would be exposed after implementation of the control, and the costs of achieving that reduction, it would not be rational to require implementation of the control."

The test therefore is the expected benefits, (the reduction in noise levels) compared to the cost of achieving that reduction. It is not the cost of achieving the reduction compared to the value of the machinery in question, as Duininck seems to contend. The benefits expected here are substantial - a reduction of between 6 and 15 decibels of noise exposure. This is especially significant in view of the testimony (not refuted) that personal protection equipment is often unreliable under field conditions, and may not result in noise reduction to the extent that the equipment manufacturers represent.

In my judgment the cost of providing such engineering controls (full cab with acoustical treatment) amounting to $10,000 to $13,000 is not "wholly out of proportion to the expected benefits." It is therefore rational to require implementation of the control.

I conclude therefore that Duininck failed to utilize feasible engineering controls to reduce the noise exposure of its tractor operators.

ORDER

Based on the above findings of fact and conclusions of law, **IT IS ORDERED:**

1. Citation Nos. 3445314 and 3619333 are **AFFIRMED**

2. Duininck shall, within 30 days of the date of this Decision, pay the following civil penalties for the violations found herein:

CITATION	30 C.F.R.	PENALTY
3445314	56.5050(b)	$20
3619333	56.5050(b)	$20
	TOTAL	$40

James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 16 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 90-224
	:	A.C. No. 46-01816-03744
v.	:	
	:	Gary No. 50 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

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 $91 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.1105. The respondent filed an answer contesting the alleged violation and a hearing was held in Beckley, West Virginia. The UMWA failed to appear. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty and (2) the appropriate civil penalty that should be assessed based on the civil 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 this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95.164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 75.1105.

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. The presiding judge has jurisdiction to hear and decide this matter.

2. The inspector who issued the contested citation was acting in his official capacity as a Federal coal mine inspector.

3. The citation was properly issued to the respondent's agents.

4. The cited conditions were timely abated.

5. Payment of the proposed civil penalty assessment of $91 will not adversely affect the respondent's ability to continue in business.

Discussion

The contested section 104(a) non-"S&S" Citation No. 3237370, issued by MSHA Inspector Randall C. Wooten on May 2, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.1105, and the cited condition or practice is described as follows:

> The battery charging station located in the No. 4 entry, 6 B section, where batteries are being serviced from the equipment to be charged, is not housed adequately in a fireproof structure or area.

Petitioner's Testimony and Evidence

MSHA Inspector Randall C.Wooten testified that he issued the citation in the course of a regular mine inspection after finding what he believed to be an inadequate fireproof structure or area used to house a battery-charging station. The inspector estimated that the area was approximately 16 feet by 40 feet, and he stated that it was located between two pillar blocks of an entry 20 feet wide. A fireproof stopping constructed of masonry blocks was located in front of the area in question, and the interior area consisted of corrugated metal walls attached to and supported by 4 x 4 inch wooden timbers. The inspector confirmed that the corrugated metal walls and stopping were constructed of fireproof materials and he found no problems with this.

Mr. Wooten stated that the roof of the enclosure consisted of incombustible rock, and that the coal ribs were approximately 6 to 8 inches behind the metal corrugated walls of the enclosure. The timbers supporting the metal walls were located between the ribs and the back of the walls. The corrugated metal did not extend fully to the roof, and the faces of four or five of the wooden support timbers were not fully covered by the metal. The exposed timber areas ranged from one to 12 inches. However, the areas between the support timbers consisted of incombustible draw rock which extended 10 to 12 inches down from the roof and around the perimeter of the metal enclosure. The roof was approximately 5 1/2 feet high.

Mr. Wooten stated that the enclosure area was well rock-dusted and properly ventilated, and he found no problems in this regard. His belief that the enclosure was inadequate was based on the fact that the interior metal walls did not extend all the way to the roof, thereby leaving some of the tops of the combustible wooden timbers exposed. He confirmed that if the metal material were extended all the way to the roof fully covering the timbers, he would not have issued a citation. He also confirmed that abatement was achieved by extending the metal material to the top of the timbers around the enclosure (Tr. 13-22).

Mr. Wooten stated that the battery charger was approximately 30 inches high, 34 inches long, and 30 inches wide, and that it was located "off to the left as you walk into the station" and approximately two to three feet from the corrugated metal in from the rib (Tr. 23). If one were in the station area he would see corrugated metal to the right and left, a stopping with a block removed "dead ahead", and an incombustible rock roof overhead (Tr. 20). He was not sure whether or not the battery charger was in use at the time of the inspection (Tr. 23).

Mr. Wooten stated that if a fire were to occur in the charging station, the timbers could be ignited and burn and the structure would then collapse and expose the coal ribs behind the walls (Tr. 17). If a fire were to occur, he believed the flames would reach the roof (Tr. 22). He later testified that the charging station was completely open to the intersection and if there were a fire at the station, it was unlikely that it would spread out into the intersection because the fresh air which was directed through the station was going through the stopping return. He confirmed that the violation was "non-S&S", and he indicated that any smoke from a fire would probably burn in the direction of the return. He had no reason to believe that the air current would cause the flames to go in an upward direction and ignite the exposed portions of the timbers in question (Tr. 25).

Respondent's Testimony and Evidence

William L. Jones, mine safety inspector, testified that when he became aware of the citation he went to the area and found that the floor was well rock-dusted with six to eight inches of rock dust, and fifty bags of rockdust were stacked on the right side of the station. Referring to his notes taken at the time in question, he testified as to the construction of the battery charging station, and in his opinion it was housed in a fireproof structure. He was also of the opinion that in the event of a fire at the charging station the exposed timber tops supporting the tin enclosure would not have been exposed to any flame because the battery charger was located toward the back of the station on the left side looking in, and any fire would have traveled inby towards the stopping and into the return (Tr. 35-38). He confirmed that the timbers near the area where the battery charger was located were least exposed and the corrugated metal covered more of those timbers than the others (Tr. 39).

On cross-examination, Mr. Jones stated that taking into account the rock dust in the area, the ribs, roof, floor, and any exposed combustible materials, it was his opinion that the cited station was fireproof and that the exposed timbers could not have caught fire in the event a fire occurred at the battery charging station (Tr. 40).

In response to further questions, Mr. Jones stated that the cited station was constructed approximately a week prior to the inspection, and that two additional stations were constructed in the area in the same fashion. He did not know whether the inspector ever saw the additional stations, but he confirmed that they were not cited and were not reconstructed after the issuance of the citation in question (Tr. 42).

Findings and Conclusions

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. § 75.1105, which provides in relevant part as follows:

> Underground * * * battery-charging stations, * * * shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. * * *.

MSHA's Program Policy Manual, July 1, 1988, states in relevant part as follows with respect to the application of section 75.1105:

> * * * * * *
>
> Compressor stations, shops, and permanent pumps are required to be enclosed in structures with the sides, roof, and floor composed of incombustible material. Where such structures are built, the naturally incombustible surface of the roof, rib, or floor may be utilized.
>
> * * * * * * *
>
> Battery-charging units enclosed in substantial metal housings which are used to charge batteries that are also enclosed in substantial metal housings and remain on the machine during the charging operation may be considered to be in a fireproof structure and require no further fireproofing.
>
> * * * * * * *
>
> The battery(ies), battery charger(s), and the battery-charging station should be kept free of extraneous combustible materials, such as paper, liquids, grease, oil, wood, loose coal, or coal dust.

The term "fireproof" is not defined in MSHA's regulations. Although section 75.1105, states that battery charging stations shall be housed in fireproof structures or areas, such stations are not included in the policy application requiring compressor stations, shops, and permanent pumps to be enclosed in structures with the sides, roof, and floor composed of incombustible material. The policy does not explain any distinctions, if any, between a "structure" and an "area", and it only requires that extraneous combustible wood materials be kept free of the station.

The evidence establishes that the battery-charging station, an area approximately 16 feet wide and forty feet long, was adequately ventilated and that the air was being coursed into the return as required by the standard. The evidence also establishes that the corrugated metal walls and concrete stopping

used as part of the station were constructed of fireproof materials and that the station was well rock-dusted. It has also been established that the roof of the station, which was approximately 5 1/2 feet high, consisted of incombustible rock, that the coal ribs were 6 to 8 inches behind the metal walls, and that the areas between the tops of the 4 x 4 wooden timbers which supported the metal walls enclosing the station consisted of incombustible draw rock that extended 10 to 12 inches down from the roof and around the area (Tr. 17, 18, 28).

The parties do not dispute the fact that the corrugated metal material which formed the two walls in the area housing the battery charging station was incombustible. Nor do they dispute the fact that the concrete block stopping, the roof composed of draw rock, and draw rock which extended down from the roof and along the top of the ribs, and the well rock-dusted floor, were all incombustible. Indeed, the inspector himself conceded that all of these materials used as part of the construction of the area housing the station did not cause any problems and he considered them to be fireproof.

The inspector believed that the term "housed" as used in the standard means that the battery charging station should be inside a fireproof structure or area (Tr. 24). In his opinion, a "fireproof" structure or area is one that has no combustible exposed material as part of its construction (Tr. 30). His conclusion that the cited station was inadequately housed in a fireproof structure or area was based on the fact that the tops of four or five timbers which served to support the metal walls were not completely covered by the corrugated metal material for distances ranging from 2 to 10 inches. The inspector believed that these exposed wooden combustible areas rendered the station less than fireproof and unacceptable and inadequate as a fireproof area or structure (Tr. 27-28).

In Clinchfield Coal Company 4 FMSHRC 465 (March 1982), Commission Judge Gary Melick affirmed a violation of section 75.1105, after finding that a battery charger located seven feet from combustible coal ribs, with no fireproof separation between the charger and the ribs, was not housed within a fireproof structure or area. Judge Melick rejected the operator's contention that the absence of fireproof housing around portions of the station was necessary to allow for the ventilation required by the second part of the standard, and he took note of the operator's admission that the station was not completely housed in a fireproof structure or area. However, he tacitly approved of the following interpretation of the standard as advanced by the mine operator (4 FMSHRC 467):

> The proper interpretation of this mandatory standard insofar as it states the charging station be housed in a fireproof area must be that the battery-charging

> station must be so housed as to prevent the spread of fire to combustible materials while, at the same time, allowing proper and necessary ventilation to carry away any and all gases and fumes which could contribute to an ignition and fire and all fumes and smoke that would result from an ignition or a fire.

During the course of the hearing, respondent's counsel complained that he only learned "the past week or so" prior to the hearing that the inspector had a problem with exposed timbers in the battery charging station. Counsel pointed out that the citation makes no mention of any exposed timbers and simply states that the station was not adequately housed in a fireproof structure. Counsel believed that it was inconceivable and incredible that any fire or flame in the direction of the air being forced through the return "is going to allow those flames to leap six feet in the air and catch a four-inch timber that is exposed perhaps as little as one-half inch" (Tr. 45).

Although I agree that the citation simply states a conclusion that the charging station was inadequately housed, and provides no description of the actual hazardous conditions (exposed combustible wooden timbers), I cannot conclude that the respondent has been prejudiced. I take note of the fact that the parties engaged in pre-trial discovery, and although the petitioner advised the respondent that the inspector would testify" about the conditions which gave rise" to the issuance of the citation, and furnished the respondent a copy of the inspector's notes, no further follow-up was apparently taken by the respondent. Further, the respondent had an opportunity to provide a management representative to accompany the inspector at the time of the inspection, but apparently opted not to do so (Tr. 46-27). Finally, the citation was timely abated, and the inspector testified and was cross-examined rather thoroughly by the respondent's counsel. Under all of these circumstances, I cannot conclude that the respondent has been prejudiced by the unartfully written citation. To the contrary, I conclude and find that the respondent has had a full and fair opportunity to defend itself.

In response to a pre-trial interrogatory as to why it believed that it did not violate 30 C.F.R. § 75.1105, the respondent stated as follows:

> The cited battery-charging station was housed in a fireproof area consisting of metal and incombustible rock. The roof, mine floor, and the upper portion (21"-22") of both ribs consisted of incombustible rock. The sheet metal protecting the ribs extended above the coal seam. Along one rib the metal extended to within 1-1/2"-10-1/2" of the roof. The metal extended to

1/2"-6-3/4 of the roof along the other rib. The metal is 30-gauge corrugated galvanized tin sheet. The MSHA Program Policy Manual recognizes that the naturally incombustible surface of the roof, rib, and floor may be utilized as part of the fireproof structure.

In its posthearing brief, respondent relies on the following definitions of "fireproof" and "fireproofing":

Fireproof is defined as:

Proof against fire; relatively incombustible. The general meaning of fireproof, as applied to a residence, a modern office building, an ordinary safe, and a bank vault, includes varying degrees of immunity from fire. Since even buildings and commodities constructed of incombustible material will be damaged by a fire of sufficient intensity, fire-prevention engineers prefer the term "fire resisting" to "fireproof" as being more accurately descriptive. In technical usage, "fireproof" designates buildings in which all parts that carry weights or resist stresses, and all exterior and interior walls, stairways, etc., are made of incombustible materials, and in which structural members of materials such as steel or iron, which are injuriously affected by heat, are protected effectively by other materials not so affected. Degrees of fire resistance, in decreasing order, are designated by "fire-resistive", "fire retardant", and "flameproof".

Webster's New International Dictionary, 2d Edition Unabridged, 1946.

4. Fireproofing means:
Method of making normally combustible materials as nearly non-combustible as possible. In most cases, it is possible only to treat them with a solution or coating of some substance that will tend to retard their ignition... Wood construction can resist fire for a long time if the timbers are much heavier than necessary for structural strength. Fire will burn very slowly inward from the surface, leaving enough sound timber in the center to prevent collapse.

The New Columbia Encyclopedia, 1975.

The respondent takes the position that "fireproof" does not denote absolute protection against fire, but rather, indicates a resistance to burning. Respondent maintains that the cited

charging station provided a high degree of resistance to fire and that in view of the size and location of the charger, the surrounding structure, and the air coursing into the return, it was extremely unlikely that a fire could reach and ignite the timbers at the roofline. Respondent further argues that it is illogical to claim that the exposed timbers destroyed the fireproof nature o the structure when a fire could spread into the intersection or through the regulator in the stopping and into the return.

In support of the citation, the petitioner cites Clinchfield Coal Company, supra, and argues that just as in that case, there was no fireproof separation between the battery charging station cited by the inspector in the instant case and the exposed combustible timbers and coal ribs. Under the circumstances, petitioner concludes that the cited station was not housed within a fireproof structure or area.

Contrary to the respondent's assertion that the four-inch timber was "exposed perhaps a little as one-half inch", (Tr. 45), the unrebutted and credible testimony of the inspector reflects that on either side of the two walls there were approximately four or five timbers with exposed and unprotected face areas ranging from one to 12 inches which were not covered by the metal material which was otherwise fastened to the timbers (Tr. 17, 31). While it is true that the areas between the timbers consisted of incombustible draw rock which extended 10 to 12 inches down from the roof, the fact remains that the wooden timbers which provided the framework for the two corrugated metal walls were combustible, and the inspector was concerned that if a fire were to occur the unprotected timbers could be ignited and burn, resulting in a collapse of the walls and the exposure of the coal ribs which were located approximately 6 to 8 inches behind the wooden framed walls.

While it is true that except for the exposed and unprotected wooden combustible timber areas in question, the rest of the station area was well rock dusted, adequately ventilated, and constructed of incombustible materials, given the dynamics of mining on a day-to-day basis, there is no assurance that a fire will never occur or that the air ventilating a battery charging station will never be interrupted and will always be adequate and coursed through the return. In the event of such adverse occurrences, one cannot predict the results of any fire which may occur within the confines of the station, particularly in the presence of exposed and unprotected combustible wooden timbers.

I cannot conclude that the inspector's belief that a fireproof battery charging station area or structure pursuant to section 75.1105, is one that has no exposed combustible exposed material as part of its construction is unreasonable, and I agree with the inspector. Further, although the language found in

section 75.1105, does not include the words "adequate" or "inadequate", I cannot conclude that the inspector's finding that the exposed combustible wooden timber areas rendered the station inadequate for purposes of the application of the regulation was unreasonable or erroneous.

The regulatory requirement found in section 75.1105, is straight forward--it requires that battery charging stations be housed in fireproof structures or areas. I conclude and find that all materials used in the construction of a structure or area to house (locate) a battery charging station must be incombustible or fireproof, and that once constructed, the station must be completely maintained in fireproof condition. On the facts of this case, the station in question was rendered less than fireproof when the metal material used in the construction of the walls was not extended fully to the top of several of the wooden combustible support timbers, leaving the upper portions of the timbers exposed and unprotected. In these circumstances, I conclude and find that a violation of section 75.1105, has been established, and the contested citation IS AFFIRMED.

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

I conclude and find that the respondent is a large mine operator, and it has stipulated that the proposed civil penalty assessment will not adversely affect its ability to continue in business.

History

A summary of the respondent's violation history for the period of May 2, 1988 through May 1, 1990, reflects that the respondent paid $63,795, in penalty assessments for 488 violations issued at the subject mine (Exhibit P-1). A computer print-out itemizing the violations reflects that 161 of them were "single-penalty" (non-"S&S") violations. Twenty (20) of the prior violations are for violations of section 75.1105, five (5) of which were issued as "non-S&S" section 104(a) citations. Taking into account the size of the respondent's mining operations, and absent any additional evidence to the contrary, I cannot conclude that the respondent's history of prior violations warrants any additional increase in the civil penalty assessment which I have made for the violation.

Good Faith Compliance

The parties stipulated that the respondent timely abated the violation, and I have taken this into consideration.

Gravity

Based on the inspector's testimony and his finding that the violative conditions were not significant and substantial, I conclude and find that the violation was non-serious.

Negligence

I agree with the inspector's "low negligence" finding, and I have taken this into consideration.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the proposed civil penalty of $91 is reasonable and appropriate, and it is affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $91 for the violation which has been affirmed within thirty (30) days of the date of this decision and order. Payment is to be made to MSHA, and upon receipt of payment, this mater is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 16 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-225 A.C. No. 46-01816-03745
v.	:	
	:	Gary No. 50 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

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 $157 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.511. The respondent filed an answer contesting the alleged violation and a hearing was held in Beckley, West Virginia. The UMWA failed to appear. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty, (2) whether the violation was "significant and substantial," and (3) the

appropriate civil penalty that should be assessed based on the criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 75.511 and § 75.153.

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. The presiding judge has jurisdiction to hear and decide this matter.

2. The inspector who issued the contested citation was acting in his official capacity as a Federal coal mine inspector.

3. The citation was properly issued to the respondent's agents.

4. The cited conditions were timely abated.

5. Payment of the proposed civil penalty assessment of $157 will not adversely affect the respondent's ability to continue in business.

Discussion

The contested section 104(a) "S&S" Citation No. 3237405, issued by MSHA Inspector Gerald L. Smith on May 9, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.511, and the cited condition or practice is described as follows:

> It was revealed during a 103(g)(1), Step 3 grievance held on 5-9-90 that electrical work was being performed on 5-2-90 in the Sulfer Branch section when repair was made on a damaged permanent type splice in a 300 U.D.C.

trailing cable by a nonqualified person or under the supervision of a qualified person.

Petitioner's Testimony and Evidence

Edward Ray Lewis, a shuttle car operator, testified that on May 2, 1990, he found "a split in the boot on the shuttle car cable," and reported it to his section foreman Harry Brooks. Mr. Brooks instructed him to "lock it out and get some tape and tape it." Mr. Lewis confirmed that he locked out the machine, obtained some black electrical tape "and wrapped it three or four coats and covered the split real good as best I could on the cable and boot." Mr. Lewis confirmed that he is not a certified electrician, that Mr. Brooks is not a certified electrician, and that there was no certified electrician on the section at the time in question. Mr. Lewis stated that he was not qualified to know whether the cable was repaired properly (Tr. 62-64).

On cross-examination, Mr. Lewis stated that he has worked as a shuttle car operator for approximately 5 1/2 years. He confirmed that during this period of time he has found "nicks" on shuttle car cables, and that he always reported it to his foreman or directly to the mechanic. Mr. Lewis denied that he had ever taped such cable nicks in the past, or that any other foreman had ever asked him to do so. He admitted that he has helped a mechanic tape such a cable "plenty of times," and that he did the actual taping in the presence of the mechanic or a certified person (Tr. 64-65).

Mr. Lewis stated that on the day in question, he saw no exposed cable wires and that the "split in the boot" was approximately 2 1/2 inches deep and long, and 1/2 inch wide. He explained that the "split" was in the boot of the permanent cable splice. He confirmed that the condition was "just a nick in the outer boot", and that he taped it as instructed by Mr. Brooks (Tr. 66).

Mr. Lewis further explained his prior taping of cables and he indicated that he has helped a mechanic tape a splice after the mechanic or certified electrician made the splice. He confirmed that he has also taped cables in the past with a mechanic either helping him or watching him, and he stated further as follows at (Tr. 69):

Q. When we are just taping a nick, not making a splice, just taping a nick, what part does the mechanic play in that? What does he do while you are taping the nick in the cable?
A. He usually does -- he's standing there.

Q. Just standing there. He does not really have to do anything; he is just there.
A. Yes, sir.

Mr. Lewis stated that he did not object to the taping assignment by Mr. Brooks and he did not tell Mr. Brooks that he was not qualified to do the work. Mr. Lewis stated that it took him approximately 5 minutes to lock out the machine, obtain the tape, and tape the cable. He confirmed that he informed a safety committee member about the matter. Mr. Lewis did not believe that it was unsafe to do the work, and he did not believe that he was placing himself at risk because the power was off the machine. He also believed that it would have been unsafe to leave the cable nick "like that" (Tr. 72).

MSHA Electrical Inspector Gerald L. Smith confirmed that he issued the contested citation on May 9, 1990, and that he did so on the basis of information which he received in the course of a section 103(g)(1) Step 3 grievance proceeding at the mine. Based on the evidence from individuals involved in the grievance, a determination was made that electrical work had been performed by a person who was not a certified or qualified electrician or under the direct supervision of a certified or qualified person (Tr. 76-79).

Mr. Smith stated that Mr. Lewis testified at the grievance proceeding that he observed a damaged place in a permanent splice on the cable of the shuttle car which he had operated and that Mr. Brooks gave him a lock and told him to repair the damaged place in the splice by taping it. As a result of this information, Mr. Smith issued the citation and he did so because he believed the work performed by Mr. Lewis was electrical work and Mr. Lewis was not a certified electrician and did not perform the work under the direct supervision of a certified person (Tr. 79).

Mr. Smith stated that he considered the taping of the cable by Mr. Lewis to be electrical work and repair to the cable, even though the cable was not energized. Mr. Smith considered the citation to be significant and substantial because Mr. Lewis was not a qualified electrician and he could not determine whether he repaired the cable properly so that it would not fail or cause problems in the future. The insulated conductors inside the cable would need to be checked to determine whether there was any damage caused by the nick, and if the repairs are not properly made future dampness could cause an arc inside the cable and result in a blown cable. Although Mr. Lewis was not MSHA-certified, Mr. Smith had no knowledge of his qualifications to repair the cable, and Mr. Lewis stated that he had no previous training (Tr. 81).

Mr. Smith stated that it was reasonably likely that "something could occur if the splice hadn't been properly repaired." He also stated that "taping the splice is not acceptable anyway" (Tr. 82). Mr. Smith did not believe that the splice was properly repaired because permanent splicing is covered by section 75.604. However, Mr. Smith confirmed that Mr. Lewis was not making a splice and that "all he did was just tape over top of a splice, which we don't accept anyway" (Tr. 83).

Mr. Smith believed that shock injuries could occur if someone were to handle a cable under wet conditions at the point where it is damaged. Mr. Smith did not know how many people were in the area on May 2, 1990, when Mr. Lewis repaired the cable, and he had no knowledge of the actual condition of the cable. Mr. Smith also did not know whether or not the mine safety committee pursued the issue of the condition of the cable, and he believed that the committee was only concerned about whether or not Mr. Lewis was a qualified person to do the work in question (Tr. 84-85).

On cross-examination, Mr. Smith confirmed that he never saw the cable and did not inspect it. He stated that the citation was issued a week after Mr. Lewis performed the work on May 2, and that he did not issue a citation for a violation of section 75.604, because the complaint concerned electrical work being performed by a noncertified person and not the type or quality of the work being performed. He believed that the taping of the cable would have been a violation of section 75.604 (Tr. 87).

Mr. Smith stated that a nick in the cable may be taped, but if the splice is nicked it may not be taped and a new splice must be made (Tr. 89). He further indicated that if there were a nick in the outer insulation of the cable, the fact that Mr. Lewis taped it would not be a violation of section 75.604. Mr. Smith explained the requirements of sections 75.517 and 75.604 (Tr. 90-94).

Mr. Smith stated that he would consider the taping of a nick on any portion of the cable to be electrical work, and that MSHA's policy prohibits an unqualified person from applying tape to a cable or to a splice. He believed that an unqualified person may not apply tape anywhere along the length of a trailing cable (Tr. 95). He considered this to be "electrical work" for the following reason (Tr. 95):

Q. Why do you consider that electrical work?

A. Because it's an electrical component of that piece of equipment, and it's the portion of that equipment that furnishes power to

> operate that equipment. If you use electrical tape and take the regular steps pertaining to 511 which says that it should be locked and tagged out, if you do all that, so you must consider it electrical work or why would you lock and tag it out if it's not electrical work.

Mr. Smith explained the reasons for locking out the equipment, and he described the cable and cable splice in question (Tr. 96-98). He stated that if he were repairing a cable splice he would visually examine the inner conductors to be certain that they were not split or would allow moisture to get in. He confirmed that the cable is protected, and if it blows, the system will deenergize (Tr. 99-100).

Referring to MSHA's policy guidelines with respect to the application of section 75.511 (Exhibit P-5), Mr. Smith stated that the work performed by Mr. Lewis would "maybe" fall under Example No. 5 at page 59, "repair of electrical components of electrically-powered portable, mobile or stationary equipment" or Example No. 7, "electrical maintenance of permissible equipment" (Tr. 102). He agreed that the policy examples concerning what is considered to be "electrical work" and what is not are not clear cut, and he stated "I don't agree with a lot of them" (Tr. 104).

In response to further questions, Mr. Smith stated that the citation was issued after he participated in the contractual union-management grievance concerning the union's complaint that an unqualified person (Lewis) was required to do electrical work. Mr. Smith further stated that he made the determination that electrical work was performed and that a violation existed, and that the determination was in the form of the citation which he issued (Tr. 106-108). He confirmed that his "determination" consisted of the citation and abatement, and although notes were taken during the grievance, the information supplied by witnesses was not tape-recorded and no transcript of the grievance was made (Tr. 113). Mr. Smith stated that his determination that Mr. Lewis was not "qualified" was based on Mr. Lewis' statement to that effect which he made the day following the grievance (Tr. 114).

Respondent's Safety Manager Chris Presley confirmed that state mine inspectors were also called to hear the grievance and they too issued a citation after concluding that the work performed by Mr. Lewis was "electrical work." Respondent's counsel stated that the respondent contested that state finding, which was in the form of a citation, and that a hearing has been held, but no decision has been rendered (Tr. 108-111).

Respondent's Testimony and Evidence

Jeffrey Music, mine maintenance manager, testified as to his duties as a maintenance foreman for 12 years, and he confirmed that he has been a West Virginia certified electrician for 12 years. He confirmed that he is an MSHA "qualified person" pursuant to section 75.153 (Tr. 114-116).

Mr. Music was of the opinion that once a cable splice is made permanent, it becomes an integral part of the cable because it is permanent and nothing further is required to be done. If the splice is damaged, it is treated no different than other part of the cable. If the damage is great, the splice is remade. If the damage is superficial, such as the outer jacket, it is simply taped and sealed in the same manner as a regular piece of cable (Tr. 117).

Mr. Music stated that a nick in an unspliced portion of a trailing cable, where there are no exposed wires, is simply repaired by applying tape to the jacket. Similar damage to a permanent splice is repaired in the same manner. Splice kits are not used unless a permanent splice is being made. Cable nicks, where no conductors are exposed, are taped in order to keep the condition from becoming worse, to keep water out, and to prevent "nuisance tripping" of the breakers (Tr. 118).

Referring to the West Virginia State Administrative Mining Regulations (Exhibit R-2), itemizing examples of what is considered to be electrical work, and what is not, Mr. Music stated that this information is used as part of the mine training. He confirmed that as a qualified electrician, he is obligated to follow these quidelines. He pointed out that item No. 13, at page 2, states that a noncertified electrician may perform work taping or reinsulating cables if no conductors or bare wires are showing. In his opinion, Mr. Lewis was not asked to perform electrical work because he was not making a splice, and there were no exposed conductors or leaks (Tr. 119-120).

On cross-examination, Mr. Music stated that he was not at the Mine on May 2, 1990, and he agreed that all electrical work should be performed by a qualified person or under the direct supervision of a qualified person. In his opinion, a nick in a cable splice may be taped by a certified or noncertified person (Tr. 121). He believed that an outer cable jacket provides mechanical protection for the conductors inside the cable, and "in one sense of the word it would be a type of mechanical work" (Tr. 122).

Arguments by the Parties

During oral arguments in the course of the hearing, petitioner's counsel asserted that pursuant to MSHA's policy, the work performed by Mr. Lewis when he locked out the equipment and

taped the nick in the shuttle car trailing cable, was electrical work within the meaning of section 75.511. Counsel stated that the taping of the cable by Mr. Lewis constituted a "repair," and that the locking out of any electrical equipment is required to be done by a qualified person or under the supervision of a qualified person. Counsel confirmed that the terms "qualified" and "certified" are used interchangeably. He took the position that Mr. Lewis and Mr. Brooks should have waited for an electrician to check out and repair the cable, and that simply because the cable was taped did not render it safe. Counsel concluded that due to the hazards presented by an unqualified persons repairing a trailing cable, the violation was significant and substantial (Tr. 52-54; 73-74). Counsel took the position that the intent of the cited standard is to insure that all electrical work is done by a qualified person, or under the supervision of a qualified person, so as to preclude any future problems. He concluded that on the facts of this case, Mr. Lewis was not only not qualified to do the work in question, but he was also not qualified to determine whether the cable was repaired properly.

In its posthearing brief, the petitioner asserts that the respondent may not rely on the less stringent state standard that allows a non-qualified person to tape cables where there are no visible conductors or bare wires, and that MSHA's mandatory standard is controlling. Petitioner also reiterates its argument that an unqualified person would not be able to properly repair a cable or to properly inspect it to ascertain the extent of any damage to the insulated conductors.

Petitioner concludes that the hazards involved in having unqualified persons working on or repairing trailing cables is well-documented, citing Karst Robins Coal Company, Inc., 10 FMSHRC 1708 (December 1988), where an unqualified miner was shocked and burned while working on a 480 volt trailing cable. However, I take note of the fact that in Karst Robins even though the miner's supervisor who assigned him the electrical repair work was the chief electrical supervisor and maintenance foreman, the roof bolter cable which caused the injury had not been deenergized and locked out or tagged at the power center. In the instant case, the trailing cable which was taped by Mr. Lewis was locked out and the shuttle car was deenergized.

Citing U.S. Steel Mining Company, Inc., 5 FMSHRC 1752 (October 1983), where Judge Broderick affirmed a violation of section 75.511, after concluding that an unqualified shuttle car operator who changed a light bulb in a shuttle car performed electrical work, the petitioner concludes that even though putting a piece of tape on a nick in a permanent splice in a trailing cable seems rather elementary so that no certification is required, it is still electrical work which only certified persons should perform. However, I also take note that in the

case cited, the unqualified miner failed to lock out and tag the disconnecting device when he did the work, and that the changing of the light bulb required the removal of the lens and the insertion of the bulb having two prongs into a socket having two holes.

Respondent's counsel asserted that at no time prior to the hearing was he informed that the locking out of the equipment by Mr. Lewis was considered a violation, and he pointed out that the citation makes no reference to any "locking out" (Tr. 54-56). With regard to the alleged "electrical work" performed by Mr. Lewis, counsel asserted that there were no exposed wires or conductors in the cable, and that "all Mr. Lewis did that day was tape a cut in the outer insulation of a splice in a trailing cable of a shuttle car," and that he was "simply dealing with a nick in the neighborhood of 1 1/2 by 3 inches cut in the outer surface of the cable" (Tr. 56). Counsel concluded that this was not electrical work within the meaning of section 75.511.

Respondent's counsel further pointed out that the term "electrical work" is not defined in MSHA's Safety Regulations, but that it is addressed in MSHA's Program Policy Manual (Exhibit P-5). Counsel asserted that Mr. Lewis was not making a cable splice, which is one of the policy examples cited as "electrical work". Referring to the policy examples of work which is not required to be performed by a qualified person, counsel argued that "if handling an energized trailing cable is not electrical work, then merely applying tape to a de-energized trailing cable can hardly be considered to be electrical work" (Tr. 57). Counsel cited Example No. 10 -"mechanical repairs on electrically powered equipment, provided no energized parts or conductors are exposed"- as work similar to what Mr. Lewis was doing. Counsel argued that Mr. Lewis "was not doing anything electrical. He was simply physically applying tape to a cut in an outer insulation" (Tr. 58).

Respondent's counsel produced a copy of the rules and regulations of the State of West Virginia with respect to the certification of mine electricians, and he pointed out that many of the examples as to the type of work which does and does not qualify as "electrical work" are similar or identical to MSHA's policy guidelines. We also pointed out that the state qualifies the respondent's mine electricians and that they are duly recognized as such by MSHA. One of the examples of nonelectrical work which does not require a qualified person to perform states "Reinsulate or tape cables when there are no conductors or bare wires showing" (Exhibit R-2, No. (13), pg. 2; Tr. 58). Counsel took the position that the work performed by Mr. Lewis "is simply not electrical work under the State of West Virginia. Anybody can do it" (Tr. 127).

In its posthearing brief, the respondent asserts that in view of the requirements of sections 75.514 and 75.604, a permanent splice provides at least the same degree of protection to the electrical conductors within the cable as does the outer insulation along the remainder of the cable. Respondent concedes that if conductors or bare wires are exposed, a permanent splice must be made by a qualiied peson to complete the electrical repair. However, the respondent maintains that where cable damage consists of a nick that does not expose conductors or bare wires, the application of tape by a competent person is an adequate mechanical repair because no electrical components of the cable are damaged, and there is no basis for concluding that damage to a cable permanent splice must be repaired any differently than the same degree of damage to the remainder of the cable.

Findings and Conclusions

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. § 75.511, which provides as follows:

> No electrical work shall be performed on low-, medium- or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent. (emphasis added)

An individual is deemed to be a "qualified person" to perform electrical work within the meaning of section 75.511, if he or she meets the requirements stated in 30 C.F.R. § 75.153. The petitioner's counsel confirmed that the terms "certified" and "qualified" are used interchangeably.

The respondent was cited for a violation of section 75.511 after the inspector received information that shuttle car operator Edward Lewis had locked out the machine and taped over a split or "nick" which he found on the boot of a permanent splice in the shuttle car cable. Mr. Lewis had reported the cable condition to his section foreman Harry Brooks, and Mr. Brooks instructed him to lock out the machine and tape the nick in the cable. Mr. Lewis did so, and the job took approximately 5 minutes.

The parties agreed that Mr. Lewis and Mr. Brooks were not "qualified persons" pursuant to section 75.153 (Tr. 58-59). When the UMWA Union learned that Mr. Brooks had instructed Mr. Lewis to perform a job task which it believed constituted electrical work, it filed a safety grievance pursuant to section 103(g) of the Act. Based on the information received in the course of that grievance, the inspector concluded that the work performed by Mr. Lewis (locking out the machine and taping the nick in the cable) was electrical work, and since Mr. Lewis was not qualified to do the work pursuant to section 75.153, and since Mr. Brooks was not qualified to supervise the work, the inspector issued the citation.

The parties agreed that there were no exposed wires or conductors in the cable at the time Mr. Lewis taped over the nick in the splice boot, and there is no evidence concerning the overall condition of the cable, or the quality of the taping job performed by Mr. Lewis other than his statement that he "wrapped it real good." The inspector believed, but was not sure, that the splice was subsequently removed from the cable during the same shift. Respondent's Safety Manager Presley indicated that the splice was removed so that mine management could use it at any hearing, but that it was later disposed of (Tr. 127-128).

The term "electrical work" is not defined in MSHA's regulations or in its most recently published July 1, 1988, Program Policy Manual (Exhibit P-5). However, the West Virginia State Mining Regulations establishing standards for certification of persons performing electrical work in coal mines contain the following definition (Exhibit R-2):

> Section 48-7-2. Definitions.
> 2.1 Electrical work - The term "electrical work" shall mean work consisting primarily of electrical construction, installation, testing, inspection, maintenance and repair tasks on electrical coal mining equipment, apparatus, circuits, and/or distribution circuits used in or around a coal mine.

MSHA's Program Policy Manual states that for the purpose of section 75.511, "electrical work is considered to be the work required to install or maintain electric equipment or conductors" (Exhibit P-5, pg. 58). Included among the examples of work required to be performed by a qualified person are "3. Making splices, connections and terminations in electric conductors and cables," and "7. Electrical maintenance of permissible equipment." Included among the examples of work that is <u>not</u> required to be performed by a qualified person is "10. mechanical repairs on electrically-powered equipment, provided no energized parts or conductors are exposed."

The state regulations also contain examples of what is, and what is not, considered to be work required to be performed by a certified electrician. Included among the examples of work that is not required to be performed by a certified electrician is the identical provision found in MSHA's policy manual (Item #10 quoted above), and the following: " (13) Reinsulate or tape cables when there are no conductors or bare wires showing".

The violation notice issued by Inspector Smith describes the "electrical work" in question as a "repair made on a permanent type splice" in the trailing cable. However, the evidence reflects that Mr. Lewis did not make or repair a splice. He simply taped over a nick or split in the boot of the permanent splice, and other than a roll of electrical tape, he used no tools or other equipment. There were no exposed wires or conductors, and Mr. Lewis covered the nick with three or four wraps of tape, and it took him 5 minutes to lock out the machine, obtain the tape, and tape the cable. MSHA's policy does not prohibit the taping of a cable by a non-certified person when there are no conductors or bare wires showing.

Although it is true that Mr. Lewis was not a qualified person for purposes of electrical work, he admitted that he had often either taped cables in the presence of a mechanic or a certified person or assisted a mechanic in the taping of cables. He also admitted to the taping of cable splices after they were made by a mechanic or certified electrician. In the instant case, Mr. Lewis did not advise Foreman Brooks that he was not a qualified person, nor did he object to doing the work. Further, Mr. Lewis did not believe that he was at risk by doing the job, particularly since the machine was deenergized and locked out. Indeed, Mr. Lewis believed that it would have been unsafe to leave the cable nick in the condition which he found it.

The inspector stated that taping over a splice is not acceptable, and he was concerned that a nonqualified person such as Mr. Lewis was not competent to determine whether or not a cable splice was properly repaired to preclude future failure or other problems. The inspector stated that the taping of a splice is unacceptable and he believed that the splice was not properly repaired by Mr. Lewis as required by Section 75.604, and that the taping was a violation of that section. However, the inspector admitted that Mr. Lewis was not making a splice, and there is no evidence to indicate that simply taping a nick in a cable constitutes the making or repairing of a splice within the meaning of Section 75.603, which defines a temporary splice as "the mechanical joining of one or more conductors that have been severed," or Section 75.604, which covers permanent splices in trailing cables. Under the circumstances, I cannot conclude that the taping of the cable constituted a violation of Section 75.604, and I take note of the fact that no violations

were issued pursuant to any of the mandatory standards dealing with trailing cable splices.

The inspector's belief that Mr. Lewis was performing "electrical work" when he taped over the nick in the deenergized and locked-out trailing cable was based on the fact that the cable was an electrical component of the piece of equipment in question (shuttle car), and his assumption that Mr. Lewis would not have locked out and tagged the equipment pursuant to Section 75.511, unless he performed electrical work. Section 75.511 requires the locking out and tagging of disconnecting devices by the qualified or trained person doing the work. However, the respondent was not cited for any violation because Mr. Lewis locked out and deenergized the equipment.

I cannot conclude that simply because someone peforms work involving a piece of electrical equipment or component, such as a trailing cable, that such work ipso facto constitutes electrical work required to be performed only by a qualified person. MSHA's policy authorizes repairs to electrical equipment by nonqualified persons provided no energized parts or conductors are exposed. The quidelines also allow nonqualified persons to perform work handling energized trailing cables, inserting and removing cable couplers from receptacles, and transporting cables. It seems to me that this type of work, which does not require qualified people to perform it, present potential hazards greater than simply taping a nick in a trailing cable which has been deenergized and locked out by the person doing the taping.

I take note of the fact that MSHA's policy examples also provide that work involving the installation, repair, or guarding of trolley wires may be done by nonqualified persons. Although the policy goes on to explain that Section 75.510 requires training to repair and maintain energized trolley wires, it is not clear whether training is required to repair or install trolley wires which are not energized. I also note that pursuant to the state regulations, the taping or reinsulation of cables where there are no conductors or bare wires showing is not required to be performed by a certified electrician, even though "maintenance and repair tasks on electrical coal mining equipment" is included in the state definition of "electrical work."

With respect to the locking out of the equipment and trailing cable, I am not persuaded that electrical equipment is only locked out if electrical work is going to be performed. The inspector conceded that equipment is locked out regardless of any electrical hazard "if you're working on it," and he agreed that a person can be physically injured by a shuttle car or "hooked" by the cable if the machine is inadvertently started (Tr. 96). I take note of the fact that although Section 75.511 provides for

the locking out and tagging of electrical disconnecting devices by the qualified person doing the work, if that person is unavailable, the locks and tags may be removed by a person "authorized" by the operator to do so. In the instant case, since his foreman gave Mr. Lewis the lock and instructed him to lock out the machine, I assume that Mr. Lewis was "authorized" to remove the lock.

After careful consideration of all of the evidence and testimony adduced in this case, including the arguments advanced by the parties in support of their respective positions, I conclude and find that the taping of the nick in the deenergized and locked out trailing cable by Mr. Lewis was more akin to mechanical work and was not electrical work within the meaning of the cited seciton 75.511, and that the work was not required ot be performed by a qualified person pursuant to section 75.153. Under the circumstances, the contested citation IS VACATED.

ORDER

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

1. Section 104(a) "S&S" Citation No. 3237405, May 9, 1990, citing an alleged violation of 30 C.F.R. § 75.511 IS VACATED.

2. The petitioner's proposed civil penalty assessment for the vacated citation IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 16 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-73
	:	A.C. No. 46-05868-03541
v.	:	
	:	Pinnacle Prep Plant
UNITED STATES STEEL MINING COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Koutras

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 $46 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.200. The respondent filed an answer contesting the alleged violation and a hearing was held in Beckley, West Virginia. The parties filed posthearing briefs and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the safety standard as alleged in the proposal for assessment of civil penalty (2) whether the violation was "significant and substantial," and (3) the appropriate civil penalty that should be assessed based on the civil 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 this decision.

Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 77.200.

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. **The presiding judge has jurisdiction to hear and decide this matter.**

2. **The inspector who issued the contested citation was acting in his official capacity as a Federal coal mine inspector.**

3. **The citation was properly issued to the respondent's agents.**

4. **The cited conditions were timely abated.**

5. **Payment of the proposed civil penalty assessment of $46 will not adversely affect the respondent's ability to continue in business.**

The contested section 104(a) "S&S" Citation No. 2736728, issued by MSHA Inspector Michael T. Dickerson on September 10, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.200, and the cited condition or practice is described as follows:

> The concrete floor at the feed end of (exterior) thermal dryer bed has deteriorated. Leaks at floor level are allowing live embers and small amounts of float coal dust to escape dryer bed area, and allowing loss of small amounts of fluidizing air current.

Petitioner's Testimony and Evidence

MSHA Inspector Michael T. Dickerson testified that he issued the contested citation during a regular inspection of the respondent's preparation plant on September 10, 1990. He stated that during his inspection of the thermal coal dryer he observed hot

coal embers and coal dust coming through the "fractured" concrete floor at the feed end of the dryer bed. He believed that a loss of drying fluidizing air current could cause coal dust to settle and become hot and this would pose a hazard of fire or explosion. He explained that his main concern was over the loss of air current which could cause coal to settle on the drying bed, and that any coal in suspension above the drying bed could be ignited.

Mr. Dickerson stated that dryer explosions were not unusual events, and he believed that it was reasonably likely that a fire or explosion would occur as a result of the cited conditions, and that the dryer attendant would be exposed to these hazards. He confirmed that the violation was the result of "low negligence" on the part of the respondent because the conditions were difficult to see. He also confirmed that the violation was abated by repairing the concrete floor area and welding a split in the dryer wall. He did not know whether any work was done inside the refractory (Tr. 133-139).

On cross-examination, Mr. Dickerson described the thermal dryer as "six stories high" and he stated that the cited conditions were located at "floor level". He identified a drawing of a "Typical Thermal Coal Dryer" (Exhibit P-6), as similar to the cited dryer facility in question. He stated that the deteriorated concrete floor area was exposed to the air but was not a walkway. He stated that he was in the area for approximately 30 minutes and observed the floor from approximately 5 to 6 feet away and then closer as he approached the area immediately adjacent to the dryer feed bin. He stated that the "crumbled concrete" floor condition began a few inches from the dryer and extended over an area approximately 8 to 10 feet long.

Mr. Dickerson stated that he found no methane hazards present at the cited area, but he observed hot embers and coal dust coming from the deteriorated floor. He agreed that it was not unusual to see deteriorated concrete floor areas around a thermal coal dryer. He stated that there was a "constant flow" of embers from the floor and that he could see at least 10 embers present at any one time. Mr. Dickerson was shown two photographic exhibits (R-1 and R-2), showing a deteriorating concrete floor area, but he could not definitely confirm whether they were the areas which he cited (Tr. 140-144).

Mr. Dickerson stated that the dryer building was washed down on a regular basis. He did not observe any accumulations of coal embers or coal dust, and he did not believe that the presence of hot embers presented a hazard (Tr. 145). He stated that a small area where the coal dust was coming through the floor was "cloudy, and he believed that it was float coal dust in suspension. However, he did not believe that the amount of coal dust which he observed posed any hazard (Tr. 147).

Mr. Dickerson stated that he could "feel air" coming through the floor and that when he lifted a small piece of broken concrete he felt an air current. He believed that the air current would blow away any float coal dust, but he was concerned that the loss of fluidizing air current would allow coal dust to settle on the dryer bed itself, and if left unattended, it could cause a fire. He was concerned that the conditions could deteriorate further, and for these reasons, he believed that the violation was "significant and substantial" (Tr. 151).

Mr. Dickerson stated that he was told that the dryer wall was damaged and that a seam had to be sealed to correct the conditions in question. He confirmed that if the dryer wall were not damaged and there was no leakage, the deteriorated concrete would not have caused a problem and the deteriorated concrete condition was not in and of itself something that was "out of disrepair" under the cited mandatory standard (Tr. 150).

Mr. Dickerson confirmed that he was familiar with MSHA's policy manual (Exhibit P-5), and he stated that section 75.200 of the manual does not specifically address thermal dryers. He believed that he cited the appropriate section 77.200, because the loss of fluidizing air, coal dust, or embers, which is addressed in section 77.305, requires tight ceiling doors to prevent these conditions. He explained that "since I was not addressing a door, I couldn't use that section at all and had to go to section 77.200" (Tr. 153). He further confirmed that the deteriorated floor played no part in the violation, and that he only included the condition of the floor to describe what he observed. The violation pertained to the loss of hot embers and coal dust that floated out in the air, and this was caused by the split in the metal lining of the dryer. The purpose of the floor area was not to enclose the leakage from the dryer bed. The metal which split was used for that purpose (Tr. 153).

In response to further questions, Mr. Dickerson stated that the dryer leak was significant enough to cause loss of air current, which posed a hazard (Tr. 154). He granted the respondent two weeks to abate the conditions because he knew that any abatement work would involve the damaged dryer wall. Although he indicated that the deteriorated floor would affect the air current and any potential hazard, he also stated that the deteriorated floor did not contribute to the hazard and that it was "just a tattle tale sign" (Tr. 155).

Mr. Dickerson stated that he was concerned with the loss of fluidizing air current inside the dryer. He explained that the fluidizing air current moves the coal across the dryer bed inside the dryer and that the deteriorated concrete floor area was the location where the dryer was leaking (Tr. 157). If the floor had not deteriorated he would not have been able to see the escaping

fluidized air current, and the concrete floor would not have allowed the air to escape (Tr. 159).

Mr. Dickerson confirmed that the escaping coal dust and escaping coal embers did not pose a hazard, and if the facility were washed down regularly, as he believed it was, any escaping fluidizing air current would only be hazardous internally to the dryer system, and not externally. The small amount of fluidizing air current coming through the deteriorated concrete would only pose a hazard if it restricted the air flow inside the dryer (Tr. 150).

Mr. Dickerson confirmed that a split in the metal lining of the dryer was the cause of the escaping fluidizing air current, and that at the time he viewed the conditions he did not know that the dryer wall was constructed solely of metal or whether the concrete floor was part of the dryer wall. He also confirmed that the purpose of the floor which had deteriorated was not to enclose or encompass the fluidizing air current, and he stated as follows at (Tr. 160-161):

> A. To clear this up, if they had fixed the wall of the dryer and said, "Mike, the floor had nothing to do with it," and I had went and looked and the floor was still cracked up along there, that they had fixed the metal and no air currents were escaping, I would have terminated the paper.
>
> * * * * * * *
>
> Q. If the floor had been properly maintained and there would not have been any leaks coming out from the floor, would there have been leaks into the atmosphere going from somewhere else or another source?
>
> A. No, because that seam was against the floor. The floor was poured against that seam.
>
> Q. The reason that the embers and the air current leaks were coming out into the atmosphere was because of the deteriorated floor?
>
> A. That was part of it, yes.

Respondent's Testimony and Evidence

David T. Walters, shift foreman, testified that he became aware of the cited conditions on the afternoon of the day Mr. Dickerson issued the citation. Mr. Walters stated that he took photographs of the area where he observed sparks being emitted from the broken concrete floor area cited by the

inspector, and he confirmed that there were no operational changes from the time the inspector saw the conditions (Exhibits R-1 and R-2; Tr. 165-167).

Mr. Walters stated that he observed "a puff" of air, and a "gentle constant flow" of small burning embers coming through the floor. He stated that he observed an "ashy" colored product, rather than float coal dust, and he described the material as "fine pulverized coal" which had gone through the combustion process. He stated that the material was leaking through a 3 to 4 inch crack in the stainless steel dryer wall and that the condition was abated by welding the crack and pouring a new concrete floor for "cosmetic purposes". Mr. Walters characterized the effect of the three-to-four inch split in the dryer lining as "a spit in the ocean", and he believed that it would take a large hole to short circuit the two 400 and 1,000 horsepower fans which were shoving from the bottom and pulling from the top. He also confirmed that the area in question is washed down more than once a day, and that people are there three shifts a day. (Tr. 168-171).

Mr. Walters stated that the deteriorated concrete floor condition extended for a distance of approximately three and one-half feet by one-foot, and in his opinion this condition presented no hazard of any accident or injury to anyone. He stated that leakage has occurred in the past because the metallic dryer joint reacts to heat and splits, and when this occurs it is necessary to weld the joint. In order to reach the joint, the concrete floor is broken up in order to access the joint seam, and it is then repaired. However, if the seam splits again, the floor must again be broken in order to make the repairs (Tr. 172-172).

In response to further questions, Mr. Walters stated that he is concerned about "sparks being emitted everywhere" and the leak in the dryer wall. However he did not consider the condition an imminent danger or something that would require shutting down the plant. (Tr. 176).

Discussion

The mandatory safety standards dealing with thermal dryers are found in Subpart D, Part 77, Title 30, Code of Federal Regulations. Sections 77.300 through 77.315, cover the operation and maintenance of thermal dryers, and section 77.305 requires drying chambers and associated ductwork to be equipped with tight sealing access doors which are required to be latched during dryer operation to prevent the emission of coal dust and the loss of fluidizing air. In this case, the respondent has not been charged with a violation of any of these dryer standards, nor has it been charged with any violations of section 77.202, which covers accumulations of coal dust on surface structures,

enclosures, or other facilities, or the surface travelway requirements found in section 77.205. The respondent is charged with an alleged violation of section 77.200, which covers surface installations in general, and it provides as follows:

> All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

MSHA's July 1, 1988, and the most current April 1, 1991, Program Policy Manual reference to section 77.200, (Exhibit P-5), states as follows:

> This section does not apply to housekeeping. It is to be used for keeping surface facilities in good repair relative to safety.
>
> Inspections of surface facilities, structures, and enclosures should include an examination of all load-carrying members and related bracing. When such members or bracing are substantially warped, bent, deteriorated due to corrosion or weathering, or otherwise damaged or missing, the structure may be unstable or have a reduced load-carrying capacity. These conditions can cause or contribute to serious accidents and injuries, and appropriate enforcement action must be taken pursuant to this Section to require the structure, enclosure, or other facility to be maintained in good repair.
>
> The district engineering staff should be consulted to evaluate the condition of a surface structure where assistance is needed in determining whether the condition causes instability or reduces the load-carrying capacity of the structure.

During oral arguments on the record, and in his posthearing brief, the respondent's counsel took the position that the cited section 77.200 requirement for maintaining surface installations "in good repair" is intended to apply to the structural stability of surface facilities, rather than the conditions cited by the inspector. Counsel asserted that the "structural stability" interpretation is specifically covered and discussed in MSHA's policy guideline (Exhibit P-5, Tr. 177-178). Counsel also suggested that since the inspector allowed two weeks to abate the conditions, they did not constitute a significant and substantial violation (Tr. 151).

Respondent's counsel conceded that the respondent would be concerned about a deteriorating thermal dryer wall that allowed material to escape into the atmosphere "if there is not

sufficient air current to continue to move that coal across the dyer bed" (Tr. 162). Counsel asserted that it was his understanding that the metal lining, rather than the dryer wall itself, was cracked, and that the lining did not provide any structural support for the dryer. Counsel agreed that the equipment "was not designed to leak like that" (Tr. 164).

Petitioner's counsel took the position that although there is no specific regulation addressing the particular problem posed by the conditions which the inspector believed were hazardous, the inspector necessarily relied on the more general requirements found in the cited section 77.200 (Tr. 177).

In his posthearing brief, petitioner's counsel asserted that since the damaged floor was causing a loss in the fluidizing air current in the dryer chamber, a violation of section 77.200, occurred since this scenario could potentially result in an unplanned ignition or explosion.

Inspector Dickerson confirmed that he was familiar with MSHA's policy guidelines concerning the application and interpretation of section 77.200, and the sections dealing with thermal dryers. He still believed that he cited the proper standard, and he explained that although the loss of fluidizing air or coal dust and embers is addressed in section 77.305, that section requires tight ceiling doors to prevent the conditions. Since he was not addressing a door, he believed that he could not rely on section 77.305, and had to rely on section 77.200. (Tr. 152-153). The inspector also confirmed that if he had seen only the ruptured lining and the two-inch opening exposed above the level of the floor he would still cite a violation of section 77.200 (Tr. 177).

Findings and Conclusions

Although I agree with the respondent's contention that the primary purpose and intent of section 77.200, as explained by MSHA's policy manual, is to assure the physical and structural integrity of surface coal preparation structures such a thermal dryer, I believe the language of the standard is broad enough to cover a damaged and unrepaired dryer bed enclosure lining which allows dangerous levels of coal dust or float coal dust to escape and remain on equipment structures where it could be ignited by escaping hot embers and sparks flowing from the damaged enclosure. The standard requires that such structures be maintained in good repair to prevent accidents and injuries to employees.

I conclude and find that the dryer bed enclosure was not maintained in good repair. While it may be true that the metal lining, rather than the dryer wall itself was cracked, the fact remains that the cracked or ruptured lining, which I find was an

integral part of the enclosure, allowed materials to escape or leak out of the enclosure. The respondent has not rebutted the fact that the damaged lining was in fact causing the leakage, and it conceded that the enclosure was not designed to leak and that it would be concerned about a deteriorating dryer wall that allowed material to escape.

Although I have found that the dryer bed enclosure was not maintained in good repair, I conclude that given the language "to prevent accidents and injuries to employees" found in the standard, in order to establish a violation it must be established that the disrepair, or condition of the cited equipment presented a hazard to miners. Based on the evidence adduced in this case, I cannot conclude that the petitioner has established that the leaking dryer bed enclosure lining presented a hazard to miners.

Inspector Dickerson conceded that the escaping coal dust and coal embers did not pose a hazard, and he detected no hazards from any methane. Although he expressed concern that coal dust could settle on the drying bed and that coal dust in suspension could be ignited, he confirmed that the air current would blow away any float coal dust, and he did not believe that the amount of coal dust which he observed posed any hazard. The inspector also conceded that the deteriorated floor condition described in the citation did not contribute to any hazard, and he did not believe that the floor area in question was a walkway. As noted earlier, no citations were issued for accumulations of coal dust on surface structures or enclosures, or for any unsafe surface travelways, and the inspector confirmed that he found no accumulations of coal dust or embers.

The inspector's testimony reflects that he was primarily concerned about the loss of a fluidizing air current inside the dryer, and his concern that any loss of air current could cause coal dust to settle on the drying bed itself and pose a potential ignition or fire hazard. However, he conceded that if the facility were washed down regularly, as he believed it was, any hazard resulting from any escaping fluidizing air current would be limited to the inside of the dryer and not the outside. Given the small amount of fluidizing air current coming through the cracked dryer lining, the inspector further conceded that it would only pose a hazard if it restricted the air flow inside the dryer. However, there is no evidence that this was the case. Under all of these circumstances, I conclude and find that the petitioner has failed to establish a violation. Under the circumstances, the contested citation IS VACATED.

ORDER

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

1. Section 104(a) "S&S" Citation No. 2736728, September 10, 1990, citing an alleged violation of 30 C.F.R. § 77.200, IS VACATED.

2. The petitioner's proposed civil penalty assessment for the vacated citation IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 18 1991

LONNIE DARRELL ROSS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 91-76-D
v.	:	BARB CD 90-40
	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC., Respondent	:	
CHARLES E. GILBERT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 91-77-D
v.	:	BARB CD 90-41
	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, KY, for Complainant;
Neville Smith, Esq., Manchester, KY, for Respondent.

Before: Judge Fauver

These consolidated discrimination proceedings were brought by Lonnie Ross and Charles Gilbert against Shamrock Coal Company, Inc., alleging that they were wrongfully discharged for engaging in protected activity, i.e., making safety complaints, in violation of Section 105(c)(1) of the Federal Mine Safety Act of 1977, 30 U.S.C. § 801 et seq.

In September, 1990, Complainants filed their initial complaints with the Mine Safety and Health Administration (MSHA). On November 7, 1990, MSHA advised them that its investigation did not indicate a violation of § 105(c). On November 30, 1990, Complainants filed the instant complaints with the Commission.

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

FINDINGS OF FACT

1. Respondent operates an underground coal mine known as Greasy Creek Mine No. 10, where it mines coal for sale or use in or substantially affecting interstate commerce. Mine No. 10 is part of Respondent's Greasy Creek coal division, which consists of several coal mines.

2. Complainant Lonnie Ross was employed at the mine as a fireboss and crew leader, and Charles Gilbert as a maintenance worker on Ross' crew, when they were discharged by Respondent, on July 31, 1990.

3. Lonnie Ross began work for Respondent on May 28, 1981. He was employed as a fireboss and maintenance employee on the night (third) shift from 1985 until July 31, 1990, when he was discharged. Beginning about 6 months before his discharge, he also became a crew leader of a maintenance crew on the third shift. His principal duties included firebossing, doing preshift examinations of two sections, and being a crew leader in maintenance work to prepare one section to run coal on the day shift. His job was to carry out orders from the third shift foreman.

4. Charles Gilbert was employed by Respondent as a maintenance worker on the third shift from July 3, 1981, until July 31, 1990, when he was discharged. His job was to carry out orders from the third shift foreman or his crew leader in preparing his section to run coal on the day shift. Gilbert was a member of Ross' maintenance crew.

5. The maintenance crew in Section 10-3A, where Complainants were working when they were discharged, consisted of three miners -- Lonnie Ross (fireboss and crew leader) and two general maintenance workers, Charles Gilbert and Mike Europa. Occasionally they had a "greenhorn," a trainee miner, assisting them. Their job was to carry out assigned duties to prepare the section for the production of coal by the day shift. Complainants regularly performed electrical work without the presence or direct supervision of certified electricians. This included splicing high voltage cables, disconnecting and hooking up power centers, electrical boxes and water pumps, locking out and re-energizing power circuits. The electrical work was not isolated or sporadic, but a regular part of their jobs. Complainants were not certified mine electricians. They moved the power center in their section three or four times a week, routinely doing the electrical work that was involved in such a move.

6. It was well known by their supervisors that Complainants were not certified mine electricians, that they were doing electrical work without the direct supervision of a certified electrician, and that this work was prohibited by federal safety standards.

7. In the 1980's, Ross and Gilbert complained to their foreman, Doug Collett, about working on high voltage electricity and not being certified mine electricians. Collett indicated to them that was part of their job and they had the choice of doing it or quitting. In the fall of 1989, they complained to his successor, Foreman Ralph Bowling, but he either ignored their complaints or said he could not spare an electrician to do the electrical work they were doing.

8. Ross and Gilbert continued doing unlawful electrical work to keep their jobs, but they did not want to work on high voltage electricity and did so only because their supervisors expected such job performance of them.

9. In the fall of 1989, the mine changed the work week from five 8-hour days to four 10-hour days. The two production shifts increased daily production from 16 hours to 20 hours, so that the third shift maintenance crew had only 4 hours instead of 8 hours between production shifts. This significantly increased the work load and job pressures on Complainants. As a result, Ross and Gilbert were vocal in making complaints to Foreman Ralph Bowling that they had too much work to do in the 4 hours between production shifts and asked for help by having more personnel assigned. They emphasized that they did not have enough time to do their jobs properly. Bowling did not address these complaints.

10. In January, 1990, the general mine superintendent, Stanley Couch, quit because of his objections to the 10-hour plan. He found that it created unacceptable job pressures and inefficiency.

11. Couch was replaced by Don Smith as mine superintendent. Ross and Gilbert complained to Smith that they needed more men on their crew, and did not have enough time to do their jobs, but he either ignored the complaints or indicated that they were expected to do the job with what they had.

12. In the first part of July, 1990, Foreman Bowling went on vacation for one week. He recommended that Ross be promoted as acting third shift foreman in his absence. Smith approved the recommendation. In recommending Ross, Bowling said Ross was one of his best workers.

13. On July 18, 1990, a federal mine inspector was preparing to go underground for an inspection. Ross had filled out his preshift examination report, as fireboss, and signed it. Smith came up to him and said that the day shift foreman, Charles L. Morgan, had not countersigned the report. Without Morgan's signature, it would be a violation to begin production on the day shift. Smith asked Ross to sign Morgan's name. Ross refused. Smith asked him again, but Ross refused. This made Smith angry, and he signed Morgan's name himself.

14. After this incident, Ross perceived a clear change in Smith's attitude toward him, which became hostile and harassing. Ross feared, from that incident, that Smith would retaliate against him.

15. The last week of July, 1990, Mike Europa, the third man on Complainants' maintenance crew, went on vacation for one week. Ross and Gilbert asked Foreman Ralph Bowling to replace Europa for that week, but Bowling told them that Ross would have to do Europa's job as well as his own duties for that week. This decision increased the job pressures on Ross and Gilbert for that week, and created a number of safety risks by causing pressures on them to do their jobs faster. These risks included rushing Ross in his preshift examinations and rushing Ross and Gilbert in doing unlawful electrical work. Both Complainants complained to Foreman Bowling that they needed a replacement for Mike Europa that week, and could not do their work properly without a replacement. These complaints were unheeded.

16. Ross was fireboss and crew leader, and also filling in for Mike Europa (on vacation) the last week of July, 1990. Gilbert was doing his regular job, with added pressure because of the absence of Europa. The only other employee with Ross and Gilbert was a greenhorn, who had been in training for several weeks.

17. On July 26, 1990, between production shifts, Ross and Gilbert moved the power center in their section, doing the electrical work involved in the move.

18. By the time they moved the power center and one cable, it was approaching 6:00 a.m., and they still had two cables to move. They were under pressure to move the cables, so they could hook up the power center, connect the cables, and have the section ready for the day shift at 7:00 a.m. Ross looked for pull ropes on the section, but did not find any. These ropes are loops used to attach a cable to a vehicle for pulling. He decided to use a method of pulling the cables that he had often seen used before, and at times had used himself. By bending a cable into a loop, and lowering the scoop batteries onto the loop, a cable could be pulled by the scoop. This method was commonly used to pull a cable out of the mine, or to move a cable out of the way if it was going to be removed from the mine. The advantage of this method was that the grip on a cable loop was more reliable than a grip on a pull rope, which would become loose or disconnected over a long distance. The disadvantage of this method was that a cable loop could be damaged by the heavy batteries (weighing about 7,000 pounds) and this would require cutting off about four feet of cable. Since this amount of cable cost only $20, various supervisors believed it was worth the cost, rather than lose time reconnecting a pull rope during a long haul. This comparison of time and cost was relevant in moving a cable out of the mine, because the replacement of the damaged end of the cable eliminated a safety risk. Also, pulling the cable did

not present a hazard at the time of pulling, because the cable was de-energized. However, a safety risk would be involved if the last four feet of cable were damaged and not replaced. The damage could expose bare wire or it could weaken the outer jacket so that, with further use of the cable in mining, a bare wire might be exposed in the last four feet of the cable and could cause an electric shock. It was therefore not a safe practice to move a cable by placing it under the scoop batteries if the looped end of the cable was not replaced before re-using the cable. Ross knew that it was not a good practice, but he was also aware of cases in which a cable was moved that way with no apparent damage. He had also seen foremen move a cable this way when they were in a hurry.

19. As of July, 1990, moving a cable under scoop batteries was not an accepted practice at this mine if the cable were being advanced with the section. It was an accepted practice if the cable were being moved out of the mine.

20. When Ross told Gilbert to lower the scoop batteries onto the cables, Gilbert knew this was not an accepted practice, and advised Ross several times not to move the cables under the scoop batteries. Ross rejected this advice, and ordered Gilbert to lower the scoop batteries onto the cable loops. Gilbert followed the order of his crew leader.

21. Gilbert drove the scoop, pulling the cables to the power center, where Roger Hoskins saw him. Hoskins, a crew leader on a repair crew, told Gilbert that they were wrong to pull the cables that way.

22. When the day shift tried to use the cables, one had internal damage so that the circuit breaker would keep shutting off the circuit. Hoskins told the day shift foreman, Charles Morgan, that he had seen certain employees pull the cables under scoop batteries. He did not tell Morgan their names.

23. Morgan told Mine Superintendent Don Smith what Hoskins had said. Smith told Foreman Ralph Bowling to find out what happened and that, if employees had pulled the cables under the scoop batteries, to fire "whoever did it."

24. Bowling contacted Ross, who said he did not know anything about it. He then contacted Gilbert, who said he drove the scoop, pulling the cables under the scoop batteries. Bowling told him he was fired. Gilbert said he would not take the blame alone, and that Ross had told him to do it. Gilbert was not actually fired at that time. He was fired later, by Superintendent Smith, not Foreman Bowling.

25. On July 31, 1990, at Smith's request, Bowling called Ross to the office, where Don Smith, Pearl Napier, and Gilbert were also present. Smith confronted Ross with Gilbert's statement that he

had told Gilbert to move the cables under the scoop batteries. Ross said he would take the blame.

26. Bowling did not want to see the men fired. He persuaded Don Smith to step outside the room. Outside, he recommended two weeks' suspension without pay, instead of discharge. Smith agreed.

27. They returned, and Bowling said they were giving Complainants two weeks off without pay. Ross indicated his agreement to accept that punishment. Gilbert was angry, because he had only followed his crew leader's order and did not believe he should be given time off without pay, and because he believed the company had imposed undue job pressures on him. He told management he did not believe he deserved two weeks' suspension and that he was "tired" of "having to work like a dog and not having time to do the job" (Tr. 36). He said that, if he had enough accumulated hours for that year for his profit-sharing fund, they could go ahead and fire him rather than give him two weeks' suspension.

28. Someone called the payroll office, to see whether Gilbert had enough hours for 1990 for his profit-sharing fund, and reported that he did have enough time. At this point, Bowling told Smith that they could not fire one employee and give the other only two weeks' suspension since they were "equally" at fault. Gilbert then reconsidered. He said that he did not want Ross to lose his job, and agreed to take the two weeks' suspension.

29. Superintendent Don Smith, who had a short temper, lost his temper at this point, and said "just go ahead and fire both of them." Tr. 338.

DISCUSSION WITH FURTHER FINDINGS

Scope of Protected Activity

Section 105(c)(1) of the Act [1] protects miners from

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[1] Section 105(c)(1) provides:

> 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,

retaliation for exercising rights under the Act, including the right to complain to supervisors about an alleged danger or safety or health violation.

The basic purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing 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." S. Rep. No. 95-181. 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. (1978)).

This provision is a key part of remedial legislation, which is to be liberally construed to effectuate its purposes.

Reporting an alleged danger or violation to a mine operator is distinguished from refusing to work because of such a complaint. Refusal-to-work cases generally focus on whether the miner believed that he or she was being subjected to danger. A key issue is whether the belief was held in good faith and was a reasonable one. In such cases, the miner generally has an obligation to express the safety complaint with sufficient clarity and detail to enable the mine operator to address it and take corrective action if necessary. In contrast, if a miner does not refuse to work but complains about a hazard or violation, the voicing of the complaint is protected by § 105(c) without examining whether the miner would be justified in refusing to work.

Complaints About Electrical Work

Early in their employment, Complainants were introduced to electrical work as a normal part of their jobs. This included making high voltage splices, disconnecting and hooking up power centers, electrical boxes, water pumps, and locking out and re-energizing circuits. This work was dangerous in the hands of unqualified personnel and forbidden by a mandatory safety standard, 30 C.F.R. § 75.511, which provides:

> representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify 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.

> No electrical work shall be performed on low, medium, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

Complainants were not certified mine electricians ("qualified persons") and were not working under the direct supervision of a certified mine electrician when they performed electrical work. Indeed, they usually did such work without the presence of a certified mine electrician. Respondent regarded this unlawful [2] electrical work as a routine and integral part of their jobs.

Complainants complained to an early supervisor, Foreman Doug Collett, about doing electrical work and not being certified mine electricians. Collett did not heed their complaints, and indicated that they had the option of doing such work or quitting.

They complained to Collett's successor, Foreman Ralph Bowling, about doing electrical work and not being certified mine electricians. His usual reaction was to ignore their complaints or say that he could not spare an electrician to do the electrical work Complainants were performing.

The regular practice by Ross and Gilbert, with Respondent's knowledge, was to handle the power moves on their section, doing the electrical work themselves, including disconnecting and hooking up the power center, electrical boxes, disconnecting, hooking up

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[2] In finding that Complainants' electrical work was unlawful, I address the basis of one of their protected activities under § 105(c), which applies to complaints of "an alleged danger or safety or health violation" (emphasis added). Complainants were entitled to complain about safety violations to their employer without fear of retaliation. Their performance of electrical work without the direct supervision of a certified mine electrician was a plain violation of 30 C.F.R. § 75.511 (quoted above). This is not an adjudication of a violation for civil penalties under § 110(i) of the Act, or for any purpose other than determining the nature of Complainants' protected activities proved in these proceedings.

and splicing cables, and locking out and re-energizing circuits, without the presence or supervision of a certified electrician.

The reliable evidence corroborates Complainants' testimony that they regularly did unlawful electrical work as a routine, integral part of their jobs. Other employees saw them do electrical work and themselves did electrical work although they were not certified electricians. Respondent did not assign an electrician to Complainants' section, but did so a few months after they were discharged. During Complainants' employment, on the third shift electricians were assigned to a "roving" repair crew that covered a number of mines. They were usually not present for power moves in Complainants' section.

Complainants' foreman, Ralph Bowling, knew that Complainants were doing electrical work, and saw them hooking up power boxes and making high voltage splices. His attitude was that in doing such work Complainants were in "No more danger than an electrician or anybody else would have been in" (Tr. 435). Bowling was not a certified mine electrician but did electrical work because he believed in doing "What had to be done" (Tr. 436). In his view, an "electrician's card" does not make an electrician. This apparently was his justification for not seeking electrical training and certification and for employing Complainants to do electrical work without the presence or supervision of a certified electrician. Foreman Bowling showed a serious disregard for mandatory safety standards requiring training, qualification, certification, and job assignments of mine electricians.

Complainants' safety complaints about doing electrical work went unheeded by Respondent. Gilbert testified that his last safety complaint about doing electrical work was about 5 or 6 months before his discharge (Tr. 78). Ross testified that he specifically requested that he not be required to do electrical work "A lot of times" (Tr. 169). Ralph Bowling became their foreman around October, 1989, and remained their foreman until they were discharged. I find that Complainants complained to Foreman Bowling about doing electrical work a number of times and at least as late as the last months of 1989. With Bowling's attitude toward electrical work, such complaints were futile.

Complainants complained, and adequately put Respondent on notice, that they objected to doing electrical work for which they were not certified mine electricians, and that they did not want to work on high voltage. They acquiesced in doing unlawful electrical work, not because they were not afraid of high voltage electricity, but because they needed to keep their jobs. This mine is located in a remote area where jobs are very had to find. One of the Complainants was on a waiting list for a year to get his job with Respondent, and his starting wage was nearly three times larger than the pay he was earning elsewhere. Complainants had families to provide for, and were easy prey to pressures to ignore safety

standards.

I find that Complainants' complaints about doing electrical work were a protected activity under § 105(c).

Complaints About the 10-Hour Work Shift

In the fall of 1989, Respondent started a 10-hour work shift, changing from five 8-hour days to four 10-hour days. This meant that coal was produced 20 hours a day instead of 16 hours, and the third shift had only 4 hours between production shifts, instead of 8 hours, to do section preparation work while power and production machinery were turned off. Although, in theory, the third shift maintenance crew had 10 hours (instead of 8 hours) to prepare their section for daytime production, in reality they were under increased and significant job pressures because much of their work required shutting off the power. The mine superintendent, Stanley Couch, quit in January, 1990, because of his objections to the 10-hour plan. His replacement, Don Smith, testified that the 10-hour plan was later dropped because "it wasn't working out. We could not keep our repairing up on our equipment. We just did not have enough time in four hours to keep the repairing on our equipment and stuff. The down time was eating us up...." Tr. 344. Complainants bore a considerable work burden under this plan, and were vocal in their complaints to Foreman Ralph Bowling and at times to the new mine superintendent, Don Smith, that they needed more men to assist them and that they could not do their jobs properly in the squeeze of 4 hours between production shifts. Complainants advanced the power center three or four nights a week. This meant that their power moves and related electrical work that could be done only between production shifts had to be done in 4 hours instead of the 8 hours previously allowed. Complainants' complaints to Bowling and Smith went unheeded.

I find that these complaints were a protected activity under § 105(c) of the Act. In light of the dangers inherent in mining, a miner's complaints (without refusing to work) that he is overworked and does not have enough time to do his job properly imply a safety complaint that haste and overwork will create hazards and accidents. Whether or not such a complaint merits corrective action by management, depending on an evaluation of the facts, the voicing of the complaint has a sufficient connection to safety or health to be a protected activity under § 105(c). In addition, there were clear hazards in rushing these Complainants because Ross was doing critical firebossing duties and both he and Gilbert were performing unlawful electrical work. [3] As stated, complaints of

[3] The dangers involved in Complainants' unlawful electrical work were increased in the context of mine management's longstanding risk-taking attitude toward electrical work. On one occasion, their foreman, Collett, said he would have the main power

this nature are distinguished from refusal-to-work complaints, which may require more specificity.

Ross' Refusal to Falsify a Preshift Report

On July 18, 1990, two weeks before Complainants' discharge, Ross had a serious incident with Mine Superintendent Don Smith. The day shift production foreman, Charles Morgan, had failed to countersign Ross' preshift report, and it would be a violation to start production without it. A federal inspector was about to begin his inspection. Smith asked Ross to sign Morgan's name. Ross refused. Smith asked him again, and Ross refused. Smith became angry and signed Morgan's name himself. Ross perceived a marked change in Smith's attitude toward him, which became hostile and harassing.

Ross' refusal to falsify a preshift report was a protected activity under § 105(c) of the Act. Miners are protected against retaliation for refusing to violate the Act or any safety or health regulation promulgated under it.

Complaints About the Failure to Replace Mike Europa

In the last week of their employment, Mike Europa, the third member of Complainants' maintenance crew, went on vacation. Complainants asked Foreman Bowling to replace Europa for that week, but he said Ross would have to fill in for Europa. This meant another major increase in the already intense work pressures on Complainants. They were vocal in complaining to Bowling several times during that week that they could not do their jobs properly without a replacement for Europa. This condition created safety hazards for Complainants and others. Ross was pressured in his

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circuit de-energized while Ross made a high voltage splice. Collett failed to do so, and it was only Ross' decision to de-energize the local circuit that prevented an electrical shock to employees. On another occasion, Don Smith sent an employee to de-energize a circuit and assumed he was gone long enough to do so. Smith started cleaning the bare leads of a high voltage cable with a subordinate. When Smith sprayed a cleaner on the wires, there was a short circuit and a bolt of electricity shot from the cable, hitting Smith and knocking him against the mine rib. He was hospitalized. The surge through his body caused a burn where each of his dental fillings touched his tongue. Smith and his subordinate could have been killed or permanently disabled by this misjudgment. Complainants' last foreman, Bowling, who was not a certified mine electrician, showed a serious disregard for the mandatory safety standards requiring training, qualification, certification, and job assignments of mine electricians.

duties as fireboss and both Ross and Gilbert were under substantial pressure in trying to cope with the 10-hour shift problems, now made more severe by the absence of a critical member of their maintenance crew, and rushing in their performance of unlawful electrical work. Their complaints were unheeded.

I find that these complaints were a protected activity under § 105(c), for the reasons stated concerning the 10-hour shifts.

Gilbert's Complaints on July 31, 1990

In the meeting between management and Complainants on July 31, the day of their discharge, management offered to discipline Complainants with two weeks' suspension without pay. Ross agreed to take this punishment. Gilbert rejected this at first, feeling that he did not deserve punishment because he was only following the order of his crew leader and being upset about management's excessive work pressures. Gilbert stated he was "tired" of "having to work like a dog and not having time to do the job " (Tr. 36).

I find that, in the context of Complainants' prior safety complaints to mine management, this expression of being overworked (worked like a dog and not having enough time to do his job) related sufficiently to prior and recent safety complaints about the excessive work pressures on Complainants to be a protected activity under § 105(c).

Was There Discrimination Against Complainants?

Having found that Complainants were engaged in protected activities, I turn to the question whether adverse action against them was motivated by their protected activities.

To establish a prima facie case of discrimination under § 105(c) of the Act, a miner has the burden to prove that he or she 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 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981).

"Direct evidence of motivation is rarely encountered, more typically, the only available evidence is indirect. * * * 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965). In "analyzing the evidence, circumstantial or direct, the [adjudicator] is free to draw any

reasonable inference" (id.).

After accepting Foreman Bowling's recommendation, Superintendent Don Smith agreed to discipline Complainants by two weeks' suspension without pay. Ross agreed to accept the discipline. Gilbert at first objected to suspension, because he was only following an order of his crew leader and believed he should not be punished, and because he felt so mistreated by being "worked like a dog" and "not having time to do the job" (Tr. 36). He added that, if he had enough accumulated time that year for his profit-sharing fund, they could go ahead and fire him rather than give him two weeks' suspension. Someone called the office, and reported that Gilbert had enough reported hours for vested profit-sharing in 1990. Bowling then said to Smith that they could not fire one employee and give the other only two weeks off because they were "equally" guilty. Gilbert then reconsidered. He said he did not want to see Ross lose his job, so he (Gilbert) would accept the two weeks' suspension also.

At this point, Don Smith, who had a short temper, lost his temper and said, "just go ahead and fire both of them." Tr. 338. Smith testified that he lost his temper (became "aggravated") because "they was a'squalling and hollering. I got aggravated and I told them to just go ahead and fire both of them." Id. I find that an animus toward Complainants was created in Smith by their safety complaints, including the July 18 incident between Ross and Smith over the signature on the preshift report, complaints about the pressures of the 10-hour shift and the failure to replace Mike Europa, and Gilbert's safety-related complaint at the final meeting (being worked like a dog and not having enough time to perform his job), as well as their long background of complaining about unlawful electrical work. Smith also testified that he believed "They weren't sorry for what they did and they would probably do it again anyway." Tr. 338. This appears to me to be an afterthought by Smith, not a motivating factor. However, assuming that this was a factor in his decision to discharge Complainants, I find that it was a "mixed motive" discharge, motivated at least in part by protected activities of the Complainants. Complainants made out a prima facie case of discrimination.

Did Respondent Rebut the Prima Facie Case of Discrimination or Establish an Affirmative Defense?

An operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. In a "mixed motive" case, although the miner must bear the ultimate burden of persuasion, the operator, to

sustain its affirmative defense, must prove by a preponderance of the evidence that the adverse action would have been taken even if the miner had not engaged in the protected activity. Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983).

Foreman Bowling's recommendation for two weeks' suspension does not reflect a discriminatory animus against Complainants. He was trying to reach a reasonable and, he believed, just result (although suspension of Gilbert would appear harsh considering he was following a crew leader's order).[4]

However, the discharge decision made by Don Smith was through a loss of temper directed at Complainants, after management had offered two weeks' suspension and Complainants had accepted it. This showed an animus toward them which I find was motivationally connected with their substantial protected activities. Respondent has not proved, by a preponderance of the reliable evidence, that the Complainants would have been discharged even if they had not engaged in protected activities. Instead, Respondent has offered a case generally denying that safety complaints were even made. However, I credit Complainants' evidence of making safety complaints. Respondent did not prove an affirmative defense.

The fact that Don Smith originally ordered discharge for "whoever did it" does not alter this conclusion. The reliable evidence shows that Smith, at that time, knew or had reasonable grounds for believing that Complainants had moved the cables under the scoop batteries. It was clear that the cables were moved on the third shift, in Complainants' section. Complainants' three-man maintenance crew were the only employees who would be moving cables with a scoop in that section on the third shift. Mike Europa was on vacation. Excluding the greenhorn, that left Complainants. I do not credit Smith's testimony that he did not know or have reasonable grounds for believing that Complainants were the ones who moved the cables under the scoop batteries. An angry early order to fire "whoever did it" on facts that pointed to Complainants would have presented a similar problem for Respondent in responding to a prima facie case as did the actual discharge decision made on July 31. However, the early order to Bowling is not the issue here. The issue is the July 31 discharge, which I find was an angry decision taken after Smith knew Complainants had accepted management's offer to take two weeks' suspension. This was a discriminatory discharge, of at least a "mixed motive" kind, and Respondent has not made out an affirmative defense.

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[4] There was no precedent at this mine for suspending or discharging a miner for following the order of a crew leader or other supervisor.

Respondent's Limited Offer to Reinstate Gilbert

Respondent introduced evidence that, around October 27, 1990, after Complainants engaged an attorney and filed their complaints with MSHA, Respondent's personnel director made an offer to Gilbert to reinstate him with one month's back pay. This settlement offer was made to Gilbert directly and not to his attorney, and it did not offer to pay Gilbert full back pay, interest, and litigation costs including a reasonable attorney fee. I find that Gilbert was not obligated to accept this limited offer.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent discriminated against Complainants on July 31, 1990, by discharging them in violation of § 105(c)(1) of the Act.

3. Complainant Gilbert was not obligated to accept Respondent's limited offer of settlement.

4. Complainants are entitled to reinstatement with back pay, interest, [5] and their litigation costs, including a reasonable attorney fee.

ORDER

WHEREFORE, IT IS ORDERED THAT:

1. Respondent shall, within 30 days of this decision, reinstate each Complainant in its employment with the same position, pay, assignment and all other conditions and benefits of employment that would apply had he not been discharged on July 31, 1990, with no break in service for employment or any other purpose; provided: Respondent may in its discretion apply retroactively two weeks' suspension without pay to Ross or to both Ross and Gilbert effective July 31, 1990.

2. Within 15 days of this decision, counsel for the parties shall confer in an effort to stipulate the amount of Complainants' back pay, interest, and litigation costs including a reasonable attorney fee. Such stipulation shall not prejudice Respondent's right to seek review of this decision. If the parties agree on the amount of monetary relief, counsel for Complainants shall file a stipulated proposed order for monetary relief within 30 days of this decision. If they do not agree on such matters, counsel for Complainants shall file a proposed order of monetary relief within

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[5] Interest is computed at the IRS adjusted prime rate for each quarter. See Arkansas-Carbona Company, 5 FMSHRC 2042, 2050-2052 (1983).

30 days of this decision and Respondent shall have ten days to reply to it. If appropriate, a further hearing shall be held on issues of fact concerning monetary relief.

3. This decision shall not be a final disposition of this proceeding until a supplemental decision is entered on monetary relief.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 90-47
	:	A. C. No. 44-05668-03577
v.	:	
	:	Docket No. VA 90-60
LJ'S COAL CORPORATION, Respondent	:	A.C. No. 44-05668-03579
	:	
	:	Docket No. VA 90-62
	:	A.C. No. 44-05668-03580
	:	
	:	No. 1 Mine

DECISION

Appearances: Ronald E. Gurka, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
Carl E. McAfee, Esq., LJ's Coal Corporation, St. Charles, Virginia for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based on three Petitions for Assessment of a Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Pursuant to notice, these cases were scheduled for hearing March 25 - 28, 1991. On March 14, 1991, Petitioner filed a Motion to Continue Hearings. The Motion was subsequently granted, and the cases were rescheduled for July 8, 1991. On March 17, 1991 Petitioner filed a Motion to Reschedule, which was not opposed by the Operator (Respondent). The hearing set for July 8-11, 1991, was adjourned and rescheduled for July 23-25, 1991. A hearing was held on July 23, 1991 in Bristol, Virginia. Fred L. Buck, Clarence Slone, and Ewing C. Rines testified for Petitioner. Respondent did not call any witnesses, nor did it offer any documents in evidence.

Finding of Fact and Discussion

I. Docket No. VA 90-47

A. Citation No. 2968870.

Fred L. Buck, an MSHA Inspector inspected the Mine Technology Mine Rescue Station ("Mine Technology") on April 11, 1990. According to Buck, the records of Technology Mine contain dates of inspections performed on Mine Technology apparatus, and indicate what was done on each inspection. Buck testified that the records indicated that an inspection had not been performed within the preceding 30 day period. According to Buck, MSHA records indicate that Respondent filed with the MSHA District Manager a "request" indicating that Mine Technology is to perform mine rescue services at the Respondent's Mine No. 1. (Tr. 19) Buck issued a Citation alleging a violation of 30 C.F.R. § 49.6(b) in that "the mine rescue apparatus was not being tested within the 30 day interval."

As pertinent, Section 49.6(b) supra provides that a trained person shall "inspect and test" mine rescue apparatus at intervals not exceeding 30 days. At best, the evidence establishes that the records at Mine Technology did not contain an entry listing an inspection of rescue apparatus within a 30 day period prior to April 11, 1990. This evidence by itself is insufficient to establish that, in fact the apparatus itself was not tested within a 30 day interval. Accordingly, Citation No. 2968870 is to be dismissed.

B. Citation No. 3146288

On April 17, 1990, Clarence Slone, an MSHA Inspector, inspected Respondent's No. 1 Mine, and observed a high voltage cable in the No. 2 drive of the track and belt entry that was not guarded. The cable, which carried 4,160 volts, was suspended within 6 to 8 inches from the roof. In this area, the distance from the floor to the ceiling was 60 inches. The cable itself was insulated, and had a protective jacket or cover. According to Slone, the area in question is examined daily, and that, in general, 2 to 3 times a shift persons would work under the cable "handling materials such as maybe a slate bar, a shovel ..." (Tr.37). He also indicated that if coal is produced and the belt is in operation, it must be examined and maintained, which requires miners to shovel. Slone issued a Citation alleging a violation of 30 C.F.R. § 75.807.

Section 75.807 supra provides, as pertinent, that a high voltage cable "... shall be covered, buried or placed so as to afford protection against damage, guarded where men regularly work or pass under them unless they are 6 1/2 feet or more above the floor or rail, securely anchored, properly insulated, and guarded at ends and covered, insulated, or placed to prevent contact with trolley wires and other low-voltage circuits." The testimony of Slone established that the cable in question carried high voltage, was unguarded, and was suspended in an area where men regularly work or pass under. Also Slone's testimony has established that the cable was less then 6 1/2 feet above the

floor. Hence, I find that the Respondent herein did violate Section 75.807 as alleged.

Slone further indicated that air containing oxygen ventilates the surface of the roof in the area in question. He said that in the normal course of mining, the air flow would cause the roof consisting of firm shade to become soft and fall off. Since the cable in question was not protected by a guarding, a roof fall could damage the cable. If a cable is thus damaged, voltage could leak out causing a person in proximity to the cable to be electrocuted even without contact. Although the cable in issue did not have any observable defects and was protected with a jacket or cover, I find, based on the testimony of Slone, that the lack of a guarding contributed to a hazard of a miner suffering an electrical shock. Thus, given the further fact that the mine was wet as testified to by Slone, and considering the condition of the roof as testified to by Slone, I conclude that an injury of a reasonably serious nature was reasonably likely to have occurred, given continued mining in the absence of a guarding. Hence, it has been established that the violation herein was significant and substantial (See Mathies Coal Co. 6 FMSHRC 1 (1984)).

The violation herein could have led to a miner being electrocuted, and hence was of a high level of gravity. On direct examination, Slone was asked whether the violative condition was one that "appeared" to him "to have existed there for some time" (Tr.43). Slone answered "that's correct" (Tr. 43). This testimony is the only evidence adduced with regard to Respondent's negligence. I conclude that it has not been established that the degree of Respondent's negligence herein was more than a low level. I conclude that a penalty of $100 is proper for this violation.

C. Citation No. 3146289

On April 17, 1990, when Slone inspected the subject mine, he examined the No. 3 belt transformer. An AC receptacle approximately 6 x 8 inches, is located on the side of the transformer, approximately a foot to 18 inches off the floor. The receptacle contains fingers or prongs that are exposed, and stick out approximately a half inch beyond the surface. The fingers receive cable plugs in order beyond supply power outby to belt drives, pumps and other equipment. When Slone observed the receptacle, a protective cover, which is designed to snap in place, was not in place, and the fingers were exposed. According to Slone, the breaker for this equipment was tested and was found to be not working. He indicated that the fingers were energized, and accordingly, if a miner were to plug in or unplug equipment and come in contact with the energized receptacle, he could be injured. He also indicated that it is easy to come in contact with the receptacle if one is next to the power center. He said

that contact with the energized receptacle would at least produce an electrical shock, and at the most would lead to a fatality. Slone issued a Citation alleging a violation of 30 C.F.R. § 75.1725.

Section 75.1725 supra provides, in essence, that machinery and equipment "...shall be maintained in safe operating condition and the machinery or equipment in unsafe condition shall be removed from service immediately." Webster's Third New International Dictionary, (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "free from" as "(a) lacking: without." "Danger" is defined in Webster's as "3. liability to injury, pain, or loss: PERIL, RISK... ." I find that the exposed energized prongs of the receptacle exposed miners to the risk of injury by way of electrical shock. As such, applying the common usage of the term "safe" as defined in Webster's, infra, I conclude that the receptacle was not safe, and as such, I find that Respondent herein did violate Section 75.1725, supra.

According to Slone, equipment must be plugged into the receptacle in question at least once a shift. In addition, if the belt requires repair work, it must be unplugged from the receptacle in question in order to stop the belt. Hence, considering the location of the receptacle, being only a foot to 18 inches off the floor, and the fact that, as testified to by Slone, the area was wet, and the fact that the breaker did not operate, I conclude that it was reasonably likely that the violation herein would have resulted in contact with the exposed energized prongs, and that it was reasonably likely that such contact would have led to a reasonably serious injury. As such I find that the violation herein was significant and substantial.

I find the violation herein to be of a high level of a gravity inasmuch it could have resulted in a fatality. Also, I find support for Slone's testimony that the lack of a protective cover being in place should have been noticed, taking into account the size of the receptacle, its location, and, the fact that the cover was at the side of the power center within arms reach of the receptacle. I conclude that a penalty of $100 is appropriate for this violation.

D. Citation No. 3146290

According to Slone, when observed by him on April 17, 1990, the No. 3 Belt Drive breaker box contained an accumulation of dry float coal and dust at a depth of a quarter of an inch throughout the floor of the box. Slone issued a Citation alleging a violation of 30 C.F.R. § 75.400, which, as pertinent, provides that coal dust including float coal dust shall be cleaned-up and not be permitted to accumulate in active workings or on electrical equipment therein. Based on Slone's

uncontradicted testimony, I find that there was an accumulation of coal dust especially considering its depth, and therefore section 75.400 supra was violated.

Although Slone indicated on cross examination that generally the mine is wet, it is significant that there was no contradiction to his testimony that the accumulation in question was dry. There also was no contradiction to his testimony that float dust is most volatile. There also was no contradiction to Slone's testimony that the belt in question is stopped and started 2 to 3 times a shift, and that these actions cause an arc in the circuit box which could cause an explosion, given the presence of the accumulation at issue. According to Slone, should such an explosion occur, the box would be blown apart. Since the box is located 10 feet from the belt drive, in the event of an explosion at the box, there would be a reasonable likelihood of injuries to miners who frequently come to the area to clean and inspect the belt drive. Hence, I find that the violation herein to be significant and substantial.

Inasmuch as the violation herein could have resulted in an ignition and hence injury to miners, I conclude that the gravity of the violation is moderately high. Slone's opinion that it took approximately 2 to 3 shifts for the accumulation herein to have occurred was not contradicted. I find a reasonable basis for this opinion taking into account the depth and extent of the accumulation inside the box. Hence I find that the violative conditions should have been noted on a preshift examination and should have been cleaned-up. Hence Respondent's negligence herein is of a moderately high degree. I conclude that a penalty of $100 is appropriate for this violation.

E. Citation No. 3146292.

On April 18, 1990, Slone observed wet float coal dust on previously dusted surfaces beginning at the No. 2 belt drive, extending inby 180 feet, and extending into the crosscuts. The float coal dust which was black in color, was located on the floor, and both ribs. Since Slone's testimony was not contradicted, I find that the Citation he issued, alleging a violation of Section 75.400 supra was properly issued, and that Respondent herein did violate section 75.400 supra. Inasmuch as the accumulations herein were approximity 5,000 feet from the face and were wet, I conclude that the violation was of a low level of gravity. Slone opined that it took 2 to 3 shifts for the accumulations to have occurred. Due to the extent of the accumulations, I find a basis for his conclusion. Hence, Respondent's negligence herein was of a moderate level. I conclude that a penalty of $50 is appropriate for this violation.

F. Citation No. 3146293

Slone testified that on April 19, 1990, he observed an accumulation of wet, loose, coal dust of a depth of 2 to 8 inches commencing at the portal, and extending inby approximately 800 feet under the No. 1 conveyor belt. He said that, in the area in question, the accumulation was under all of the belt's idlers, and extended for the width of the belt. Inasmuch as Slone's testimony was not contradicted, I find that Respondent herein did violate section 75.400 supra as alleged in the Citation that he issued.

Although the accumulation was wet, according to Slone, over a period of time it will dry out and the idlers could roll in the coal. Should these idlers then become hot there is a possibility of a fire. Hence, the violation was a moderate level of gravity. According to Slone, the area in question is subject to daily examinations, and the cited accumulation was "obvious" (Tr. 169). This opinion has not been contradicted, and hence I find that Respondent was moderately negligent in not having cleaned up the accumulation. I find that a penalty $50 is appropriate for this violation.

G. Citation No. 3146294

Slone testified, in essence, that on April 19, 1990, he issued Citation No. 3146294 alleging a violation of Safeguard No. 2969259 dated May 6, 1987, which requires, as pertinent, as follows: "... crossover facilities be provided on all belt conveyors in the mine hereafter where men are required to crossover them to do work." [sic]. According to Slone, belts 1, 2, and 4 were provided with crossovers. However, belt No. 5, located more than 1,000 feet from the face, did not have any crossover facilities to allow persons to cross the belt. When Slone made his observations the belt was in operation, and he estimated that the closest crossover to belt No. 5, was approximately 3,000 feet away. According to Slone, persons are required to cross the belt to clean it, and to maintain the rollers and remove dust. He said that crossing the belt while it is in motion without the use of a crossover facility is a hazard.

Slone's testimony was not contradicted, and accordingly I find that the No. 5 belt was not provided with a crossover in violation of Safeguard No. 3146294.

Inasmuch as persons desiring to cross the belt to clean it could either wait until the belt is turned off, or walk to the closest crossover, I find that the violation herein to be only a moderate level of gravity. No facts were adduced with regard to Respondent's negligence, and hence that I cannot find that it was more than a low level. I conclude that a penalty of $30 is appropriate for this violation.

G. Citation No. 3146300

On May 3, 1990, Respondent utilized a miner and two bridge carriers hooked to one another, to remove coal. The bridge carriers are moved in tandem with the miner and operated from the side of the bridge carrier.[1] The location of the panel containing the controls for the operation of the bridge carrier requires the miner operating it to crawl alongside the carrier. The operator of the miner is not able to see either the bridge carriers or their operators. Hence, the bridge carriers are provided with a switch which allows the operator of the carrier to de-energize the miner, so as to prevent it, in an emergency, from running into the carrier and possibly crushing its operator. The miner itself does not contain an automatic shut off in the case an emergency.

On May 3, 1990, when the system was observed by Slone, the switch at the bridge carrier to stop the miner in the event of an emergency did not operate, although the switch to stop the carrier itself did function. Slone issued a Citation alleging a violation of Section 75.1725 supra. Slone's testimony that the emergency switch did not operate was not contradicted. Due to the failure of the switch, there was a danger of the miner running into the carriers and thus injuring their operators. I thus conclude that the haulage system at question was not in a safe condition, and hence Section 75.1725 was violated.

Slone testified that in 1977 a fatality had occurred when an operator of a bridge carrier was crushed against the rib by a miner. Slone testified that in backing up the miner, its operator could not see the bridge carriers or their operators. This testimony was not contradicted. Hence, since the emergency switch of the bridge carrier herein did not function, I find that there was a reasonable likelihood of a reasonably serious injury to the operator of the carrier. I thus conclude that the violation was significant and substantial.

Inasmuch the violation herein could have resulted in a fatality it is of a high level of gravity. According to Slone's uncontradicted testimony, Gary Williams, Respondent's superintendent, informed him when he discussed the violation with him that he knew that the switch was out. There were no facts presented at the hearing to mitigate Respondent's negligence. I find that the degree of Respondent's negligence was of a high level. I conclude that a penalty of $300 is appropriate for this violation.

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[1]Each carrier has its own operator.

II. Docket No. KENT 90-60

A. Order No. 3146287

In essence Slone testified that when observed by him on April 16, 1990, a portable sanitary toilet located on the surface of Respondent's mine was locked with a padlock. He said that inside the shop a key was hanging on a nail 12 feet above the floor, and a sign indicated that it was a toilet key. Slone issued an Order alleging a violation of 30 C.F.R. § 75.500.

Respondent did not contradict Slone's testimony. Hence, I find that Respondent herein did violate Section 75.500 supra which requires the provision of a sanitary toilet.

I find that the level gravity of this violation was low. According to Slone, Williams did not give him any reason why the toilet was locked. There were no facts adduced to mitigate Respondent's negligence. I find that the violation herein resulted from Respondent's intentional act. I find that a penalty of $500 accordingly is appropriate.

B. Citation No.3146291

At the hearing, Respondent moved to withdraw its Answer with regard to this citation. Accordingly, judgment is entered in favor of the Secretary based on the pleadings. Respondent shall pay a civil penalty of $50, the amount sought in the Secretary's Petition.

III. Docket No. VA 90-62

At the hearing, the Respondent moved to withdraw its pleading in regard to this docket number. The motion was granted, and accordingly judgment is entered on the pleadings in favor of the Secretary. Respondent shall pay a civil penalty of $364, the amount sought in the Secretary's Petition.

ORDER

It is **ORDERED** that Citation No. 2968870 be **DISMISSED**. It is further **ORDERED** that Judgment be entered in favor of the Petitioner with regard to Citation No. 3146291, and regard to Docket VA 90-62. It is further **ORDERED** that Respondent pay, within 30 days of this Decision, $1,644 as a civil penalty.

Avram Weisberger
Administrative Law Judge

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THE FEDERAL BUILDING
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SEP 19 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),		Docket No. WEST 90-197-M
Petitioner	:	A.C. No. 04-01924-05518
	:	
v.	:	Docket No. WEST 90-205-M
	:	A.C. No. 04-01924-05519
JAMIESON COMPANY,	:	
Respondent	:	Pleasanton Pit & Mill

DECISION

Appearances: George O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA, for Petitioner;
William R. Pedder, Esq., Alameda, CA, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") alleges Respondent Jamieson Company, ("Jamieson"), violated safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

A hearing on the merits was held on July 9, 1991, in San Francisco, California. The parties filed post-trial briefs.

Docket No. West 90-197-M

This case involves three citations. Citation No. 3460324 alleges Jamieson violated 30 C.F.R. § 14112.

At the hearing, Petitioner moved to vacate this citation.

For good cause shown, the motion was granted and it is formalized in this decision.

Citation No. 3458703 alleges the operator violated 30 C.F.R. § 56.14112(B). [1]

THE EVIDENCE

Ann F. Johnson, an MSHA inspector since February 1989, is experienced in mining and construction. (Tr. 7).

On March 6, 1990, she inspected Jamieson's sand and gravel operation in California. The fairly good-sized operation employs about 80 people.

During the course of the inspection Ms. Johnson observed the guard on the PC4A tail pulley conveyor belt. The guard was hanging by one of its two posts. The posts secure the pinch point on the tail pulley. (Tr. 9). Ms. Johnson prepared a drawing depicting the guard. (Ex. S-1).

The head pulley of the conveyor was depositing coarse material (rock and dirt) onto the tail pulley of the conveyor.

The inspection party determined that the material coming off the head pulley had knocked off the guard. (Tr. 10, 11). There was a single extended guard for the tail pulley and the conveyor belt roller. (Tr. 12).

Ms. Johnson states she was on the other side of the guard from the portion shown in Exhibit R-2. The company had only one guard at that time. (Tr. 14, 15).

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1 The cited regulation reads as follows:

> § 56.14112 Contruction and maintenance of guards.
> (a) Guards shall be constructed and maintained to-
> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation; and
> (2) Not create a hazard by their use.
> (b) Guards shall be securely in place while machinery is being operated, except when test ing or making adjustments which cannot be performed without removal of the guard.

CHRISTOPHER LEE MATHIAS, safety coordinator for Jamieson, accompanied the inspector during the walk-around. (Tr. 26, 27).

The drawing (Exhibit R-1) is a fair representation of the conveyor belt. There are two separate guards: One is for the tail pulley and one for the skirting panel. The tail pulley guard did not fall in any fashion. Material coming into the hopper caused the skirting guard to be displaced.

The guard was photographed (Exhibit R-2) from a different side but it reflects the situation. The tail pulley guard is separate from the skirting guard. (Tr. 29).

The side shown in Exhibit R-2 is not the side where the guard was displaced.

Even with the skirting guard out of place no one would have access to the tail pulley since the tail pulley was well protected. The skirting guard had fallen down between the first and second inspection of the area. (Tr. 32).

Mr. Mathias disagrees with the inspector's contention that the guard was one piece rather than two. The skirting panel guard that fell was actually protecting the conveyor belt rollers. (Tr. 35).

Exhibit R-3 is MSHA's policy statement relating to conveyor belt rollers. (Tr. 36).

Discussion and Further Findings

The critical question here is whether there were separate guards, namely a skirting guard and a tail pulley guard.

The citation itself does not clarify this issue. However, Inspector Johnson prepared a diagram at the time of the inspection (Exhibit S-1). The diagram shows shape of the "fallen" guard to be elongated rather than square. This discription bears a striking resemblance to the drawing of the skirting guard shown in the operator's schematic drawing. (Ex. R-1).

The inspector testified the guard was a one piece unit. However, I credit the contrary testimony of Jamieson's safety coordinator. He indicated the tail pulley guard was separate from the skirting guard. As a safety coordinator, Mr. Mathias should be more familiar than the inspector with the intricacies of the guards on the PC-4A conveyor.

In the factual scenario presented here it appears a prima facie violation of § 56.14112(b) existed. It is uncontroverted that the skirting guard was not "securely in place" within the meaning of the regulation.

In support of its defense that the citation should not have been issued, Jamieson offers a portion of MSHA's Program Policy Manual, Volume IV, Part 56/57, which provides in part as follows:

> Conveyer belt rollers are not to be construed as "similar exposed moving machine parts" under the standard and cannot be cited for the absence of guards and violation of this standard where skirt boards exist along the belt. However, inspectors should recognize the accident potential, bring the hazard to the attention of the mine operators, and recommend appropriate safeguards to prevent injuries. (Ex. R-3).

The cited portion of the Policy Manual is not applicable here. It is true the conveyor belt rollers are at least partially guarded by skirt guards along the belt. (See Ex. R-2). However, MSHA's policy statement deals with "similar exposed moving machine parts". Such "exposed moving machine parts" are not involved in the cited regulation, § 56.14112.

Even assuming MSHA was not following its own directives that factor would not be a sufficient reason to vacate an otherwise valid citation. MSHA's instructions are not officially promulgated and do not prescribe rules of law binding on the Commission. Old Ben Coal Company 2 FMSHRC 2806, 2809 (1980).

Citation No. 3458703 should be affirmed.

Citation No. 3458711 alleges a violation of 30 C.F.R. § 56.12005. [2]

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2 The cited regulation reads as follows:

> § 56.12005 Protection of power conductors from mobile equipment.
>
> Mobile equipment shall not run over power conductors, nor shall loads be dragged over power conductors, unless the conductors are properly bridged or protected.

THE EVIDENCE

During the inspection Ms. Johnson observed a power cable lying across a concrete driveway. The welding power cable extended from the mill shop to the tool crib building. The 440 volt cable was not bridged or protected. There were tire marks on the cable. If cables of this type are run over, the inside wires can be crushed. If electrical current escapes, a fatality could result. (Tr. 17, 18). There were employees in the area. The condition was abated by putting the cable in conduit and placing it over the top of the driveway. Ms. Johnson prepared a diagram showing the violative condition. (Ex. S-2). The cable had been spliced next to the shopmill but the splice was not mechanically strong. (Tr. 19-21). It had rained the day of the inspection and there was moisture in the air. (Tr. 24).

One to five people could be impacted by this situation. (Tr. 25).

MERLE W. MOODY, an electrician for Jamieson, accompanied the inspector. The location of the cable across the driveway was temporary.

Mr. Moody did not observe any water in the area. In his opinion if there was any leak from the cable it would go to ground which is wrapped in the cable. However, it could go to ground or spray out. (Tr. 39). If the electricity goes to ground, the current is broken and it kicks the breaker. (Tr 40).

Witness Mathias (recalled) indicated the photograph (Exhibit R-3) depicts the same condition as existed on the day of the inspection. (Tr. 43).

Discussion and Further Findings

Respondent does not dispute the existence of this violation but contests the "significant and substantial" designation and the number of people affected, i.e., five (5) with the consequent alleged high degree of negligence.

A violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In Consolidation Coal Co., 8 FMSHRC 890, 897-98 (June 1982), aff'd, 824 F.2d 1071 (D.C. Cir.

1987), the Commission explained that adapting the National Gypsum/Mathies test to a violation of a mandatory health standard results in the following formulation of the elements necessary to support a significant and substantial finding:

> (1) The underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health constributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

In the instant case, Inspector Johnson testified that a fatality could result if the high voltage current escaped from the power cable. I credit Ms. Johnson's testimony over the contrary view of the operator's expert. Mr. Moody, in fact, conceded that electricity "could" spray out of the power cable. (Tr. 39).

The close proximity of workers in the vicinity of the power cable establish factors (3) and (4) within the National Gypsum doctrine. Factors (1) and (2) are apparent.

Citation No. 3458711 should be affirmed.

Docket No. WEST 90-205-M

This case involves Citation No. 3460325 alleging the operator violated 30 C.F.R. § 56.14201(b).

At the hearing, Petitioner moved to vacate the citation.

For good cause shown, the motion was granted and it is formalized in this decision.

Civil Penalties

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, 30 U.S.C. § 820(i).

The evidence establishes that Jamieson has 80 employees and is a "fairly good-size" operator. As a result, the penalties herein appear appropriate.

There is no evidence as to the effect of the penalty on the operator's ability to continue in business. However, this is an affirmative defense.

The record fails to develop any facts showing the operator's prior history.

Concerning the operator's negligence: the guard was displaced between the initial inspection and a subsequent walk-through on the same day. This indicates only minimal negligence was involved.

The power cable on the concrete driveway involves high negligence such the condition was open and obvious.

The gravity involving the displaced guard was minimal as the tail pulley guard remained in place. Further, employees were only minimally exposed to the hazard.

The power cable involved exposure to at least one employee. I consider the gravity high whether one employee or five employees were involved.

The operator demonstrated statutory good faith by abating the violative conditions.

Considering the statutory criteria, I consider that the penalties set forth within this decision are appropriate.

For the foregoing reasons I enter the following:

ORDER

Docket No. West 90-197-M:

1. Citation No. 3460324 and all penalties therefor are **VACATED.**

2. Citation No. 3458703 is **AFFIRMED** and a penalty of $20 is **ASSESSED.**

3. Citation No. 3458711 is **AFFIRMED** and a penalty of $200 is **ASSESSED.**

Docket No. West 90-205-M:

4. Citation No. 3460325 and all penalties therefor are **VACATED.**

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

SEP 19 1991

WILLIAM P. KORHONEN, USWA, ON BEHALF OF FOUR MINERS J. EDWARDS, B. COLEMAN, C. MAEZ, and R. BOWERS, Complainants	:	DISCRIMINATION PROCEEDING Docket No. WEST 90-267-DM RM MD 90-07
v.	:	General Chemical Mine
GENERAL CHEMICAL COMPANY, Respondent	:	

DECISION AND ORDER OF DISMISSAL

This case is before me on a discrimination complaint filed under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The complaint was filed by William P. Korhonen, President USWA, Local Union 1532 Miners Representative on behalf of four miners, Mr. John E. Edwards, Mr. Barrey W. Coleman, Mr. Casey L. Maez and Mr. Robert F. Bowers.

The Complainants allege that Respondent violated the provision of 30 C.F.R. § 48.30 in its scheduling of rotating shift/surface production employees for MSHA required annual refresher training and in so doing discriminated against them in violation of 105(c) of the Act.

The initial complaint was filed with MSHA in April 1990. MSHA made an investigation and on review determined that the facts disclosed during the investigation did not constitute a violation of Section 105(c) of the Act.

Complainants then filed the discrimination complaint with the Commission. After the matter was set for hearing before me, the parties filed and requested approval of a settlement agreement which in pertinent part reads as follows:

> Concurrent with the representing parties and affected miners signature to the following, and with Administrative Law Judge August F. Cetti's acceptance of same, all Discrimination Complaints under this matter are hereby withdrawn.
>
> The Company, in its scheduling of rotating shift/surface production employees for MSHA required annual refresher training will afford such employees the option to receive such training:

(a) on the last day of the employee's normal evening shift schedule, provided that the employee agrees to obtain the training on day shift and further agrees to fulfill his or her scheduled shift for that given evening Or,

(b) during the employee's normal working hours when he or she is normally scheduled on day shift.

While it is understood that in certain instances, unforeseen circumstances may dictate training schedules other than that which an employee has chosen, it is also understood that the Company will exhaust the list of those qualified, by experience and contractual agreement, to fill the vacancy, if the Company desires to fill such vacancy, of the employee who has chosen to receive training during his or her normally scheduled day shift hours.

The proposed settlement provides that on the undersigned Administrative Law Judge's acceptance of the executed settlement all discrimination complaints under Docket No. WEST 90-267-DM are "withdrawn".

After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable, appropriate, and in the public interest. Accordingly, the settlement is accepted and this proceeding is **DISMISSED.**

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 23 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 90-112-M A.C. No. 39-01363-05502 X52
v.	:	Docket No. CENT 91-49-M A.C. No. 39-01363-00503 X52
SUMMIT INCORPORATED, Respondent	:	Richmond Hill Mine

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John J. Delaney, Esq., DELANEY, BANKS, JOHNSON, JOHNSON, COLBATH & HUFFMAN, Rapid City, South Dakota, for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in Rapid City, South Dakota, on May 29, 1991. The parties filed post-trial briefs.

STIPULATION

At the hearing the parties stipulated as follows:

1. Summit is engaged in the mining of gold, lode, and placer, in the United States, and its mining operations affect interstate commerce.

2. Summit is an operator at the Richmond Hill Mine, MSHA I.D. No. 39-01363-X52.

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

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

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.

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

7. The proposed penalty will not affect Respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

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

10. The operator is a medium-sized operator with 144,452 hours worked in 1990.

In CENT 91-49-M Summit is charged with violating 30 C.F.R. § 56.11002. [1]

Citation No. 3452409 reads as follows:

> The walkway along the right side of the Keohring back-hoe with a rock knocker attached on it was not equiped [sic] with handrails or midrails to eliminate a person from falling off walkway and being injured. The walkway was approximately 4 1/2 feet up off the ground. Person uses walkway for maintenance and repair, which is probably not often. The Koehring back-hoe was located at the ore stockpile at the crushing area.

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1 The cited regulation provides as follows:

§ 56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

GUY CARSTEN, an MSHA inspector experienced in mining, inspected the Richmond Hill Mine where Summit was performing work. (Tr. 10-12). The inspection took place on March 8, 1990. The inspector observed that the walkway on the right side of the backhoe lacked a handrail and a midrail. The walkway was approximately 18 inches wide and about 12 feet long. It was about 4.5 feet above the ground. (Tr. 13-14). (See Exs. R-1, R-2, and R-3 showing backhoe with rail installed.)

Inspector Carsten considered the walkway to be a travelway because a fire extinguisher was located about halfway to the cab. In addition, maintenance and pre-inspection workers use the walkway to check the engine (Tr. 14). Summit's representative Mr. Ross told the inspector that workers travel the area approximately twice a week. (Tr. 14).

The cab was located on the front part of the backhoe. You can step out of the cab onto the walkway and walk down the walkway to the motor compartment. (Tr. 15).

There were no handrails or midrails on the outside edge. (Tr. 15). The inspector considers this condition to constitute a violation of Section 56.11002 since the standard requires handrails on the outside edge of an elevated walkway. (Tr. 17). Inspector Carsten has cited other operators under Subpart J.

In a CAV inspection, the operator (not Summit) was required to change the original structure of the machine. (Tr. 18).

The inspector did not consider this to be an S&S violation because the walkway was seldom used. (Tr. 19).

MSHA inspectors are required to write a citation if they observe a violation. The hazard involved any worker who might fall off a walkway and be injured. (Tr. 20).

The operator abated the citation by placing handrails, as well as midrails, on the walkway.

The South Dakota Cement Plant and Pete Lien & Company have similar equipment (backhoes) equipped with handrails and guardrails. (Tr. 24).

The inspector did not have an MSHA policy memorandum stating the side of a backhoe constitutes a travelway. (Tr. 29, 30).

In the inspector's opinion, a walkway is regularly used if it is used once weekly or monthly. (Tr. 31). If it is used once a year, that would be sufficient to make the passageway "regularly used." (Tr. 31).

Whoever starts the backhoe should pre-inspect it. The person doing such inspections must walk down the passageway. If no person ever uses the walkway, then it is not a travelway. (Tr. 32, 33).

The handrails, as presently located, prevent the engine compartment doors from opening fully. The doors could either be put on a slide or be hinged on each side. (Tr. 37).

The inspector did not know if this equipment had been previously cited. (Tr. 41).

CHUCK ROUNDS, testifying for Summit, advised MSHA in a letter that the walkway was used a couple of times a week. (Tr. 43). A worker boosts himself to a standing position on the platform by using a grab rail on the back corner of the machine. (Tr. 44). The mechanics usually visually check components of the machine. (Tr. 45).

The operator of the machine does not do any maintenance work on it. The operator does his walk-around inspection on the ground before he climbs on the machine. (Tr. 46).

Before this citation was received, no one suggested that handrails were required. (Tr. 47, 48). MSHA inspections occur twice a year. (Tr. 48).

The company is challenging the citation because extending the rails would modify the swing radius of the backhoe. Also, handrails can be knocked off while the equipment is being operated.

Supervisory employees, both mechanical and production, would see this equipment on a daily basis. The platform, located 54 inches off the ground, is wide enough to accommodate a worker traveling between the cab and the engine. (Tr. 52).

GUY CARSTEN, recalled, testified that Summit was the first operator cited "in recent history." (Tr. 55).

JOHN ROSS, safety director for Summit, indicated the company had never been previously cited for this condition.

The machines have platforms along the side and are inspected by MSHA twice a year. (Tr. 56). The company was never previously cited for this condition.

The backhoe operator has no duties that require him to travel to the rear of the machine. (Tr. 57). The maintenance

people check the oil, fuel, and do such repairs as are necessary; maintenance is done from the counterweight; and the side door is used to remove interior parts. (Tr. 58). The operator does his walk-around from the ground. (Tr. 59).

Mr. Ross agreed that he told the inspector that the maintenance people travel that area. If a pump goes out, it would have to be replaced. (Tr. 60).

MARTY DELP, equipment manager for Summit, worked for CATERPILLAR dealers for 23 years. He is familiar with backhoes of similar size and nature as the one involved here.

In the industry, backhoes of this size have a platform along the side. They have no guardrails. In his 23 years, Mr. Delp was never aware of being cited for such a travelway lacking a guardrail. (Tr. 62, 63).

Mr. Delp's department is responsible for maintenance which includes daily maintenance and repairs. The equipment operators have no maintenance responsibilities for this equipment. On very rare occasions, a backhoe operator will start the machinery.

The backhoes are operated two to three times per week. (Tr. 63, 64). A maintenance person would cross the track onto the platform, come back to the counterweight, open the rear doors, and check the engine oil and the radiator. (Tr. 64). He would then climb down, go up to the cab, and start the machine. (Tr. 65). He would go in through the side door when there was a radiator or a heating problem. A visual inspection is made through the door to check for radiator leaks. (Tr. 65).

The platform on the side of the backhoe, to the witness's knowledge, was not used as a walkway by the maintenance workers. (Tr. 66).

If the radiator must be removed, it would be necessary to unbolt the handrail, which is held by three bolts. The handrail has restricted access to the back of the counterweight and to the grab rail. (Tr. 67).

The company has other backhoes without guards. They have not been cited for such equipment. (Tr. 68, 69).

Exhibits R-4, R-5, R-6, and R-7 show similar equipment, which also lack handrails. (Tr. 71).

DARRYL GALT has been the Operations Manager for Butler Machinery Company in Rapid City since March 1989. Butler machinery is the authorized dealer for hydraulic excavators, [2] including CATERPILLAR. (Tr. 78).

In contacting major mining companies, the CATERPILLAR company, other manufacturers, and competitors, it was established that any backhoes manufactured in the 50,000-pound class and above come equipped with platforms on the service access areas. (Tr. 80-82). Such suppliers are expected to build equipment complying with applicable safety regulations. There are no guardrails on any of Summit's other equipment nor have they been cited by MSHA. (Tr. 84, 85).

All of the CATERPILLAR equipment is manufactured in accordance with the SAE 185 Safety Standards. (Tr. 85). The backhoe falls under Subpart M which makes it a mobile machine and, as a result, guardrails are not required. (Tr. 85). The SAE standards are developed by the Society of Automotive Engineers. (Tr. 85). The existing SAE standards do not have any requirements for guardrails. The SAE regulations come up for modification every five years. (Tr. 86).

The witness identified two exhibits (R-8, R-9), showing two pieces of equipment with access platforms but without guardrails. (Tr. 87).

Mr. Galt described a handrail or handgrab as something taken a hold of to help lift yourself onto a machine. On the other hand, a guardrail is to prevent an individual from falling over an open side. (Tr. 89, 90).

The rotating structure of these backhoes continually moves in a 360° swing. If the machine is made longer or wider, its capability to operate in confined spaces is limited. (Tr. 91, 92).

DISCUSSION

The initial issue presented here is whether the facts establish a violation of Section 56.11002.

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2 A hydraulic excavator is the same as a backhoe such as involved here. (Tr. 79).

The mandatory regulation requires, in its relevant part, that "elevated walkways" shall "be provided with handrails."

This regulation is contained in Part 56 of 30 C.F.R. which regulates surface metal and non-metal mines.

While the term "travelway" is defined in Sections 56.2 and 56.3000, there is no definition of what constitutes a "walkway." It is accordingly proper to construe "walkway" in its ordinary meaning. Webster defines a walkway as "a passage for walking." [3] The definition of a "walkway" appears less broad than that of "travelway."

In the factual scenario presented here, maintenance workers use the walkway to check the motor as well as the radiator. According to Witness Ross, people "travel that area approximately twice a week." (Tr. 14). The walkway is a means of traveling to the motor compartment of each of the backhoes. Further, whoever pre-inspects the equipment would have to travel on the walkway to check the fire extinguisher located near the compartment door. (Tr. 32).

Section 56.11002 is not detailed but rather is the type made "simple and brief in order to be broadly adaptable to myriad circumstances." See, Kerr McGee Corp., 3 FMSHRC 2496, 2497 (November 1981); Alabama By-Products Corp., 5 FMSHRC 2128, 2130 (December 1982). Nevertheless, such a broad standard must afford reasonable notice of what is required or proscribed. U.S. Steel Corp., 5 FMSHRC 3, 4 (January 1983). The safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); see also, Phelps Dodge v. FMSHRC, 682 F.2d 1189, 1192 (9th Cir. 1982).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of

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3 Webster, New Collegiate Dictionary, 1979, at 1307.

the standard would have recognized the specific prohibition or requirement of the standard." Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). "In order to afford adequate notice and pass constitutional muster, a mandatory 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.'" Id., quoting Alabama By-Products Corp., 4 FMSHRC at 2129.

In the instant case there is no evidence of the weight of this backhoe but industry standards require guardrails if the weight of the equipment exceeds 50,000 pounds. This would indicate that a reasonably prudent person would have recognized that handrails were required on its backhoes by Section 56.1102.

The initial issue presented here is whether the facts establish a violation of Section 56.11002.

The regular activities by maintenance workers using the platform establish the platform of the service access area is a walkway. Compare Homestake Mining Company, 4 FMSHRC 146 (1982); Hanna Mining Co., 3 FMSHRC 2045 (1981).

Since the platform was about 4.5 feet off the ground, it was elevated. Compare: United Cement Company, 2 FMSHRC 133 (1980) (Cook, J) (Platform 30 inches above ground without handrails; held to be a violation of 30 C.F.R. § 56.11).

It is uncontroverted that the platform lacked guards.

Summit argues the section cited does not apply to backhoes. Specifically, the operator argues that read in its entirety the Subpart is clearly designed for general application to protect workers as they move from place to place. Further, Summit contends the platform is not a travelway.

I conclude the cited section encompasses elevated walkways found on mobile equipment as well as in other locations. Subpart J of Part 56, entitled "Travelways" is a general section relating to travelways found in surface metal and/or non-metal mines. There is no language in Subpart J removing mobile equipment from the application of Section 56.1102. It is true that Subpart M is entitled "Machinery and Equipment." However, there is no language in Subpart M stating that mobile equipment is not covered by Subpart J as well.

A broad interpretation of Section 56.11002 to include elevated walkways on mobile equipment is warranted and consistent with the intent of Part 56. See Ideal Cement Company, supra.

This section should not be interpreted narrowly so as to derogate from the safety of miners by removing all mobile equipment from the Subpart J requirements. If an elevated walkway found at a crusher is considered unsafe without handrails, then the elevated walkway found on a piece of mobile equipment is likewise unsafe.

Clearly MSHA knows how to remove equipment from the coverage of a regulation. For example, see Section 56.11025, provides as follows:

> Fixed ladders, except on mobile equipment, shall be offset and have substantial railed landings at least every ... .

It is apparent, as stated by the inspector, that Summit is the only operator cited for this condition "in recent history." However, since the facts establish a violation of the regulation, the citation should be affirmed.

Respondent also asserts, for various reasons, that the platform on the backhoe as a "travelway."

As previously noted, Section 56.11002 addresses "elevated walkways." "Travelways," which are otherwise defined, are not involved in this case.

In CENT 91-49-M, the citation should be affirmed.

In CENT 90-112-M, the parties submitted a written settlement motion to settle one citation for $54, the amount of the penalty originally assessed. Petitioner further modified the citation to indicate the violation was non-S&S.

In support of their settlement motion, the parties have further submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

CIVIL PENALTY

It is necessary to assess a civil penalty for the violation of Citation no. 3452409.

The statutory criteria to assess civil penalties are contained in Section 110(i) of the Act, 30 U.S.C. § 820(i).

The operator's previous history is very favorable since it was cited for only one violation in the two years prior to March 7, 1990. It had no violations before March 8, 1988.

The operator is medium-sized and the proposed penalty will not affect the company's ability to continue in business. (Stipulation).

The operator was negligent since the lack of guardrails was an open and obvious condition. The gravity was low since the platform was only 4.5 feet off the ground. The operator abated the violation and is entitled to statutory good faith.

I believe that the proposed penalty of $20 is appropriate. Accordingly, I enter the following:

ORDER

In CENT 91-49-M:

1. Citation No. 3452409 and the proposed penalty of $20 are AFFIRMED.

In CENT 90-112-M:

2. The settlement agreement is APPROVED.

3. Citation No. 3452408 and the proposed penalty are AFFIRMED.

4. Respondent, if it has not already done so, is ORDERED TO PAY $54 to the Secretary of Labor within 40 days of the date of this decision for the settlement in CENT 90-112-M.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 90-49 A. C. No. 36-07783-03516
v.	:	Slope No. 1 Mine
HICKORY COAL COMPANY, Respondent	:	

FINAL ORDER

Before: Judge Fauver

My decision of July 2, 1991, found that Respondent violated § 103(a) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. This matter has been pending assessment of a civil penalty for the violation.

The record indicates that the Department of Justice has obtained a default judgment against Respondent for the arrearages of unpaid civil penalties referred to in my decision. It appears that Respondent is now exploring with the Justice Department the possibility of a schedule of payments to satisfy the judgment.

Considering the facts of the violation found in this case, Respondent's financial condition, and all the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $600 is appropriate for the violation found in this case.

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $600, in three monthly installments of $200 on November 1, 1991, December 1, 1991, and January 1, 1992; provided: if any installment of $200 is not paid when due, the entire remainder of the civil penalty shall become due immediately.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 2 3 1991

CYPRUS TONOPAH MINING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 90-363-RM
	:	Citation No. 3645243; 9/5/90
v.	:	
	:	Docket No. WEST 90-364-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION, Respondent	:	Citation No. 3459560; 9/5/90
	:	Cyprus Tonopah
	:	Mine I.D. 26-02069
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 90-202-M
	:	AO No. 26-02069-05507
v.	:	
CYPRUS TONOPAH MINING CORP., Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner;

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for Contestant/Respondent.

Before: Judge Lasher

In this matter (1) the Respondent/Petitioner (MSHA) seeks assessment of penalties for two alleged violations originally charged in two Section 104(a) [1] Citations dated February 27, 1990, which were subsequently modified by MSHA on March 1, 1990, to a Section 104(d)(1) Citation and a Section 104(d)(1) Withdrawal Order, respectively (I-T. 24-28), and (2) Contestant/Respondent Cyprus Tonopah Mining Corporation (herein "Cyprus")

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[1] Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

seeks (as enlarged at hearing) broad review of practically all aspects of the two enforcement documents and MSHA's actions taken with respect thereto. [2]

Enforcement Documentation

Section 104(d)(1) Citation No. 3459560 as modified was issued by MSHA Inspector Arthur L. Ellis and charges Cyprus with a violation of 30 C.F.R. § 56.3200 as follows:

> There was loose material and rocks on high walls in the Pushback 1 Pit. Benches were full and did not provide protection from falling material. The walls were about 145 ft. high. An access road ran next to the west wall and pumps were being utilized to pump water at the bottom of the pit. An employee enters the area to move and maintain pumps. The area was not posted or barricaded to prevent travel alongside the high walls.

30 C.F.R. § 56.3200, under the general heading "Scaling and Support" and pertaining to "Correction of Hazardous Conditions," provides:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unathorized entry.

Section 104(d)(1) Order No. 3645243, as modified, was issued by Inspector Ellis and charges Cyprus with the following violation of 30 C.F.R. § 56.3130:

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[2] The hearing was held on three hearing days, March 13, 14, and 15, 1991. For each of the three days of hearing there is a separate transcript beginning with page 1. Accordingly, the transcript citations will be prefaced with "I", "II", and "III" for March 13, 14, and 15, respectively.

> Benches between the 5545 level and the 5400 level in the Pushback 1 had accumulated with materials and would not provide an adequate catch-bench to protect persons working below. An access road ran next to the west wall and pumps were being utilized to pump water from the bottom of the pit. Employees enter the area to move and maintain the pumps. [3]

30 C.F.R. § 56.3130, under the general heading "Mining Methods" and specifically pertaining to "Wall, bank, and slope stability" provides:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

Contentions

Cyprus (1) challenges the occurrence of both violations charged, the special findings of "Significant and Substantial" ("S&S") and "Unwarrantable Failure" attributed by MSHA to both, and the validity of the issuance of the modifications to both enforcement documents, and (2) maintains that both enforcement documents (the Citation and the Order) and the two safety standards allegedly infracted are impermissibly vague. In addition, and of considerable focus during litigation, Cyprus contends that the two violations charged are duplicative. Cyprus alleges that no "hazard" existed relative to the Section 56.3200 standard, and that (a) there was no "wall, bank, or slope" instability, and (b) clean benches were not "necessary" - relative to the Section 56.3130 standard.

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[3] It is noted that neither enforcement document specifically alleges that the benches themselves were failing, although the testimony of MSHA's expert witness, Assistant District Manager Rodric M. Breland, mentions "failing" benches and stress fractures in benches. (I-T. 127-130). After careful scrutiny, it is concluded that both enforcement documents are broad enough to include this condition as a ground condition hazard or bench inadequacy.

It is noted that Citation No. 3459560 is the underlying 104(d)(1) Citation in the Section 104(d) chain required as a prerequisite to the validity of the subject (d)(1) Order, No. 3645243 (I-T. 26-27). Should, for any reason, the Citation fail, or its 104(d) nature prove to be unsustainable, the validity of the Order would likewise fail.

A final major question is whether, with respect to both the allegedly S&S Citation and Order, any hazard contributed to by any proven violation was "reasonably likely" to have resulted in an injury.

MSHA'S Modifications of Original Citations

Citation No. 3459560 (involved in Contest Docket WEST 90-364-RM) was modified to a Section 104(d)(1) Citation on March 1, 1990, at 8 a.m., was "terminated" on March 2, 1990, at 9 a.m., and was modified what appears to be three subsequent times thereafter. In a modification on September 5, 1990, line 10 D of this enforcement document was modified to show that the "Number of Persons Affected" was "5" instead of "1".

Similarly, Citation No. 3645243 (involved in Contest Docket West 90-363-RM) was modified to a Section 104(d)(1) Order on March 1, 1990 (the hour of such modification was left blank on the modification form); was "terminated" at 8:40 a.m. on March 2, 1990 (see Stipulation, Court Ex. 1); and was further modified in various respects on five subsequent occasions. In a modification dated March 5, 1990, line 10 D of this enforcement document also was modified to show the "Number of Persons Affected to "5" instead of "1".

Cyprus, in both contest dockets, filed its "Notice of Contest" on September 13, 1990, and an "Amended Notice of Contest" on September 24, 1990. In its contests, Cyprus challenged only the validity of the modifications dated March 5, 1990, pertaining to the number of persons affected by the alleged violations. [4] It is noted here that other challenges made to the enforcement, i.e., occurrence of the alleged violations, special findings, duplicative charges, etc., were litigated as part of the penalty docket, WEST 90-202-M.

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[4] In its contest pleadings Cyrpus correctly pointed out, as to both enforcement documents, that such were "subject to challenge in a civil penalty contest docketed at No. WEST 90-202-M."

Prior to hearing, Cyprus filed a "Motion for Partial Summary Judgment" (on December 10, 1991) confined again to the same March 5, 1990, modifications described above. The basis for such motion was that a Citation, once "terminated," cannot be modified. By my Order dated January 22, 1991, this motion was denied. It was held, inter alia, in such Order that (1) MSHA's administrative termination of a citation does not vacate it, and (2) that a citation can be modified after its termination to alter or amend allegations relating to penalty assessment factors but not to materially change the nature of the violation charged or the description of the violation charged set forth in the citation. That holding is here affirmed and my "Order Denying Motion for Partial Summary Judgment" dated January 22, 1991, is incorporated by reference as part of this decision.

Stipulation

Pursuant to written stipulation (Ct. Ex. 1; I-T. 178), the parties stipulated and I find as follows:

1. At all times relevant to these proceedings, Cyprus was the owner and operator of an open pit molybdenum mine located in Tonopah, Nevada.

2. Cyprus's mining operations affect interstate commerce.

3. Cyprus and its mine at Tonopah are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the "Act").

4. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.

5. Citation No. 3459560 was properly served by a duly authorized representative of the Secretary of Labor upon an agent of Cyprus. It was not issued or served at the time or date shown on the Citation.

6. Citation No. 3645243 was properly served by a duly authorized representative of the Secretary of Labor upon an agent of Cyprus. It was not issued or served at the time or date shown on the Citation.

7. Cyprus is a large operation and the subject mine is a large mine.

8. Civil penalties have been proposed for Citation Nos. 3459560 and 3645243. Payment of such penalties will not affect Cyprus's ability to continue in business.

9. By a subsequent action issued on March 1, 1990, Citation No. 3459560 was modified to allege a violation of Section 104(d)(1) of the Act.

10. Citation No. 3459560 was terminated on March 2, 1990, at 9 a.m.

11. By a subsequent action issued on March 1, 1990, Citation No. 3645243 was modified to allege a violation of Section 104(d)(1) of the Act.

12. Citation No. 3645243 was terminated on March 2, 1990, at 8:40 a.m.

Findings

On Tuesday, February 27, 1990, MSHA Metal/Non-Metal Mine Inspector Arthur L. Ellis, while on a regular inspection of the mine, observed the conditions which he cited in the two subject Citations (Exs. P-1 and P-2; I-T. 13-15). The Citations were actually served on Cyprus on February 28, 1990. (I-T. 14-15). Inspector Ellis intended both Citations to cover the entire area called "Pushback No. 1," meaning the north, south, east, and west walls thereof. (I-T. 28, 45-46). The conditions cited did exist.

When Inspector Ellis commenced his inspection on February 27, 1990, Cyprus's Mine Manager Michael A. "Mike" Curran and Safety Director Robert R. Altamirano accompanied him to a place called the "overlook" from which they could observe the pit, i.e, the entire operation (I-T. 15). Mr. Ellis explained generally what he saw:

> ... We got out of the vehicle, looked at the overlook and I observed the pit, and looked like there was a pit within a pit. It was explained that the small pit, the middle of the pit is the--actually was called "Pushback No. 1. (I-T. 16) [5]

Inspector Ellis observed some of the benches to be filled with loose, unconsolidated material and rocks. (I-T 16, 29, 79, 82). Benches are normally left on a pit wall to prevent material

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[5] See also I-T. 125-126 and photographs (Exs. P-3 and R-14 A) for a general description and views of the subject area.

from accelerating down a wall. (II-T. 18-19). If material falls off the top, the bench is to act as a catch area to keep material from accelerating down into the pit and possibly causing damage or injury.

On the east wall of the pushback [6] he observed a "partial bench about one quarter of the way down from the top [7] and "no benches the rest of the way down." (I-T. 17, 49).

During the inspection from the overlook, Inspector Ellis observed a dozer about to descend into the pit and was advised by Mr. Curran that he (Curran) "was getting ready to build a berm." (I-T. 17) The berm was to be built in the pit alongside the west wall of the Pushback 1 (I-T. 17, lines 21-22), because the berm which has been there had filled up "with a loose, a ravel material." Mr. Ellis objected, since he did not want the west wall disturbed, since he was afraid "loose material or something" would come down on the dozer. [8] Curran and Altamirano explained to him that the former mine manager and chief engineer who were responsible for the situation had been discharged (I-T. 18, 19) for giving false information to the general mine manager (I-T. 19). This had nothing to do with this matter. (II-T. 207-208). It was decided to build the new berm by hauling in new material (I-T. 17). Before leaving the overlook, Inspector Ellis indicated to Curran and Altamirano that he was going to issue a citation.

After leaving the overlook, the inspection party proceeded to near the bottom of the pit, but did not stay because it was narrow and there was activity ensuing in building the new berm (I-T. 18-19, 33). They then went to the south end at the top of Pushback 1. The Inspector described what he saw there as follows:

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[6] Review of the transcript reveals that the inspector's primary concern was the west wall of Pushback 1.

[7] The height of the pushback was approximately 250 feet. (I-T. 49, 85).

[8] Although his testimony was somewhat disjointed, the Inspector credibly testified "there were some benches on the west wall" which were not "being maintained" and were "full"; that there was "loose" on the faces and that there was "loose and unconsolidated material in the west wall that could come down and get somebody." (I-T. 29, 79). A berm already at the base of west wall was "filled up." (I-T. 68).

And from there I observed the same thing I did from the overlook, benches that had been filled with loose and consolidated materials and some benches that had appeared to be--have been failing on the east wall. There was one partial bench about one quarter of the way down, but hardly any benches. I also noticed that the east wall kind of bellied in the middle and protrudes out, narrowing the middle of the pit floor considerably. (I-T. 20).

* * * * *

A. I noticed some loose unconsolidated material and rocks in the wall. Benches were pretty well full, the ones that they had tried to lever or had filled with this material and some benches that appeared to be failing.

Q. All right. And the material you described as loose, is this material that has the potential to move or be dislodged?

A. Yes, it does.

Q. And how did you determine that the material was loose?

A. Well, just from my experience, it looked loose. And also from Mike Curran and Bob Altamirano's statement that this loose material was continually filling up their benches and that's why they were putting in berms [9] about 10, 15 feet from the toe, 3 to 4 feet high, was to try to keep any material from coming all the way down on the people who were working at the bottom.

* * * * *

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[9] The purpose of a berm, according to Inspector Ellis, is "to keep something from coming on down into the bottom of a pit or to block something out," or to keep people away from hazards (I-T. 91-92).

A berm installed to abate two previous citations was inadequate. (II-T. 38-39).

A. That's correct. I asked them why there wasn't a berm at the toe at the time I was observing this pit and they said because it filled up with loose unraveled material. (I-T. 21). (Emphasis added).

* * * * *

MSHA expert witness David M. Ropchan, a mining engineer in the Ground Support Division of MSHA, observed the Pushback 1 area on March 6, 1990, some seven days after the inspection of Inspector Ellis. He stated that he was first struck by the narrowness of bottom of the pit.

> Yes, it was immediately apparent that--the first thing that really struck me was the very narrow condition of the bottom of the pit. There really wasn't a floor in the pit; there was just a travelway that looked really very narrow, considering the overall condition of the lower area of the pit. [10]
>
> * * * * *
>
> ... The west wall of the pit was in a state of distress. It had--it was evident that partial failure in the upper area of the wall had covered portions of benches. It appeared that some of the lower benches had failed and that there was a material covering or a portion of those lower benches rendering some of them quite ineffective.
>
> * * * * *
>
> Well, benches were normally--are normally left on a pit wall to prevent material from accelerating down the wall. If material falls off the top, the bench is to act as a catch area to

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[10] Mr. Ropchan indicated that "... considering the very narrow throat area down in the bottom, the condition of the walls was totally inadequate to allow people to work in the bottom of that pit." (II-T. 30).

keep material from accelerating down into the pit and possibly causing damage or injury.

* * * * *

For the most part, it did not appear that there had been any attempt to maintain or keep the benches open or clean them. There was no--simply did not seem like that there was much really effective area really left there to contain. There was still some bench area left but not a great deal.

* * * * *

Near the top of the west wall there was some rather large material that was loose on the top of the wall. It appeared that there was portions of an escarpment at the very top of the wall. This is a hazardous situation because these areas could feed rock down onto the slopes below and allow it to roll down into the pit. (II-T. 18-19).

Mr. Ropchan described the "material" as rock "of various sizes." (II-T. 22, 24). More specifically, in connection tion with an area along the upper part of the west wall, he testified:

> ... from the north end you could easily see a fault trace running across the south end of the upper area of the pit, and Mr. Curran said that the fault trace pretty much aligned--was pretty much aligned along the edge of the upper part of the west wall, [11] and some of the--of course that material to the west was alluvium, and it was a brownish, tanish material, and some of it in fairly large chunks was lying in the top part--it was in the top part of that wall, loose.

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[11] See also Ropchan Report (Ex. P-12, pg. 1). Although Mr. Ropchan's inspection took place a week after the Ellis inspection, it is found that the passage of this relatively short period in terms of mining environment and conditions does not materially detract from the reliability or the probative value of Ropchan's observations, opinions, and conclusions.

Q. And did you notice the size of the loose material you observed?

A. Oh, it was fair-sized. I think some of it was several feet in diameter.

Q. All right. And based on what you saw, if the material of the size that you saw was to reach the bottom of the pit floor could it damage equipment if it struck equipment at the bottom?

A. Yes, definitely. I think it was a real threat to men and equipment at the bottom.

Q. All right. And from what you observed, if there were movement of the loose material, would the catch benches, starting with the point at the west wall you observed, would those benches have been able to--would they have been able to contain material moving down the slope?

A. Well, definitely they'd contain some of it, but I felt there was sufficient threat of them being unable to contain it, that there was a real hazard from this material. (II-T. 31-32).

Mr. Ropchan in some detail described the nature and mechanism of the hazard he observed. In particular, he stated:

A. The hazards that I perceived were the west wall was in a state of failure. The benches had either failed or were partially filled or fallen away. There was no access to any of the benches on the lower--on that west wall. There was no way to maintain it, and it stood right above a very narrow travel way.

Q. What was the hazard?

A. In the fact that it stood above a very narrow travel way. <u>There was loose material, large loose material escarpments</u> on the very top of the fall, could have fed rock down, allowed it to roll down, jump off that wall, hit the floor below. The overall wall was

> very ragged and rough in appearance. It was not a smooth surface. It was a very hazardous condition for rock fall. Anyone who's ever observed rock fall will note that on areas of rough walls, this rock can bounce and hop around, become airborne, it can assume a considerable horizontal velocity. It can really reach out. [12] (II-T. 36) (Emphasis added).

In his written report (Ex. P-12), Mr. Ropchan reached specific conclusions as to the conditions in Pushback 1 and their portent which are (a) found convincing, reliable, and consistent with the general sense of the evidentiary record (including the various photographic exhibits therein) and (b) incorporated as part of the findings and factual conclusions set forth in this decision, to wit:

> The portion of the pit below the 5545 level contains serious safety hazards from a ground control standpoint. This lower area has been developed in a manner that has resulted in narrow, deep work areas that are poorly protected against rock falls or slope failure.
>
> The west wall of this lower part of the pit is in a very hazardous condition. There are no adequate or effective catch benches remaining in place along most of this wall. The existing benches are either full or have partially or completely failed. The alignment of this lower west wall along a major fault could result in a continuous weakness plane occurring in the upper part of the wall. There has evidently been a large displacement along this fault plane. This could result in a disturbed or weakened shear zone occurring in both the monzonite and in the alluvium for some distance on both sides of the fault. The presence of a long tension crack developing just back of and parallel to the edge on the wide bench above this lower pit area may be a result of this weakness zone.

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12 See illustration, Ex. P-11.

> The east wall in the lower portion of the pit does not have adequate catch benches to protect against falling rock in the work and travel areas below. Furthermore, this portion of the pit wall wall is convex in plain view which puts the wall area under tension. This can increase the potential for failure of portions of the slope. At the outermost bulge of this wall, the pit floor (which is also a travelway) is only about 50 feet wide.
>
> In summary, the lower portion of this pit appears to have been developed to minimize the excavation necessary to get at two small areas of the ore body. In so doing, both travelways and work areas are exposed to serious fall of ground hazards. The narrow, deep confined work areas at each end of the pit floor expose workers to ground fall hazards funneled toward the pit floor from three sides in close proximity. The haulroad leading down into the lower pit area is not sufficiently protected from falling material from either the west or east walls. A berm has been placed along the west half of the road along the west wall. This berm is too close to the wall and too small to provide sufficient rock fall protection considering the overall condition of this west wall. In addition, the size of the haulage trucks (170-ton) make it inadvisable to reduce the roadway width to such a degree.

It is found from the testimony and evidence of Inspector Ellis and Mr. Ropchan [13] that loose unconsolidated material not only had the potential of moving from the wall face, but was in fact moving and filling up the benches below the movement (see also Breland, I-T. 127-135) and had filled up a berm built by Cyprus at the bottom. Thus, the material could and did travel to the bottom (III-T. 126-127; Ex. P-11) and, as indicated in the statement to the Inspector by Mr. Curran and Mr. Altamirano, the purpose of the berm was to try to keep the material from coming down "on the people who were working at the bottom." (See also I-T. 68, 188-191, 193). I infer from this and the testimony quoted above that the material was of sufficient size to have created a hazard, i.e., posed a threat of bodily harm to those

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13 Contrary to Cyprus's Contention (Cyprus's Brief, p. 17).

working at the bottom. (See, for example, Ropchan testimony reporting "large material." (II-T. 18, 36, 38-39). See also, testimony of Cyprus's Mine Operations Supervisor Vernon Lee Alan. (II-T. 164, 173-175), and further testimony at II-T. 189-190, 194-198; III-T. 126-127).

The use of adequately maintained benches was a necessary part of the mining method employed by Cyprus in Pushback No. 1. (I-T. 29, 29, 79-86, 121-122, 130, 134-135, 155-157, 165-168, 171-172, 173, 174, 188-189, 193, 195; II-T. 18, 31-32, 36; Exs. P-10, P-11, P-12).

It was established not only from the testimony of Inspector Ellis and MSHA Engineer Ropchan, but also that of MSHA Assistant District Manager Breland, who inspected the area 30 days after Ellis, that the benches were full, inadequate, and failing. (I-T. 79-83, 128, 129, 130; II-T. 20, 32, 3-37, 40). [14]

The bottom of the Pushback No. 1 Pit was very narrow, amounting only to a travelway. (II-T. 18, 36).

The conditions (loose rock and material, filled benches, falling benches, tension cracks, and a narrow pit floor) in Pushback 1, as charged in Citation No. 3459560 constituted a hazard. (I-T. 21, 23, 26, 28, 29, 30, 51-52, 65, 79-83, 84-86, 122, 130, 134-135; II-T. 18, 19, 21, 23, 27, 28-29, 30-36, 67-68, 74, 83; III-T. 15-16, 33-34, 126-127; Ex. P-3, P-10, P-11, P-12).

Approximately five miners who worked in the pit were exposed to the hazard (I-T. 62-63, 184; Exs. P-5, P-6, P-7, and P-8). Four miners (a shovel operator and three truck drivers) had been working in the pit shortly before Inspector Ellis's inspection (I-T. 23-26, 50, 52, 61-62, 63) in addition to another miner who was maintaining and moving pumps (I-T. 18, 22, 51-52, 62, 67, 91).

Water at the north and south ends of the Pushback 1 pit blocked access to the bottom of the pit below the walls at those two ends (I-T. 55, 64-65). The west wall was not bermed or barricaded to prevent access to the area below the wall (I-T. 29, 64; Ex. P-12).

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[14] If benches, originally installed as part of a mining methodology, are not maintained and/or kept clean, and such lack of maintenance subsequently causes or contributes to a groundfall hazard, can it reasonably be said that benches are not "necessary" as that term is used in 30 C.F.R. § 56.3130?

Mining was "expected" by Cyprus to be and was completed in the bottom of Pushback 1 on or about Monday, February 26, 1990, and thereafter the only activity going on there was to have been maintaining the pup station (II-T. 135, 136, 141, 142; III-T. 11-12, 15). The last blasting in the bottom of the Pushback 1 occurred on about February 15 (II-T. 139-140). Pushback 1 was completed on the swing shift on February 26, 1990 (II-T. 165-166, 168; III-T. 11). There were no plans to go into the bottom of the pit thereafter with a shovel and haul trucks (III-T. 11). Final mining in the pit was along the south end (III-T. 17).

Summary of Cyprus's Evidence

Alan Dale Curtis, who was Cyprus's acting chief engineer on February 27, 1990, was of the opinion that the west, east, and south walls were safe and stable for miners to work and travel under and that the catch benches were adequate to catch any raveling (II-T. 129, 130-134). [15]

He also indicated, inter alia, that Cyprus does not go back on benches to clean them up after mining below them because "the catch bench is in place and we've done all we can to scale the wall without equipment, with our blasting methods, so ... it's not necessary to go back." He said that if "you do go back, you're putting equipment and manpower at risk ... ." (II-T. 157-158).

Mine Operations Supervisor Vernon Lee Alan testified that the week before mining ceased in Pushback 1 (the week before February 27, 1991) he felt the east, west, and south walls were stable and that it was not "unsafe to work in the bottom of the pit." (II-T. 162-163).

Cyprus introduced two videotapes, Ex. R-24 (taken between March 2 and March 13, 1990) and Ex. R-39 (taken in December 1990). Exhibit R-24 runs 20 minutes, demonstrates the conditions of Pushback 1, and is summarized in a written narrative of record--Exhibit R-25. Exhibit R-38 runs five minutes, was shown during the hearing (II-T. 184-186) and depicts an enactment of the effect (loss of energy) of dumping material over a bench down a 35-36°, 40-50 feet vertically high (90-foot long) slope (II-T.

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[15] He indicated that when the design for Pushback 1 was put in place, it was never intended to go back on the benches to clean and scale (II-T. 146).

181-183, 184-185, 190, 193). These two pieces of evidence have been considered both as to occurrence of a hazard, gravity, and the "reasonable likelihood" aspect of the "significant and substantial" issues.

Robert R. Altamirano, Safety Director, testified that there had been no accidents or injuries to miners from material coming off the east, west, or south walls of Pushback 1. (II-T. 189). there were "one or two incidents" where boulders "came down and struck equipment" over the 12-month period prior to February 27, 1990 (II-T. 194, 195-200). See also Exhibits P-21, P-22, and P-24. Exhibit P-22, an Incident Investigation Report dated 1-19-89, indicates that "In this area it's hard to tell if you have a ball of mud or a big rock hanging on the wall."

Mr. Altamirano gave the following opinion as to work safety in Pushback 1:

> Q. And why do you think it was safe to work in Pushback 1 with regard to the slopes?
>
> A. Well, in discussing the west wall I was informed that we had stepped back and the angle of repose had been reached and we maintained a berm at the bottom, so that, you know, in my opinion, the west wall did an adequate job.
>
> Q. What about the east wall?
>
> A. On the east wall where the double-benching technique had been attempted or, you know, had taken place, they took extra precautions to step back at each bench. I think it was five feet or so, so they wouldn't undercut, and to me that looked like a good situation. (II-T. 188).

Mine Superintendent Michael A. Curran testified it was not unsafe to conduct mining in the bottom of the pit because the "walls around the bottom of the pit were in a stable condition and posed no hazard" because "the west wall was stepped out and sitting at an angle of repose, and material that was on that slope was at rest ... . He also indicated that the berm had been constructed along the toe to keep travel away from that area (III-T. 16, 26-27). He said the east wall was "very competent rock that had been scaled and that there were adequate catch benches along the south wall (III-T. 16-17). Final mining in the pit was in the southeast corner and there was an adequate catch bench above this area (III-T. 17).

Duane W. Pergrem, Manager of Safety and Hygiene, examined the pit on March 6, 1990. He scrutinized the old berm (built to abate the 1989 violations) and the new berm (under construction on February 27, 1990) [16] and noted that the old berm was about half full. (III-T. 44-45).

He felt the west wall was fairly shallow and that two or three pieces of large material on it "were resting in a fairly stable position." (III-T. 46). He indicated that in some places on the west wall "it had run to the angle of repose" and that in some places it still had benches. He saw no problem with the east wall or the south wall, noting that there was water in front of both the south and north walls. (III-T. 46-47). He thought the benches were satisfactory on the east wall and saw nothing "that looked like it was going to come off." (III-T. 48-49). His conclusion was that it was safe to work in the bottom of the pit. (III-T. 52).

Based on his prior experience with Cyprus's and other mines, he stated that

> ... I have not seen a pit that didn't have benches full with material sluffed down to the next level. On many of them I've seen berms or barriers above in a place where employees might go by to contain the material if it should go on down. (III-T. 53).

During his examination, Mr. Pergrem observed a blast on one of the upper benches of the south wall of Pushback 1 and noted that the material which he "assumed" was from the blast traveled slowly down the wall in the southwest corner. He saw no other material move on the wall. (III-T. 49-51, 52).

James P. Savely, senior geological engineer in Cyprus's technical service assistance group, who was recognized at the hearing as an expert in slope stability (III-T. 75, 77) inspected Pushback 1 on March 6, 1990. (III-T. 78).

He found nothing to be concerned about with the east wall, finding the same to be stable and competent. (III-T. 84, 87). He felt the benches on the south wall "were in pretty good shape." (III-T. 88).

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16 III-T. 32.

On the west wall, he examined the crown (top) of the failure, found no tension cracks that were "well behind the crest of the slope" and concluded that the "rubble-ized" portion of the slope was superficial. (III-T. 89). He had no alarming concerns about the reddish material (the large pieces mentioned by Mr. Ropchan). (III-T. 89-90). His conclusion was that it was safe to work in the bottom of the pit. (III-T. 91-92). [17]

As to the reddish material below the work area on the west wall, Mr. Savely was unable to reach a conclusion as to the likelihood of its coming down the wall. He did believe that the rock pieces were not "strong" and would tend to break up when "colliding" and thus concluded that such was "likely" to fragment and stop somewhere on the slope. (III-T. 102-103). His observation of the new berm on March 6, 1990, was that there was nothing on its far side and that it was "containing everything there." (III-T. 103, 111, 112).

Mr. Savely testified that it was not common practice to go back and clean benches once mining had progressed past them. (III-T. 103). The mining method to be utilized was to mine such an area bench by bench and to "step out" (explained, infra) and subsequently to install berms. (III-T. 104, 109). He thought it "unlikely" that the material on the west wall would start to move on its own. (III-T. 105).

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[17] This is repeated in a summary of Mr. Savely's findings, Exhibit R-15. Therein, he reiterates his favorable view of the east wall's stability, indicates he saw no evidence of unsafe mining practices, and as to the west wall indicates:

> The west wall below the Liberty fault had partial benches remaining. There were no signs of deep-seated large-scale movement or active failure. The talus on the slope was already at an angle of repose of 36° to 38°, which is a stable condition. There was no significant active raveling occurring and because the slope is at angle of repose it is very difficult for rocks to begin to roll. Usually, for rocks to roll on angle of repose slopes they must have some significant energy input to give the rock momentum. This occurs when material is being dumped from above or when the slope is in active failure. Neither condition was present.

Dr. Richard D. Call, president of a geotechnical consulting firm and an expert on ground control, also testified on behalf of Cyprus. Dr. Call's firm specializes in rock mechanics, open-pit slope design, and underground rock mechanics. He visited the mine on May 15, 1990, to inspect it in preparation for rendering his expert opinion on slope stability conditions. (III-T. 116). Mining had taken place around the top of Pushback 1 during the interim between February 27 and the date of his inspection--three levels on the east side and one level on the south end. (III-T. 118, 121-122). Dr. Call could not state for certain that material he observed which had "gone beyond the berm and was on the pit floor was from "overbank," i.e., being pushed over the bank during mining during the interim period, or from raveling. (III-T. 126-128). Dr. Call's opinion was that it would have been safe to work in the bottom of the pit on February 27, 1990. (III-T. 130-131, 133). He felt the probability that material on the west wall reaching bottom was low:

> A. Well, one, there's a significant probability that it won't reach the bottom. The material and angle of repose tend to absorb energy. As a particle goes in that, the energy's lost in moving pieces around. So that it could very easily get hung up on the wall on the way down, and there are a number of boulders on the face there that have done just that.
>
> Secondly, when it reaches the bottom it's not going to have high--a high level of energy, therefore it's not going to be moving that fast, and it will impact directly at the toe of the slope, and it doesn't take a great deal of a retaining berm to stop it from rolling on out into the pit.
>
> Q. When you say it doesn't take a great deal of a retaining berm, let's take the berm that had been built at the time of the citations issued five to six feet high and out from that wall. Would that be retaining material that was raveling off it, for some reason, did ravel?
>
> A. Based on my observations of the mechanics and the computer simulations of that, I would estimate that 90 percent or greater of the material would be retained by that berm. I can't say a 100 percent because that's an extreme value and all kinds of extreme values are possible, but in terms of reasonable probability, it would be retained. (III-T. 131-132).

Dr. Call said that the "potential is very low for any significant rock fall on the east wall" (III-T. 133) and that the south wall was "intermediate" meaning not as favorable as the east wall but "more competent" than the west wall. (III-T. 133-134). [18]

Dr. Call also pointed out a line of thinking that benches actually decrease slope stability. (III-T. 138-141).

Special Findings Concerning Order No. 3645243 and "Unwarrantable Failure" Issues

On May 31, 1989, and June 1, 1989, Cyprus received two citations, analogous to the two involved in the instant proceeding, also charging violations of the same two standards, 30 C.F.R. § 56.3200 and 30 C.F.R. § 56.3130. These were issued by MSHA Inspector Ronald Barri and were numbered 3463545 (Ex. P-18) and 3463546 (Ex. P-19), respectively. See I-T. 102-104, 105-110, 11, 175-176.

Citation No. 3463545 charged:

> There were large pieces [sic] of loose material hanging on the west high wall about 100 feet above the ramp haul road on the 5400 level. Haul trucks and other equipment travel the road alongside the high wall. The area was not posted or barricaded to prevent travel alongside the high wall.

Citation No. 3463546 charged:

> The 5728 bench on the south end of the pit to the east face at 5682 level bench on the south end and east face had been allowed to accumulated [sic] materials and would not provide an

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[18] Dr. Call's testimony, en toto, seems to concede the hazard of rock fall, but gauges the probability of such happening and going beyond the berm as improbable. See also his testimony at III-T. 142-143. As with the opinion of Mr. Savely, this testimony has more probative value in terms of the "reasonable likelihood" aspect of S&S, rather than as to the occurrence of a violation.

> adequate catch bench to protect haul truck traffic below. A maintenance program for maintaining benches had not been established. During time periods needed to clean these benches [operator will use] one lane outer edge haulage beneath these benches will be required if loose material is subject to spilling on haul road.

On or about June 1, 1989 (I-T. 102, 104, 106, 105-113), MSHA Assistant District Manager Rodric M. Breland spoke with Inpector Barri and then conducted his own investigation of these two prior citations at the mine.

At this time, some nine months prior to the issuance of the instant Citations, Mr. Breland observed that the benches on the west wall had "already started to fail." (I-T. 105, 106-107, 109). Thereafter, on the same day, a meeting was held with Cyprus's management (I-T. 110-114), including Mr. Curran, which was described in some detail by Mr. Breland as follows:

> Predominantly we discussed the issue of the pit walls and overall mining plan, and mostly in generalities as far as reacting to conditions as they developed. In this case the west wall was showing signs of failure and they were aware of that and had at that time explained that they were going to step out a little bit, and by stepping out meaning move away from the angle they were at, at that time, and flatten it back a little more. We talked about the 56.3130 requirement and the 3200 requirements, fairly extensively, that the--with the conditions such as were existing there, they were required to put the berm or the barrier in prior to continuing on with working in the area. They couldn't wait for loose material to hit the floor. There was some material on the floor that had sluffed off the face, even after the berm had been put in, even the day before I was there, so that face was working. Also the 3130 I specifically had gone out on several of those benches with Mike Curran and my superintendent. I talked to him about what was going on there. They were--or could have been accessed to do the bench maintenance that's required as part of the standard. However, they were not doing that and had not been doing that, and I explained the requirement there to keep those benches clear as long as there was staff beneath them. (I-T. 110-111). (Emphasis added).

These two prior citations were not contested (I-T. 171-172) and were abated by (a) building a berm to impede traffic to the affected area and (b) cleaning off the benches. (I-T. 112, 151-152, 175-176; II-T. 206-207). [19]

During the meeting on these two prior citations, Mr. Breland "cautioned" Cyprus management that MSHA had issued a CAV (Compliance Assistance Visit) notice (Ex. P-9, Notice dated 7-27-88) prior to the commencement of their operation "concerning the same issue on the benches and bench maintenance" and reminded them that this was a "subsequent repeat problem or potential problem and that they had been made aware back probably six months (previously) that MSHA expected bench areas--or benches to be maintained where people work." (I-T. 114, 115, 120, 121).

Following the issuance of the July 27, 1988, CAV Notice pertaining to cleaning benches the following correspondence (I-T. 117-119) ensued between Thomas C. Lukins, MSHA District Manager, and Cyprus. [20] In a letter dated August 2, 1988, Mr. Lukins advised Ron O. Kellnar, Vice President/General Manager of Cyprus, as follows:

> During the July 28, 1988, visit to your operation by Ron Barri and Art Ellis of the Mine Safety and Health Administration, we discussed the problem of your benches and the inability to maintain or clean them.
>
> Section 56.3130 states, "Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall

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[19] Cleaning a bench which had "tension fractures" may not have been feasible (I-T. 152-153) due to inaccessibility. According to Mr. Breland, Cyprus used the "berm" abatement technique it employed to abate these two prior violations as part of its subsequent "routine mining practice." (I-T. 172).

[20] This correspondence, like the two prior Citations and the CAV Notice, is of some consequence with respect to the issues of unwarrantability, culpability generally, and the question whether or not benches were necessary as part of Cyprus's mining methodology to maintain wall, bank, and slope stability.

be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

Since no mining activity was being conducted and your company has just recently taken over the mine, a general mine plan was not available. As per the meeting, a general mine plan must be submitted to this office, when developed, stating the bench heights and widths to be used and how you plan on cleaning/maintaining the benches if they become full of material. (Ex. P-10). (Emphasis added).

In Cyprus's reply letter to Mr. Lukins from Mine Manager Burjore E. Choksey, dated September 21, 1988 (Ex. P-4), regarding "30 C.F.R. § 56.3130, Ground Control, Wall, Bank, and Slope Stabiity," Cyprus enclosed its mine plan, and agreed to utilize a double-benching technique to "contain any raveling," to wit:

In response to your letter dated August 2, 1988, to the V.P. and General Manager, Mr. Ron Kellner, we are enclosing a copy of our mine plan titled "Ultimate Pit with Roads."

The mine plan will utilize a double benching technique, which will allow us to have wider catch benches to contain any raveling that may occur. The width of the catch benches will vary from 32 to 50 feet, for every 91 to 100 feet of vertical interval. The varying widths are because of Anaconda having had 14-meter-high benches.

The current pit bottom elevation is 5500. Benches above this elevation will be 46 feet high and below 5500 level, they will be 50 feet high. As an added safety factor we plan to step-out an additional 10 feet, every fourth bench. The plan also provides for extra road width so that catch berms could be constructed if for some reason we encountered increased local raveling. Every effort will be made to control the pit walls by way of controlled perimeter blasting and surface drainage. The plan as laid out above will allow us to operate the mine in a safe and efficient manner." (Ex. P-4). (Emphasis added).

Conflicting Evidence

The testimony of MSHA's witnesses, including Inspector Ellis who observed the violative condition on February 27, 1990, has been credited over the testimony of Cyprus's witnesses in the areas of major conflict: whether a hazard existed, whether benches were necessary, whether benches should have been cleaned and maintained as mining progressed to the bottom level, and whether there was loose rock and material on the slopes which posed the threat of falling into the bottom of the pit on miners.

The description of conditions and the opinions of MSHA's witnesses were particularly convincing. See, for one example, Inspector Ellis's testimony at I-T. 21 as to why he considered the material to be "loose." Thus, it appeared that way (loose) not only from his visual observation but he was told that the old berm had filled up from falling material and that Mr. Curran and Mr. Altamirano were having the new berm built to keep material from falling on miners in the pit. I find this and the preponderance of documentary and testimonial evidence at odds with the opinions of Mr. Curran and Mr. Altamirano and other Cyprus's witnesses that it was safe for miners to work in the pit.[21] Upon careful evaluation of the record, it is concluded tha MSHA's evidence was the more objective, reliable, and convincingly stated. I have thus to some extent incorporated MSHA's evidence into "Findings," supra, but summarized Cyprus's evidence.

DISCUSSION, ULTIMATE FINDINGS, AND CONCLUSIONS

A. The Two Regulations

Section 56.3130 requires:

1. that mining methods be used that will maintain wall stability where persons work or travel, and

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[21] The behavior and conversation of Cyprus's Superintendent and Safety Director on February 27, 1990, when advised of the violations doesn't indicate disagreement at that time with Inspector Ellis's determination.

The long-standing approach of Cyprus to the situation, beginning with the CAV inspection, through the two prior citations in 1989 and to the two subject violations, appears to have been an ignoring of the problem recognized and described by MSHA and discussed between MSHA and Cyprus.

2. if benches are necessary as part of the mining method, their width and height shall be based on type of equipment

   a. used for cleaning the benches, or

   b. used to scale the walls and slopes.

To establish the elements of a violation, MSHA must establish that benches

1. were a "necessary" mining method, or part of such,

2. the benches were improperly maintained (cleaned) or were of inadequate width and height to permit maintenance/cleaning, and

3. that, as a result of the improper benches, or maintenance thereof, "wall, bank, and slope" stability was not maintained, in

4. places where persons work or travel ... ."

The focus of this standard is on benches, and their being a necessary part of the mining method used. If benches were a necessary mining method and they were not kept up, and people worked in the area, an infraction occurs. [22] The standard (3130) itself does not specifically require benches. (I-T. 70, 96, 101, 164).

The d-1 Order (No. 3645243) in its second sentence clearly charges that persons work or travel in the area.

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22 This differs from the thrust of 30 C.F.R. § 56.3200 (d-1 Citation No. 3459560) where the essence of the violations charged was existence of "ground conditions," i.e., "loose materials and rocks on highwalls" which created a hazard (of such falling on persons below). If the hazard--which MSHA attests was contributed to by full benches--is created, work or travel is not to be permitted until the condition is alleviated, and until this "corrective work" is completed, the area shall be posted--and ... barricaded when unattended. (See I-T. 101-102). Notably, the the Citation charges that there existed "loose material and rocks on high walls," as well as full benches, as well as the admitted fact that the area was not posted or barricaded.

B. Vagueness

Cyprus contends that 30 C.F.R. § 56.3130 is impermissibly vague since it does not provide reasonable notice of the conduct required by the mine operator. Based on analysis of this standard, supra, it is concluded that a reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the standard would understand what was required. See Ideal Cement Company, 12 FMSHRC 2409, 2415-2416 (November 1990). The record indicates that benching was a necessary part of the mining method employed by the mine operator, that Cyprus undoubtedly understood the purpose of the standard (Exs. P-4 and P-10; I-T. 103-119, 120-121, 165-166; II-T. 206-207), [23] that Cyprus in writing agreed to a plan utilizing a "double benching technique" to actually "have wider catch benches to contain any raveling that may occur" (Ex. P-4; I-T. 165), as well as agreeing that every fourth bench would be stepped out an additional 10 feet as "an added" safety factor. (Ex. P-4). It did not mention that it did not intend to maintain or clean such.

The standard is clearly the type of regulation that must be couched in simple and brief language in order to be "broadly adaptable to myriad circumstances." [24] As the Secretary states in her Brief (p. 7), "Any person familiar with open-pit mining and its methods would be aware that the standard is directed toward the prevention of death or injury caused by the collapse of walls, banks, or slopes upon miners who work in the area." The Secretary also cites comments appearing in the Federal Register, Vol. 51, No. 195, p. 36193, October 8, 1986, concerning what would appear to be understandable to an average prudent person as requirements of the standard and such are listed here and approved as part of the meaning attributable to the standard:

a. When benching is necessary, the benches must be able to serve as catch benches.

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[23] As above noted, Cyprus was cited for a similar violation of the same standard on June 1, 1989. (See Ex. P-19; I-T. 102-113, 114) which was not contested. (I-T. 191-192).

[24] The process for analysis of vagueness challenges is well illustrated in Secretary v. U.S. Steel Corporation, 5 MSHRC 3 (January 1983).

b. The determination of when benches are a necessary part of the mining process is left within the province of the mine operator (see I-T. 101), as is the determination of bench width and height.

c. The only restriction placed upon the operator is that the width and height selected for the benches be measurements which allow the operator to use available equipment to prevent the benches from creating a fall of ground hazard as well as to act as a catch bench.

Here, it is clear that Cyprus chose benching as a part of its mining method. Accordingly, it was required by the standard to maintain the benches to ensure wall, bank, and slope stability in those places where persons worked or traveled. (See I-T. 157, 172, 173-174, 175-176).

The contention of Cyprus that the standard in 30 C.F.R. § 56.3130 is unenforceably vague is rejected. [25] Any contention of Cyprus that the standard cited in Citation No. 3459560 (30 C.F.R. § 56.3200 is unenforceably vague [26] is likewise rejected.

C. Duplicative Charges

Cyprus takes the position that the two subject enforcement documents (Citation and Order) were issued for essentially the same condition in the same area of the mine, i.e., "because the benches were full" in Pushback 1. (Cyprus Brief, pp. 58-59).

This contention is rejected. As noted in the analysis above, the gravamen of violations under the two subject standards differs materially. Under Section 56.3200 the existence of a hazard must be established and, once established, a violation is established if work or travel is permitted in the area. If the hazardous condition is in the process of correction but correction is not completed, the area is to be posted and/or barricaded. Section 56.3130, on the other hand, does not focus on the actual existence of a hazard and does not mention the requirements of corrective work, barring work and travel of miners, and posting and barricading.

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25 Compare Secretary v. Alabama By-Products Corp., 4 FMSHRC 2128 (December 1982).

26 Such contention is not made specifically in Cyprus's Brief.

The fact that both the Citation and Order mentioned one condition--full benches--in common does not change the basic differences in the thrust of each or the safety standard under which each was issued. Contrary to Cyprus's argument, the conditions cited in each enforcement document differ. They were not the same. In addition to full benches, the Citation also charges, unlike the Order, (1) that there was "loose material and rocks" on highwalls in Pushback 1, and (2) in the specific language of Section 56.3200, that the area was not posted or barricaded. Both these factual issues were the subject of evidentiary presentation at hearing.

The Mine Act imposes a duty upon mine operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but unrelated mandatory standard. Secretary v. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981); Secretary v. UNC Mining and Milling, 5 FMSHRC 1164 (June 1983).

The Citation and Order are found not to be duplicative.

D. Occurrence of Violations

As charged by the Inspector and as reflected hereinabove, it is concluded that there existed loose rock and material on walls and slopes of Pushback 1, which together with full and partly full, inadequately maintained, failing benches created a hazard to miners working in the narrow pit below and traveling along the haul road leading into the lower pit area. These hazardous ground conditions had not been taken down or corrected, and the area was not posted with a warning against entry or otherwise barricaded to impede entry. Miners were permitted to work and travel in areas exposed to the danger of ground fall.

This is found to constitute a violation of 30 C.F.R. § 3200 as charged in underlying Section 104(d)(1) Citation 3459560.

Although Cyprus management indicated it never intended to maintain or clean the benches in Pushback 1, this is found to be contradictory to its previous conduct and acquiescence when cited during the CAV inspection, and when cited with two prior violations and discussions following such. (I-T. 110-111; Exs. P-4, P-9, P-10).

The most reliable and persuasive in the record establishes that benches in Pushback 1 had accumulated with rock and materials and did not serve as adequate catchbenches to protect miners working below. The mining method employed by Cyprus to mine in

Pushback 1 did not maintain wall, bank, and slope stability sufficient to safeguard miners working in the pit or traveling along the haulroad from falling rock and material. That a hazard existed was well-established by MSHA by the preponderant reliable and probative evidence. Thus, maintenance and cleaning of the benches was "necessary." [27]

In summary, it is concluded that a violation of 30 C.F.R. § 3130 as charged in Section 104(d)(1) Order No. 3645243 did occur since MSHA, in terms of the standard, established that

1. benches (including the maintenance and cleaning thereof) was "necessary,"

2. the benches were not maintained or cleaned, were inadequate, and were, in some cases, themselves "failing,"

3. that as a result of the inadequate benches, "wall, bank, and slope" stability was not maintained in

4. places where person worked or traveled. [28]

E. Unwarrantable Failure

"Unwarrantable Failure" means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). An operator's failure

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[27] It does not appear that Cyprus contends that building the benches initially was not necessary. Cyprus made no convincing showing that it had successfully employed some alternative method to accomplish wall and slope stability, i.e., effective to prevent the ground fall hazard. As noted elsewhere in this decision, there was evidence that rock and material was reaching the bottom of the pit, not just that it was "loose" on the wall. The presence of loose rock on the walls without adequate catch benches below would create a hazard and alone warrant the conclusion that "benching" (including the maintenance thereof) was "necessary."

[28] It is noted that this violation of 3130 was simply a part, a component, of the larger 3200 violation for having a "ground condition" hazard which was not taken down, etc., in an area which was not posted or barricaded.

to correct a hazard about which it has knowledge, where its conduct constitutes more than ordinary negligence, can amount to unwarrantable failure. Secretary v. Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). While negligence is conduct that is "thoughtless," "inadvertent," or "inattentive," conduct constituting an unwarrantable failure is "not justifiable" or is "inexcusable."

Here, Cyprus concedes it never intended to maintain its benches after mining through them in Pushback 1, and that it was unsafe to go back and maintain the benches. Thus, by not maintaining the benching or engaging in an alternative mining mode consistent with keeping the benches clean and safe (II-T. 39-40), Cyprus contends that after the benches indeed became unsafe to clean and maintain, that such justifies its mining methodology to begin with. This argument is rejected for several reasons. First, because of the actual hazard of falling rock and material injuring miners working in the pit and haul road. Secondly, because this record does reflect that such material did in fact reach the areas in the pit where miners worked, and because of the conduct and reaction of Cyprus's management with respect to the prior attempts of MSHA (CAV inspection, two prior Citations, and correspondence) to deal with the problem belying the explanations derived on this record after the two subject enforcement documents were issued by Inspector Ellis. While Cyprus further argues that the regulation (56.3130) was unconstitutionally vague in that it deprived Cyprus of knowing what course of conduct to follow, the prior enforcement actions of MSHA also serve to dilute the efficacy of this argument. [29]

The record is compelling that Cyprus's failure to maintain and clean its benches was not merely due to inadvertence or inattention since it is beyond dispute that its management personnel were quite aware of the continuity of the conditions, proceeded intentionally to expose miners on the haul road and in the very narrow pit despite ineffective failing catch benches, and the presence of loose rock and material. See Secretary of Labor v. Eastern Associated Coal Corporation, 13 FMSHRC 178, 187 (February 1991).

It is thus concluded that the violations charged occurred as a result of Cyprus's unwarrantable failure to comply with the two cited safety standards.

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[29] I have previously in this decision found the Secretary's position meritorious on the vagueness question.

F. Significant and Substantial

Both enforcement documents (Citation and Order) were designated as "Significant and Substantial."

A violation is properly designated "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

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, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2011-12 (December 1987). Finally, the Commission has emphasized that 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 Co., 6 FMSHRC 1834, 1836 (August 1984).

It has been determined that the violations charged in both the Citation nd Order did in fact occur, and that both constituted and/or contributed to discrete safety hazards as above described. In terms of the four-part Mathies formula, the decisive question here is whether the hazard contributed to by both violations, respectively, would in reasonable likelihood result in an injury. [30]

Inspector Ellis, although given the opportunity, never advanced from characterizing the "likelihood" of the hazard's occurrence from something which "could have" happened, or was merely "possible." (I-T. 85-86, 95). There was no evidence presented by MSHA of prior injuries or what can be termed "close calls" from fall of ground.

Cyprus's evidence that occurrence of the hazard was not likely is found to be more persuasive. (III-T. 103, 105, 126-127, 131; Ex. R-25). As Cyprus points out [31] a lengthy and unlikely chain of events would have to transpire, even in connection with the west wall [32], before the circumstances constituting the hazard would combine to cause an injury:

1. Movement of material would have to begin as a result of some event.

2. Such material would have to travel to the bottom of PB1 in sufficient size to pose a hazard.

3. Such material would have to retain sufficient velocity to pose a hazard.

4. Such material would have to overcome the friction of the material on the west wall.

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[30] The testimony of MSHA's primary witness, Inspector Ellis, did not directly deal with the "likelihood" question and was almost devoid of enlightenment as to the possibilities of the occurrence of the hazard.

[31] Brief, pgs. 49-50.

[32] Which by all accounts was the most hazardous of the four walls in Pushback 1.

5. Such material would have to overcome the characteristics of the material on the slope of the west wall to gain momentum as it slid down the slope.

6. Such material would have to retain sufficient momentum to climb up and over the berm at the bottom of the west wall.

7. Such material would have to overcome the unevenness of the slope of the west wall which would tend to slope or stop the material.

8. Such material would have to avoid being retained on the slope by the remnants of the existing benches.

9. When mining was occurring, such material would have to come to the bottom of the pit with sufficient size and with sufficient velocity to overcome (in some cases), protection afforded by the location of miners in equipment cabs high above the pit floor.

10. After mining ceased, such material would have to arrive at the bottom of PB 1 coincident with the brief 10-15 minute period on one of the two or three days a week when the pumps were serviced in the pit.

11. After mining ceased, such material would have to arrive at the bottom in a portion of the pit where access to the base of the walls was not blocked by large pools of water.

While it has been determined that there existed serious "fall of ground" safety hazards to miners contributed to by the two violations, it is also concluded that there was not established a "reasonable likelihood" that the hazards contributed to would result in an injury. Accordingly, both violations are found not to be significant and substantial.

G. Final Modifications

Since Citation No. 3459560 has been found not to be "Significant and Substantial," it does not meet the requirements of Section 104(d)(1) of the Act. Accordingly, its nature shall be modified to delete this special finding and to show issuance under Section 104(a) of the Act.

Since Citation No. 3459560 as originally issued was the underlying Section 104(d)(1) Citation for Section 104(d)(1) Withdrawal Order No. 3645243 [33], its modification to a Section 104(a) Citation results in there no longer being the prerequisite foundation in the 104(d)(1) scheme for Order No. 3645243. Since Order No. 3645243 has also been found not to be "Significant and Substantial," it lacks the prerequisite elements for a 104(d)(1) Citation, and it also is to be modified to a Section 104(a) Citation. See Mettiki Coal Corporation, 13 FMSHRC 760, 764 (May 1991); Consolidation Coal Company, 4 FMSHRC 1791 (October 1982).

H. Penalty Assessment

Cyprus is the owner and operator of a large open pit molybdenum mine located in the vicinity (Ex. P-12) of Tonopah, Nevada. Cyprus is a large mine operator (Stipulation, Court Ex. 1) which had a history of 34 previous violations (Ex. P-27) including the two similar violations cited on May 31, 1989, and June 1, 1989, discussed in detail herein. Payment of penalties will not affect Cyprus's ability to continue in business (Court Ex. 1). Cyprus, after notification of the violations, proceeded in good faith to promptly abate the same. (III-T. 159).

Although neither violation has been found to be "significant and substantial" within the special meaning in mine safety law of this legal term of art, both violations are found to be serious in view of the hazard found to have been posed by them and the potential for serious injury to miners had the hazard come to fruition.

In view of the frequency of the occurrence of the problem, first discovered during a CAV inspection, subsequently cited in May and June of 1989, and again cited during the subject inspection by Inspector Ellis, and the mine operator having been warned about the situation by MSHA's representative Mr. Breland, I have concluded that both violations resulted from Cyprus's continuing (see I-T. 188-193, 195) unwarrantable failure to comply with the pertinent standards and here conclude that Cyprus exhibited a considerable degree of culpability in the commission of the two infractions.

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[33] See Exhibit P-1, 1st Ellis Modification of Order 3645243 dated 3-1-90.

Accordingly, a penalty of $1000 is assessed for Citation No. 3459560 and a penalty of $1000 for Citation No. 3645243.

ORDER

1. Citation No. 3459560 is MODIFIED to change the "Gravity" designation in Section 10 A thereof from "Reasonably Likely" to "Unlikely," to delete the "significant and substantial" designation in Section 10 C thereof, and to change the issuance authority thereof from Section 104(d)(1) of the Act to Section 104(a).

2. Order No. 3645243 is MODIFIED to change the "Gravity" designation in Section 10 A thereof from "Reasonably Likely" to "Unlikely," to delete the "Significant and Substantial" designation in Section 10 C thereof, and to change its nature and issuance authority from a Section 104(d)(1) order to a Section 104(a) Citation.

3. Contestant/Respondent Cyprus shall pay to the Secretary of Labor within 30 days from the date of issuance of this decision the total sum of $2000 as and for the civil penalties above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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SEP 25 1991

ARCH OF KENTUCKY, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 91-16-R
	:	Order No. 3384076; 9/13/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 37 Mine
	:	Mine ID 15-04670
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-167
	:	A.C. No. 15-04670-03634
v.	:	No. 37 Mine
ARCH OF KENTUCKY, INCORPORATED, Respondent	:	

DECISIONS

Appearances: Mary Sue Taylor, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Respondent/Petitioner;
Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for the Contestant/Respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of civil penalty filed by the Secretary of Labor (MSHA), against the respondent mine operator (Arch of Kentucky, Inc., hereafter referred to as Arch), 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 $1,000, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.316 (Docket No. KENT 91-167). Docket No. KENT 91-16-R, concerns a Notice of Contest filed by Arch challenging the legality and propriety of the violation.

The contested citation and order were consolidated for hearing in Pikeville, Kentucky, and the parties appeared and presented testimony and evidence with respect to the alleged violation. Subsequently, the parties informed me that they

settled the cases, and they filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. 2700.30, seeking approval of the proposed settlements.

Stipulations

The parties stipulated in relevant part as follows (Tr. 5-6):

1. The contestant/respondent is a large mine operator.

2. The contestant/respondent is subject to the jurisdiction of the Act and the presiding administrative law judge.

3. Payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

4. The mine ventilation plan required 38,000 cubic feet of air per minute on the longwall face on September 13, 1990, and it also mentions other air quantities. The plan did not specify a location for taking face air readings.

Discussion

The alleged violation of mandatory safety standard 30 C.F.R. § 75.316, is stated as follows in the initial section 104(d)(1) Order No. 3384076, issued by MSHA Inspector James W. Poynter on September 13, 1990:

> The approved ventilation and methane and dust control plan was not being fully complied with on the G-2 (004) longwall section. An air measurement taken with a calibrated anemometer, at the No. 66 shield, indicated that 29,858 cfm of air was coursing across the longwall face. The approved plan stipulated that 38,000 cfm of air will be maintained on the longwall face.

In the course of the hearing, MSHA's counsel stated that the contested order was subsequently modified to a section 104(d)(1) citation (Tr. 10-11). As a result of the settlement discussions by the parties following the hearing, the citation has been further modified to a section 104(a) citation, with special significant and substantial (S&S) findings. Further, the proposed civil penalty assessment of $1,000, has been reduced to an assessment of $500, which Arch has agreed to pay.

In support of their proposed settlement, the parties have submitted additional information with respect to negligence and gravity, and I take note of the fact that abatement was achieved within approximately one hour when the air current across the longwall face was increased to 38,768 cfm of air. The record reflects that the decreased air on the section was caused by a blockage of the tailgate area by a piece of rock. The parties agree that the mine had some problems with rock falls in the tailgate area, and that the foreman discussed the decreased air situation with his crew and that they all agreed that in their opinion the safest way to remove the rock was to take additional cuts of coal along the longwall face. Under these mitigating circumstances, the parties further agree that the unwarrantable failure notice should be modified to a section 104(a) citation.

Conclusion

After careful review of the entire record in this case, including the posthearing arguments submitted by the parties in support of the proposed settlement, I conclude and find that the settlement is reasonable and in the public interest. Accordingly, IT IS APPROVED.

ORDER

IT IS ORDERED THAT:

1. Docket No. KENT 91-167. The modified section 104(a) "S&S" Citation No. 3384076, September 13, 1990, charging a violation of mandatory safety standard 30 C.F.R. § 75.316, IS AFFIRMED.

   The respondent Arch of Kentucky, Inc., IS ORDERED to pay a civil penalty assessment of $500 for the violation, and payment shall be made to MSHA within (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

2. Docket No. KENT 91-16-R. In view of the approved settlement of the civil penalty case, the contest filed by Arch of Kentucky, Inc., is deemed to be withdrawn, and IT IS DISMISSED.

George A. Koutras
Administrative Law Judge

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SEP 20 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-36-M A.C. No. 41-00267-05520
v.	:	Laura Todd Pit and Plant
FEATHERLITE BUILDING PRODUCTS CORPORATION, Respondent	:	

AMENDMENT TO CORRECT CLERICAL ERROR IN DECISION

Before: Judge Cetti

The decision dated December 13, 1990, at 12 FMSHRC 2580 (Dec. 1990) is **AMENDED** to approve the penalties assessed by MSHA for three citations that were accepted and paid by Respondent without formal litigation or approval.

The Parties, through their respective representatives, have now filed and requested approval of a settlement agreement pursuant to Section 110(k) of the Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 30 U.S.C. § 801-960, (the Act). The parties by their settlement agreement seek a formal order approving the full amount of the penalties assessed by MSHA and paid by Respondent as follows:

Citation No.	Standard 30 C.F.R. §	Assessment	Disposition Settlement
03276702	56.12032	$ 276	$ 276
03276704	56.12032	$ 276	$ 276
03276459	56.12016	$1000	$1000

I have reviewed these three citations in light of the six statutory criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 810(i), and find that the penalties assessed are in accordance with the provisions of the Act.

Accordingly, I approve the above-mentioned penalty assessments and, the operator having paid, these penalties in addition to the $7,000 penalty assessed for the other three citations that were fully litigated, this case is and remains **DISMISSED.**

August F. Cetti
Administrative Law Judge

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SEP 27 1991

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

DECISION

Appearances: Michael Dinnerstein, Esq., and Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for the Complainants;
John Graykowski, Esq., and Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., for the Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission on May 9, 1991, and upon subsequent reassignment for further proceedings to determine (1) whether "good cause" exists for the Complainants failure to have presented to the judge then presiding, their excuses for the untimely filing of their complaint for compensation, and, if so, (2) whether there is "adequate justification" for the late filing of their complaint and, if so, (3) whether the Respondent has suffered "material legal prejudice" from the delay.

A thorough analysis of the law regarding these issues and a detailed procedural history of the case is provided in the Commission's decision and need not be restated herein. It is sufficient for purposes of this decision to note that on April 17, 1990, the Department of Labor, Mine Safety and Health Administration (MSHA), issued to the Island Creek Coal Company (Island Creek) an imminent danger withdrawal order and a related citation alleging dangerous concentrations of methane in its VP-3 Mine. By letter dated October 29, 1990, and received by the

Commission on November 2, 1990, Roy Farmer, identifying himself as a miner's representative, filed a "request for compensation per Section 111 of Coal Mine Safety and Health Act of 1977." [1]/

Commission Procedural Rule 35, 29 C.F.R. § 2700.35 provides as follows:

> A complaint for compensation under section 111 of the Act, 30 U.S.C. 821 shall be filed within 90 days after the commencement of the period the complainants are idled or would have been idled as a result of the order which gives rise to the claim.

As the Commission noted in its decision, Mr. Farmer's complaint, submitted to the Commission more than 6 months after the issuance of the imminent danger order, is silent as to reasons for the late filing. On November 28, 1990, Island Creek filed its answer asserting that the complaint "must be dismissed because it was not filed within the period required by Commission Rule 35". On November 30, 1990, Island Creek also filed a motion to dismiss arguing that the Complaint was late filed and that no excuse was offered for the untimeliness. There is no evidence that the Complainants ever responded to the dismissal motion. As noted by the Commission, its procedural rules provide a party 10 days after the date of service, plus 5 additional days for a document served by mail, to file a statement in opposition to a motion. 29 C.F.R. § 2700.8(b) and § 2700.10(b). In this instance then the Complainants' 15-day period for filing a response ended on December 17, 1990.

Subsequently on December 20, 1990, the presiding judge issued his order of dismissal noting representations that the complaint was filed 198 days after the date of the alleged entitlement and that Rule 35 requires filing within 90 days after that entitlement. Referencing the late filing and Complainants failure to respond to the motion or to offer any justification for the late filing, the judge granted the motion and dismissed the proceeding. Subsequently, based in part upon excuses advanced in a petition for review filed with the Commission on January 4, 1991, the Commission remanded this case to give the Complainants an additional opportunity at an evidentiary hearing to present "good cause" and/or "adequate justification" for the untimely filing of its Complaint and its failure to have responded to the motion to dismiss.

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[1]/ The action herein would come within Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act."

At evidentiary hearings on August 22, 1991, Mr. Farmer clearly established that even before the Motion to Dismiss was filed in this case, he made reasonable efforts to obtain copies of the Commission Rules of Procedure from both this Commission and the Department of Labor, but without success. These rules, as previously noted, provide time frames and guidance for opposing a motion such as the Motion to Dismiss at issue herein. Mr. Farmer also testified credibly that he thought he would be given an opportunity to present the reasons for his late filing at an oral hearing, and that he was unaware of a requirement for a written response. Under the circumstances, I find that good cause does indeed exist for Complainants' failure to have filed a written response to the Motion to Dismiss or to have otherwise timely presented their excuses for the late filing of their complaint.

The Complainants have also furnished adequate justification for the late filing of their complaint. The credible evidence establishes that their representative, Mr. Farmer, was indeed ignorant of the filing requirements for compensation claims. Moreover, while it is true that Farmer's educational background would suggest that he should be held to a higher standard, compensation proceedings under the Act are relatively rare and, from the mere fact of his having a college degree in business administration and that he was "reading the law" for the Virginia Bar, it cannot reasonably be inferred that he should have had or should even be expected to have such esoteric knowledge.

In addition, there is sufficient credible evidence in the record to conclude that Farmer did converse with Mine Manager Eddie Ball about the issue of compensation and that Ball at the very least advised Farmer that nothing would be done about compensation until the contest of the underlying citation was resolved. I also find from the credible evidence that Mr. Farmer did contact officials from the Federal Mine Safety and Health Administration within the 90 day deadline but was not provided sufficient information to file a timely complaint with this Commission. From these circumstances alone, I find that "adequate justification" exists to excuse the late filing herein. I further find that there is insufficient evidence of "legal prejudice" to otherwise warrant dismissal of these proceedings.

Under the circumstances the Motion to Dismiss is denied and this case may now proceed on the merits.

Gary Melick
Administrative Law Judge

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SEP 30 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-286
	:	A.C. No. 46-01452-03773
v.	:	
	:	Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) requesting the imposition of a civil penalty for an alleged violation of 30 C.F.R. § 75.517. The Operator (Respondent) filed an answer, and pursuant to notice, the case was heard in Morgantown, West Virginia on August 28, 1991. Lynn Arthur Workley, and Michael J. Kalich, testified for Petitioner. Harold W. Moore, Jr., and Kevin D. Dolinar, testified for Respondent. The parties waived their right to submit a written brief, and in lieu thereof, at the conclusion of the hearing, presented closing arguments.

Findings of Fact and Discussion

On January 17, 1991, while inspecting the 1-R section at Respondent's Arkwright No. 1 Mine, Lynn Arthur Workley, an MSHA inspector who is also a certified underground electrician in Ohio, observed a split outer jacket on a cable that supplies power to a continuous mining machine ("miner"). At the hearing, Respondent indicated that it stipulates to the violation. Based upon the stipulation as well as the evidence presented at the hearing, I find that Respondent herein did violate Section 75.517 supra as alleged.

The cable at issue contains three phase conductors, 2 ground wires, and a pilot wire. It supplies approximately 1000 volts from the power center to a miner. The cable is protected by a jacket, approximately a quarter of an inch thick, which completely envelopes the cable. In addition to physically protecting the conductors, ground, and, pilot inside the cable, the jacket also serves to keep out water, dust, and oil. The only defect to the cable in question when observed by Workley, was that it had a longitudinal gash or split a few inches long. Workley, was able to see the conductor shield below the jacket but could not estimate the width of the split. Harold W. Moore, Jr., Respondent's safety escort who accompanied Workley testified that the width of the split was less than an inch. Inasmuch as his testimony in this regard was not impeached or rebutted it is accepted.

Each of the phase conductors in the cable is covered with insulation and physically protected by a shield made up of braided copper and cotton. When observed by Workley, there was no evidence of other damage to the jacket aside from the split, and there was no evidence of damage to the conductor shield. The condition was abated by sealing the jacket with tape. Essentially, it is the opinion of both Workley and Michael G. Kalich, an MSHA electrical inspector who has taught courses in electricity, and is a certified electrician for medium high and low voltage, that the violation herein is significant and substantial since, there was a reasonable likelihood of a serious injury with continued mining operations. For the reasons that follow, I conclude that it has not been established that the violation herein is significant and substantial.

In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the recent Decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917).

The record establishes, as discussed infra, a violation of a mandatory safety standard, and that the violation herein, i.e. the split in the jacket, did contribute somewhat to the hazard of exposure to abrasion of the inner shield and insulation. Such abrasion could destroy the integrity of the shield and insulation which could possibly lead to a ground fault or leakage of voltage. This could possibly cause injury, should one come in contact with the exposed portions of the cable or equipment, which could be affected by the ground fault. Accordingly, the record establishes the first two elements of the Mathies formula.

However, the record fails to establish the third element i.e. a reasonable likelihood that the hazard contributed to will result in an injury, which requires that the Secretary establish "a reasonable likelihood that the hazard contribute to would result in an event in which there is injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Essentially, according to Workley, inasmuch as the integrity of the cable jacket has been breached by the split in question, continued normal use of the heavy cable by dragging it around corners and against edges of equipment, will cause abrasion, which, over time, will damage the insulation of the conductors. However, such damage is possible only in the event that the split in question would not have been found and corrected. There is nothing in the record to support such a conclusion. To the contrary, Respondent had provided its miner operators with instructions to look for "cuts, breaks, bare wires, and bad

splices in cable" (sic) and to notify a foreman or mechanic if any damage is found (Exhibit 0-1).

Kalich opined that since the jacket was subject to sufficient stress to create a split in it, it is reasonably likely that some damage occurred to the wires inside the cable, inasmuch as the insulation material of the conductors is not as strong as the jacket. However, there is no evidence that such did occur. Workley in this regard indicated that there was no evidence of damage aside from the split in the jacket.

According to Kalich, even though the insulation on the conductors is intact, if a conductor's shield is not intact, a person touching it could be subject to up to 600 volts as a result of a corona[1] which normally is grounded. Kalich was asked how a break in the shield would occur in normal mining. He said that" ... it could be an improperly repaired place in the cable ... . And that would be normally what you would expect, you know, if you would find that condition, that's what would happen" (Tr.56). He was asked if this is a comon occurrence and he said that he had found a "few" cables that had not been properly repaired, and the shield had not been replaced (Tr. 56). There is nothing in the record to indicate there was any likelihood a splice would not be properly repaired. Due to Dolinar's work experience and education, having a Bachelor's degree in electrical engineering, I place more weight upon his opinion that a corona is of concern only if 4,000 to 5,000 volts are present. In contrast, in the instant case, the voltage supplied by the cable is only approximately 1,000 volts.[2]

Kalich testified to a hazard of leakage of electricity to the shields, and that contact with 0.05 amps could cause shock, and contact with 0.1 amps would cause death. He indicated if a person touches a shield to which electricity had leaked, an injury could occur, as the person may suffer burns. He also opined that due to electrical shock, a peson might jump or fall onto moving equipment. However, any hazard created is mitigated by the fact that the electrical system in question is protected by circuit breakers that cut off power at 4 to 5 amps. Also, due to the grounding system present, the amount of leakage is limited to 40 volts which is the maximum allowed by MSHA. It is Respondent's position, as testified to by Kalich, that if the breakers were not set or did not function properly, their protection would be nullified and a hazard would result. There is no evidence that the breakers were in any way defective.

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[1] Current which is induced.

[2]According to Dolinar, the shielding "attempts" to distribute the voltage equally among the three conductors. (Tr. 123)

Kalich indicated essentially that defects to breakers could occur in normal mining, and that in his expereince "probably" five out of 100 breaken tested do not work properly (Tr. 52). This evidence is insufficient to establish that there was a reasonable likelihood that the breakers herein would fail with continued mining.

Kalich also testified that since the breakers were set for 4 to 5 amps, a leakage of a lesser amount could result. He indicated that, in such an event, should a person contact equipment attached to the electical system at issue, an injury could result, especially if the person is wet, as his resistance would be less. In this connection, Kalich indicated that in normal mining conditions the environment would be wet, as the continuous miner would normally be sprayed with water.

According to Dolinar, even a leakage of up to 4 amps would not create any danger to a person coming in contact with an exposed shield. He indicated that the grounding system insures that no more than 40 volts would he present in exposed equipment or shields. As such, according to Dolinar, there would be insufficinet force to push a current of 4 Amps into a person considering the person's resistance. In this connection he indicated that a ground path with only 1 ohm of resistance is available. In contrast, the resistance to electricity of an average dry person is measured in the range of 50,000 to 75,000 ohms. He testified that even soaking wet and standing in a puddle of water the resistance of a human body would be at least 1,000 ohms.

I accept this testimony of Dolinar, inasmuch as in the main it was not rebutted or impeached. Also mitigating any hazard is the fact that the conductors are tied to the ground wire, and are grounded together providing further protection. Although, as indicated by Dolinar on cross examination, if the jacket becomes loose it will affect the connection between the ground and the conductors in the area of looseness, there is no evidence that it is reasonably likely that the jacket will become loose. Also, although the system could break down if the breakers are set improperly, if the ground wire breaks, or if the breakers do not trip, there is insufficient evidence to conclude that these events are reasonably likely to occur.

For all these reasons, I conclude that it has not been established that there was a reasonable likelihood that the hazard of an electrical shock contributed to by the violation herein would result an event in which there is an injury. Accordingly, I conclude that it has not been established that the violation herein is significant and substantial.

Petitioner has not adduced any evidence with regard to Respondent's negligence. Taking this into account, as well as

the gravity of the violation, and the remaining statutory factors, I conclude that a violation of $50 is appropriate for the violation found herein.

ORDER

It is **ORDERED** that Citation No. 3315922 be amended to reflect the fact that the violation cited therein was not significant and substantial. It is further **ORDERED** that Respondent shall, within 30 days of this decision, pay $50 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 13 1991

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

ORDER GRANTING IN PART AND DENYING IN PART CONTESTANTS' MOTIONS TO COMPEL, AND DIRECTING THE SECRETARY TO SUBMIT DOCUMENTS FOR IN CAMERA INSPECTION

On July 26, 1991, Contestants Kentucky Carbon, et al., filed a motion for an order to compel the Secretary of Labor to produce 67 documents which she claims are privileged and therefore not subject to discovery. In the alternative, Contestants request that the Secretary be required to produce the documents for an in camera inspection by the court. A memorandum was filed in support of the motion. On July 26, 1991, Contestants Andalex Resources, Inc., et al., filed a similar motion and relied on the arguments advanced on behalf of Kentucky Carbon, et al. Contestants' position is that the Secretary has failed to meet her burden of justifying her claim of privilege with respect to all of the documents. The Secretary filed an opposition to the motions on August 9, 1991. She agrees to an in camera inspection if I am unable from the document description to determine the validity of the privilege asserted.

On August 13, 1991, Contestants Great Western Coal, Inc., and Harlan Fuel Company, filed a motion to compel, joining in the motion of Kentucky Carbon, et al., and filing a memorandum of law. Great Western requested that the motions be scheduled for oral argument.

On August 19, 1991, Contestants Horn Construction Co., Inc., et al, filed a motion to compel, joining in the motions filed by Kentucky Carbon, et al., and Great Western Coal Co., et al.

On August 9, 1991, the Secretary filed an Opposition to the Motion of Kentucky Carbon, et al., to Compel Discovery and filed a Memorandum of Law in Support of the Opposition. On August 26, 1991, she filed a Memorandum in Support of her opposition to the Motion of Great Western to compel discovery. On August 21, 1991, Contestants Kentucky Carbon, et al., filed a Reply Memorandum. On August 22, 1991, I ordered the Secretary to reply to the contention in the Motions to Compel, that the privileges must be formally asserted by the agency head after personal consideration

of the documents for which privilege is claimed. On August 30, 1991, the Secretary filed an affidavit of Edward C. Hugler, Deputy Assistant Secretary for Mine Safety and health, U.S. Department of Labor. Secretary Hugler formally asserted the "deliberative" privilege with respect to certain documents, the "investigative" privilege with respect to others and, the attorney-client privilege with respect to yet others. He concurred with the assertion of the work product privilege made by the Solicitor of Labor. He also decided not to assert a privilege with respect to certain documents for which privilege was originally claimed.

Attached to Secretary Hugler's affidavit is an affidavit of Robert A. Thaxton, Supervisory Industrial Hygienist for MSHA, and an agent of Federal grand juries investigating allegations of the alteration of coal dust samples. He reviewed certain documents for which privileges have been claimed and asserts that release of those documents would reveal potential targets of criminal or civil investigations, the investigative techniques being utilized, or grand jury proceedings. Thaxton's affidavit provides additional descriptions of documents 326, 327, 328, 350, 353 and 406.

The affidavit of Secretary Hugler was stated to have been filed in accordance with my order of August 22, and is intended to supplement the Secretary's opposition to the Motion to Compel.

Contestants Great Western, et al., filed a reply to the Secretary's opposition on September 13, 1991.

I

PLAN AND SCHEDULE OF DISCOVERY

On June 21, 1991, the Secretary, in compliance with the Prehearing Order Adopting the Amended Plan and Schedule of Discovery, provided Contestants with a list of 406 documents which she revised on July 8, 1991, to include 425 documents. Of the 425, she claims that 67 are privileged and therefore not subject to discovery. On July 29, 1991, the Secretary filed an amended Generic and Privileged Document List, adding two documents to the privileged list. Contestants filed an additional Motion to Compel production of these documents, and the Secretary filed an opposition thereto.

II

DISCOVERY AND PRIVILEGE

Under Commission Rule 55(c), 29 C.F.R. § 2700.55(c), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all

relevant material not privileged is subject to discovery. The Commission and the Federal Courts have broadly construed the discovery rule to include relevant material, and conversely, have narrowly construed the claim of privilege. Hickman v. Taylor, 329 U.S. 495 (1947); Secretary/Logan v. Bright Coal Co., Inc., 6 FMSHRC 2520 (1984). The burden is on the party claiming that relevant material is not subject to discovery because of privilege. In re: Sealed Case, 676 F.2d 793 (D.C. Cir. 1982). As contestants further point out, even if the Secretary has properly asserted a privilege, the material may be subject to discovery "where disclosure is essential to a fair determination of the case."

The Secretary claims that the documents involved here are not subject to discovery because they are covered by (1) the deliberative process privilege; (2) the investigative file privilege; (3) the attorney-client privilege; (4) the attorney work product privilege, and, with respect to certain documents, by more than one of the privileges. She also asserts that some of the documents are subject to Rule 6(e) of the Federal Rules of Criminal Procedure prohibiting disclosure of grand jury information.

Rule 501 of the Federal Rules of Evidence provides that "[e]xcept as otherwise required by the Constitution . . . or provided by Act of Congress, or in rules prescribed by the Supreme Court [i.e., Rule 26(b) FRCP] . . . , the privilege of a witness, person, government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Therefore questions of privilege in cases before the Commission must be determined in the light of Federal Court case law, which may arise in connection with discovery disputes or in suits brought to enforce disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

Contestant Great Western argues that the Government's claim of privilege may only be asserted by a formal claim of the agency head supported by affidavit. In the reply memorandum of Kentucky Carbon, et al., Contestants contend that the claim of privilege in this case may only be asserted by Secretary of Labor Lynn Martin after her personal consideration of the documents in question.

The case of U.S. v. Reynolds, 345 U.S. 1 (1953), involved an assertion of privilege based upon national security interests in a military aircraft accident report. The Supreme Court held that in such a case "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter [here the Secretary of the Air Force], after actual personal consideration by that officer." Id. at 7-8. Two cases from the District Court of Delaware, Pierson v. United States,

428 F.Supp. 384 (D.Del. 1977) and Coastal Corp. v. Duncan, 86 F.R.D. 514 (D.Del. 1980) held that "executive privilege" (including the deliberative and investigative privileges) may be asserted only by the responsible agency head (the Commissioner of Internal Revenue and the Secretary of Energy in the two cases). The latter case also considered the attorney-client privilege and the work product privilege although they were asserted by Department of Energy attorneys. United States v. O'Neil, 619 F.2d 222 (3rd Cir. 1980) involved an administrative subpoena duces tecum issued by the United States Civil Rights Commission upon the Commissioner of the Philadelphia police department for certain records. Privilege was asserted orally by the city Solicitor based on claims of the Fifth Amendment privilege against self-incrimination, attorney-client and work product privileges and police officers' due process rights. The privilege was rejected because it was asserted orally, because it was not invoked by the head of the department, and because it was "a broadside invocation of privilege. . ." In the case Mobil Oil Corp. v. DOE, 520 F.Supp. 414 (N.D. N.Y. 1981), the court stated that the department head may delegate the assertion of executive privilege, "but only to a subordinate with high authority," and then only after the head of the agency has issued "guidelines on the use of the privilege." Id. at 416.

In Fowler v. Wirtz, 34 F.R.D. 20 (S.D. Fla. 1963) the Court held that where the authority to make policy decisions relating to suits under the Labor Management Reporting and Disclosure Act was vested solely in the Secretary of Labor, the Secretary was required to file a formal claim of privilege against disclosure of governmental informers.

In the Bright Coal Co. case, supra, the Commission stated at page 2523:

> There is authority for the proposition that the privilege (informant's privilege) can be invoked only through the filing of a formal claim of privilege and confidentiality by the head of the department with control over the matter, supported by affidavits attesting to facts sufficient to allow an independent judicial determination that the privilege exists . . . [cases]. The great weight of case law concerning the privilege, however, addresses and disposes of the issue without focusing on whether the privilege was 'formally' raised.

In a more recent case, Secretary v. Asarco, 12 FMSHRC 2548 (1990), the Commission considered assertions of informant's privilege, attorney-client privilege and work product privilege raised by the Secretary's trial counsel, and did not hold that

the privileges could only be invoked by the Secretary of Labor personally.

Because discovery of relevant material is favored, and a claim of privilege is narrowly construed, it is essential that privilege not be lightly claimed. Whatever the formalities required, its assertion must be made by a responsible governmental official. In a suit for damages for an alleged illegal eavesdropping operation by the FBI, plaintiff sought to discovery FBI files. Executive privilege was claimed and an affidavit by the Attorney General who had not personally considered all the documents, together with an offer to produce the documents for in camera inspection by the court was held sufficient. Black v. Sheraton Corp., 564 F.2d 531 (D.C. Cir. 1977). The Court said at page 545:

> Even if the affidavit . . . was too imprecise to be used in a final determination of the scope of the privilege, it was adequate to reserve for the government an opportunity to interpose specific objections with respect to individual documents before their production was ordered. In our view the proper course would have been for the District Court to have accepted the proffered file for in camera inspection.

I take official notice that the Secretary of Labor is involved in a large number and variety of regulatory and enforcement matters. She may be a party at a given time in hundreds of proceedings in the courts and before administrative agencies. To require that she personally consider all the documents in these cases and invoke privileges such as are claimed in this administrative proceeding is in my opinion neither practical nor necessary. I hold that the claim of executive privilege invoked here by a high level official of the Department of Labor who has direct responsibility for the matters involved after personal consideration of the documents, is sufficient formal claim of privilege when coupled with the Secretary's offer to submit the documents (except those for which grand jury immunity is claimed) for in camera inspection.

The request for oral argument on the motions is DENIED.

III

DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege is unique to the government. It seeks to insure that government agency subordinates will feel free to provide their superiors with uninhibited recommendations and opinions and to protect against

premature disclosure of policies under consideration. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). The documents in question must be "predecisional," NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975), and must indeed be deliberative. The agency has the burden of establishing the deliberative quality of the document. Id., at 868. The Sears Roebuck case was a suit under the Freedom of Information Act for disclosure of documents, rather than a discovery issue in a pending lawsuit, but the principles are the same: See Environmental Protection Agency v. Mink, 410 U.S. 73, 91: "Exemption 5 [of FOIA] contemplates that the public's access to . . . memoranda will be governed by the same flexible common sense approach that has long governed private parties discovery of such documents involved in litigation with government agencies." See also **2 Weinstein's Evidence** § 509.

Factual material contained in deliberative memoranda is not privileged from discovery by private parties in litigation with the Government. Environmental Protection Agency v. Mink, supra, Schwartz v. Internal Revenue Service, 511 F.2d 1303 (D.C. Cir. 1975). Memoranda prepared by consultants, not Government employees, recommending for or against proposed Government action may be part of the deliberative process of the agency and protected from disclosure. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert denied, 410 U.S. 926 (1972).

IV

INVESTIGATIVE FILE PRIVILEGE

Documents which are claimed to be privileged by a government agency because contained in investigatory files must not only be shown to have been prepared in the course of an investigation, but the agency must establish that disclosure would interfere with enforcement proceedings. Coastal States Gas Corp., supra. Where there is no prospect of law enforcement proceedings, Bristol Myers Col v. Federal Trade Commission, 424 F.2d 935 (D.C. Cir. 1970), cert denied, 400 U.S. 824 (1970), or where the government's regulatory action has already been taken, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), the materials are not privileged.

V

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest privilege known to common law. **Weinstein**, supra, § 503[02]. It protects from discovery communications from client to attorney (including communications from a Government agency to a Government attorney) and communications from the attorney to the client. Coastal

States Gas Corp., supra. Confidentiality must be maintained at the time of the communication and subsequently. Disclosure to an outside party will waive the privilege. Despite its venerable and honored state, it is, like all privileges, "narrowly construed and . . . limited to those situations in which its purposes will be served." Coastal States Gas Corp., at 862. The privilege is based on the assumption that it encourages clients to make the fullest disclosure to their attorneys, enabling the latter to act more effectively as officers of the Court. Upjohn Co. v. United States, 449 U.S. 383 (1981).

The privilege is limited to communications and focuses on the attorney-client relationship. Information other than communications between attorney and client is not covered by the privilege. In re: Sealed Case, at 808.

VI

THE ATTORNEY WORK PRODUCT PRIVILEGE

The attorney work product privilege first set out in the Supreme Court case of Hickman v. Taylor, and later in Rule 26(b)(3) FRCP is in one sense broader than the attorney-client privilege in that it protects from disclosure materials not constituting attorney-client communications. It includes materials gathered by or prepared by an attorney. In another sense, it is narrower because it applies only to work and materials performed or assembled in anticipating of litigation. Hickman v. Taylor, supra; Coastal States Gas Corp., supra; In re: Sealed Case, supra.

Its rationale is not protection of the client's interest, but rather "both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share." In re: Sealed case, at 808-9. The attorney work product privilege is applicable to Government attorneys and includes "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." NLRB v. Sears Roebuck & Co., at 154. Jordan v. United States Department of Justice, 591 F.2d 753 (D.C. Cir. 1978). It may include materials prepared or gathered by others and assembled in the work files of an attorney. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 462 (E.D. Mich. 1954): ". . . work files of an attorney, assembled in preparation for a lawsuit, are protected against deposition-discovery provisions of the Federal Rules of Civil Procedure . . . even though the materials were gathered by FBI investigators." The "documents must presently be part of the work files of an attorney before they are entitled to the protection of the work product rule." Id. at 465. A party seeking disclosure of such documents may obtain it "upon a showing that the party . . . has substantial need of the

materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3). An order to disclose factual work product materials must "protect against disclosure of the mental impressions, conclusions, opinions, or legal themes of an attorney . . . " Id.

The Commission has held in Asarco, supra, that the work product rule may apply even to documents not prepared by or for an attorney, so long as they are prepared because "of the prospect of litigation."

VII

GRAND JURY SECRECY

Rule 6(e)(2) of the Federal Rules of Criminal Procedure generally prohibits the disclosure of matters occurring before the grand jury. As the Secretary notes, this prohibition extends not only to testimony before the Grand Jury but also to names of witnesses and identity of documents before the grand jury. Contestants Great Western, et al., contend that Rule 6(e) is totally inapplicable to documents not in the actual possession of the grand jury and therefore is an inappropriate basis for objection.

Because I have found the documents claimed subject to grand jury secrecy privileged on other grounds, I need not decide at this time whether the Secretary has properly invoked Rule 6(e) of the Fed. Rules of Criminal Procedure mandating secrecy for grand jury documents.

VIII

QUALIFIED PRIVILEGES

Except for the attorney-client privilege and the rule mandating grand jury secrecy, all the privileges involved in this proceeding are qualified privileges. Therefore, even if the privilege is properly invoked, disclosure may be ordered if the needs of the party seeking disclosure outweigh the interests served by the privilege. Committee For Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971), cert denied, 404 U.S. 917 (1971); Logan, 6 FMSHRC at 2526. Therefore, I must decide whether the Contestants have shown that they require the withheld documents in order to fairly and adequately prepare for trial in these proceedings, and if they do, whether this requirement is of greater importance than the Government's interest in keeping the documents secret.

Contestants allege that the documents withheld directly relate to the central issue of the litigation, that they are

exclusively in possession of the government, and that they consist largely of factual material. I must consider these contentions with respect to each document for which I uphold the claim of privilege to determine whether Contestants' need for the documents in the preparation of their cases outweighs the policies behind the privilege against disclosure. The burden of proof on this issue rests with Contestants.

IX

SECRETARY'S CLAIM OF PRIVILEGE UPHELD

In applying the foregoing principles to the documents claimed to be privileged among the listed documents provided in the Secretary's Amended Generic and Privileged Document List, I have determined that the Secretary's claim of privilege was properly invoked with respect to the following documents. I conclude that her description of these documents, while somewhat cryptic and lacking in detail, is sufficient for me to determine that the documents fit the privilege asserted.

Document 3. Letter from Warren Myers, Ph.D. [apparently a consultant] to MSHA regarding draft of the report [Document 1]. The deliberative process privilege includes memoranda prepared by consultants to agency personnel concerning proposed Government Action. See Wu v. National Endowment, supra. The document is privileged as part of the deliberative process of the Agency.

Document 4. Summaries of investigative work conducted on AWC's by West Virginia University and Pittsburgh Health Tech Center. I am upholding the privilege based on the deliberative process, which the document clearly fits, but not the claim of attorney work product since there is no showing that the summaries were prepared by or for Government attorneys, were part of the attorney work files, or prepared in anticipation of litigation. See United States v. Kelsey-Hayes, supra; Asarco, supra.

Document 5. Draft Report titled, Investigation of Dust Deposition Patterns on Respirable Coal Mine Dust Samples. I uphold the claim of privilege based on the deliberative process but not on the attorney work product for the same reasons as given for Document 4.

Document 17. Note to File from Assistant U.S. Attorney setting forth phone conversation with coal operators' attorney. The claim of privilege based on the attorney-client relationship is upheld. The note is to a file in MSHA's (the client's) possession.

Document 56. Letter from Associate Solicitor DOL and Assistant Secretary DOL to U.S. Attorney. This document is

clearly a communication from client to attorney, and as such is privileged.

Document 111. Page 9119 of a memorandum from MSHA District Manager to MSHA Chief Division of Health containing notes of Ronald Franks concerning an investigative program being developed involving other potential violations of the dust sampling program. I uphold the claim of privilege as being part of an investigative file and not as attorney work product.

Document 113. Draft of a letter from U.S. Attorney to Peabody Coal Company with handwritten notes said to reveal deliberations and thought processes of U.S. Government Attorneys. I uphold the claim of privilege. The document appears to be part of the work product of a government attorney.

Document 119. MSHA internal memo concerning AWC investigation including information prepared for the Secretary reflecting opinions of Agency officials. I uphold the Secretary's claim based on deliberative process privilege.

Document 130. Letter from U.S. Attorney to MSHA concerning criminal investigation. The document is privileged as an attorney-client communication.

Document 131. Memorandum for the Secretary from the Assistant Secretary dated April 12, 1991, concerning potential agency action subsequent to the citations. The document is protected as part of the deliberative process. (It is not shown to be part of the attorney work product).

Document 132. Memorandum from Associate Solicitor DOL to Deputy Solicitor concerning criminal matters in AWC cases. The document is protected as part of the attorney work product.

Document 133. Memorandum from Assistant Secretary to Acting Secretary concerning criminal matters involving AWCs. The claims of privilege based on the deliberative process and investigative files are upheld.

Document 134. Memorandum from MSHA Chief Office of Investigation to Supervisory Special Investigator concerning data for U.S. Attorney. The privilege based on the document being part of an investigative file is upheld.

Document 135. Memorandum for MSHA District managers titled "Special Investigation" concerning direction and development of potential criminal investigation. This document is privileged as part of the Government's investigative files. It is not shown to be part of any deliberative process.

Document 136. Letter from U.S. Attorney to counsel for

trial litigation SOL. Although the description of the document does not at all indicate the subject matter of the letter, I assume that it is relevant to these cases and concerns the alleged dust sample alterations. It is privileged as a confidential communication from attorney to client.

Document 137. Memorandum for the Secretary from the Solicitor titled "Peabody Dust Fraud Investigation." This also is privileged as a confidential communication from attorney to client.

Document 138. Memorandum from Associate Solicitor to MSHA Administrator for Coal Mine Safety and Health concerning referral of special investigation to U.S. Attorney. This document is privileged as a confidential communication from attorney to client.

Document 141. Memorandum from Associate Solicitor to Solicitor titled "Peabody Dust Fraud Investigation." This document is privileged as part of the attorney work product.

Document 142. Memorandum from Acting Counsel for Trial Litigation to Associate Solicitor regarding Dust Fraud Investigation. This document is privileged as part of the attorney work product.

Document 145. Memorandum from Acting counsel for Trial Litigation to Associate Solicitor concerning AWC criminal investigation. This document is privileged as part of the attorney work product.

Document 146. Memorandum from Administrator Coal Mine Safety and Health concerning special investigation and referral of cases to U.S. Attorney. This document is privileged as part of a government investigative file.

Document 147. Letter from Administrator Coal Mine Safety and Health and Associate Solicitor to U.S. Attorney concerning AWC Criminal investigation. This document is privileged as a confidential communication from client to attorney.

Document 148. Memorandum from MSHA Special Investigator to Chief Office of Investigations concerning referral of tampered dust samples to U.S. Attorney. This document is privileged as part of the deliberative process and the government investigative file.

Document 149. Unsigned document giving the status of a special investigation of AWC indicating developments and potential direction of criminal investigation. This document is privileged as part of the deliberative process and the government's investigative file.

Document 152. List of mine operators and AWC occurrences prepared at the direction of and for the assistance of the U.S. attorney. This document is privileged as part of the attorney work product and as part of the investigative file.

Document 155. List of mine operators with handwritten marks prepared at the direction of and for the assistance of the U.S. Attorney. This document is privileged as part of the attorney work product.

Document 156. List of mine operators and AWC occurrences prepared at the direction of and for the assistance of the U.S. Attorney. This document is privileged as part of the attorney work product.

Document 157. Memorandum concerning criminal investigation and studies to be performed to assist the U.S. Attorney in criminal investigation of possible dust tampering. This document is privileged as part of the attorney work product.

Document 160. Memorandum from Assistant Secretary to Secretary concerning AWC investigation discussing past deliberations and potential future actions of Agency. This document is privileged as part of the deliberative process.

Document 200. Note to file concerning FOIA request which includes advice received from SOL. This document is privileged as including confidential communication from attorney to client.

Document 201. Memorandum for District Mangers from Chief Division of Health concerning processing of dust samples and referring to investigative program being developed. This document is privileged as part of the investigative file.

Document 203. Notes of telephone conversation with MSHA Arlington Health Division concerning new void code for dust samples reflecting opinions and deliberations of Agency officials. This document is privileged as part of the deliberative process.

Documents 326, 327, and 328. These were originally described as a printout of dust samples, a printout of "AWC tally," and a printout of certified dust samplers. The privilege claimed for each document was work product, but there was no indication that they were prepared in anticipation of litigation. However, the affidavit of Robert Thaxton, attached as Exhibit 1 to Deputy Assistant Secretary Hugler's affidavit states that each of these documents was prepared at the request of United States Attorneys' offices and is related to criminal investigations. On the basis of Thaxton's amended description, I hold these documents are privileged as part of the attorney work product.

Document 339. Document titled "AWC Test Case" prepared by counsel for Trial Litigation SOL. This document is privileged is part of the attorney work product. (There is no indication that it is a confidential communication to the agency-client).

Document 340. This document was prepared by attorneys in SOL office titled "Dust Case (Civil)." It is privileged as part of the attorney work product.

Document 365. Letter 3-16-90 from G. Tinney to Dr. Warren Myers re-draft report on sampling filter abnormalities reflecting deliberations and opinions prior to completion of Report (Document No. 2). This document is privileged as part of the deliberative process.

Document 366. Letter from G. Tinney to Dr. Warren Myers re-draft report on sampling filter abnormalities. This document is privileged as part of the deliberative process.

Document 367. Draft of report of Dr. Myers and Allen Wells with handwritten notations reflecting Agency thought processes and deliberations concerning altered dust samples. This document is privileged as part of the deliberative process.

Document 384. Notes of Robert Thaxton MSHA of conference call with U.S. Attorney and SOL, includes discussion of opinions of agency officials and direction of investigation. This document is privileged as part of the investigative file.

Document 394. Monthly Planner Calendars maintained by Robert Thaxton December 1989 to January 1991, including information concerning the direction of criminal investigation of altered dust samples. This document is privileged as part of the investigative file.

Document 401. File marked PHTC Report containing draft of PHTC study and deliberations prior to PHTC report identified as Document No. 1. This document is privileged as part of the deliberative process.

Document 402. Report titled "Tampered Samples Summary for Southern West Virginia" prepared for U.S. Attorney's Office. This document is privileged as part of the attorney work product.

Document 403. Notes of telephone conversation between G. Tinney and Robert Thaxton discussing AWC investigation and including opinions and deliberations of agency and advice received from Solicitor. This document is privileged as part of the deliberative process.

Document 406. 19 Manila File Folders containing documents prepared at the request of the U.S. Attorneys' Offices in

connection with ongoing criminal investigations. The Secretary has withdrawn her claim of privilege with respect to certain portions of this document as detailed in Attachment A to the Affidavit of Deputy Assistant Secretary Hugler. The remaining documents are privileged as part of the attorney work product.

Document 407. 1991 Monthly Planner Calendar Robert Thaxton including information concerning the direction of the criminal investigation of altered dust samples and indicating the thought processes and deliberations of the Agency. This document is privileged as part of the investigative file.

Document 424. Draft titled "List of Tables" 9/29-10/5/89 with notations indicating results of Agency testing of dust filters preliminary to report identified as Document No. 1. This document is privileged as part of the investigative file.

Document 426. Monthly planning calendars of Robert Thaxton 1988 to January 1990 including information regarding the criminal investigation of altered dust samples. The documents are privileged as part of the investigative file.

Document 441. Letter April 4, 1989 to FBI from Robert Thaxton concerning respirable dust samples submitted to FBI in ongoing criminal investigation. This document is privileged as part of the investigative file.

X

SECRETARY DIRECTED TO SUBMIT DOCUMENTS FOR IN CAMERA INSPECTION

In Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert denied, 415 U.S. 977 (1974), the court stated at 826 that it "will no longer accept conclusory and generalized allegations of exceptions [in FOIA] . . . but will require a relatively detailed analysis in manageable segments." This direction was repeated in Coastal States Gas Corp., at 861. In the Motion filed by Kentucky Carbon, et al., counsel suggests as an alternative to ordering production of the documents that I should conduct an in camera inspection to determine which documents or portions of documents are truly privileged. The Secretary agrees to an in camera inspection of any document concerning which I cannot determine from the Secretary's description the validity of the privilege asserted, with the exception of certain portions of Document 406 which involve grand jury investigations.

For the reasons given by Judge Gesell in Military Project v. Bush, 418 F.Supp. 876 (D.D.C. 1976), I am reluctant to order an in camera inspection of documents claimed to be privileged. Judge Gesell was apparently unsuccessful however in obtaining

more specificity in document description, see 418 F.Supp. 880, and I would not expect greater success if I ordered the Secretary to provide better and more complete description of some of the documents. I conclude that an in camera inspection will save time and trouble. Therefore, I will order the Secretary to submit the following documents to me for an in camera inspection to determine whether the privileges were properly invoked.

Document 55. Letter 11-1-89 from Chief General Litigation and Legal Advice Section, Criminal Division, DOJ to U.S. Attorney.

Document 112. Undated memorandum setting forth substance of meeting with U.S. Attorney involving development of criminal investigation.

Document 116. Letter 1-18-91 from J. Davitt McAteer, Occupational Safety and Health Law Center to Assistant Secretary with handwritten notes. The letter itself is not privileged, but the handwritten notes may be.

Document 120. Undated draft briefing paper reflecting "the thought processes and deliberations of the Agency."

Document 139. Unsigned note to file concerning case referral to U.S. Attorney's Office.

Document 143. Undated memorandum concerning criminal AWC investigations.

Document 144. Sample citation and memorandum concerning AWCs.

Document 154. Undated memorandum concerning criminal AWC investigation "which apparently was prepared prior to the issuance of the citations and which concerns the thought processes and scope of direction of investigative activities."

Document 161. Unsigned handwritten notes concerning AWC investigation.

Document 169. Unsigned handwritten notes concerning April 18, 1991, meeting with MSHA.

Document 350. AWC statistical breakdown.

Document 353. Printout summary of altered dust samples with handwritten date of October 13, 1989, concerning criminal investigation.

Document 375. Memorandum 3-15-89 from Leighton Farley to Robert Nesbit (not identified) re: request for direct referral to

U.S. Attorney, possible tampering with respirable dust samples, Eastern Associated Coal Co.

Document 425. Unsigned notes of Andrew Gero, not otherwise identified, with handwritten notations.

XI

SECRETARY'S CLAIM OF PRIVILEGE DENIED
ORDER TO PRODUCE DOCUMENTS

With respect to the following documents, the Secretary's claim of privilege is not justified by the document descriptions, and the Secretary is ORDERED to make them available to Contestants by placing them in the Document Depository.

Document 116. The letter without the handwritten notes (concerning the handwritten notes, I have directed the Secretary to submit the document for in camera inspection).

Document 163. Briefing materials for the Secretary for use in preparation for Secretary's testimony before Congress. These documents obviously are not part of the work product. There is no indication that they were prepared in anticipation of litigation. Their relationship to the deliberative process is tenuous and wholly based on conclusions.

Document 176. FBI "invoice" to the PHTC. Nothing in the description indicates that the document is part of the deliberative process or investigative files.

Document 329. Printout listing of AWC sampling and documents used to prepare list. Nothing in the description of this document reportedly shows that it is part of the attorney work product, prepared in anticipation of litigation.

Accordingly, IT IS ORDERED:

1. The Secretary's claim of privilege is upheld with respect to Documents 3, 4, 5, 17, 56, 111, 113, 119, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 142, 145, 146, 147, 148, 149, 152, 155, 156, 157, 160, 200, 201, 203, 326, 327, 328, 339, 340, 365, 366, 367, 384, 394, 401, 402, 403, 406, 407, 424, 426, 441.

2. The Secretary shall submit the following documents to me for in camera inspection: 55, 112, 116 (handwritten notes), 120, 139, 143, 144, 154, 161, 169, 350, 353, 375, 425.

3. The Secretary shall produce the following documents: 116 (letter without notes), 163, 176, 329.

4. After I have reviewed the documents submitted for in camera inspection, I will determine which privileged documents, if any, are to be disclosed as being essential to the adequate preparation of the operators' cases.

James A. Broderick
James A. Broderick
Administrative Law Judge

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SEP 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 90-348 A. C. No. 15-15509-03527
v.	:	No. 1 Mine
TOLER CREEK ENERGY, INC., Respondent	:	Docket No. KENT 91-30 A. C. No. 15-15509-03532
	:	No. 2 Mine

DECISION APPROVING IN PART AND DISAPPROVING IN PART A PROPOSED SETTLEMENT

Before: Judge Fauver

These consolidated proceedings are petitions for civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq.

The parties have filed a motion to approve settlement.

I

In Docket No. KENT 90-348, the settlement would reduce the penalty from $1,300 to $700 for Citation 3368969 and have no change in the penalties for Order 3368970 ($1,300) and Order 3368971 ($1,000). In Docket No. KENT 90-30 the settlement would reduce the penalty from $850 to $500 for Order 3361356, from $850 to $500 for Order 3369132, and have no change for Order 3361357 ($850). I find these proposals consistent with § 110(i) of the Act.

II

In Docket No. KENT 91-30, the settlement would merge the charges in Order 3369721 and Order 3369722 into Order 3369722, charging a single violation of 30 C.F.R. § 75.300 for failure to maintain the mine fan in its original condition.

Order 3369721 charges a violation of § 75.300 because the main mine fan was not maintained as originally approved. The fan's circuit had been rewired so that the fan shared a power circuit with No. 1 belt drive. It alleges that the rewiring was done in

an unworkmanlike manner and required the stoppage of the main fan at any time No. 1 belt was stopped, and that this violated the approved mine fan plan. The plan required that the fan circuit be separate from any other mine circuit.

The motion states that Order 3369722 was issued the same date "for problems with the mine fan's electrical system under § 77.900 of the regulations."

The parties have not attached a copy of Order 3369722 and have not shown that the charge in such order is so closely related to the charge in Order 3369721 as to warrant merger of the charges. Therefore, unless the missing order is presented with a showing that merger is justified, that part of the motion will be denied.

III

The motion seeks to merge the charges in Order 3361358 and Order 3361359 into Order 3361359.

Order 3361358 charges a violation of § 75.303 for failure to make adequate preshift examinations along Nos. 1, 2, 3, 4, 5 and 6 belt conveyors in 001-0 working section.

Order 3361359, issued the same date, charges a violation of § 75.305 for failure to conduct adequate weekly examinations in the return air course.

The motion seeks a merger of the charges on the ground that "the two violations were the result of a single action by the operator ...." However, the orders allege separate violations based on the failure to report and correct separate hazards in separate locations. Order 3361358 alleges inadequate preshift examinations as reflected by the failure to report and correct "numerous violations of mandatory safety standards issued along the six belt conveyors" referencing citations and orders that charge violations for float coal dust and loose coal accumulations along the belt conveyors.

In contrast, Order 3361359 alleges that inadequate examinations of the return air course were evident from the failure to report and correct violations of safety standards in that "there were at least 25 permanent stoppings that were not plastered. Stoppings were missing from cross-cuts in two different locations."

I find that these separate orders charge discrete violations and the motion does not show sufficient cause for a merger of charges.

IV

The motion seeks to merge the charges in Orders Nos. 3362168, 3362169, and 3362176 into Order 3362169 charging a single violation of § 75.400 for accumulations of loose coal and float coal dust on Nos. 5 and 6 belt drives.

Order 3362168 alleges a violation of § 75.400 because loose coal and float coal dust accumulations 2 to 4 inches deep were present the entire length of No. 6 belt entry, for approximately 700 feet.

Order 3362169 alleges a violation of § 75.1100-2(b) because fire hose outlets were not installed at 300 feet intervals for the entire waterline in Nos. 5 and 6 belt conveyors, a distance of about 2,200 feet.

Order 3362176 charges a violation of § 75.400 because float coal dust ranging from 1/4 to 2 inches deep was present at numerous locations in an area from No. 5 belt drive to an outby distance of approximately 1,500 feet.

The motion states that "the presence of coal, loose coal and float coal dust along the two belts is the same violation of the Act and that the lack of sufficient waterhose outlets on beltline was a condition contributing to the fire hazard due to dust buildups on those belts."

I find that these orders charge discrete violations and the motion does not show sufficient cause for a merger of charges.

V

The motion seeks to merge the charges in Orders Nos. 3369123, 3369125, 33669126, and 3369127 into Order 3369123 charging a single violation of § 75.400 for float coal dust accumulations in Nos. 1, 2, and 3 beltlines and No. 2 entry.

Order 3369123 charges a violation of § 75.400 because float coal dust ranging from 1 to 4 inches deep was allowed to accumulate along the ribs, mine floor and under the belt roller on No. 1 belt conveyor in No. 2 entry and extended the length of the No. 1 belt conveyor, a distance of approximately 1,500 feet.

Order 3369125 charges a violation of § 75.400 because float coal dust ranging from 1 to 10 inches deep was allowed to accumulate along the ribs, mine floor and under the belt roller on No. 2 belt conveyor in No. 2 entry for a distance of approximately 1,200 feet. The first 10 bottom belt rollers inby this drive were turning in float coal dust.

Order 3369126 charges a violation of § 75.400 because float

coal dust one inch deep was allowed to accumulate in the bottom of the 480 volt energized starter box used to control power to No. 2 belt drive.

Order 3369127 charges a violation of § 75.400 because float coal dust ranging from 1 to 12 inches deep was allowed to accumulate along the ribs, mine floor and under the belt rollers on No. 3 belt in No. 2 entry, a distance of approximately 800 feet.

I find that these orders charge discrete violations and that the motion does not show sufficient cause for a merger of charges.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion to approve settlement is GRANTED as to the following citations and orders:

Citation or Order	Approved Civil Penalty
3368969	$ 700
3368970	$1,300
3368971	$1,000
3361356	$ 500
3361357	$ 850
3369132	$ 500
	$4,850

2. Respondent shall pay the above penalties within 30 days of the date of this decision.

3. The motion to approve settlement by merger of charges, as discussed above, is DENIED. Those charges will proceed to hearing unless a new settlement motion is submitted and approved.

William Fauver
William Fauver
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 25 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 91-127
	:	A. C. No. 15-15400-03513
v.	:	Docket No. KENT 91-151
	:	A. C. No. 15-15400-03514
COAL MAC INCORPORATED, Respondent	:	Coal Mac No. 17 Surface
	:	Docket No. KENT 91-152
	:	A. C. No. 15-14847-03514
	:	Docket No. KENT 91-154
	:	A. C. No. 15-14847-03514
	:	Coal Mac No. 7 Surface

DECISION APPROVING IN PART AND DISAPPROVING IN PART A PROPOSED SETTLEMENT

Before: Judge Fauver

These consolidated cases are petitions for civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 et seq.

The parties have moved for approval of a settlement.

It is stipulated that Respondent is a large operator.

The Meaning of a "Significant and Substantial" Violation

Since the settlement motion proposes to reduce many of the charges from a "significant and substantial" violation to a "non-significant and substantial" violation, it will be helpful to review the meaning of this statutory term.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U. S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825

(1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (1984). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated," [1] and expressly places S&S violations below imminent dangers. [2] It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

The Proposed Settlement

Citation 3517608 alleges a violation of 30 C. F. R. § 77.410, dealing with automatic warning devices on mobile equipment. The motion states that the inspector would testify that the reverse alarm on the Caterpillar 992 C loader was inoperative. Respondent's witnesses would testify that the loader operated in an area in which no one worked afoot and there was minimal vehicular traffic.

Originally, the inspector determined that the violation was significant and substantial. The parties move to change this designation to non-S&S.

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[1] Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

[2] Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger . . . ."

The citation was assessed at $276. The motion proposes a penalty of $178.

The absence of a reverse alarm in "minimal vehicular traffic" does not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517610 alleges a violation of § 77.1606(c), which requires that equipment defects affecting safety be corrected before the equipment is used. The motion states that the inspector would testify that the Ford 7000 grease truck had several defects; namely, the headlights were stuck on low or high beam, the left front turn signal was missing from the truck, and all the other turn signals were inoperative. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $178. The motion proposes $127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517611 alleges a violation of § 77.1606(c). The motion states the inspector would testify that the Ford 800 fuel haulage truck had several defects; namely, the headlights were stuck on low or high beam, all the turn signals were inoperative, and the brake lights were inoperative. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $178. The motion proposes $127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517612 alleges a violation of § 77.404(a) dealing with the operation and maintenance of machinery and

equipment. The motion states the inspector would testify that a Black & Decker angle grinder aboard the Ford F-250 welding truck was not equipped with a guard to protect a user from accidental contact with the metal-cutting disk. Respondent's witnesses would testify that the grinder had been removed from service.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $227. The motion proposes $178.

The motion does not state why the grinder was in the welding truck if it "had been removed from service." In the absence of facts showing how the grinder was removed from service, the proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction in the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517613 alleges a violation of § 77.208(e) dealing with storage of materials. The motion states that the inspector would testify that he found that the valves of the acetylene and oxygen cylinders stored on the Ford F-250 welding truck were not protected by any type of cover. The gauges and hoses were attached to the cylinders. Respondent's witnesses would testify that the tanks were empty and were being transported to an appropriate storage area.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $178. The motion proposes $127.

The proposed reduction in the amount of penalty and the redesignation as a non-S&S violation are approved.

Citation No. 3517614 alleges a violation of § 77.1606(c). The motion states that the inspector would testify that he found the following defects on the 600 Mack water haulage truck used for allaying road dust: the headlights were stuck on low or high beam, all of the turn signals were inoperative, an air leak was present near the engine. The exhaust pipe was broken near the muffler, and no heat shield was provided around the upright exhaust stack near the right cab door. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic. They would testify that the operator of this truck regularly got in and out of the vehicle through the left cab door and that there usually were no passengers in this vehicle.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $178. The motion proposes $127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517616 alleges a violation of § 77.404(a). The motion states that the inspector would testify that he found aboard the Ford F-800 mechanic's truck three chisels with mushroomed striking surfaces with cracks in the outer edges. He considered that the condition of the chisels increased the likelihood of injury from flying metal chips during use. Respondent's witnesses would testify that the chisels had been removed from service and were being transported back to the garage for regrinding.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $227. The motion proposes $127.

The motion does not state why the defective chisels were in the mechanic's truck if they had been "removed from service." In the absence of facts showing how the defective chisels had been removed from service, the proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction in the penalty amount is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517607 alleges a violation of § 77.1606(c). The motion states that the inspector would testify that the bottom step of the right side boarding ladder was torn off and the rear step to the engine access area on the fight side was missing from the Caterpillar 980C loader (Company No. L-13). The equipment was being used to load coal. Respondent's witnesses would testify that, in the normal course of operations, the right side of the equipment was not used for boarding by the operator and that there was other access to the engine area.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $178. The motion proposes $127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517609 alleges a violation of § 77.1606(c). The motion states that the inspector found the following defects in the 600 Mack explosives haulage truck: there was no heat shield around the exhaust stack located adjacent to the right side cab door used by the blaster's helper, the headlights were stuck on low or high beam, all the turn signals were inoperative, and the brake lights were inoperative.

The inspector determined that the violation was S&S. The parties agree that this is the proper designation.

The citation was assessed at $178. Respondent has agreed to pay this amount.

The proposed settlement of this charge is approved.

Citation No. 3517615 alleges a violation of § 77.1103(a) dealing with the storage of flammable liquids. The motion states that the inspector would testify that he found approximately one pint of gasoline being stored in a gallon milk jug. The jug had been tied onto the side of the 600 Mack water haulage truck, and was used to fuel the transfer pump.

The inspector determined that the violation was S&S. The parties agree that this is the proper designation.

The citation was assessed at $178. Respondent has agreed to pay this amount.

The proposed settlement of this charge is approved.

Citation No. 3517851 alleges a violation of § 77.1606(c). The motion states that the inspector would testify that the Caterpillar No. 14G motor grader used to grade the road had several defects affecting safety; namely, the brake and tail lights were gone, the rear windshield wiper was inoperative, oil leakage was noted at the valve banks under the cab and at the hydraulic lines to the steering gearbox. Respondent's witnesses would testify that the grader regularly was used only on the day shift and in areas where there was minimal vehicular traffic, and that the leakage noted would not adversely affect the operator's ability to steer the grader.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $311. The motion proposes $178.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved,

but not the redesignation as a non-S&S violation.

Citation No. 3511971 alleges a violation of § 45.4(b) dealing with the maintenance of an independent contractor register. The motion states that the inspector would testify that he found that Respondent had failed to maintain in writing the contractor register containing information required in § 45.4(a)(1) through 45.4(a)(4). The information could not be produced when requested.

The non-S&S citation was assessed at $20. Respondent has agreed to pay this amount.

A violation that hampers enforcement of the Act is a serious violation, even though it is non-S&S. If the facts indicated were proved at a hearing, I would consider a penalty of $50 appropriate for this violation.

Citation No. 3517584 alleges a violation of § 77.1605(b) dealing with the installation of brakes and parking brakes on loading and haulage equipment. The motion states that the inspector would testify that he found that the White Mack Truck, Number 7, used to transport explosives was being used with defective brakes. There was an air leak in or near the brake valve. The right front brake plunger would not move when the foot brake was set. The brakes needed to be adjusted on all wheels; the loss of air when the brakes were used showed that there was too much travel in the brake pedal.

The inspector determined that the violation was S&S. The parties agree that this is the proper designation.

The citation was assessed at $371. Respondent has agreed to pay this amount.

The proposed settlement of this charge is approved.

Citation No. 3511978 alleges a violation of § 77.1303(d), which requires that damaged or deteriorated explosives or detonators be destroyed in a safe manner. The motion states that the inspector would testify that he found explosive materials in a state of deterioration. Liquid had leaked from the explosives in the explosives magazine. Several cartridges of Tovex water gel explosives had been cut in half and were stored in that condition in the explosives magazine. He noted that the deteriorated and damaged explosives had not been destroyed in a safe manner, and that the use of such material, altered from the condition intended by the manufacturer, could adversely affect a blast. Respondent's witnesses would testify that only their explosives experts would have access to the explosives and that they were not planning to use the altered explosives.

The inspector determined that the violation was S&S. The

parties agree that this is the proper designation.

The citation was assessed at $350. The motion proposes $227.

The proposed settlement of this charge is approved.

Citation No. 3517842 alleges a violation of § 77.410. The motion states that the inspector would testify that he found that the blue Ford F250 mechanic pickup truck, used for repair work, was not provided with a reverse alarm. The view to the rear of the truck was impaired by tool boxes on each side of the truck bed and an air compressor mounted in the middle of the bed. There was a ladder atop the right side tool box. The truck was used in a service area where others were afoot.

The non-S&S citation was assessed at $20. Respondent has agreed to pay this amount.

If the proffered facts were proved at a hearing, I would be inclined to find the violation was S&S, instead of a non-S&S, and that a penalty of $150 is appropriate for this violation. The proposed settlement of a $20 penalty is not approved.

Citation No. 3517843 alleges a violation of § 77.1605(b). The motion states that the inspector would testify that he found that the white Ford F600 grease truck, used for service of equipment, was not provided with adequate brakes. The emergency park brake failed to hold the truck on a slight roadway grade. The truck was subject to steep grades at this pit and the driver would not be able to stop in the event of a service brake malfunction. In the inspector's opinion, the truck could roll if parked on a slight grade. Respondent's witnesses would testify that the truck was not operated where others were afoot.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $392. The motion proposes $227.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517844 alleges a violation of § 77.400(a) dealing with mechanical equipment guards. The motion states that the inspector would testify that he found that there was no guard on the two V-belts, flywheel and pulley of the air compressor on the white Ford F-600 grease truck. In the inspector's opinion, workers could have contacted moving parts or could have been struck by a broken belt. Respondent's witnesses would testify that

placement of the equipment in the bed of the truck made it so inaccessible that it was unlikely that a worker could come into contact with the moving parts.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $311. The motion proposes $178.

The conflict between the expected testimony of the inspector and Respondent's witnesses, without a factual resolution, does not warrant redesignation as a non-S&S violation. The proposed reduction in the amount of penalty is approved.

Citation No. 3517847 alleges a violation of § 77.208(b) dealing with storage of materials that could create hazards if accidentally liberated from their containers. The motion states the inspector would testify that gasoline vapors were being emitted from the fill cap atop the pit gasoline tank. The gasoline was not properly stored in that no vent pipe was installed to allow vapors to escape higher and away from the top of the tank where a careless smoker or spark could cause ignition.

The non-S&S citation was assessed at $20. Respondent has agreed to pay this amount.

The proffered facts do not indicate a non-S&S violation. If the proffered facts were proved after a hearing, I would be inclined to find an S&S violation and find a penalty of $100 to be appropriate.

Citation No. 3517848 alleges a violation of § 77.1606(c). The motion states that the inspector would testify that he found that the Caterpillar 988 loader, used to load spoil into trucks, had several safety defects. The right boarding ladder was badly bent thereby reducing the width of the ladder, and the right bottom step was missing. The left and right engine deck steps were gone and had been replaced with a chain which required a step of 30 inches. The windshield wipe overtraveled to the left, leaving approximately the right one third of the windshield unclean. The right tail light was inoperative. The brake lights were inoperative. The front horn was too weak to be audible at a distance. Respondent's witnesses would testify that,in the normal course of operations, the right side of the equipment was not used for boarding by the operator and there was a good boarding ladder on the other side of the truck where the operator usually boarded. They would testify that there rarely was a passenger on this equipment. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic and where people are not afoot.

Originally, the inspector determined that the violation was

S&S. The parties move to change this designation to non-S&S.

The citation was assessed at $311. The motion proposes $227.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Provisional Order

If the parties agree to entry of the following provisional order, the charges herein will be disposed of as indicated. In such case, the parties should file, within 10 days of this date, a joint motion for entry of the provisional order as a final order.

If the parties do not agree to the provisional order, they may file a revised settlement motion.

"PROVISIONAL ORDER

"Upon motion of the parties, settlement of the charges in these cases is approved as follows, without modification of the citations (except Citation 3517613, which is redesignated as a non-S&S violation):

Citation	Approved Civil Penalty
3517608	$178
3517610	127
3517611	127
3517612	178
3517613	127
3517614	127
3517616	127
3517607	127
3517609	178
3517615	178
3517851	178
3511971	50
3517584	371
3511978	227
3517842	150
3517843	227
3517844	178
3517847	100
3517848	227
	$3,182

"Respondent shall pay the above civil penalties within 30 days of the date of this Order."

William Fauver
Administrative Law Judge

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/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 27 1991

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS — MASTER DOCKET NO. 91-1

ORDER GRANTING MOTION FOR RECONSIDERATION
ORDER UPHOLDING CLAIM OF PRIVILEGE ASSERTED FOR CERTAIN DOCUMENTS
ORDER TO PRODUCE NON-PRIVILEGED DOCUMENTS
ORDER TO PRODUCE CERTAIN PRIVILEGED DOCUMENTS

In accordance with my order of September 13, 1991, the Secretary submitted on September 20, 1991, certain documents for in camera inspection. She also filed a motion for reconsideration of that part of my order directing production of documents 161 and 176, and submitted these two documents for in camera inspection in the event the motion for reconsideration is granted.

I

MOTION FOR RECONSIDERATION

The Secretary argues that document 163 is protected by the work product privilege and the deliberative process privilege. She asserts that document 176 is protected by the investigative privilege. I have examined both documents, and grant the Secretary's motion for reconsideration.

Document 163 consists of 36 typewritten pages, some with handwritten changes. The title page is dated April 11, 1991, and is headed "Briefing Materials" with eleven subtitles. Pages 9248 through 9262 constitute a draft of a statement for Secretary of Labor Lynn Martinto be given before a House Subcommittee on April 15, 1991. There are handwritten changes on pages 9255, 9256, 9257, and 9259 of the draft. Pages 9262 through 9265 consist of a general description of the Department's dust sampling program and a "chronology of events" outlining the history of "tampered samples" from February 1989 through March 1991. Pages 9266 through 9270 contain proposals from persons outside the Department for changes in the dust sampling program and the Department's position on those proposals. Pages 9271 through 9275 contain proposals for enforcing "AWC violations" by penalty assessment, decertification, changes in the sampling program and criminal investigations. Pages 9276 through 9280 have to do with Department proposals for future action on matters unrelated to the dust tampering changes. These pages are not relevant to this

proceeding. Pages 9281 and 9282 are a copy of a letter from Assistant Secretary Tattersall to the Safety Director of Energy West Mining Company, December 24, 1990, concerning the latter's proposal for the use of a helmet to control a miner's dust exposure.

The Secretary argues that the work product privilege is applicable because the document was prepared after the dust sampling citations were issued. But it is clear that it was not prepared in contemplation of litigation but to brief the Secretary who was going to testify before Congress. The work product privilege is inapplicable. With the exception of pages 9266 through 9275, the document is not covered by the deliberative process privilege. Only those pages comprise predecisional recommendations or opinions concerning policies under consideration. I uphold the Secretary's claim of privilege with respect to pages 9266 through 9275. Pages 9276 through 9280 are irrelevant and therefore not discoverable. The Secretary will be ordered to produce the rest of the document.

Document 176 is a single page memorandum from the FBI to MSHA Pittsburgh Technical Support Center dated April 11, 1989, accompanying 19 respirable dust sample cassettes. The Secretary asserts that a reference in the upper right hand portion of the document reveals an investigative technique. As such it is privileged. The remainder of the document is not privileged. The Secretary will be ordered to produce the document after excising the description in the upper right hand corner.

II

OTHER DOCUMENTS INSPECTED IN CAMERA

Document 55 is a copy of a letter from the Criminal Division of the United States Justice Department to the U.S. Attorney for the Eastern District of Kentucky dated November 1, 1989, concerning an MSHA investigation of tampered respirable dust samples. The letter notes that identical letters were sent to 15 other U.S. Attorneys. The Secretary's claim of privilege is upheld. The document is protected by the work product privilege.

Document 112 is a file concerning an investigation of possible altered dust samples by a coal mine operator showing referral to the U.S. Attorney and "progress updates" from March 1989 to May 1991. The document is privileged as part of the investigative file.

Document 116 is a letter dated January 18, 1991, from J. Davitt McAteer, Executive Director, Occupational Safety and Health Law Center to Assistant Secretary Tattersal, enclosing a copy of a letter from McAteer to Senator Edward Kennedy and a "Report on the All White Center Problem" prepared by the

Occupational Safety and Health Law Center. There are underlinings and marginal notes in the letters and report, apparently made by MSHA officials. The letter and accompanying documents are not privileged. Neither the underlining nor the marginal notes could be taken as predecisional deliberations by MSHA personnel. Therefore, the claim of privilege is denied and the Secretary will be ordered to produce the entire document.

Document 120 is an unsigned, undated draft "Briefing Paper" describing the respirable dust standards for coal mines, the purposes and results of the standards, and "recent enforcement activity" concerning the alleged tampered samples. The description of the recent enforcement activity is factual and does not include proposals for future action. For this reason it does not fit the deliberative process privilege. The Secretary will be ordered to produce the document.

Document 139 is a memorandum dated March 16, 1989, concerning the direct referral of a case to the U.S. Attorney, Charleston, West Virginia. This document is privileged as part of the U.S. Attorney work product, and the investigative file.

Document 143 consists of notes of a meeting on August 8, 1989, between MSHA representatives and the Solicitor of Labor's office concerning evidence of alleged respirable dust sample tampering and "a strategy for dealing with the growing scope of this evidence." The document appears to be incomplete, but as presented is privileged as part of the attorney work product.

Document 144 is a sample citation and a one page list of "issues to be discussed during 10/24 meeting." The latter page lists a number of options for dealing with alleged violations of § 70.209(b). It includes a discussion of possible criminal proceedings. The document is privileged as part of the deliberative process.

Document 154 is a two page, undated, unsigned memorandum with two headings: "The Peabody Case" and "Current MSHA Activity." The latter discusses proposed enforcement action against mine operators after the completion of the criminal investigation. The document is privileged as part of the investigative file.

Document 161 consists of two pages of unsigned handwritten notes headed by "5/13 Dust Meeting:" the notes refer to the Peabody plea agreement, Congressional oversight hearings and future enforcement activity, including criminal proceedings. The document is privileged as part of the investigative file.

Document 169 consists of a single page of handwritten notes entitled "Meeting with MSA 4/18/91." It does not appear to refer to the present proceedings or future proceedings, but to a

proposal for new dust capsules. It is privileged as part of the deliberative process.

Document 350 is a computer printout showing the number and percentage of tampered samples from approximately 630 mines. It does not show any dates. It is privileged as part of the investigative file.

Document 353 is a computer printout of altered dust samples with handwritten notations. The handwritten notations indicate that the count is "as of 10/13/89". Although the Secretary states that it concerns a criminal investigation, there is nothing in the document to indicate that. However, it is privileged as part of the investigative file.

Document 375 is a copy of a memorandum dated March 15, 1989, from an MSHA investigator and an MSHA industrial hygienist to the Chief of the MSHA Office of Technical Compliance and Investigations recommending that a case of alleged dust sample tampering be referred to the U.S. Attorney. This document is privileged as part of the investigative file and as part of the attorney work product.

Document 425 consists of copies of 2 pages of partially illegible notes with dates from 10/30/89 to 12/8/89, apparently referring to testing of dust filters. The document is privileged as part of the investigative file.

III

DISCOVERY OF PRIVILEGED DOCUMENTS

Documents for which claims of "executive privilege" or attorney work product privilege are upheld may nevertheless be ordered produced if necessary to the opposite party's case. In such a case, I must consider whether "need for access to the documents, or any part of the documents, for purposes of this litigation must be overridden by some higher requirement of confidentiality." Committee For Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 794 (D.C. Cir. 1971), cert. denied, 404 U.S. 917 (1971). In the case of Secretary/Logan v. Bright Coal Company, Inc., 6 FMSHRC 2520 (1984), the Commission considered whether disclosure of documents protected by the "informer's privilege" should be compelled. It ruled that the burden is on the party seeking disclosure to show that the information is essential to a fair determination of the case. Factors to be considered in deciding whether to compel disclosure include whether the Secretary is in sole control of the material, and whether the other party has other avenues available to it to obtain the substantial equivalent of the requested material. In the cases before me, the material sought is, for the most part, in the sole possession of the Secretary, and the operators do not

have other means of obtaining it or its equivalent. In addition to those factors, I will use the following guidelines in deciding whether to order disclosure of privileged documents:

1. Confidential communications between attorney and client will not be ordered disclosed.

2. Documents related to continuing criminal investigations or criminal proceedings will not be ordered disclosed.

3. Other documents for which the claim of executive privilege was upheld will be ordered disclosed to the extent that they are factual and deal with matters which are completed rather than those still pending.

4. Documents for which the claim of work product privilege was upheld will be ordered disclosed to the extent they are factual and do not include mental impressions, conclusions, opinions or legal theories.

Following these guidelines, I will order the Secretary to disclose the following documents by placing them in the Document Depository:

Documents 3, 4 and 5. These documents were held privileged as part of the deliberative process. However, they appear to be factual in nature although in draft form. They are exclusively in the Secretary's control, and are clearly relevant and important, indeed are close to the core issue of this case. Since the final report has been prepared, these documents relate to a completed matter. I hold that their disclosure is essential to a fair determination of this case, and this overrides the Secretary's interest in confidentiality.

Documents 350 and 353. These are computer printouts concerning the alleged tampered samples. They are wholly factual and do not include mental impressions, conclusions or proposals for future action.

Documents 365, 366 and 367. These documents do contain deliberations and opinions, but they precede the Report on sample filter abnormalities (Document No. 2), and therefore are related to a completed rather than a pending matter.

Document 401. This is a draft of a study PHTC prepared prior to the report identified as Document No. 1 For the reasons given in my discussion of Documents 365, 366 and 367, this document will be ordered disclosed.

Document 424. This is a draft showing the results of Agency testing of dust filters preliminarily to the preparation of Document No. 1. For the same reasons as given for the four prior

documents, this will be ordered disclosed.

Documents 425. This document apparently relates to testing of dust filters. There is no indication that it involves pending or continuing matters.

ORDER

For the above reasons, IT IS ORDERED:

1. The Secretary shall produce the following documents by placing them in the Document Depository available to all other parties: Documents 3, 4, 5, 116, 120, 163 (except for pages 9266 through 9275 and 9276 through 9280), 176 (with the description in the upper right hand corner of the one page document excised), 201, 203, 329, 350, 353, 365, 366, 367, 401, 424 and 425.

2. The Secretary need not produce the following documents: 17, 55, 56, 111, 112, 113, 119, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152, 154, 155, 156, 157, 160, 161, 169, 200, 326, 327, 328, 339, 340, 375, 384, 394, 402, 403, 406, 407, 426, 441.

James A Broderick

James A. Broderick
Administrative Law Judge

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